THE TWO YEAR GUILLOTINE

SECTON 9 OF THE CIVIL LIABILITY ACT, 1961

1. **Pre-1961.** Prior to 1961 the survival of actions against a deceased's estate was limited. The common law did permit a claim against the estate of a deceased person for breach of contract by the deceased, or for a remedy for a wrongful act where property, or proceeds of value of property, belonging to another had been appropriated by the deceased. The Road Traffic Act, 1933 extended this to allow claims for personal injury arising from road traffic accidents to be pursued against a deceased's estate – further extended in 1956 to cover 'fatal claims'[1]. Then came Part II of the Civil Liability Act, 1961 headed *'Survival of Certain Causes of Action on Death'*. Sections 8-10 govern 'Causes of Action subsisting against deceased person'.

2. **S.8(1)** provides:

> *"On the death of a person all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."*

This section was innovative, allowing, almost for the first time, a claim in tort to be made against the estate of a deceased person and thus, in effect, abolishing the principle of *actio personalis moritur cum persona.*

[1] Fatal Injuries Act, 1956, s.6.

3. **'*Excepted causes of action*'** are defined in s.6 to include breach of promise to marry, defamation, and seduction, but the only surviving exception is seduction. The Defamation Act, 2009 amended s.8, with effect from 1st December, 2009, to allow an estate to be sued for defamation committed by a deceased in his lifetime, but provides that the damages recoverable cannot include general damages, punitive damages or aggravated damages i.e. only 'special damages' can be claimed[2]. Thus an estate can now be sued for financial loss incurred by a person defamed by a person who dies after committing the tort. A person who knows they are dying can no longer publish with impunity damaging untruths about the business of their erstwhile enemy.

4. **Subsisting actions**: S.8 only governs actions that were '*subsisting*' against a person on the date of his death, and does not cover a cause of action which only accrues after his death. This is important because if the cause of action arises after the date of death then the two year limitation period provided for in s.9(2)(b) does not apply. In *Bank of Ireland v O'Keeffe*[3] the Bank sued the deceased's widow as his personal representative on foot of a guarantee he had signed to support a development company. The proceedings were commenced in 1985 over two years after the date of death on 11th February, 1982, and the defence claimed they were statute barred under s.9(2)(b). However the guarantee had only been called in by letter of demand dated 6th May, 1982, and Barron J. accepted the Plaintiff's argument that the cause of action only arose following the demand, and that ss. 8 and 9 of the 1961 Act had

[2] S.39(3) is the amending provision, and 'special damages are defined in s.31(7). A corresponding provision in s.39(2) amends s.7 of the Civil Liability Act, 1961 to allow an estate to sue for special damages for defamation of a deceased during his lifetime.
[3] [1987] I.R. 47.

no application.

By contrast in *The First Southern Bank Limited v Maher*[4], Barron J found that s.9(2)(b) did bar a claim on foot a promissory note notwithstanding that it had a provision for "*payment on demand"* and no demand was made during the lifetime of the deceased. The deceased had defaulted on an instalment during his lifetime and under the terms of the note the entire sum became due immediately. Thus the cause of action was subsisting at the date of death in 1983, and the proceedings commenced in 1989 were statute barred.

4. **Section 9:** Turning to section 9, the limitation period of two years has proved to be something of a trap for practitioners. The section provides:

9.—(1) In this section "the relevant period" means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

(2) No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either—

> (*a*) *proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or*
>
> (*b*) *proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires.*

5. The section has been the subject of considerable litigation, including a number of

[4] [1990] 2 I.R. 477.

recent decisions. As will be seen it imposes an absolute two year limitation period that does not appear to be capable of extension by reason of minority, mistake or fraud, and it can lead to harsh results.

6. **Constitutionality:** The constitutionality of s.9(2) was tested early on in *Moynihan v Greensmyth*[5], a decision that has had a profound influence on subsequent jurisprudence. On 6th August, 1966 a car in which the Plaintiff, then aged 16, was a passenger was driven negligently by William Greensmyth against a bridge. The driver was killed and the Plaintiff was injured. Proceedings against Greensmyth's estate were instituted on her behalf on 5th August, 1969 - just short of three years from the accident – probably in the belief that the relevant period of limitation was the three years for personal injury actions then provided for in s.11(2)(b) of the Statute of Limitations 1957. The defence pleaded that the action was statute barred by s.9(2)(b), and the Plaintiff by way of Reply pleaded that the section was an unjust attack on the Plaintiff's property rights and therefore repugnant to Article 40.3. It was argued that the Plaintiff's right to claim damages was chose in action and therefore a property right and that the absence of any provision in s.9 extending the two year period in case of infancy, to allow them to attain their majority (then 21) and then sue, rendered it unconstitutional.

7. Murnaghan J in the High Court rejected this argument. Having commented *"the old adage that hard cases make bad law is in my opinion as true today as it was when it was first enunciated"* he went on to say that <u>if</u> the Plaintiff's argument was correct *"in an extreme case it might mean that the winding up of a particular estate might be held up for over 20 years to see whether an injured infant was going to bring an action*

[5] [1977] 1 I.R. 55.

and, if so, to discover the amount (if any) to be paid to such plaintiff by way of damages and costs."[6] He decided that the attack on rights in s.9(2) was not unjust.

8. In affirming this decision O'Higgins J, in delivering the unanimous decision of the Supreme Court, stated:

> *"When it was decided to provide generally for the survival of causes of action, a general limitation period of two years was provided in the impugned provisions of s. 9, sub-s. 2(b), of the Civil Liability Act, 1961. It was conceded in argument that this could not be regarded as an unjust attack on those not suffering from incapacity and that, in such circumstances, the period was reasonable and fair. In relation to those (such as the plaintiff) who at the time of the accrual of the cause of action are under 21 years of age, is a two-year period from the death of the wrongdoer so unreasonably short as to constitute an unjust attack on their rights? Bearing in mind the State's duty to others—in particular those who represent the estate of the deceased, and beneficiaries—some reasonable limitation on actions against the estate was obviously required. If the period of infancy were to form part of the period of limitation, as was formerly the case, then the danger of stale claims being brought would be very real and could constitute a serious threat to the rights of beneficiaries of the estate of a deceased. The alternative was to apply a period of limitation which would have general application. It had to be either one or the other; and it does not appear that any compromise was possible.*
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> *In these circumstances, in the view of the Court, having regard to the conflicting claims on the State's protection, this sub-section cannot be regarded as constituting an unjust attack nor can its enactment be a failure to vindicate the alleged property rights of infants. In the view of the Court it has not been shown that the State has not*

[6] P.64-65.

fulfilled its obligations under Article 40, s. 3, sub-s. 2, to protect from unjust attack and, in the case of injustice done, to vindicate the property rights of the plaintiff. Accordingly, this appeal is dismissed."

9. The breadth of application of s.9 (2) is emphasized in two other decisions concerning road traffic accidents resulting in claims against estates.

10. **S.76 of RTA**: In *Bus Eireann-Irish Bus v The Insurance Corporation of Ireland Plc*[7] the Plaintiff suffered property damage to a bus on 19th December, 1987 caused solely by the negligent driving a car the driver of which sustained fatal injuries. The liability of the driver's estate was determined in the High Court on appeal from the Circuit Court, but although there was insurance (with ICI) it did not indemnify the deceased in respect of the driving on this occasion.

Section 76 of the Road Traffic Act, 1961 provides, so far as relevant, that where a person claims to be entitled to recover from the owner of a vehicle damages and there is in place a policy of insurance covering the use at the relevant time, he may, by adopting the procedures in the section, get leave of the court to institute proceedings against the insurer *"in lieu of the owner or user"* and recover in this action from the insurer any sum that he would have been entitled to recover from the owner or user. The bus company sought to avail of this and issued a Plenary Summons on 31st May, 1990 seeking to recover off the insurer. ICI pleaded that s.9(2) of the Civil Liability Act barred the claim, and Morris J. agreed:

"I do not accept counsel's submission that s.76 creates a new cause of action in respect to which a separate limitation period would be applicable. To my mind, it is clear that all that the section does is enable an injured party to substitute for a deceased defendant the insurance company holding cover at the time. In reaching

[7] [1995] 1 I.R. 105.

this conclusion, I consider it relevant that the entire structure and wording of the section seems to me to do no more than attach to the insurance company whatever responsibility the deceased owner had……It is my clear view that it is the same action but that there is an entitlement conferred upon the plaintiff to pursue the claim against the insurance company. I consider that all that is given to the plaintiff is the right to institute and prosecute the proceedings against the insurer or guarantor "in lieu" *of the owner."*

11. **M.I.B.I**.: In *Bowes v Motor Insurers Bureau*[8] the Plaintiff was driving a car when he was injured in a collision with a motor cyclist who was uninsured. The motor cyclist died in the accident, which occurred in November, 1993. There was delay in the MIBI nominating a solicitor to accept service of the proceedings as the motorcycle was registered in the UK. The Plenary Summons issued in February, 1996 i.e. 2 years and some months after the accident. As the motor cycle driver was identified, under clause 2 of the MIBI Agreement of 1988, and in the absence of a compromise with the MIBI, in order for the Plaintiff to succeed he had first to obtain judgment against the driver – in this case his estate. The Supreme Court (Murphy J, delivering a judgment with which Hamilton C.J., Denham J and Keane J agreed, Barron J dissenting), affirming the High Court, held that no claim by the Plaintiff (or his passenger who also suffered injuries) could be sustained because judgment had not been obtained against the deceased's estate and any such proceedings would now be statute barred by s.9(2).

[8] [2001] 2 I.R. 79.

12. **Contribution by estate of concurrent wrongdoer – s.31 CLA:**

In a recent decision of *Keane v The Western Health Board and Anne Meehan*[9] Quirke J had to consider the relationship between s.9(2)(b) and section 31 of the Civil Liability Act, 1961 which provides:

"31. An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater."

13. The facts were that in 1983 the Plaintiff's wife delivered twins in the Galway Regional Hospital by Caesarean section. She had a condition known as pre-eclampsia, and following the operation she remained in a coma. Her attending obstetrician was Dr. Fergus Meehan. Tragically she remained in the coma until she died on 8th July, 2002. In the meantime Dr. Meehan died in 1991. The Plenary Summons was issued on behalf of the Plaintiff's wife in 2000, naming as defendants the hospital and the Second Defendant as executrix of Dr. Meehan's estate. On 7th July, 2005, just short of three years from the date of his wife's death in 2002[10], the Plaintiff obtained an order joining himself as a party, and it was accepted by both defendants that the proceedings should now be treated as a Fatal Claim under Part IV of the Act of 1961.

[9] 2nd October, 2006 unreported High Court, Quirke J., and an 'addendum' judgment dealing with the issue of contribution between defendants on 22nd November, 2006, also unreported.

[10] S.48(6) of the Civil Liability Act, 1961 requires that a 'fatal' claim under Part IV of the Act be commenced within three years of the death of the person whose death was caused by the wrongful act. In *McCullough v Ireland* [1989] I.R. 484 Barron J held that this section defeated a claim brought by a widow, including that of an infant dependant, observing that the limitation period was in the same statute as s.9(2) i.e. the Civil Liability Act, and that the same submissions as raised in Moynihan v Greensmyth applied i.e. it was constitutionally valid and not capable of extension during the minority of a dependant.

It was accepted by the defendants that the late Mrs. Keane's *"cause of action"* was, pursuant to s.8(2) of the 1961 Act, deemed to be *"subsisting"* against Dr. Meehan before his death. In his first judgment delivered on 2nd October, 2006 Quirke J., relying heavily on the *Moynihan* decision, held that as no proceedings had been brought against Dr. Meehan's estate within two years of his death in 1991 the claim initiated by the Plenary Summons issued in 2000 was barred by s.9 of the Act of 1961, and it followed that the claim as treated/converted into a fatal claim was similarly barred. This ofcourse did not apply to the hospital, and he declined to dismiss the claim against it on grounds of the delay which he found to be excusable in the circumstances, noting also that there was significant documentation available and no significant prejudice. The claim could therefore proceed against the hospital.

14. Quirke J. then invited argument on s.31 in relation to the hospital's claim for contribution and indemnity against Dr. Meehan's estate, which claim had been notified in February, 2006. If the hospital could rely on s.31 it would extend the period for the contribution claim to two years from the date of ascertainment of the hospital's liability. The estate argued on the basis of the rule *generalia specialibus non derogant* (general things do not derogate from special things) that s.9 should be preferred to the more general provisions of s.31. In his judgment delivered on 22nd November, 2006 Quirke J accepted this argument:

"In the instant case it is undeniable that the provisions of s.9 of the Act of 1961 are clear, precise and unambiguous. As indicated earlier the provisions of that section were upheld as constitutionally valid by the Supreme Court in Moynihan v Greensmyth*. The intention of the legislature and the reasons which gave rise to the*

enactment of the section were expressly considered and identified by the Supreme Court in that judgment.

The relevant provisions of s.31 of the Act appear prima facie *to be inconsistent with the provisions of s.9(2). The latter expressly provide that, unless commenced within the precise periods prescribed by the section, no proceedings whatever are maintainable against the estate of a deceased person such as Dr. Meehan.*

For the reasons identified by Mr. McGrath I am satisfied that the Board's claim against the estate of Dr. Meehan comprises a "proceeding" *within the meaning of s.9 of the Act.*

Applying the rule "generalibus specialibus non derogant" *and having regard to the purpose of the legislation and the intention of the legislature as identified by the Supreme Court in* Moynihan v Greensmyth *I am satisfied also that the provisions of s.9(2) of the Act apply to the Board's claim for contribution against Dr. Meehan's estate."*

Thus actions claiming contribution, or notices within existing proceedings claiming contribution, against estates must be brought within the period of two years from the date of death.

15. **"Any cause of action whatsoever":**

The phrase *'any cause of action whatsoever'* in s.9(2) has been broadly interpreted in two other recent cases concerning claims against a deceased/his estate – the first a claim in contract and the second a claim in contract/quasi contract or alternatively an equitable/proprietary estoppel claim.

16. ***Corrigan v Martin**:* this was a Circuit Court appeal heard by Fennelly J in Monaghan, and in which he delivered a reserved judgment on 13th March, 2006, the facts were as follows:

The Plaintiff used to help his uncle (the deceased) on a 37 acre farm, and while doing so suffered an injury in a tractor accident; his uncle was uninsured, and the Plaintiff asserted that in 1990 they had orally agreed that, if he did not sue, his uncle would transfer and/or devise the 37 acre farm to him. The Plaintiff also claimed to have worked on the lands thereafter, and that the deceased had repeatedly assured him that he would make over his lands to him by his will. The deceased made his will on 15th December, 200, and died on 29th December, 2000, survived by his wife – there were no children. By his Will he left his lands to his wife for life, remainder to the Plaintiff absolutely. The Plaintiff first learned of the Will in January, 2001, and thereafter there was correspondence between the solicitors acting for the estate and the Plaintiff's solicitors, but proceedings were not commenced until an Equity Civil Bill was issued on 20th July, 2004. The Plaintiff sought specific performance of the 1990 agreement, and alternatively upon a quantum meruit in respect of work done on the farm, and the defendant executor contended that the action was statute barred by section 9(2)(b) – an argument that succeeded in the Circuit Court. The Plaintiff appealed.

17. The Plaintiff's Counsel raised three arguments in order to avoid the two year limitation point:

(i) there is no period of limitation for an action for specific performance – s. 11(9)(a) of the Statute of Limitations 1957 excepts such actions from the general limitation period applied to actions for breach of contract – and therefore, he argued, no *'relevant period'* as defined in s.9(1) of the Civil Liability Act, or mentioned in s.9(2)(a).

He argued that s.9(2)(b) could only apply where there was a choice of two limitation periods i.e. a period under the Statute, and the two year period under s.9(2)(b).

(ii) that the making of the Will on 15th December, 2000 was a breach of the agreement and was concealed by the deceased from the Plaintiff – so he argued that s.71 of the Statute applied and that the period of limitation only ran from the moment of discovery of the fraud.

(iii) that the cause of action was not covered by section 8 or section 9 of the Civil Liability Act because it was not *"subsisting"* against the deceased at the time of his death and therefore did not *"survive"* the death of the deceased - it only matured or came into existence upon death.

The executor's response was that s.9(2) applies to *"any cause of action whatsoever"*, and he relied on s.8(2) which states:

"(2) Where damage has been suffered by reason of any act in respect of which a cause of action would have subsisted against any person if he had not died before or at the same time as the damage suffered, there shall be deemed, for the purposes of subsection (1) of this section, to have been subsisting against him before his death such cause of action in respect of that act as would have subsisted if he had died after the damage was suffered."

It was argued that as the damage was suffered at the time of death the action was deemed to be subsisting against the deceased and therefore had to be brought within years of the death.

18. Fennelly J remarked that he thought s.8 (2) was primarily designed to deal with cases of fatal road traffic accidents where the driver dies, but felt it unnecessary to decide that issue for two reasons. Firstly he decided that the Plaintiff's cause of action arose

from the deceased's obligation to perform the contract during his lifetime and not at the moment of his death, stating –

"Hence, the cause of action was complete immediately before his death. It is unnecessary to decide how long before the death."

Secondly he stated –

"I am satisfied the Oireachtas intended by the strong and clear language of section 9(2) to apply a maximum two-year period to all claims against the estate of deceased persons. Section 8(1) applies to "all causes of action (other than excepted causes of action) subsisting against him….". *…..The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe the Oireachtas can have intended to make such a fine distinction. It could serve no useful purpose which has been identified in this case."*

19. Fennelly J went on to consider s.9(2), the introductory and governing wording of which was *"expressed in strong and absolute terms"*. He accepted the policy considerations underlying the section, adopting a passage from the *Moynihan* case where O'Higgins C.J., noting that prior to the 1961 Act an infant could wait until three years after attaining majority before instituting proceedings against the estate of a negligent deceased driver, observed –

"This could mean that the administration of an estate might be greatly delayed or, alternatively, that after many years those entitled on a death might be subjected to a claim for damages of which there had been no prior notice. Obviously in such circumstances severe hardship might be caused and injustice done to innocent people."

Fennelly J regarded this as a general policy consideration, and noted also that –

"….those charged as executors or administrators of estates of deceased persons are entitled and indeed bound to carry out their tasks with reasonable expedition and that creditors of the estate and ultimately the beneficiaries are entitled to have the estate administered in a reasonable time. I believe the Oireachtas deliberately chose to impose a short but fair time limit on claims so that these desirable objectives would be attained."

20. In holding that the two year limitation period was fatal to the Plaintiff he also rejected the other two arguments raised. The fact that there was no *"relevant period"* under the Statute for a specific performance action did not help the Plaintiff as he had to come within sub-paragraph (a) or (b), and if there is no limitation period under the Statute the action against the estate is barred after two years under (b).

21. He also addressed the s.71 fraud argument. Section 71(1) of the Statute of Limitations provides:

"(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either-

(a) The action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or

(b) The right of action is concealed by the fraud of any such person, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

Fennelly J said of this:

"The two-year limitation period, fixed by section 9 of the Act of 1961 does not come within that provision: It is not ".....a period of limitation.....fixed by [the Act of 1957]...". In the absence of any provision in the Act of 1961 that that Act as a whole or any part of it, in this case section 9, is to be construed together with the Act of 1957, section 71 of the latter Act has no application. This was no oversight. The expression "relevant period" is defined by reference to the Act of 1957 but that is all. I would add that this makes sense. It would be all too easy to make claims of fraud against the estates of deceased persons and all too difficult for the executors to rebut. It is apposite to recall the rule that some corroboration or other support is required to support claims against the estates of deceased persons, or as it is put in McGrath, Evidence *(Thomson Round Hall 2005), par 4-16,* "*although claims of this type should be examined with care, corroboration, while desirable, is not essential.*" "

22. The learned judge went on to point out that in any case the Plaintiff became aware of the contents of the Will, and hence the breach of contract, within a month of the deceased's death – on 23rd January, 2001 - so that even if the deceased had fraudulently concealed the breach the Plaintiff still had failed to institute proceedings within two years of that date. To this extent the judge's determination on s.71 was

obiter. However it is a strong obiter, and reflects the concession made in the *Moynihan* – that the infant plaintiff was not entitled to rely on a suspension of the period during her minority as provided for in s.49 of the Statute of Limitations.

23. This means, to take an extreme case, that if a property vendor made unqualified fraudulent representations to a purchaser as to the structural stability of the premises - knowing from his undisclosed surveyor's report that it was in danger of collapse - and the premises collapsed two years and one day after the vendor's death, no claim could be maintained against the vendor's estate – even if his personal representative had come across the surveyor's report and deliberately concealed it.

Taking this example one step further, if the personal representatives were honest and disclosed the surveyor's report within the two years, and admitted in writing that the estate was liable to repay the purchase money and that this was a debt due by the estate, would such letter, in the absence of any fresh consideration, amount to an *"acknowledgment"* under Chapter III of the Statute such that the limitation period (be it two years or longer) would start afresh? *Corrigan* and *Moynihan* would suggest not, but the estate might be estopped from relying on section 9 – a subject which I touch on later.

24. ***Dempsey Deceased***:

The second recent authority is the decision in *Re Patrick Dempsey Deceased: Prendergast v McLaughlin*[11] where O'Keeffe J had to determine as a preliminary issue

[11] [2009] I.E.H.C. 250 (Unreported, High Court, O'Keeffe J).

whether the Plaintiff's claim was barred by s.9(2)(b) on the basis of facts agreed for that purpose which may be summarized as follows:

The deceased Patrick and his brother John were bachelor farmers who lived in a farmhouse on John's 85 acre farm in Co. Kilkenny. The deceased also owned a farm of 156 acres. The Plaintiff, a neighbouring farmer, helped the deceased and John in farming John's land from 1978, and he was repeatedly told by John and the deceased that John's lands would be left to him after both had died. He continued to work for them on the faith of these promises, to his own detriment. In July 1998 the Plaintiff met with John, the deceased, and a third brother William, and John said he was leaving his lands to the Plaintiff. John died in July 2000 and by his Will made in 1997 he in fact left the lands to his brother Patrick and a small legacy to the Plaintiff. The deceased extracted Probate and John's lands became vested in him. The Plaintiff continued to help the deceased in farming these lands. Then, shortly before the death of the deceased Patrick on 28th August, 2003, he asked the Plaintiff to visit him and he told the Plaintiff that he had instructed his solicitor to make a will in which he was leaving the farm that was formerly John's to the Plaintiff. The deceased did indeed instruct his solicitor in July 2003 to make such a will, but it was never executed and he died quite suddenly. The deceased died intestate and the defendant, who was a nephew, extracted a Grant of Administration.

25. On such facts the Plaintiff had a strong and meritorious cause of action, but unfortunately proceedings were not issued until 2006, over two years after the death of the deceased. The defendant relied on *Moynihan* and *Corrigan* to support the argument that whether the Plaintiff's cause of action lay in breach of contract, quasi-

contract or equity, it came within the phrase *"any cause of action whatsoever"* in s.9(2)(b) and was therefore barred.

26. For the Plaintiff it was argued that the claim lay in equity, and was to enforce an equitable/proprietary/promissory estoppel; it was submitted that, as a will speaks from death, the absence of a will to satisfy the deceased's promise spoke from the death – therefore no wrong was done until the promise was breached by dying intestate. Thus there was no *"subsisting action"* against the deceased. Reliance was placed principally on two decisions of Barron J. I have already referred to one of these – *Bank of Ireland v O'Keeffe* – in which the Bank's demand on foot of a guarantee entered into by a deceased triggered the accrual of the cause of action after the deceased's death, therefore s.9(2) did not apply. The other was *Reidy v McGreevy and Others*[12], where the plaintiff alleged that it would be unconscionable for the estate of his late father to disregard a promise which his late father had made to him that he would exercise a power of appointment vesting lands in the Plaintiff on account of his efforts in farming the lands. In default of the exercise of the power by the father the lands vested in the Plaintiff and five siblings as tenants in common. In a short judgment Barron J held that this claim fell outside s.9(2)(b) as it could not have been maintained prior to his father's death because it was not until then that it could be ascertained whether his father had breached the promise, and in order to remedy the breach he declared that the default appointees held the lands upon a constructive trust for the Plaintiff.

    Based on this decision it was argued that the promise of inheritance created an interest equivalent to that of a beneficiary who has six years right of action after death – and that this did not conflict with the policy of finality, as a personal representative can be sued on his contract or maladministration for the same length

[12] Unreported High Court, 19th March, 1993, Barron J.

of time.

27. O'Keeffe J rejected the Plaintiff's arguments:

"I accept the defendant's submission that the plaintiff's cause of action is founded in contract or quasi contract as the plaintiff is suing the defendant in his capacity as personal representative of the deceased, Patrick Dempsey for breach of the deceased's promise to bequeath the lands to the plaintiff. The breach could only have occurred during the lifetime of the deceased and the cause of action therefore accrued before the death of the deceased. I also conclude, based on the agreed facts that the plaintiff's claim can alternatively be based on promissory estoppel or equity. As such it is not a claim arising after the death of the Deceased but a claim subsisting at death, namely the failure of the Deceased to execute a Will bequeathing the lands to the plaintiff during his lifetime. I do accept that the evidence relating to such cause of action emerged after death, the plaintiff's cause of action in contract, quasi contract or in equity subsisted during the lifetime of the Deceased. I reject the plaintiff's submission to the contrary."

He went on to prefer the reasoning of Fennelly J in *Corrigan* to that of Barron J in *Reidy*, and he distinguished *Bank of Ireland v O'Keeffe.* He felt that factually the case was very similar to *Corrigan,* and he quoted with approval the words of Fennelly J:

"That the obligation of the deceased was to perform the contract during his lifetime and not at the moment of his death. Hence the cause of action was completed immediately before his death….the cause of action, therefore, subsisted at the

moment of death and survived against his estate by virtue of section 8(1)."

28. This case was appealed to the Supreme Court, but was later settled with some provision being made for the Plaintiff. It has to be said that a factor in this was the advice to the personal representative that it could take over three years for the appeal to be heard, and the next of kin were all anxious to enjoy their inheritance (which was in any case substantial given the second farm of 156 acres).

29. So it remains to be seen what view the Supreme Court might take in a similar type of claim. I suggest that for a number of reasons the approach in *Corrigan* is likely to be approved: firstly *Moynihan* was an infant case with little delay, yet the Supreme Court identified the strict policy behind s.9 and found it accorded with the common good. Secondly Fennelly J is a highly regarded judge of the Supreme Court and his judgment contains a detailed analysis of sections 8 and 9.

30. **S.89 Succession Act, 1965:** Thirdly there is a cogent argument that was not opened in these cases: while it is commonly thought by practitioners that 'a will speaks from death', this is not quite accurate. S.89 of the Succession Act, 1965 provides:

"89. –Every will shall, with reference to all estate comprised in the will and every devise of bequest in the will and every devise or bequest contained in it, be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears from the will."

The words highlighted support the argument that a Will made that fails to fulfil a prior promise by a deceased of a devise of lands is itself a breach of contract/equitable obligation that arises 'immediately before the death of the testator' – and therefore gives rise to an action arising immediately before death that is *"subsisting"* at death. This section only applies where there is a valid will, and would not have applied in *Re Dempsey* where the deceased never got around to executing a will that had been drafted, but it would have supported an argument by analogy that the failure to make a will fulfilling the prior promise was the breach and this arose immediately before death.

31. **Action *in rem***: In the case of pure proprietary estoppel – based on work done or expenditure on property in the absence of any contract, where the owner has stood back or encouraged the Plaintiff to act to their detriment - it might still be argued by a Plaintiff that their claim is *in rem* i.e. against the property, rather than *in personam* against the deceased or his or her estate, and that if the relief sought is merely a declaration of an <u>existing</u> equitable interest in the property section 9 has no application. Although raised in *Re Dempsey*[13] this point was not really decided there or in *Corrigan,* as in both cases the Plaintiffs' first assertion was related to breach of contract. It could be that a court would regard the proprietary estoppel Plaintiff as having an established *but imperfect* property right, and, in the same way that equity will perfect an imperfect gift, give effect to that entitlement e.g. by declaring that the deceased owner held the property on a constructive trust, and that it is now held by his estate on a similar trust notwithstanding that the claim may be statute barred. The Irish courts have shown themselves willing to use the 'new model' constructive

[13]Counsel relied on Re Basham [1986] 1 WLR 431 where a proprietary estoppel was held to give rise to a constructive trust.

trust in certain instances *" where a person ……..holds property in circumstances which in equity and good conscience should be held or enjoyed by another he will be compelled to hold the property in trust for another"*[14].

32. **Practitioners:** Common to *Corrigan* and *Re Dempsey* is that legal advice was sought by the plaintiffs in good time, and there was correspondence between the parties within the two year period. Indeed in *Corrigan* a claim against the estate had been mooted in a letter sent some four months after the deceased's death. In *Moynihan* this does not appear from the report, but the proceedings were instituted by the plaintiff's next friend one day before the expiry of three years from the accident and Murnaghan J in the High Court remarked *"In my opinion, this was probably because it was thought that the relevant statutory limitation was three years."* In *Yardley (A Minor) v Boyd*[15] Herbert J found himself constrained to dismiss a case barred by s. 9(2), and stated:

"I am satisfied on the evidence and I so find, that the sole reason why the originating summons in this action was issued outside the period allowed by Section 9(2) of the Civil Liability Act, 1961, was that the person in the Firm of……..having carriage of the action was unfortunately unfamiliar with that Section and the shorter limitation period which it specified as compared with the generally known period of three years provided by Section 11(2)(b) of the Statute of Limitations, 1957."

33. After the recent cases it is hard to conceive of any reason that would exonerate practitioners from professional negligence if they failed to advise a Plaintiff to

[14] Costello J in H.K.N. Invest Oy v Incotrade Pvt Ltd [1993] 3 I.R. 152. See also Murray v Murray [1996] 3 I.R. 251 (Barron J), and Kelly v Cahill [2001] 1 I.R. 56 (a decision of Barr J that is criticised by O'Dell in (2001) 23 DULJ 71 for relying on the 'new model' constructive trust when it could have been determined on the basis of established principles of rectification).
[15] Unreported High Court (Herbert J.), 14th December, 2004.

institute proceedings in respect of a subsisting cause of action against an estate within the two year period from the date of death. In practical terms this may be a little less important now that the primary period of limitation for bringing a personal injury action has been reduced to two years[16], but in other actions practitioners could still fall into the trap of thinking that they have six years.

34. Equally if the s.9 (2) guillotine is available to personal representatives defending an action, it must be pleaded, and solicitors and barristers acting for estates must be aware of it and advise accordingly. A personal representative could chose not to plead or rely on the section, but this may amount to a breach of duty to administer the estate in accordance with law. A personal representative can *"compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account dispute, claim or other matter relating to the estate.."* and the personal representatives are not *"personally responsible for any loss occasioned by any act or thing so done by them in good faith"* (s.60(8) of the Succession Act). However fettering this power by not pleading a limitation defence would be ill advised, and generally waiving such a defence should only be done with transparent good faith – and it might be advisable to give notice to, or even obtain prior informed consent from, any beneficiary adversely affected by such a decision. I am not aware of any action to date by a disappointed legatee or next of kin who loses out as a result of non-reliance by personal representatives on a limitation defence against the lawyers acting for the estate, but it is only a matter of time.

35. **Defective Products Exception**: Earlier I gave the example of a fraudulent vendor of

[16] By amendment effected by s.7 of the Civil Liability and Courts Act, 2004, operative from 31st March, 2005. But ofcourse the Statute of Limitations allows for extension in the case of disability, and the 1991 amending Statute allows for time to run from the date when the Plaintiff ought to have had knowledge of cause of action and identity of the defendant.

property who dies and whose estate escapes liability if not sued within the two years. This example would not work if the property sold was a *"defective product".* Under s.7(1) of the Liability for Defective Products Act, 1991 an action for recovery of damages cannot be brought after the expiration of three years from the date on which the action accrued or the Plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. Subsection (2) then provides for a 'long stop' of 10 years from the date the product was put into circulation, and subsection (3) provides:

"(3) Sections 9 and 48(6) of the Civil Liability Act, 1961, shall not apply to an action for the recovery of damages under this Act."

In other words if the deceased was a 'producer' (= manufacturer, importer or supplier) of products his estate could be liable for defects for up to 10 years from the date of death, and if the injured party proves the defect, damage and a causal connection there is strict liability unless the estate can prove one of the statutory defences! These subsections implemented Articles 11 and 12 of the consumer protection driven Products Liability Directive[17] which was binding on Ireland.

36. **Unconscionable conduct exception?**

As the law stands the extension of limitation periods in case of disability (minority or unsoundness of mind), acknowledgement, part payment, fraud and mistake, all provided for in Part III of the Statute of Limitations, do <u>not</u> apply to or qualify

[17] Council Directive 85/374/EEC

s.9(2)(b).

37. The question arises as to whether there could be any circumstances in which it would be unconscionable to rely on the section, or where the estate might be estopped from such reliance. For example where the estate admits liability and then enters into discussion on settlement but this is does not lead to compromise on damages or other remedy within the two years, can the estate still rely on s.9 or is it estopped from relying on that provision?

38. In *O'Reilly v Kevins*[18] Chief Justice O'Dalaigh indicated, obiter, that an estoppel might arise if a plea based on the Statute of Limitations was *"wholly unmeritorious…..unconscionable and plainly dishonest".* In *Doran v Thompson Ltd*[19]

the Supreme Court considered that the conduct of an insurer, though not sufficient to amount to a promissory estoppel, might yet be so dishonourable or such that it would be inequitable in the Court to allow them to rely on a time-bar. Griffin J[20] stated:

"Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance. The

[18] [1971] I.R. 90.
[19] [1978] I.R. 223.
[20] P.230.

representation, promise or assurance must be clear and unambiguous to found such an estoppel: see Bowen L.J. at p. 106 of the report of Low v Bouverie [1981] 3 Ch. 82."

In *Ryan v Connolly* [21] , in the only judgment delivered by Keane C.J., he approved this statement, but added two observations: firstly, with regard to the representation relied upon, *"A party seeking to rely on the principle cannot……rely on a strained or fanciful interpretation".* Secondly he said that that the fact that a defendant has expressly and unambiguously conceded the issue of liability will not necessarily make it reasonable for the plaintiff to assume he can defer instituting the proceedings beyond the limitation period. The Plaintiff *"……must be in a position to satisfy the court that there was a clear and unambiguous representation by the defendants that liability would not be in issue from which it was reasonable to infer that the institution of proceedings was unnecessary."*

39. In the *Yardley*[22] case Herbert J had to consider whether it was unconscionable for the defence to rely on s.9 (2) to bar the claim. On the facts he held that there was no estoppel, but he clearly considered that it could be unconscionable to raise the section.

In this respect there would seem to be no distinction between the Civil Liability Act time-bars and those arising under the Statute of Limitations.

40. **Personal Injuries Assessment Board Act, 2003, section 50:**

[21] [2001] I.R. 627.
[22] Unreported High Court, 14th December, 2004.

"50. In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act, 1991, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of the issue of an authorization under, as appropriate, section 14, 17, 32 or 36, rules under section 46(3) or section 49 shall be disregarded."

41. This means that in a civil claim for personal injuries that must first be submitted to PIAB the running of time under the Statute is suspended. However, as we have seen the Civil Liability Act is not to be read with the Statute of Limitations, so where the claim is against the estate of a deceased person it would appear (there is as yet no decision on the point) that the running of time under s.9 (2) is not suspended by the operation of s.50. It is easy to see how this could produce disastrous results, as, through no fault of a claimant or their legal advisors, the application to PIAB might not be processed within the two year period. It is all the more significant given the intention of the legislation to make it easier for claims to be processed without the involvement of lawyers. This seems to have been a statutory oversight that would warrant early amendment of s.50.

Robert Haughton S.C.

May, 2010.