HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

CAROL ANNE STINGEL APPELLANT

AND

GEOFFREY CLARK RESPONDENT

Stingel v Clark [2006] HCA 37
20 July 2006
M153/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 12 May 2005 (as amended by order made on 8 June 2005) and, in their place, order that the appeal to that Court is dismissed with costs.*

On appeal from the Supreme Court of Victoria

Representation

R P Gorton QC with T J Seccull for the appellant (instructed by Maurice Blackburn Cashman)

R J Stanley QC with C M O'Neill for the respondent (instructed by Coadys)

T J Casey QC with J H L Forrest QC and A J M Moulds seeking leave to intervene on behalf of the Commonwealth of Australia (instructed by Australian Government Solicitor)

J H Kennan SC with K D Mueller seeking leave to intervene on behalf of Carl Henning Wright (instructed by Hollows Lawyers)

CATCHWORDS

Stingel v Clark

Limitation of Actions – Appellant alleged respondent had raped and assaulted her in 1971 – Appellant alleged that she suffered post-traumatic stress disorder of delayed onset in 2000 and became aware of the connection between this disorder and the rapes and assaults in the same year – Proceedings were commenced for trespass to the person in 2002 by which time the general limitation period of six years for commencing actions in tort stipulated in s 5(1)(a) of the *Limitation of Actions Act* 1958 (Vic) ("the Act") had expired – Whether s 5(1A) of the Act applied to extend the limitation period from the date she first knew of those injuries and their causal connection – Whether a trespass to the person is an action for a "breach of duty" – Whether the injury alleged is a "disease or disorder contracted".

Words and phrases – "breach of duty", "disease or disorder contracted".

Limitation of Actions Act 1958 (Vic), ss 5(1)(a), 5(1A), 23A.

1 GLEESON CJ, CALLINAN, HEYDON AND CRENNAN JJ. The appellant, who was born in 1955, alleges that in 1971 she was assaulted and raped by the respondent. She alleges that, in consequence, she suffered injury, in the form of post-traumatic stress disorder of delayed onset. She also says that she first became aware of the connection between the assaults and rapes, and the injury, in 2000. In August 2002, the appellant brought an action for damages against the respondent in the County Court of Victoria. She claims aggravated, exemplary and punitive damages. Her cause of action is for trespass to the person.

2 The merits of the appellant's case have not been tried. The present appeal concerns the application of the *Limitation of Actions Act* 1958 (Vic) ("the Act"). For actions founded on tort, s 5(1)(a) of the Act prescribes a general limitation period of six years from the date on which the cause of action accrued (in the case of trespass, from the date of the trespass). If that period applied, it had long since expired in 2002. The general limitation period of six years is subject to certain qualifications, which have varied in a number of respects since 1958. The legislative history is important.

3 In 1955, the Victorian Parliament enacted a general *Limitation of Actions Act*, which came into effect on 1 January 1956. The topic had been under consideration by the Statute Law Revision Committee for several years. That committee, in turn, had examined the Report of the Tucker Committee in the United Kingdom. It had also received evidence from Mr Justice O'Bryan, in which he expressed his understanding of some aspects of what was intended by the Tucker Committee. The Victorian Parliament followed the precedent set by the United Kingdom and provided, in s 5(1) of the 1955 Act, a general limitation period of six years, which was qualified by s 5(6). The qualification was expressed as follows:

> "No action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued."

4 Sections 5(1) and 5(6) were reproduced in the 1958 Act, which, in its amended form, is the legislation with which we are concerned.

5 Section 23A was introduced into the Act by amendment in 1973[1]. It applied to causes of action in respect of personal injuries. It conferred upon a court a discretionary power to extend the limitation period. The conditions subject to which the power could be exercised were specified. An order under the section could be made on application by a person claiming to have a cause of action for damages for negligence, nuisance or breach of duty (whether the duty existed by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed consisted of or included damages in respect of personal injuries to any person. Plainly, that part of the language of s 23A mirrored that of s 5(6) which, in turn, followed the language of the United Kingdom legislation enacted in response to the Report of the Tucker Committee. When giving evidence to the Statute Law Revision Committee, Mr Justice O'Bryan had referred to a passage in that Report which said that trespass to the person was not intended to be covered by the language which introduced the stricter three year limitation period as a qualification to the more general six year period. He said that his understanding was that "assault which [causes] gross personal bodily injury would certainly be covered, but a mere trespass ... would not be covered"[2]. The appellant does not invoke s 23A in this case, but its terms are important to the issues of construction which must be decided.

6 In 1983, s 5(6) was repealed[3]. Section 23A was amended, in a manner that is not presently material. A new s 5(1A) was inserted, which is of direct relevance. It provided[4]:

> "An action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person may be brought not more than six years[5] from the date on which the person first knows –

---

1 *Limitation of Actions (Personal Injuries) Act* 1972 (Vic), s 3.

2 *Mason v Mason* [1997] 1 VR 325 at 328.

3 *Limitation of Actions (Personal Injury Claims) Act* 1983 (Vic), s 3(c).

4 *Limitation of Actions (Personal Injury Claims) Act* 1983 (Vic), s 3(b).

5 See now *Limitation of Actions (Amendment) Act* 2002 (Vic), s 3(3).

(a) that he has suffered those personal injuries; and

(b) that those personal injuries were caused by the act or omission of some person."

7 In 1989, the words "and the cause of action shall be taken to have accrued on" were added after the words "six years from"[6]. The language of the first part of s 5(1A) mirrored that of the repealed 5(6), and of s 23A. The respondent denies the application of s 5(1A) on two grounds. The first ground, upon which the appellant succeeded in the Court of Appeal of Victoria[7], is raised by notice of contention. If upheld, it would require this Court to overrule a line of authority in Victoria, going back to 1963, as to the meaning of the statutory language. The argument is that the appellant's action is not an "action for damages for negligence nuisance or breach of duty". It is said that an action for trespass to the person is not an action for breach of duty. If that is so, the six year limitation period in s 5(1) applies, without qualification by s 5(1A). The second ground, upon which the respondent succeeded in the Court of Appeal of Victoria (Winneke P, Charles and Eames JJA; Warren CJ and Callaway JA dissenting), is that the facts alleged by the appellant do not bring the case within the concept of a "disease or disorder contracted" so as to attract the operation of s 5(1A). That ground is the subject of the appellant's appeal. It is convenient to deal with the grounds in that order. The second point only arises if the notice of contention fails.

The notice of contention

8 The Court of Appeal in the present case followed the Victorian authority earlier mentioned. The Victorian decisions were in line with decisions of the English Court of Appeal[8] on comparable United Kingdom legislation, but the decisions of the English Court of Appeal were overruled by the House of Lords in *Stubbings v Webb*[9]. The decision of the House of Lords was followed by the Supreme Court of Ireland in *Devlin v Roche*[10]. The Supreme Court of Ireland,

---

6 *Limitation of Actions (Amendment) Act* 1989 (Vic), s 3(a).

7 *Clark v Stingel* [2005] VSCA 107.

8 *Letang v Cooper* [1965] 1 QB 232; *Stubbings v Webb* [1992] QB 197.

9 [1993] AC 498.

10 [2002] 2 IR 360.

noting that "there are two perfectly legitimate viewpoints on this question"[11], decided to follow the House of Lords rather than the Court of Appeal of Victoria.

9 The learned authors of the 19th edition of *Clerk & Lindsell on Torts* described *Stubbings v Webb* as controversial[12]. If the respondent's argument is correct, it produces a surprising result. Although in this case we are concerned directly with s 5(1A), the respondent's argument must apply equally to s 23A. It means that an injured plaintiff who is the victim of an intentional trespass is worse off, under the Act, than a plaintiff who is a victim of negligence. It means that there is a discretionary power to extend the limitation period in favour of a plaintiff who is run down by a negligent driver, but not in favour of a plaintiff who is deliberately assaulted. In the case of injuries of the kind dealt with by s 5(1A), assuming the other conditions are satisfied, the statute extends the limitation period in the case of a person who was neglected as a child, but not one who was sexually abused. It is difficult to understand why the policy of the Act would be to discriminate in that fashion.

10 The Victorian Parliament enacted both ss 23A and 5(1A) after it had been decided in 1963 by Adam J, in *Kruber v Grzesiak*[13], that an action for trespass to the person, at least in a case of unintentional trespass, was included in the meaning of "action for damages for ... breach of duty" in s 5(6) of the Act. Adam J asked the rhetorical question[14]: "[D]o not all torts arise from breach of duty – the tort of trespass to the person arising from the breach of a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse?" The "valuable judgment" of Adam J was approved by Lord Denning MR 14 months later in *Letang v Cooper*[15]. In that case the English Court of Appeal (Lord Denning MR,

---

11 [2002] 2 IR 360 at 367 per Geoghegan J.

12 (2006) at 2000 [33-39]. See also Oughton, Lowry and Merkin, *Limitation of Actions*, (1998) at 278-281; McGee, *Limitation Periods*, 4th ed (2002) at 129-131; McGee, "Trespass and Limitation", (1993) 109 *Law Quarterly Review* 356; McGee and Scanlan, "Judicial Attitudes to Limitation", (2005) *Civil Justice Quarterly* 460 at 477-479.

13 [1963] VR 621.

14 [1963] VR 621 at 623.

15 [1965] 1 QB 232 at 241.

Danckwerts and Diplock LJJ), following *Billings v Reed*[16], held that an action for trespass to the person was an action for "breach of duty" within the meaning of the *Limitation Act* 1939 (UK) as amended following the Report of the Tucker Committee. The case was one of unintentional trespass, but the reasoning of the Court of Appeal covered intentional trespass. Diplock LJ said[17]:

> "Counsel for the plaintiff has ... submitted that an action for trespass to the person is not an action for 'breach of duty' at all. It is, he contends, an action for the infringement by the defendant of a general right of the plaintiff; there is no concomitant duty upon the defendant to avoid infringing the plaintiff's general right. This argument or something like it, for I do not find it easy to formulate, found favour with Elwes J. ...
>
> In the context of civil actions a duty is merely the obverse of a right recognised by law. The fact that in the earlier cases the emphasis tended to be upon the right and in more modern cases the emphasis tends to be upon the duty merely reflects changing fashions in approach to juristic as to other social problems, and must not be allowed to disguise the fact that right and duty are but two sides of a single medal."

11 In 1965, McInerney AJ, in the Supreme Court of Victoria, followed *Kruber v Grzesiak* and *Letang v Cooper* in a case raising assault and battery[18]. In 1968, Cooke J in the Queen's Bench Division followed *Letang v Cooper* in a case of intentional trespass to the person[19].

12 That was the decisional context in which s 23A, and later s 5(1A), were enacted. The words "breach of duty" in s 5(6) had been held in Victoria, and the corresponding words in the United Kingdom legislation had been held, to cover trespass to the person including intentional trespass. Attributing to Parliament a consciousness of judicial interpretation of some word or phrase is often pure speculation, but in considering legislation upon a matter of legal technicality such as limitation of actions it may be reasonable to infer an awareness of the manner in which technical language has been construed, where a choice is made

---

16 [1945] KB 11 at 18-19 per Lord Greene MR.

17 [1965] 1 QB 232 at 246-247.

18 *Hayward v Georges Ltd* [1966] VR 202.

19 *Long v Hepworth* [1968] 1 WLR 1299; [1968] 3 All ER 248.

to adopt such language in future legislation[20]. That is especially so where the amending legislation was the product of the work of an expert committee which would have followed closely the course of judicial interpretation of the legislation in its earlier form. It is at least as reasonable to attribute to the Victorian Parliament, in 1972 and 1983, an awareness of the decisions of Adam J and McInerney AJ as it is to attribute to it an awareness of the Report of the Tucker Committee, especially since the effect of that Report had been interpreted, in a manner consistent with Adam J's later decision, by Mr Justice O'Bryan in his evidence to the Statute Law Revision Committee. The fact that the decision of Adam J had been approved and followed by the English Court of Appeal in relation to the United Kingdom legislation was also a significant part of the context.

13 When s 23A was first enacted, its repetition of the language of s 5(6) made good sense, given the meaning that had previously been attributed to that language. The description of the causes of action to which the provision applied had been treated as language of amplification rather than of restriction. The words were taken to be comprehensive, and were not treated as narrowing the provision by reference to the old forms of action. If "breach of duty" did not cover intentional trespass, the adoption in s 23A of the language of s 5(6) is more difficult to explain. Why would Parliament have restricted the discretionary power conferred by s 23A to cases of negligence as distinct from intentional harm? Such a restriction also would carry its own problems. Trespass to the person might be intentional or unintentional. Would a case of unintentional (or negligent) trespass (leaving aside questions of onus of proof) be treated as a breach of duty? Furthermore, an intentional trespass might be committed by someone (such as a teacher or a nurse) who owes a conventional duty of care to the injured person. Is that duty to be ignored in characterising an action for the purposes of s 23A? The present is not such a case, but such cases are not uncommon, and they have a bearing on the interpretation of s 23A. If the language of the section has the meaning given to it by judicial decisions prior to its enactment, then those problems do not arise. If it has a different meaning, those problems cannot be overlooked.

14 When, in 1983, s 5(6) was repealed, and s 5(1A) was introduced, so as to postpone the time bar in personal injuries actions in certain circumstances, the familiar words were used. Once again, if, as had been held, breach of duty included intentional trespass, the legislation made good sense. If it did not,

---

20 cf *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 324-325 [8].

anomalies arose. Assuming the requisite latency or delayed onset of the injuries in question, why would the legislature have intended to postpone the bar in the case of negligence but not in the case of intentional conduct? In a context such as that of s 5(1A), why should a victim of an intentional tort be disadvantaged by comparison with a victim of a negligent act or omission? Again, on what was then the accepted construction of the statutory language, the problem did not arise.

15 In 1991, the English Court of Appeal, in *Stubbings v Webb*[21], considered a case of an adult plaintiff alleging sexual abuse during childhood, and the application to that case of a provision of the *Limitation Act* 1980 (UK), using the same kind of language as that set out above, which postponed the bar in circumstances comparable to those dealt with by s 5(1A) of the Victorian legislation. It was argued that the provision did not apply because the action, being an action based on intentional trespass to the person, was not an action for "breach of duty". The Court of Appeal rejected that submission, applying *Letang v Cooper*. Bingham LJ said that, in the absence of authority, he would have reached the same conclusion, because he could see no reason why Parliament should have intended to draw a distinction between intentional torts and negligence[22]. As noted above, the decision of the Court of Appeal was overruled by the House of Lords[23].

16 In 1996, in *Mason v Mason*[24], a case not materially different from the present except in that the plaintiff was relying alternatively on s 5(1A) and s 23A, the Court of Appeal of Victoria (Hayne and Callaway JJA and Smith AJA) declined to follow the decision of the House of Lords, and held that the expression "breach of duty" in ss 5(1A) and 23A covered "intentional trespass to the person where the damages claimed consist of or include damages in respect of personal injuries"[25]. The leading judgment was that of Callaway JA, who based his reasoning substantially on the legislative history of the provisions in question.

---

21 [1992] QB 197.

22 [1992] QB 197 at 205.

23 [1993] AC 498.

24 [1997] 1 VR 325.

25 [1997] 1 VR 325 at 330 per Callaway JA.

17 This Court should uphold the decision in *Mason v Mason*, which was followed by the Court of Appeal of Victoria in the present case. There are three reasons for this. First, as a matter of principle, for the reasons given by the English Court of Appeal in *Letang v Cooper*, the words "breach of duty" are capable of covering intentional trespass. In view of the difference of opinion between Diplock LJ in *Letang v Cooper* and Lord Griffiths in *Stubbings v Webb*, it is clear that eminent judges may disagree about whether, upon jurisprudential analysis, the expression "breach of duty" is apt in the case of trespass, but statutes of limitation are more concerned with practical justice than with jurisprudential analysis, and, at the very least, the language is ambiguous. Secondly, the legislative history in Victoria is significant, and in some respects different from that in the United Kingdom. The House of Lords, in *Stubbings v Webb*, considering the same expression in the *Law Reform (Limitation of Actions, &c) Act* 1954 (UK), attached significance to some remarks in the Report of the Tucker Committee, but in his evidence to the Committee of the Victorian Parliament, Mr Justice O'Bryan had earlier glossed those remarks differently[26] in a manner consistent with the approach that later prevailed in Victoria. More significantly, ss 23A and 5(1A), both of which were the product of reviews of the existing law by expert committees, adopted language which, at the time of its adoption, had been construed judicially in a certain fashion. That history of judicial construction was part of the context in which the provisions are to be understood. It would certainly have been known to the committees advising on changes to the Act. We are dealing here with a matter of "lawyers' law"; and considerations of judicial precedent would have been to the forefront of matters taken into account. Thirdly, the alternative construction preferred in *Stubbings v Webb* results in anomalies[27]; it attributes to Parliament an intention to draw a distinction which defeats, rather than advances, the purpose of the legislation. The evident purpose of both s 23A and s 5(1A) is to relieve the position of victims of tort: the former by giving a court a discretionary power to extend the time bar; the latter by providing for an automatic extension in cases of injuries of delayed onset. There is no discernible difference, in point of legislative policy, between victims of intentional and unintentional torts. No legislative purpose is served by putting the perpetrators of intentional torts in a better position than the perpetrators of unintentional torts. There being, as the Supreme Court of Ireland said, two constructions reasonably open, that should be preferred which produces a fair result that promotes the purpose of the legislation. The construction of the words "breach of duty" in the Victorian legislation accepted in *Mason v Mason*

---

26 Victoria, *Report from the Statute Law Revision Committee on Limitation of Actions*, (1950) at 47.

27 Exemplified in *S v W (Child Abuse: Damages)* [1995] 1 FLR 862.

accords with legislative history, context and purpose. It is, therefore, to be preferred to that advanced by the respondent.

18 The point raised by the respondent's notice of contention should fail.

The appeal

19 As has been noted, s 5(1A) was introduced in 1983. By s 11 of the amending Act, it applied to causes of action which arose after 11 May 1977. By virtue of further amendments made in 1989[28], s 5(1A) as amended by the 1989 Act applies (or potentially applies) to these proceedings. It should also be noted that, in s 3 of the Act, "personal injuries" is defined to include any disease and any impairment of a person's physical or mental condition.

20 Putting to one side the issue the subject of the notice of contention, and assuming that the appellant's action is an action for damages for breach of duty, the provision applies "where the damages claimed by the [appellant] consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by [the appellant]". In that case, the action may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the appellant first knew that she had suffered those personal injuries and that those personal injuries were caused by the act of the respondent. The appellant claims, the primary judge found, and the Court of Appeal accepted, that the appellant suffered from post-traumatic stress disorder of delayed onset, that the onset occurred in 2000, and that the appellant first knew of that condition and of its causal connection with the alleged acts of the respondent at some time thereafter. It is unnecessary to go into the detail of the psychiatric evidence on which that finding was based. Accordingly, the primary judge struck out the paragraph of the defence that pleaded that the action was statute-barred. It was against that order that the respondent appealed to the Court of Appeal. The reasons in the Court of Appeal refer to a division of judicial opinion in Victoria as to the application of s 5(1A) to what have been described as "traumatic" or "frank" personal injuries as distinct from what have been described as "insidious" personal injuries. Those expressions are taken from the judgments of Chernov JA in *Mazzeo v Caleandro Guastalegname & Co*[29] and of Eames JA in this case. The three members of the majority, allowing the appeal, assigned the

---

28 *Limitation of Actions (Amendment) Act* 1989 (Vic), s 3, which also introduced 5(1B) and 5(1C).

29 (2000) 3 VR 172 at 189 [43]-[45].

case to the former category, that is, a case of frank or traumatic personal injury (assault and rape), with psychiatric consequences of late onset, as distinct from an insidiously progressive disease. It is the validity of that distinction, in its application to s 5(1A), that is at the centre of this appeal.

21 The written submissions for the respondent summarise the argument which prevailed in the Court of Appeal as follows:

> "The words '... *damages in respect of personal injuries consisting of a disease or disorder contracted* ...' in s 5(1A) of the Act [apply] only in relation to insidious diseases:
>
> - the contraction of which could not have been known by the victim at the time;
> - which are not productive of symptoms at the time of contraction or within the limitation period prescribed by s 5(1);
> - where the symptoms become manifest at a later time when the disease becomes florid."

22 The leading judgment for the majority in the Court of Appeal was written by Eames JA, with whom Winneke P and Charles JA agreed. Eames JA quoted, and described as "very persuasive"[30], the reasons of Chernov JA in the case of *Mazzeo*. The passage quoted[31] (with numbers added by Eames JA for convenience) was as follows[32]:

> "There are, in my opinion, sound reasons for favouring the view that s 5(1A) does not operate in relation to traumatic personal injury claims and that the limitation period in respect of them is prescribed by s 5(1)(a). [1] First, although s 5(1)(a) and s 5(1A) are the only provisions in the Act that prescribe the limitation period in respect of personal injury claims, their wording suggests that they are mutually exclusive in that each relates to different categories of personal injury claims so that those falling within s 5(1A), for example, do not also fall within s 5(1)(a) and

---

30 *Clark v Stingel* [2005] VSCA 107 at [81].

31 *Clark v Stingel* [2005] VSCA 107 at [80].

32 *Mazzeo v Caleandro Guastalegname & Co* (2000) 3 VR 172 at 189 [43]-[45] (emphasis in original).

vice versa. This follows from the definition in s 5(1A) of the personal injury claims to which the provision relates, namely, 'personal injuries consisting of disease or disorder' and from the effective exclusion of those injuries from the operation of s 5(1)(a) by the words '(subject to sub-section (1A))' as they appear in that subsection. [2] Secondly, the terms and the operation of s 5(1A) suggest that it relates only to personal injuries which ordinarily take a considerable period of time to manifest themselves to the injured person, hence the provision that the cause of action shall not be taken to have accrued unless the plaintiff knows 'that he has suffered those personal injuries'. No such postponement of the limitation period is necessary as a matter of fairness in respect of traumatic personal injuries because in nearly all such cases their existence is recognised at or shortly after the happening of the relevant event. It is true that often the full extent of a traumatic injury may not be ascertained until after the lapse of a considerable period of time, but the *fact* of such an injury would be known almost immediately or shortly after the event in question. Even where, in the relatively unusual case, the fact or the existence of the injury caused by a trauma is not known until after the expiration of six years after the event, the justice of the situation is met by the opportunity to have the limitation period extended pursuant to s 23A. [3] Next, the use of the word 'contracted' in relation to personal injuries consisting of disease or disorder is consistent with such injuries not being the result of a trauma. Ordinarily, traumatic injuries are said to be 'caused' or 'sustained' rather than 'contracted'. [4] Further, if traumatic injuries fell within s 5(1A) much of s 23A would be unnecessary and irrelevant.

If s 5(1A) is concerned only with personal injury claims arising out of an insidious disease such as asbestosis, a traumatic personal injury which properly falls within s 5(1)(a) does not become a 'disease or disorder' for the purposes of s 5(1A) merely because the plaintiff has been unaware of its existence or of the relevant causal nexus until after the expiration of six years following the trauma. If it were otherwise, as I have said, s 23A would have very little operation. Such a plaintiff would effectively obtain an extension of the limitation period without having to persuade the court that an extension would be just and reasonable and without having to address the question whether the extension is likely to prejudice the defendant. In my view, that is unlikely to have been contemplated by the legislature.

[5] The conclusion that, on its proper construction, s 5(1A) is concerned only with actions arising out of 'insidious' personal injuries (ie, those which have not been caused by trauma), gains support from the extrinsic material relating to the 1983 amending legislation."

23 In expressing his conclusions about the present case, and qualifying what was said by Chernov JA in *Mazzeo* in one respect, Eames JA said[33]:

> "Although Chernov JA applied a dichotomy which distinguished between traumatic injuries, on the one hand (which were said not to fall within s 5(1A)) and insidious diseases or disorders, on the other hand (to which, alone, the section did apply), it is my view, for the reasons earlier discussed, that the dichotomy is better expressed as between insidious diseases and disorders, on the one hand, and, on the other hand, frank (ie not disguised) diseases or disorders, the contraction of which are neither unduly delayed nor disguised. Most 'traumatic' injuries (that term including injuries which did not immediately accompany the traumatic event but which developed as an outcome of the trauma, such as epilepsy and osteoarthritis) would fall outside the terms of s 5(1A). In my view, this case is one such instance. A traumatic *event* might, however, be accompanied by the contraction of a disease or disorder that falls within the terms of s 5(1A). Arguably, that might constitute the disease or disorder a traumatic injury. For that reason, a dichotomy expressed as being between traumatic injuries and insidious diseases or disorders may create confusion as to what it is that the section does and does not cover.
>
> The word 'trauma' was never used in the parliamentary debates nor in the committee report, nor does it appear in s 5(1)(a) or s 5(1A). It is not the traumatic nature of the tortious act or omission which matters, so much as the character of the injury that it causes. It is only when the injury is a disease or disorder of an insidious kind, in the sense that it is contracted but not known to exist until much later, with which the section is concerned.
>
> I conclude, therefore, that the condition of post-traumatic stress disorder of delayed onset was not a disease or disorder contracted by the [appellant] within the meaning required by s 5(1A). It was a disorder not of an insidious kind to which the section applies, and was suffered at a time later than the act or omission relied on by the [appellant] as the negligent act or breach of duty constituting the cause of action in this case. No application is now brought under s 23A. If the late onset of post-traumatic stress disorder was to be the basis of an action the proceedings in respect of that injury had to be the subject of leave granted under s 23A.

---

33 *Clark v Stingel* [2005] VSCA 107 at [88]-[90] (emphasis in original).

Section 5(1A) does not apply to this case, and subject to any further submissions the proceedings should be dismissed."

24 The minority view, espoused by Warren CJ and Callaway JA, was that the words in question are unambiguous, and that while the expression "insidious disease" might be apt to describe many of the circumstances to which those words apply, they are not limited to such cases, and that there is no reason why, in an appropriate case, the delayed consequence of a physical event might not attract the operation of the provision. That, it seems to us, is the better view.

25 In this Court, counsel for the respondent, supporting the reasoning of the majority in the Court of Appeal, argued that, in the case of post-traumatic stress disorder of delayed onset, there is no injury until what was described as the necessary "constellation of symptoms" occurs; in this case in 2000. There is no insidious progress of a disease contracted many years earlier, such as mesothelioma or lung cancer. There is an occurrence, many years after a traumatic event, of a psychiatric disorder. Where, as here, the traumatic event allegedly constituted a trespass to the person, the cause of action accrued at the time of the event (damage not being a necessary element of the cause of action), the ordinary limitation period of six years applied, and s 5(1A) had nothing to do with the matter. This is not a case of a latent disease manifesting itself after a long period. Post-traumatic stress disorder of a delayed type does not exist until there are symptoms. It was further submitted that s 5(1A) "applies only in relation to insidious diseases the [contracting] of which could not have been known by the victim at the time and which were not productive of symptoms ... within the limitation period".

26 The extrinsic materials referred to by Chernov JA in *Mazzeo*, by Eames JA in the present case, and by counsel for the respondent, show that, when s 5(1A) was enacted, the focus of concern was insidious disease of the kind just described. It may be accepted that lung disease was the paradigm case to which s 5(1A) was directed. It may also be accepted that the discretionary power conferred by s 23A was regarded as the normal method by which any injustice resulting from the operation of the general limitation period could be remedied. Both considerations are relevant, but neither is conclusive. It is the text of s 5(1A) which is to be applied; not the prevailing opinion as to what was likely to be the most common kind of case in which it would be invoked. The task of a court is to construe the language of the statute. Extrinsic materials may be useful as an aid to deciding the meaning of that language, but the subjective contemplation of the drafters as to the kind of case in which that language would be most likely to be applied is not determinative. Let it be supposed, for example, that it was the problem of progressive lung disease that prompted the enactment of s 5(1A). It does not follow that the language of s 5(1A) should be

confined to cases of progressive lung disease. That problem may explain why Parliament chose the words it used, but if the meaning of those words has wider application, then a court is bound to give effect to that meaning. To hold that "personal injuries" as used in the section is confined to insidious or indeed any particular form of injury is to foreclose the factual inquiries which the section demands, these being whether the person has suffered "personal injuries" and when she first knows that she has suffered them.

27 The nature of the subject matter of s 5(1A) is a reason for particular caution in treating expressions of subjective understanding of how the provision would operate as controlling the meaning of the statutory language. Medical knowledge develops, sometimes rapidly. When the Victorian Parliament enacted s 5(1A) it cannot have believed that it could foresee all the circumstances in which diseases or disorders might later be found to fall within its terms. No doubt Parliament can keep developments in science, and medical knowledge, under review. In the nature of things, however, Parliament's knowledge, in 1983, of the circumstances in which diseases or disorders may be contracted, or become known, many years after their original causes, cannot reasonably be used, in 2006, to limit the meaning of the words it adopted. That knowledge enabled Parliament to identify the problem, but not to define its metes and bounds. That, no doubt, is why Parliament chose general language. There is no reference in s 5(1A) to insidious disease. That may be an apt description of the paradigm case that prompted Parliament's consideration of the issue, but it is not the language used by Parliament in its response. If post-traumatic stress disorder of delayed onset falls within the language of s 5(1A), the fact that it was not something to which Parliament adverted in 1983 may not be surprising. If changes in medical knowledge reveal that s 5(1A) creates a wider exception to s 5(1) than was originally contemplated, then Parliament may reconsider the language of the exception, but the courts must apply that language.

28 Section 5(1A) follows, and qualifies, s 5(1). The reference in s 5(1A) to a cause of action being taken to have accrued on a certain date is plainly related to the reference in s 5(1) to a limitation period expiring six years from the date on which the cause of action accrued. "Taken to have accrued" means "taken to have accrued for the purposes of determining the limitation period". The damages claimed by the appellant include damages in respect of personal injuries (of a psychiatric nature) consisting of a disorder contracted by the appellant. There is nothing in s 5(1A) that limits its operation to cases in which the disorder was contracted before the expiry of the limitation period identified in s 5(1). Nor is its operation limited to diseases, insidious or otherwise. The expression used is "disease or disorder", not "insidious disease". The provision undoubtedly covers a case where a plaintiff suffered personal injuries before he or she knew of them. Indeed, such a case may be the most common case to which the provision

applies. There is, however, nothing in the language which denies its application to a case where knowledge of a disorder, and of its cause, occurs at or about the same time as the occurrence of the disorder.

29 The error in the reasoning of the majority in the Court of Appeal is that it applied the language of the statute, not according to its terms, but by reference to an assumption as to the kind of case in which it would be most likely to be invoked.

30 It was pointed out on behalf of the respondent that s 5(1A), unlike s 23A, applies regardless of any prejudice to a defendant. This was put forward as a reason for construing it narrowly, rather than liberally[34]. That is a weighty consideration, but it assumes the existence of some stable theory according to which s 5(1A) may be confined, consistently with its language. The theory propounded by the respondent does not satisfy that requirement. The differences between Chernov JA and Eames JA on the matter of "trauma" illustrate the difficulty of confining the language so as to limit the operation of s 5(1A) to the case of insidious disease contracted within the general limitation period.

Interventions

31 The parties to a pending application for special leave to appeal from a decision of the Court of Appeal of Victoria, *Wright v Commonwealth of Australia*[35], sought leave to intervene, and made submissions to the Court, principally in writing. That also is a case of post-traumatic stress disorder, but there are some differences from the present case. There were sufficient similarities to move the parties to seek to be heard in this case. The Commonwealth argued that s 5(1A) applies only to the contracting of insidious diseases or disorders, and that a disease or disorder is insidious only if it is not productive of symptoms within the limitation period prescribed by s 5(1) but symptoms subsequently emerge due to the progression of the disease or disorder. The section, it was said, was designed to fill a particular gap in the legislation as it existed in 1983, that is to say, the necessity to avoid extension of time applications in cases involving insidious, pernicious, often life-threatening diseases. All other personal injuries claims are covered by ss 5(1) and 23A. The section, according to the Commonwealth, should not be given its literal interpretation.

---

34 *Mazzeo v Caleandro Guastalegname & Co* (2000) 3 VR 172 at 178 [9] per Winneke P.

35 [2005] VSCA 309.

32 The arguments of the interveners have been taken into account in the foregoing reasoning. They should have leave to intervene, but no further order should be made about their case at this stage.

Conclusion and orders

33 The appeal should be allowed with costs. Orders 2 and 3 of the Court of Appeal of Victoria should be set aside and, in their place, it should be ordered that the appeal to that Court be dismissed with costs.

34 GUMMOW J. On 23 August 2002, the plaintiff (the appellant in this Court) commenced an action in the County Court of Victoria claiming damages, including aggravated, exemplary and punitive damages, against the defendant. By her second further amended statement of claim, the plaintiff states that she was born on 9 March 1955 and alleges that she was assaulted and raped by the defendant on two occasions, in March and April 1971. The first occasion was alleged to be at the Warrnambool Municipal Gardens and the second at a beach in the same area.

35 The plaintiff was a minor at the time of the alleged offences. Allowing for that circumstance, nevertheless she commenced her action many years after she had attained her majority. Is that lapse of time fatal to pursuit of her action against the defendant? The answer depends upon the construction of s 5 of the *Limitation of Actions Act* 1958 (Vic) ("the Act") as it stood when the plaintiff commenced her action on 23 August 2002[36].

36 The text of s 5 will be set out later in these reasons. It is sufficient to observe here that a critical portion of the text of s 5 of the Victorian legislation has a progenitor in changes made to the *Limitation Act* 1939 (UK) by the *Law Reform (Limitation of Actions, &c) Act* 1954 (UK) ("the 1954 UK Act"), that the changes made by the 1954 UK Act were adopted in Ireland[37], and that this legislation has been construed by the House of Lords in *Stubbings v Webb*[38] and by the Supreme Court of Ireland in *Devlin v Roche*[39] in a fashion which, if adopted for s 5 of the Victorian legislation, would be fatal to the plaintiff's case.

37 Something more now should be said of the course of litigation leading to the appeal to this Court. The defendant pleaded that the plaintiff's action was statute barred. Paragraph (a) of s 5(1) of the Act provides that "actions founded on tort" are not to be brought "after the expiration of six years from the date on which the cause of action accrued".

---

36 The Act since has been amended by the *Limitation of Actions (Amendment) Act* 2002 (Vic), by Pt 3 of the *Wrongs and Limitation of Actions Acts (Insurance Reform) Act* 2003 (Vic), by the *Limitation of Actions (Amendment) Act* 2004 (Vic), by the *Limitation of Actions (Adverse Possession) Act* 2004 (Vic), and by ss 47 and 48 of the *Defamation Act* 2005 (Vic), but it is not submitted that these changes bear upon the issue on this appeal.

37 *Statute of Limitations (Amendment) Act* 1991 (Ir), s 3.

38 [1993] AC 498.

39 [2002] 2 IR 360.

38 However, among the particulars of injury given by the plaintiff were "Post-traumatic stress disorder of/with delayed onset" together with an allegation that she did not know until a date subsequent to 26 August 1996 that this was a consequence of the alleged rapes and assault by the defendant. This was said to enliven in her favour s 5(1A) of the Act.

39 Section 5(1A) states:

> "*An action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)* where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries *consisting of a disease or disorder contracted by any person* may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows –
>
> (a) that he has suffered those personal injuries; and
>
> (b) that those personal injuries were caused by the act or omission of some person." (emphasis added)

The term "personal injuries" is defined in s 3(1) as including "any disease and any impairment of a person's physical or mental condition".

40 The emphasised portions of s 5(1A) indicate the two issues which have been argued on this appeal. The first, which arises on the defendant's Notice of Contention, is whether the plaintiff's action is one "for damages for negligence nuisance or breach of duty"; the second, which arises from the Notice of Appeal, is whether, if so, post-traumatic stress disorder of late onset is a "disease or disorder contracted by [the plaintiff]". Further reference to the second issue may be deferred at this stage, and attention now given to the first issue.

41 Section 5(1A) should be read with s 23A. Section 5 is found in Pt I of the Act and s 23A in Pt II. The former Part is headed "PERIODS OF LIMITATION" and the latter "EXTENSION OF LIMITATION PERIODS". The provisions of Pt I have effect subject to Pt II by reason of s 4 of the Act. Section 23A(2) empowers the court, on application and if it be just and reasonable to do so, to extend the period within which an action may be brought on a cause of action enumerated by s 23A(1). On the other hand, s 5(1A) operates of its own force and qualifies the limitation period otherwise applicable under s 5(1).

42 What both s 5(1A) and s 23A(1) share, given the textual relationship described above between Pt I and Pt II of the Act, is the same starting point. From this, each provision then makes its own departure to qualify what otherwise

is the general position established by that starting point. This point is located in par (a) of s 5(1) which, as indicated above, fixes a six year limitation period for "actions founded on tort". Both s 5(1A) and s 23A(1) qualify that general provision by using an expression which is narrower in its text and scope than "actions founded on tort". To interpret s 5(1A) (and s 23A(1)) as if they spoke of "actions founded on tort" would deny the evident textual contrast between the starting point in par (a) of s 5(1) and the regimes established by the provisions which follow.

43 Parts I and II of the Act must be read as a whole and by reference to their terms, not upon assumptions as to the kinds of action in tort which its limitation provisions might have applied if different terms had been employed in the statute.

44 The two provisions of s 5(1A) and s 23A(1) have, as a criterion of their several operations, an expression specifying actions "for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of [a[40]] provision made by or under a statute or independently of any contract or any such provision)". The construction of these words is critical for this appeal. The same formula was used in the 1954 UK Act considered in *Stubbings v Webb*[41] and the Irish legislation considered in *Devlin v Roche*[42].

45 Section 23A(1) states:

> "This section applies to any action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed consist of or include damages in respect of personal injuries to any person."

46 Sections 5 and 23A[43] use the expression "cause of action". In *Williams v Milotin*[44], in the course of explaining, in the context of the *Limitation of Actions Act* 1936 (SA), that the causes of action in negligence for personal injuries and in

---

40 The word "a" appears in s 23A(1), but not in s 5(1A), but this does not affect the construction of the expression.

41 [1993] AC 498 at 503.

42 [2002] 2 IR 360 at 363.

43 In s 23A(2), (3)(c)-(d), (4).

44 (1957) 97 CLR 465. See also *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245 per Wilson J.

trespass to the person "are not the same now and they never were", Dixon CJ, McTiernan, Williams, Webb and Kitto JJ remarked[45]:

> "When you speak of a cause of action you mean the essential ingredients in the title to the right which it is proposed to enforce."

47 Further, in *McHale v Watson*[46], Windeyer J demonstrated that, contrary to the view taken by Diplock J in *Fowler v Lanning*[47], in an action for trespass to the person by a blow or missile it was for the defendant to aver and prove the absence of intent and negligence on the defendant's part, rather than for the plaintiff to aver and prove that the defendant acted either intentionally or negligently[48]. It would not be accurate to describe negligence as the essence of the plaintiff's cause of action in trespass to the person, or to treat this cause of action, at least as regards "unintentional" infliction of injury, as supplanted by the tort of negligence[49]. Moreover, in the present case, the plaintiff alleged personal violence by the defendant, not his failure to exercise reasonable care. The result was that on no footing was her cause of action in the tort of negligence.

48 The plaintiff applied for a declaration that s 5(1A) applied to her cause of action and alternatively for an order under s 23A for an extension until 26 August 2003 of the time for the commencement of her action. The application under s 23A was abandoned and Judge Hanlon in the County Court held that s 5(1A) did apply. Accordingly, he struck out par 8 of the Defence which pleaded the Act in bar to the action.

49 The Court of Appeal, by majority (Winneke P, Charles and Eames JJA; Warren CJ and Callaway JA dissenting), allowed an appeal by the defendant[50]. The Court of Appeal divided in favour of the defendant upon what has been described in these reasons as the second issue, the application of s 5(1A) to the alleged late onset of the plaintiff's post-traumatic stress disorder. As to the first

---

45 (1957) 97 CLR 465 at 474.

46 (1964) 111 CLR 384; affd (1966) 115 CLR 199.

47 [1959] 1 QB 426. See also *Letang v Cooper* [1965] 1 QB 232.

48 (1964) 111 CLR 384 at 387-388; cf *Hackshaw v Shaw* (1984) 155 CLR 614 at 618-619 per Gibbs CJ.

49 See the discussion by Dawson J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 671 and cf *Letang v Cooper* [1965] 1 QB 232 at 239-240.

50 *Clark v Stingel* [2005] VSCA 107.

issue, earlier, in *Mason v Mason*[51], the Court of Appeal had declined to apply the reasoning of the House of Lords in *Stubbings v Webb*[52] which would have favoured the defendant. *Mason*, like the present case, was an action for personal injuries the result of intentional assault. Eames JA, who gave the leading majority judgment in the present case, followed *Mason*.

50 In this Court, by his Notice of Contention, the defendant submits that the Court of Appeal also should have decided in his favour on the ground that the plaintiff's claim for damages for the alleged intentional assaults was not "[a]n action for damages for negligence nuisance or breach of duty" within the meaning of s 5(1A). For the reasons which follow, this contention should be upheld and the appeal dismissed on that ground.

51 The primary limitation provision applicable in this case is s 5(1)(a) which states:

> "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –
>
> (a) actions founded on simple contract (including contract implied in law) or (subject to sub-section (1A)), actions founded on tort including actions for damages for breach of a statutory duty".

There is then, as the reference in the text of s 5(1) to s 5(1A) indicates, a special but limited regime whereby the cause of action is taken to have accrued by reference to a later state of knowledge by the plaintiff. However, that special regime does not apply to the general description in s 5(1)(a) of "actions founded on tort including actions for damages for breach of a statutory duty". What is specified for s 5(1A) to apply is a subset of the actions identified in s 5(1)(a). In order for the tort action brought by the plaintiff to cross the threshold of s 5(1A), it must answer the narrower description of "[a]n action for damages for negligence nuisance or breach of duty".

52 The words which follow in s 5(1A) within the brackets indicate the duty may exist by virtue of a contract or by virtue of a provision made by or under a statute; the duty may also exist "independently" of contract or statute. Hence the text provides a footing for the proposition that at least some actions in tort cross the threshold of s 5(1A) as actions for damages for "breach of duty". But is the action by the plaintiff for damages for assault and rape an action for breach of duty by the defendant?

---

51 [1997] 1 VR 325.

52 [1993] AC 498.

53 The plaintiff relied for an affirmative answer, as did the Court of Appeal in *Mason*[53], upon the rhetorical question posed by Adam J in *Kruber v Grzesiak*[54]:

> "After all, do not all torts arise from breach of duty – the tort of trespass to the person arising from the breach of a general duty not to inflict direct and immediate injury to the person of another either intentionally or negligently in the absence of lawful excuse?"

54 However, the answers to that question are, first, that it is too widely framed as a statement of universal principle to be of utility in construing s 5(1A) of the Act and, secondly, that it does not accommodate the structure of the Act itself.

55 As to that second matter, if s 5(1A) had the general application which would follow from treating all tort actions as actions for breach of duty, the result would be the frustration of the evident purpose of s 5(1A) to apply its special regime to some and not to all of the general class of tort actions to which s 5(1)(a) applies. Further, there would be rendered superfluous the separate identification in s 5(1A) of actions for damages for negligence and for nuisance.

56 As to the first matter, and the proposed general principle of tort law, the following may be said. At a high level of generality, it may be said that because "duty" means the "prohibition of a certain form of behaviour in a given kind of situation", it follows that "every tort is the breach of some legal duty"[55]. But against that is the caution administered by Dixon J in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[56]:

---

53 [1997] 1 VR 325 at 329.

54 [1963] VR 621 at 623. See also the statement by Murphy J in *Macpherson & Kelley v Kevin J Prunty & Associates* [1983] 1 VR 573 at 587 that torts are "breaches of a duty owed generally to one's fellow subjects" and that by Lord Denning MR in *Letang v Cooper* [1965] 1 QB 232 at 241:

> "Our whole law of tort today proceeds on the footing that there is a duty owed by every man not to injure his neighbour in a way forbidden by law."

55 Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law*, 5th ed (2003) at 19. See also Fridman, *The Law of Torts in Canada*, 2nd ed (2002) at 9-11.

56 (1937) 58 CLR 479 at 505. Professor Glanville Williams expressed a conclusion to similar effect in "The Foundation of Tortious Liability", (1941) 7 *Cambridge Law Journal* 111 at 131-132.

> "There is, in my opinion, little to be gained by inquiring whether in English law the foundation of a delictual liability is unjustifiable damage or breach of specific duty. The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them."

57 With respect to trespass to the person, it may be said that the application of force to another without lawful justification amounts to battery even without the intended or actual occasioning of harm thereby, and that the interests thereby protected include that of personal dignity as well as physical integrity[57]. But it adds little, even at this level of analysis, to say that the defendant to such an action has broken a duty to the plaintiff not to infringe these interests.

58 If the defendant had invited the plaintiff to his house and committed there the alleged violent acts against her, it might be said that the defendant had owed a duty to take care that the house was safe. But, as has been said in the cases, would one really be thinking of a duty not to assault and rape the plaintiff while she was there[58]?

59 The question then becomes whether, in relation to any torts, negligence and nuisance apart, the phrase "breach of duty", when used in s 5(1A), has any content. With respect to the Irish legislation to which reference has been made, in *Devlin v Roche* Geoghegan J remarked[59]:

> "A breach of a duty of care is really the same thing as negligence. But the law of tort traditionally recognised particular breaches of duty which were governed by their own principles rather than by *Donoghue v Stevenson*[60]."

Reference then was made by Geoghegan J to the duty set out in *Fletcher v Rylands*[61], to the absolute duty in respect of dangerous goods or articles, and to

---

57 See *Williams v Milotin* (1957) 97 CLR 465 at 474; *Collins v Wilcock* [1984] 1 WLR 1172 at 1177; [1984] 3 All ER 374 at 377-378; Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st ed (1996) at 120-121.

58 See *Stubbings v Webb* [1993] AC 498 at 508; *Devlin v Roche* [2002] 2 IR 360 at 367.

59 [2002] 2 IR 360 at 367.

60 [1932] AC 562.

61 (1866) LR 1 Ex 265; affd *Rylands v Fletcher* (1868) LR 3 HL 330.

the common law duty to invitees as examples where breaches of duty would not always accurately be described as breaches of a duty of care and where damages might be sought in respect of personal injuries. To that may be added the branch of the common law of liability for dangerous animals which, independently of questions of trespass and negligence, imposes upon the owner an "absolute duty" to take measures to prevent them from doing damage[62].

60 In Australia and as a consequence of decisions of this Court delivered in fairly recent years, some of those examples have been enveloped and absorbed by the tort of negligence[63]. But that was not the situation when s 5(1A) and s 23A (in its present form) were first introduced into the Act by the *Limitation of Actions (Personal Injury Claims) Act* 1983 (Vic) ("the 1983 Act"). It certainly was not the case in England at the time of the enactment of the 1954 UK Act[64].

61 Something more needs now be said of the provenance of the 1983 Act.

62 The Act, as first enacted as the *Limitation of Actions Act* 1955 (Vic) ("the 1955 Act"), contained in par (a) of s 5(1) the general six year limitation period for actions "founded on tort". However, s 5(6) imposed a three year limitation period for certain actions and did so in the following terms:

> "No action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision), where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries to any person, shall be brought after the expiration of three years after the cause of action accrued."

The similarity to the opening words of s 5(1A) will be apparent. However, it also is apparent that the sub-sections serve quite different ends. Section 5(1A) operates where it applies to advance what otherwise would be the general

---

62 *Buckle v Holmes* [1926] 2 KB 125 at 128; *Draper v Hodder* [1972] 2 QB 556 at 569; *Jones v Linnett* [1984] 1 Qd R 570 at 574-575.

63 See, for example, *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

64 See, for example, the treatment of the rule in *Indermaur v Dames* (1866) LR 1 CP 274; (1867) LR 2 CP 311 by Dr Stallybrass, as editor of the 10th edition of *Salmond's Law of Torts*, (1945) at 476-481. This was followed by the rebuff in *London Graving Dock Co Ltd v Horton* [1951] AC 737 to the assimilation of occupiers' duties into the general law of negligence, and then by the *Occupiers' Liability Act* 1957 (UK).

limitation period provided by s 5(1); s 5(6) contracted the six year period to three years.

63 The 1955 Act marked the introduction into Victorian statute law of a limitation statute of general application to replace a large number of enactments touching the subject[65]. The three year limitation period had been introduced as a quid pro quo for removal of the special protection which had been given to various public authorities[66].

64 Section 3 of the 1983 Act repealed s 5(6). It also introduced s 5(1A) and made consequential amendments to s 5(1)[67]. Section 5 of the 1983 Act introduced the present s 23A. The 1983 Act was described by the Attorney-General in the Second Reading Speech in the Legislative Assembly as introducing a new scheme for limitation of actions in personal injury claims in Victoria which would "be simple and easily understood"[68]. Of the relationship between s 5(1) and s 5(1A), the Attorney-General said[69]:

> "In personal injury claims, other than disease or disorder cases, the injured person may bring his action for damages within six years after the date of the accrual of his cause of action. Normally that would be the date of the injury. In disease cases, such as asbestosis or pneumoconiosis, the injured person may bring his action for damages within six years from the date that he knows he has the disease or disorder and that someone is responsible – that is, when he knows he has a cause of action. That knowledge may not come to the injured person until many years after the disease or disorder starts to develop."

65 No attention appears to have been given in the preparation of the Bill for the 1983 Act to the significance of the carrying over, to a quite different setting, of the form of words used in s 5(6) of the 1955 Act. But this is not a case of the

---

65 *Mason v Mason* [1997] 1 VR 325 at 326-327.

66 *Mason v Mason* [1997] 1 VR 325 at 329.

67 Section 5(1A) took the form critical for this appeal, and set out earlier in these reasons, after amendment by s 3 of the *Limitation of Actions (Amendment) Act* 1989 (Vic). This also added sub-ss (1B) and (1C) to s 5. Section 5(1C) provides that s 5(1A) applies "despite anything to the contrary in this or any other Act".

68 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 December 1982 at 2765.

69 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 December 1982 at 2766.

class considered in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*, where Gibbs CJ said[70]:

> "There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the canons of construction are not so rigid as to prevent a realistic solution in such a case".

Rather, this is a case where the words of s 5(1A) which are in question can be intelligibly applied to the subject-matter with which the sub-section deals[71], and the distinction drawn between actions in tort generally (s 5(1)(a)) and those tort actions for negligence, nuisance or breach of duty (s 5(1A)) cannot be put aside as an evident drafting oversight[72]. The disease cases to which the Attorney-General referred, perhaps not unreasonably, were seen as including only actions lying in contract and those tort actions which lay for negligence, nuisance or breach of duty. It is not for the Court to conjecture that there appears no good reason for the Parliament not speaking in s 5(1A) of any action in tort and then to construe the provision accordingly[73].

66 On the appeal to this Court, each side claimed that in construing s 5(1A) controlling significance was to be found in its view of the provenance of s 5(1A) in s 5(6) of the 1955 Act. If regard be had to the origins of s 5(6) as suggested, the result favours the defendant.

67 In *Mason*[74], Callaway JA traced the origins of s 5(6) in the Bills introduced in various forms in 1947, 1948, 1949 and 1950 and in the work of the Statute Law Revision Committee in Victoria. What is apparent is that the presentation to the British Parliament in July 1949 of the Report of the Committee on The Limitation of Actions ("the Tucker Committee")[75] had a great impact upon the form taken by the law reform legislation in Victoria. Again, there had been in the United Kingdom the problem of the special position of public authorities. Paragraph 23 of the Report of the Tucker Committee read:

---

70 (1981) 147 CLR 297 at 304.

71 cf *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305.

72 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 323.

73 cf *Mason v Mason* [1997] 1 VR 325 at 330.

74 [1997] 1 VR 325 at 327-328.

75 Cmd 7740.

> "We consider that the period of limitation we have recommended should apply to all actions for personal injuries, whether the defendant is a public authority or not. We do not think it is necessary for us to define 'personal injuries', although this may possibly be necessary if legislative effect is given to our recommendations. We wish, however, to make it clear that we do not include in that category actions for trespass to the person, false imprisonment, malicious prosecution, or defamation of character, but we do include such actions as claims for negligence against doctors."

68 The text of s 5(6) of the 1955 Act was drawn from that of s 2(1) of the 1954 UK Act, rather than from previous proposals in Victoria. The view was taken by the Parliamentary draftsman in Victoria that "the Tucker Committee had comprised some of the best known jurists of the day and that it was advantageous to have uniformity in such matters among the different countries of the British Commonwealth"[76].

69 The phrase "breach of duty" in s 2(1) of the 1954 UK Act was construed by the House of Lords in *Stubbings v Webb* as not including a deliberate assault. Lord Griffiths referred to par 23 of the Report of the Tucker Committee[77], noting that rape and indecent assault (the subject of the action by the plaintiff in *Stubbings*) fell within the category of trespass to the person, and concluded[78]:

> "The phrase lying in juxtaposition with negligence and nuisance carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person."

70 It should be added that the House of Lords had before it not the 1954 UK Act itself, but provisions of the *Limitation Act* 1980 (UK). These provided for the exercise of a judicial discretion to extend the limitation period in respect of a class of personal injury actions defined in terms drawn from s 2(1) of the 1954 UK Act. There will be apparent some analogy to s 23A of the Victorian legislation. *Stubbings* has the added significance that the above interpretation was given to the same form of words as had appeared in earlier legislation with a different objective (differential limitation periods). This was carried forward to later legislation with another focus (an extension of time regime).

---

76 *Mason v Mason* [1997] 1 VR 325 at 328.

77 [1993] AC 498 at 503, 507.

78 [1993] AC 498 at 508.

71 The Irish legislation considered in *Devlin v Roche* resembled s 5(6) of the 1955 Act[79]. It provided for a limitation period of three rather than six years for actions for damages for personal injury "caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision)". The Supreme Court followed the reasoning in *Stubbings* to conclude that the six rather than the three year period applied to an action for assault and battery at a football ground by members of the Garda.

72 No doubt different conclusions might have been reached in *Stubbings* and *Devlin* on the question of construction. No doubt the drafting of s 5(6) of the 1955 Act to adopt the British precedent in the interests of consistency may be seen, with hindsight, to have disappointed some expectations of members of the Statute Law Revision Committee[80]. But these are considerations of insufficient weight to displace what flowed from the use made in Victoria of the Report of the Tucker Committee and of s 2(1) of the 1954 UK Act.

73 There remains one matter for consideration on this branch of the appeal. It concerns the point made by Eames JA in the Court of Appeal, namely that it would be anomalous if a claim of rape by a father fell outside s 5(1A) whilst a claim against the mother for breach of a duty of parental care fell within it.

74 That some actions in tort, albeit respecting disease cases to which s 5(1A) otherwise may apply, will fall outside the scope of the sub-section follows from the particular terms adopted to mark off s 5(1)(a) from s 5(1A) and to differentiate the two limitation period regimes. Further, the same factual matrix may supply the different (or at least not co-incident) essential ingredients of the rights enforced in several causes of action. One of these causes of action may answer the description in the opening words of s 5(1A), while another may not do so. But to recognise that state of affairs is one thing. It would be another to rely upon such instances to read the expression "negligence nuisance or breach of duty" as encompassing any tort action in a disease case to which s 5(1A) otherwise speaks.

75 Again, it may be said that the bracketed words in s 5(1A) are words of extension rather than limitation[81]. So much may be agreed. But what the

---

79 The only material difference was that in the Irish legislation, the limitation period ran from the *later* of the date when the cause of action accrued and the date of knowledge of the plaintiff, whereas in s 5(6) the limitation period merely ran from when the cause of action accrued.

80 See *Mason v Mason* [1997] 1 VR 325 at 329-330.

81 cf *Mason v Mason* [1997] 1 VR 325 at 330.

extension does not do is employ language to adopt a general theory of a duty-based law of torts.

76 The conclusion reached above upon the issue raised by the Notice of Contention dictates the dismissal of the appeal. The question whether the Court of Appeal correctly construed the phrase "personal injuries consisting of a disease or disorder contracted by a person" must await an appeal to this Court in a case where the threshold of the opening words of s 5(1A) has been crossed.

77 The applications to intervene in this appeal by the parties to the pending special leave application from the decision of the Court of Appeal of the Supreme Court of Victoria in *Wright v Commonwealth of Australia*[82] should be allowed, but no further costs order should be made about their case at this stage.

78 The appeal should be dismissed with costs.

---

82 [2005] VSCA 309.

79 KIRBY J. This is an appeal from a judgment entered by the Court of Appeal of the Supreme Court of Victoria[83]. For the purposes of the proceedings, that Court was exceptionally constituted by five judges. It was divided as to the outcome[84].

80 This Court too is divided over the meaning and application of the provisions of the Victorian statute applicable to the cause of action for which Ms Carol Stingel ("the appellant") sued Mr Geoffrey Clark ("the respondent") for damages. That statute is the *Limitation of Actions Act* 1958 (Vic) ("the Act") as it stood in 2002, when the proceedings were commenced.

Section 5(1A): application and ambit

81 *The application issue*: The point of construction upon which this Court has divided was not the subject of divided opinions in the Court of Appeal. This is because, upon that point, there was established authority of the Court of Appeal which determined the point in favour of the appellant[85]. The point was argued in the proceedings below. However, the Court of Appeal adhered to its earlier decision.

82 When the Court of Appeal decided the case adversely to the appellant on another point of construction arising under the Act, the appellant sought special leave to appeal to this Court. In that application, the panel granting such leave indicated that if the matter were to be considered by this Court, it would be preferable for the entire controversy to be submitted to examination[86]. So it has been. This appeal thus presents two issues arising under the Act. The first, in point of logic, is raised by the respondent's notice of contention. It concerns whether the provision upon which the appellant relied to bring her proceedings, s 5(1A) of the Act, 31 years after she was allegedly sexually assaulted by the respondent, applied to her case. Normally, by s 5(1) of the Act, actions founded on tort shall not be brought after the expiry of six years from the date on which the cause of action accrued. However, to this general provision, s 5(1A) provides an exception[87]. This presents the "application of the section" issue. It concerns whether s 5(1A) of the Act attached to the circumstances of the appellant's cause

---

83 *Clark v Stingel* [2005] VSCA 107.

84 Winneke P, Charles and Eames JJA; Warren CJ and Callaway JA dissenting.

85 *Mason v Mason* [1997] 1 VR 325 per Callaway JA (Hayne JA and Smith AJA concurring), following *Kruber v Grzesiak* [1963] VR 621 per Adam J.

86 [2005] HCATrans 969 at 12-13.

87 The provisions of s 5(1A) were introduced into the Act by the *Limitation of Actions (Personal Injury Claims) Act* 1983 (Vic), s 3.

of action so as to extend the time within which the appellant could bring her proceedings, notwithstanding the delay.

83 *The ambit issue*: The point of law on which the Court of Appeal divided was different. It concerned the ambit of s 5(1A) of the Act, once it was decided that it attached to the appellant's claim. In effect, by reference to the statutory text, its alleged purposes and extrinsic materials, the respondent suggested that s 5(1A) was confined in its operation to causes of action founded on insidious diseases, such as mesothelioma or asbestosis, the initial acquisition of which was unknown to the person affected. Upon this view, the sub-section was not available for late onset post-traumatic stress disorder such as the appellant alleges has arisen after 26 August 1996 as a consequence of the 1971 rapes and assault pleaded against the respondent.

84 This ambit issue is presented by the appellant's appeal. But logically, it came second because, if s 5(1A) of the Act has no application to a case where the action for damages arises from trespass to the person, no issue is presented for the extension of the limitation period for which s 5(1A) provides. Indeed, no other, exceptional and discretionary provision could be invoked under s 23A of the Act to postpone the descent of the limitation bar[88]. This is because the formula which creates the suggested impediment for the appellant as to the application of s 5(1A) of the Act also appears in s 23A[89].

85 In this Court, the application issue is decided in favour of the appellant by Gleeson CJ, Callinan, Heydon and Crennan JJ ("the joint reasons")[90] and by Hayne J[91]. It is decided adversely to her claim by Gummow J[92], who does not therefore have to decide the ambit issue. The joint reasons also decide the ambit issue in favour of the appellant[93]. I must choose between the competing interpretations and explain why I prefer one over the other.

---

88 Inserted by the *Limitation of Actions (Personal Injuries) Act* 1972 (Vic), s 3. The provision commenced operation in 1973.

89 The appellant originally commenced proceedings for an extension of the limitation period under s 23A of the Act. However, this was abandoned, presumably because of recognised difficulties in establishing the preconditions to the application of that section in the circumstances.

90 Joint reasons at [18].

91 Reasons of Hayne J at [132]-[133].

92 Reasons of Gummow J at [75].

93 Joint reasons at [26]-[28].

Two perfectly legitimate interpretations

86 *Two final court decisions*: The history of judicial consideration of the same, or similar, statutory language is described in the reasons of other members of this Court. That history shows the division of judicial opinion on the application of the relevant provisions and an acknowledgment that each of the contesting interpretations is well supported and strongly argued by its respective supporters such that the competing arguments produce "two perfectly legitimate viewpoints"[94].

87 The position has now been reached that the two final national courts that have examined counterparts of the contested provisions (the House of Lords[95] and the Supreme Court of Ireland[96]) have concluded that the better view is that the statutory words do not extend to claims founded on intentional trespass. The holdings of these courts are not binding on this Court. Each was aware of the conflicting opinions of other judges. Each referred to the relevant considerations in reaching its preferred conclusion. Each acknowledged the importance of avoiding an overly narrow and purely verbal approach to the problem. By reference to the applicable considerations, each concluded that the better interpretation was that the relevant provisions did not apply to a case such as the present.

88 *Material and immaterial conclusions*: This is also the conclusion that I have ultimately reached. It leads me to concur in the orders that Gummow J favours. But first, out of respect for the contrary views, I will indicate the main considerations that lead me to this result. No judicial authority dictates the outcome. Chauvinistic considerations concerning the preponderance of Australian authority against it must be set aside[97]. Generalities about the remedial or reformative character of s 5(1A) do not resolve the controversy[98]. The question remains what precisely was the introduction of s 5(1A) into the Act intended to accomplish? To answer that question it is necessary to turn to the

---

94 *Devlin v Roche* [2002] 2 IR 360 at 367 per Geoghegan J (for the Court).

95 *Stubbings v Webb* [1993] AC 498.

96 *Devlin* [2002] 2 IR 360.

97 Such as *Kruber* [1963] VR 621; *Hayward v Georges Ltd* [1966] VR 202; *Ure v Humes Ltd* [1969] QWN 25; *Mason* [1997] 1 VR 325; *Clark* [2005] VSCA 107 at [51]-[61]. See also *O'Neill v Foster* (2004) 61 NSWLR 499 at 510 [42].

98 cf *Queensland v Stephenson* [2006] HCA 20 at [49]-[56]; *Davison v Queensland* [2006] HCA 21 at [41].

statutory language. That is where the search for the meaning of the legislation must always start[99]. Ultimately, it is where the solution will be found.

89 As I approach this appeal, four considerations are of assistance in guiding me to my conclusion. These are the text of the Act; the context in which s 5(1A) appears in the Act; the legislative history; and considerations relevant to deriving the legislative purpose and policy of the Act.

The provisions of s 5(1A) do not apply

90 *The statutory problem*: The problem presented by the terms of s 5(1A) of the Act can be simply stated. It is illustrated by the alleged facts that give rise to the appellant's proceedings and the operation of the Act upon those facts. The details are set out in other reasons[100]. No facts have yet been found. The case has proceeded on the assumption that, in a trial, the appellant could prove the facts that she has alleged in her pleadings.

91 For the first (application) issue, the question is whether the appellant's claim, as pleaded, answers to the description of "[a]n action for damages for … breach of duty" within s 5(1A) of the Act notwithstanding that it is an action based on the alleged acts of assault and rape that the appellant pleads against the respondent in her claim for civil damages.

92 *Arguments for application*: A number of arguments have been deployed to support the proposition that wrongs comprising intentional trespass involve a "breach of duty", in the sense in which that expression is used in s 5(1A). They are re-expressed in this appeal by the joint reasons. They include scrutiny of the possible purpose that Parliament might have had to exclude intentional trespass from the remedies introduced by the enactment of s 5(1A)[101]; the apparently anomalous and unjust consequences of that differentiation between particular cases[102]; that the construction propounded for the respondent would place victims

---

99 See, eg, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *Neindorf v Junkovic* (2005) 80 ALJR 341 at 350-351 [42]; 222 ALR 631 at 641; *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671.

100 As to the facts see the joint reasons at [1]-[7]; reasons of Gummow J at [34]-[38]. As to the statutory provisions see the joint reasons at [3]-[7]; reasons of Gummow J at [45], [51]; reasons of Hayne J at [124]-[126].

101 Joint reasons at [12]-[13].

102 Joint reasons at [13].

of intentional torts in a less advantageous position than victims of negligence[103]; the added injustice of excluding the beneficial application of s 23A of the Act because of the use in that section of the same expression[104]; the difficulty of distinguishing trespass from negligence in particular cases[105]; and the capacity to dispel the suggested problem by the simple device of treating "breach of duty" as a phrase used in a non-technical sense[106].

93 Thus, in the present case, the appellant argued that a person such as the respondent "owed a duty", in a moral, personal and societal sense, not to assault or rape a person such as her. Viewed in this way, and in the overall remedial context of the Act into which ss 5(1A) and 23A were introduced, the supposed problem then disappears. The phrase "breach of duty" is wide enough, on this view, to include cases of intentional trespass. Judicial conclusions to this effect remove what is regarded as an anomalous and harsh outcome for legislation that was generally intended to be remedial and reformatory.

94 I acknowledge the force of these arguments. All limitation statutes involve a compromise between interests favouring the finality of risks of liability and the enforcement of rights of action claimed by a person under the law, despite delay in doing so[107]. Often, in judging the application and ambit of a limitation provision, it is necessary to weigh the competing textual arguments against the background of the competing policy objectives inherent in such legislation[108]. The outcome may not be self-evident. The existence of competing arguments is inherent in the ambiguity of language and the conflicting statutory objectives[109]. The present is a typical instance of this problem.

95 *The textual arguments*: However, the text of s 5(1A) of the Act is strongly against the construction urged for the appellant. The words "breach of duty" are words of common legal use. A breach of duty is a familiar element of the tort of

---

103 Joint reasons at [9], [14], [17].

104 Joint reasons at [13].

105 Joint reasons at [13].

106 Joint reasons at [12].

107 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 552, 565.

108 cf *Davison* [2006] HCA 21 at [34].

109 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

negligence. Similarly, a contract and a statute may create a duty. The word "duty" is a common legal expression used in the context of personal injury claims. That is the context in which s 5(1A) was introduced into the Act. In such circumstances, it is not self-evident that the phrase is used here in other than its ordinary meaning. This is: did the person against whom the action for damages is commenced owe a "duty" in law to the person commencing that action?

96 According to its long title, the statute which inserted s 5(1A) into the Act was "[a]n Act to make provision for Extending the Period within which Actions for Damages in respect of Personal Injuries may be brought"[110]. In such a context, there is no reason to introduce a different, alien, notion of "duty". The Act is addressing legal causes of action, as specified. Why should it be inferred that the Parliament which enacted it intended for this subcategory of action alone to introduce a different, vaguer, social meaning to the word "duty"?

97 Actions of intentional trespass are amongst the most ancient of the causes of action known to English law[111]. In the absence of strong arguments to the contrary, it is too late to attempt to re-express actions founded on trespass (or to distort their constituent elements) by holding that they include an element of "breach of duty". Section 5(1A), a remedial provision, uses the phrase "breach of duty", but it does not pretend to restate the components of actions of intentional trespass. "Breach of duty" is a notion alien to trespass.

98 The slightest familiarity with the ingredients of intentional trespass demonstrates that this is so. A number of authors have made this point[112] and, in doing so, have given the parliamentary language its ordinary legal meaning. The other identified wrongs on which the action for damages may be founded are apparently used in the Act in a conventional legal sense. The imposition on the phrase "breach of duty" of a looser, non-legal meaning, especially with respect to intentional torts, is therefore difficult to justify.

---

110 *Limitation of Actions (Personal Injury Claims) Act* 1983 (Vic).

111 *Cole v Turner* (1704) Holt KB 108 [90 ER 958]; *Bunyan v Jordan* (1937) 57 CLR 1 at 13; Trindade, "Intentional Torts: Some Thoughts on Assault and Battery", (1982) 2 *Oxford Journal of Legal Studies* 211; Glazebrook, "Assaults and their consequences", (1986) *Cambridge Law Journal* 379; Feldthusen, "The Canadian Experiment with the Civil Action for Sexual Battery", in Mullany (ed), *Torts in the Nineties*, (1997) 274 at 281. No argument was advanced in this appeal as to the existence of a new nominate tort of sexual battery.

112 See, eg, Franks, *Limitation of Actions*, (1959) at 196-197; cf McGee, *Limitation Periods*, 4th ed (2002) at 129-131.

99 In his reasons, Hayne J resolves this issue by reference to the presumed intention of the Victorian Parliament to enact a law applying to *all* personal injury claims[113]. However, given the Parliament's use of technical language[114], the words contained in the legislation are inapt to apply to a claim in trespass.

100 Nor can it be suggested that such an interpretation is necessary to give the words "breach of duty", in the context of s 5(1A) of the Act, meaningful work to do. The phrase is by no means otiose. It has express application from the words that follow in parenthesis. The "duty" envisaged in s 5(1A) may exist by virtue of a contract or of a provision made by or under a statute. It may exist independently of a contract or a statutory provision. At common law, it may exist outside the identified cases of negligence where a duty is an element of the alleged tort.

101 It follows that the phrase "breach of duty" should be given its ordinary legal meaning. That meaning is not engaged by intentional torts, such as assault and battery. To suggest otherwise is to debase the notion of "breach of duty" and to reduce it to a meaningless expression such as "breaches of a duty owed generally to one's fellow subjects"[115]. It seems unlikely that this would have been the purpose of Parliament in enacting a limitation statute, a species of so-called "lawyers' law"[116].

102 *The contextual arguments*: The foregoing analysis is reinforced by the statutory context. Had it really been intended that s 5(1A) of the Act should apply to every case of "breach of duty" owed to others in a moral or societal sense, it would have been a simple matter to choose a phrase having that effect.

103 Thus, it would have been possible for the drafter to provide that s 5(1A) applies to "actions founded on … contract or on tort and on statute". Indeed, such a phrase already had a history in limitations law. It appears in s 2 of the *Limitation Act* 1939 (UK). More to the point, when the *Limitation of Actions Act* 1955 (Vic) ("the 1955 Act") was enacted, s 5(1) copied the United Kingdom statute in this respect. In the general provision for a six year limitation for specified actions, the United Kingdom provisions were also copied. They

---

113 Reasons of Hayne J at [130]-[131].

114 *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 257 [16] per McHugh, Gummow, Hayne and Heydon JJ.

115 *Macpherson & Kelley v Kevin J Prunty & Associates* [1983] 1 VR 573 at 587.

116 Joint reasons at [17].

included a six year limitation for "[a]ctions founded on simple contract (including contracts implied in law) or *founded on tort*"[117].

104 The fact that this expression appeared in an adjacent provision of the Act shows that, had Parliament intended to adopt, in s 5(1A), a phrase of generality, there was a perfectly satisfactory precedent for it to follow. This would have involved no substantial modification of longstanding legal notions. Indeed, the phrase already appeared in the Act. Moreover, it had appeared in s 5 of the 1955 Act which included, in a later sub-section[118], a reference to the alternative formula "No action for damages for negligence nuisance or breach of duty … shall be brought"[119]. This legislative history therefore contradicts any suggestion that the contested phrase was a mistake or involved an oversight by the drafter.

105 The context in which s 5(1A) appears in the Act also includes s 23A. That was a provision adopted as a special addition to the general provisions in s 23 for the extension of limitation periods in cases of disability. Specifically, s 23A provided for the discretionary extension of limitation periods in specified actions for personal injuries where it appeared to the court that material facts relating to the cause of action were not known to the claimant, where there was evidence to establish the cause of action apart from the limitation defence and where, in the court's discretion, it should order an extension of the limitation period. This discretion, available where the interests of justice in the particular case suggested it, would be left with little work to do if s 5(1A) were given the generalised meaning urged for the appellant, applicable to virtually every cause of action for personal injury.

106 *The legislative history*: The foregoing conclusions are strongly reinforced when, additionally, the legislative history is taken into account. It is relevant to start by recognising the fact that attempts to reform the Victorian limitations statute began as early as 1947. In 1950, a report by the Victorian Statute Law Revision Committee on Limitation of Actions was presented to the Victorian Parliament[120]. Appended to the report was a draft Bill. That Bill was intended to

---

117 The 1955 Act, s 5(1)(a) (emphasis added).

118 Section 5(6).

119 In fact, the phrase "negligence, nuisance or breach of duty" seems to have appeared first in the *Personal Injuries (Emergency Provisions) Act* 1939 (UK), s 3(1)(b)(i) for the exclusion of entitlements to damages caused by a "war injury". In *Billings v Reed* [1945] KB 11 at 18-19, the English Court of Appeal held that, in such a context, the words "breach of duty" were wide enough to include trespass.

120 Victoria, *Report from the Statute Law Revision Committee on the Limitation of Actions Bill*, (1950).

give effect to the Committee's recommendations. In cl 5(6) of that Bill, provision was made for the introduction of a three year limitation period for actions "for defamation of character … physical injuries to the person or damage to property founded on tort or breach of a statutory duty". That Bill was not enacted. Yet it indicates that, before the troublesome phrase in issue in this appeal was introduced into the Act, those who drafted such legislation experienced no difficulty whatever in finding a universal formula (where that reflected their intention) to apply to actions "founded on tort" generally. This fact contradicts the need to twist the language in s 5(1A) to produce such a consequence.

107 In fact, as other reasons show[121], the troublesome phrase derives immediately from the report of the English Committee on the Limitation of Actions[122] of July 1949, chaired by Lord Justice Tucker (known as the "Tucker Committee").

108 That report was principally addressed to consolidating and simplifying limitations law in the United Kingdom and replacing various particular limitation provisions applicable to actions for personal injuries against public authorities in that country. However, the price extracted for assimilating the liability of public authorities in "personal accident cases" was to restrict their application and to reduce the period of limitation that had hitherto applied in the general law from six years to three[123] in actions for damages "for negligence, nuisance or breach of duty". The Tucker Committee's recommendations in this respect were given effect by the *Law Reform (Limitation of Actions, &c) Act* 1954 (UK)[124].

109 The phrase "negligence, nuisance or breach of duty" was deliberately copied in Victoria. The Attorney-General urged adoption of the United Kingdom limitation scheme, stating (in the manner of those times) that "[t]he Government considers that in this matter it is taking constructive action to bring the Victorian law into line with that which operates in England"[125]. Beyond this explanation, neither discussion nor elaboration upon the words chosen was advanced either in the Statute Law Revision Committee or in Parliament. It was a simple case of borrowing on English precedent. Where this happens, there would normally be

---

121 Joint reasons at [10]; reasons of Gummow J at [67].

122 United Kingdom, *Report of the Committee on the Limitation of Actions*, (1949) Cmd 7740.

123 *Stubbings* [1993] AC 498 at 502-503.

124 Section 2(1), inserting a proviso into s 2 of the *Limitation Act* 1939 (UK).

125 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 7 September 1955 at 279.

good reasons for accepting the authoritative interpretation of the borrowed phrase adopted by the final court of the jurisdiction from which the provision was borrowed. Although earlier reasoning of trial and intermediate courts in England reflected the debates that this Court has witnessed in this appeal[126], the authoritative, and unanimous, opinion of the House of Lords in *Stubbings v Webb*[127] puts the controversy to rest, so far as the United Kingdom is concerned. That opinion was followed in Ireland, both by the High Court[128] and by the Supreme Court[129].

110 To the question, asked by the joint reasons[130], why Parliament would have made such a distinction in the case of intentional torts, the answer, as was noted in *Stubbings*[131], is provided by the Tucker Committee's report. Lord Griffiths explained:

> "[T]he intention was to give effect to the Tucker recommendation that the limitation period in respect of trespass to the person was not to be reduced to three years but should remain at six years. The language of section 2(1) of the Act of 1954 is in my view apt to give effect to that intention, and cases of deliberate assault such as we are concerned with in this case are not actions for breach of duty within the meaning of section 2(1) of the Act of 1954."

111 Because of the compromise that was hammered out in the Tucker Committee, a distinction was consciously drawn between accidents and deliberate conduct. This distinction was expressed by use of the *discrimen* "breach of duty". As a matter of policy, it may have been an imperfect or disputable distinction. In retrospect, we may see injustices in its application. This is always a risk where lines are drawn in the law. But there can be no doubt that the distinction was deliberate. For the Tucker Committee, the three year period was to apply to a number of causes of action loosely described as

---

126 The broad view was adopted in *Letang v Cooper* [1965] 1 QB 232 and *Long v Hepworth* [1968] 1 WLR 1299; [1968] 3 All ER 248.

127 [1993] AC 498 at 502-503.

128 *Devlin v Roche* unreported, High Court of Ireland (Morris P), 4 April 2001. See [2002] 2 IR 360 at 363.

129 *Devlin* [2002] 2 IR 360 at 367.

130 Joint reasons at [13]-[14].

131 [1993] AC 498 at 508.

"personal accident cases". Where the cause of action arose out of deliberate conduct, it fell outside the scope of the intended reforms.

112 Thus, damages for trespass to the person, false imprisonment, malicious prosecution or defamation were intended by the Tucker Committee to remain within the pre-existing limitations regime[132]. They would enjoy a longer initial period for the commencement of proceedings. However, once that period had expired, there would be no opportunity for postponement of the bar. The thinking behind this was that, in the case of deliberate wrongs, the person injured would ordinarily be well aware that a wrong had occurred to them and that they had suffered some damage, thereby enlivening consideration of the commencement of proceedings, whereas, in cases of breach of duty, the breach and any damage it may have caused might not be immediately known or appreciated[133]. The consequences might only be discovered years or decades later. That this was the reasoning behind the legal change can be seen in Lord Griffiths' exclamation in *Stubbings*[134]:

> "I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury".

113 The appellant complained, with some justification, that psychological reactions to deliberate wrongs, such as rape and assault, could, in exceptional cases, be delayed years or decades, just as for "personal accidents". Contemporary scientific evidence might be capable of proving this. However, this was not the hypothesis upon which the equivalent provisions were enacted in the United Kingdom. Because those provisions were copied in Victoria, the law applicable to this case must be taken to reflect the same thinking. It is subject to the same limitations. It would be completely ahistorical to attempt now to impose on the chosen words a different meaning when language, context and history combine to show that the intention was that the chosen words ("breach of duty") would apply only to some causes of action.

114 *Principle and policy*: I am conscious that the outcome which I favour involves anomalies and could sometimes work an injustice on persons who claim late onset conditions causing damage years or decades after the initial intentional infliction of injury. I fully accept the purposive approach to the interpretation of

---

132 *Stubbings* [1993] AC 498 at 507-508. See also United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 20 May 1954 at 825.

133 *Law Society v Sephton & Co* [2006] 2 WLR 1091 at 1094-1095 [7]-[9], 1102 [41], 1108 [60] (HL).

134 [1993] AC 498 at 506.

legislation[135]. I also accept that legislation is not forever trapped in its history or in the intentions of the parliamentarians (in this case, originally, in Britain) who enacted the template statute against the background of the knowledge and objectives that were then known[136]. I do not approach this appeal on the basis that, because the House of Lords has interpreted the critical provisions one way, we are bound to follow. If, whatever the original intentions of the drafters, the words of s 5(1A) of the Act could fairly be read to respond to the type of claim brought by the appellant, I would do so. I realise that a number of judges in the past have so concluded. But I have endeavoured to show why I regard their conclusions as unpersuasive and wrong.

115 It is true that the provisions of s 5(1A) (and of s 23A which uses the same language) were intended to be beneficial and protective. However, the question remains – how beneficial; and protective for whom? Ultimately, those questions are only answered by addressing the statutory text, read in context and against the background of the admissible materials relied on in this case.

116 Although s 5(1A) of the Act is beneficial, its context is important for ascertaining its meaning. Unlike s 23A of the Act, s 5(1A) does not enliven a discretion to extend time, according to the justice of the circumstances of the particular case. It has a direct application, providing an entitlement to the extension if the preconditions are established. In this respect, it derogates, without any intermediate evaluation of competing justice considerations, from the ordinary entitlement of persons (perhaps very many years or decades later) to be free from the expense, worry and dislocation of claims that ordinarily would have long since been statute barred. For every plaintiff's benefit that is involved in such an extension of the limitation period, a considerable burden is cast on a defendant and the finality of legal rights and obligations generally is undermined.

117 *Consistency in statutory interpretation*: Upon this first issue (the application of the sub-section) I would therefore apply precisely the same reasoning as the joint reasons have done in resolving the second issue (the ambit of the sub-section). In correcting the majority of the Court of Appeal on that issue[137], the joint reasons observe that: "It is the text of s 5(1A) which is to be applied"[138]. They insist that "[t]he task of a court is to construe the language of

---

135 *Palgo Holdings* (2005) 221 CLR 249 at 264 [35]-[36].

136 *Coleman v Power* (2004) 220 CLR 1 at 95-96 [245]-[246]; cf *Ahmad v Inner London Education Authority* [1978] QB 36 at 48 per Scarman LJ.

137 See *Clark* [2005] VSCA 107 at [80] cited in the joint reasons at [22]. See also *Mazzeo v Caleandro Guastalegname & Co* (2000) 3 VR 172 at 189 [43]-[44].

138 Joint reasons at [26].

the statute"[139]. They state that extrinsic materials may be useful as an aid but ultimately the duty of a court is to give effect to the meaning of the words that Parliament has chosen to use[140]. They say that, if those words have an operation different from that which was "originally contemplated, then Parliament may reconsider the language … but the courts must apply that language"[141]. I agree with each and every one of these observations.

118 It is necessary to apply these criteria to the first, and not just to the second, issue in this appeal. One cannot pick and choose in the application of basic principles of statutory construction[142]. Consistency in approaches to statutory interpretation is a judicial obligation so as to reduce subjective elements. It is thus an attribute of the rule of law. When the same criteria are applied consistently to the first issue, they produce an outcome adverse to the appellant on that issue.

119 I accept that interpretation of contested legal texts often presents difficult problems and evokes an art, not a mechanical science[143]. The interpretations of others are not to be criticised simply because, in a particular case, the decision-maker reaches a different conclusion[144]. It is precisely because the process of interpretation involves intuition[145] and broader policy considerations that I have taken the trouble in these reasons to explain why I ultimately reach the same conclusion as Gummow J. It would have been easy for the Victorian Parliament to have provided that s 5(1A) applies to actions founded on tort generally. This is what the appellant seeks to make out of the words used in s 5(1A). But it is not what those words say.

---

139 Joint reasons at [26].

140 Joint reasons at [26].

141 Joint reasons at [27].

142 *R v Lavender* (2005) 79 ALJR 1337 at 1350 [69]; 218 ALR 521 at 537-538; *Clarke v Bailey* (1993) 30 NSWLR 556 at 571.

143 Steyn, "The Intractable Problem of The Interpretation of Legal Texts", (2003) 25 *Sydney Law Review* 5 at 8.

144 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 629-630 [191].

145 Steyn, "The Intractable Problem of The Interpretation of Legal Texts", (2003) 25 *Sydney Law Review* 5 at 8.

Conclusions, interveners and orders

120 This conclusion relieves me of the necessity to consider the second issue, concerned with the ambit of s 5(1A). The joint reasons decide that issue favourably to the appellant[146]. Because that conclusion is founded on the "language of the statute … according to its terms … [and not] by reference to an assumption as to the kind of case in which it would be most likely to be invoked"[147], it accords with the approach to statutory interpretation that I favour. Had that issue been presented for my decision, I tend to agree in the conclusion on it that the joint reasons have expressed.

121 As explained in those reasons, this Court permitted the parties in a pending application for special leave to appeal against a decision of the Victorian Court of Appeal, *Wright v Commonwealth of Australia*[148], to be heard in argument in the present appeal as to the meaning of s 5(1A) of the Act. The submissions of those parties were addressed to the second (ambit) issue. In any event, there are differences in the facts that make it undesirable to decide the interveners' case without the benefit of full submissions, based now on the reasoning that sustains the outcome of this appeal.

122 I agree in the orders proposed by Gummow J.

---

146 Joint reasons at [28].

147 Joint reasons at [29].

148 [2005] VSCA 309.

123 HAYNE J. In 2002 the appellant commenced an action against the respondent in the County Court of Victoria. By her action the appellant claimed damages for personal injury allegedly suffered as a result of the respondent's assault upon her on two separate occasions in 1971. She was aged 16 years at the time of the alleged assaults. The appellant alleged that she suffered post-traumatic stress disorder of delayed onset and that she became aware of the connection between the assaults and the disorder only in 2000. Is her action for damages for trespass to the person statute barred?

124 When the appellant commenced her action, the *Limitation of Actions Act* 1958 (Vic) ("the Act") contained three provisions of particular relevance. First, s 5(1)(a) provided that, subject to s 5(1A), "actions founded on tort including actions for damages for breach of a statutory duty" "shall not be brought after the expiration of six years from the date on which the cause of action accrued". The hinge about which that provision turned was "actions founded on tort".

125 The second relevant provision is s 5(1A) (to which the general provision of s 5(1)(a) was made subject). Section 5(1A) dealt with:

> "[a]n action for damages for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries consisting of a disease or disorder contracted by any person".

The Act then provided that such an action "may be brought not more than six years from, and the cause of action shall be taken to have accrued on, the date on which the person first knows" two matters – (a) "that he has suffered those personal injuries" and (b) "that those personal injuries were caused by the act or omission of some person". The hinge about which s 5(1A) turned was "[a]n action for damages for negligence nuisance or breach of duty ... where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries".

126 The third provision of present relevance is s 23A. It turned about the same hinge as s 5(1A). That is, s 23A applied to "any action for damages for negligence nuisance or breach of duty ... where the damages claimed consist of or include damages in respect of personal injuries to any person". Section 23A permitted a court to extend the period within which an action on such a cause of action might be brought.

127 The issues in this appeal concern the operation of s 5(1A). In particular, is the appellant's action an action of the kind with which that provision dealt: is it "[a]n action for damages for negligence nuisance or breach of duty"? Secondly, is the appellant's claim for damages which "consist of or include damages in

respect of personal injuries consisting of a disease or disorder contracted by any person"? Both questions should be answered in the affirmative. The appeal should be allowed.

128 As the joint reasons of Gleeson CJ, Callinan, Heydon and Crennan JJ record, there is a deal of relevant legislative history which lies behind the three provisions of the Act that have been mentioned: ss 5(1)(a), 5(1A) and 23A.

129 The language used as the hinge in ss 5(1A) and 23A ("[a]n action for damages for negligence nuisance or breach of duty ... where the damages claimed by the plaintiff consist of or include damages in respect of personal injuries") appears in provisions intended to ameliorate the effect of the general bar provided in s 5(1)(a) in respect of "actions founded on tort". But that has not always been so. The language found in ss 5(1A) and 23A was originally used in s 5(6) of the *Limitation of Actions Act* 1955 (Vic) ("the 1955 Victorian Act"), a provision prescribing a *shorter* limitation period for the actions with which it dealt than the general limitation period of six years for actions founded on tort. And it was for this same purpose that the language had been used in the analogous English legislation[149] considered by the House of Lords in *Stubbings v Webb*[150], and was later to be used in equivalent Irish legislation[151] considered by the Supreme Court of Ireland in *Devlin v Roche*[152]. The purpose of s 5(6) of the 1955 Victorian Act was to provide a shorter limitation period for some actions than would otherwise have applied. As an exception to a general rule, it may well have been open to argue that it should be narrowly construed. Yet, in the Victorian courts[153], the provision was construed as engaged in actions alleging trespass to the person in which damages for personal injury were claimed.

130 That construction of s 5(6) was not inevitable. The contrary conclusion was reached in *Stubbings v Webb* and *Devlin v Roche*. The effect of the construction adopted by the Victorian courts was to treat actions for damages for personal injury (however framed) as being subject to an abbreviated, three year, limitation period. Powerful arguments could have been, and can now be, mounted against construing the words "[a]n action for damages for negligence nuisance or breach of duty ... where the damages claimed by the plaintiff consist

---

149 *Limitation Act* 1980 (UK), the relevant provision of which derived from the *Law Reform (Limitation of Actions, &c) Act* 1954 (UK).

150 [1993] AC 498.

151 *Statute of Limitations (Amendment) Act* 1991 (Ir).

152 [2002] 2 IR 360.

153 *Kruber v Grzesiak* [1963] VR 621; *Hayward v Georges Ltd* [1966] VR 202 at 204.

of or include damages in respect of personal injuries" as embracing all forms of claims for damages for personal injuries. It may readily be acknowledged that trespass to the person is not easily accommodated by the expression "negligence nuisance or breach of duty" and that, if it is to be accommodated, the parenthetical amplification of "breach of duty" – "(whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision)" – does not assist the construction that was favoured in Victoria, both before[154] and after[155] the House of Lords had reached the opposing view in *Stubbings v Webb*[156]. But for present purposes, the critical fact is that the received understanding in Victoria of the reach of s 5(6) was that it embraced all forms of action for damages for personal injury.

131 It was in that setting that those who drafted what were to become ss 5(1A) and 23A drafted provisions intended to confer advantages on plaintiffs. Those who drafted those provisions used, as the hinge of each of the new provisions, words which had been construed as imposing a shorter limitation period on *all* those who claimed damages for personal injuries, no matter how they framed their claim. That is, those who drafted ss 5(1A) and 23A sought to make separate provision for *personal injury* claims.

132 In the present matter, the respondent contended that s 5(1A) applies to only some kinds of claims for damages for personal injuries. On the respondent's construction, the sub-section would apply to claims for damages for personal injury framed as actions in negligence, nuisance, breach of contract or breach of statutory duty, but not if the action was framed as an action for trespass to the person. There is no evident legislative policy for distinguishing between claims in this way. Despite the power of the argument that contrasts "negligence nuisance or breach of duty" with "actions founded on tort including actions for damages for breach of a statutory duty", the better view of s 5(1A), *understood in its historical context*, is that it embraced all actions for damages for personal injury. For these reasons, and the reasons given by Gleeson CJ, Callinan, Heydon and Crennan JJ, the respondent's contention should be rejected.

133 On the issue of whether the appellant's claim is a claim for damages which "consist of or include damages in respect of personal injuries", I agree with Gleeson CJ, Callinan, Heydon and Crennan JJ.

---

154 *Kruber v Grzesiak* [1963] VR 621; *Hayward v Georges Ltd* [1966] VR 202.

155 *Mason v Mason* [1997] 1 VR 325.

156 [1993] AC 498.

134 The appeal should be allowed and the consequential orders made in the form proposed in the joint reasons.