CA010045
CA010223

Court of Appeal for British Columbia

BETWEEN:	)	
	)	
ROGER PERRON	)	
	)	
PLAINTIFF	)	
(RESPONDENT)	)	REASONS FOR JUDGMENT
	)	
AND:	)	OF THE HONOURABLE
	)	
R.J.R. MACDONALD INC.	)	MR. JUSTICE CARROTHERS
	)	
DEFENDANT	)	
(APPELLANT)	)	

Before: The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Hutcheon

Counsel for the Appellant: J. Giles, Esq., Q.C.
J.A. Angus, Esq.

Counsel for the Respondent: D.J. Stuart, Esq.

Vancouver, British Columbia
February 2, 1990

These appeals arise in an action for damages for breach of an alleged duty on the part of the appellant, R.J.R. Macdonald Inc. ("Macdonald"), a manufacturer of tobacco products for public consumption, to warn the respondent, Roger Perron ("Perron"), of the risk of smoking tobacco while Perron was suffering from Buerger's Disease and also for breach of an alleged warranty to Perron on the part of Macdonald that smoking did not present any danger to Perron's health.

The action which was started by Perron against Macdonald on June 20, 1988, has not come to trial, but is hindered on the stumbling-block of statutory limitation of action. In this case, according to Perron's statement of claim, the cause of action arose in 1976 when Perron, who had by then been smoking cigarettes (allegedly those produced by Macdonald) for eleven years, began to suffer loss of circulation, pain and discomfort in his lower extremities. Thus, in the ordinary course of events, the two-year limitation period prescribed by s. 3(1)(a) of the Limitation Act, R.S.B.C. 1979, c. 236 (the "Act"), within which period the cause of action can be maintained, expired in 1978. On the face of it, this statutory limitation applied and the expiration of the two-year limitation period took place ten years before Perron's action was started.

The limitation defence was raised by Macdonald. Perron filed a notice of trial without a reply to Macdonald's defence of statutory limitation. Accordingly, Macdonald moved under Supreme Court Rule 19(24)(d) "otherwise an abuse of the process of the court" for an order striking out the endorsement on the writ and the statement of claim and dismissing the action on the ground that Perron had failed to plead any matter that would make the defence of limitation not maintainable.

The chambers judge hearing Macdonald's motion expressed concern that there might be some basis upon which Perron could satisfy a court that the postponement provisions of s. 6 of the Act should apply and that such basis ought to appear in a reply to the defence of limitation. Perron had not filed such a reply. Instead of adjourning Macdonald's motion to strike out the endorsement on the writ and the statement of claim and to dismiss Perron's action pending the filing of Perron's reply, the chambers judge dismissed Macdonald's motion.

A justice of appeal then granted Macdonald leave to appeal this dismissal on the ground that it was arguable whether or not the chambers judge had applied the correct legal test and otherwise properly disposed of the application. In granting leave to appeal, reference was made to Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935 (C.A.), on the question whether a dismissal under Rule 19(24)(d) could be founded on the fact that the action was obviously statute barred. Reference was also made to Cominco Ltd. v. Canadian General Electric Company Limited et al. (1983), 45 B.C.L.R. 35 (B.C.C.A.), in the matter of Perron pleading s. 6 of the Act and making claim to postponement of the limitation period. Accordingly, that order of dismissal, leave to appeal having been granted, is one of the matters before us on these appeals.

Shortly thereafter, the parties were back in Supreme Court chambers before another judge. Perron then sought leave to deliver a reply to Macdonald's limitation defence pleading the Act and claiming, pursuant to s. 6(3) of the Act, a postponement of the commencement of the two-year limitation period until June 21, 1988. Macdonald opposed Perron's application and renewed, again under Rule 19(24)(d), its own application for an order dismissing Perron's action as being statute barred on the ground that the proposed reply did not afford an answer to the plea of limitation.

The second chambers judge acknowledged that he was now hearing Macdonald's application under Rule 19(24)(d) to strike out the pleadings and dismiss Perron's action which should have been heard by the first chambers judge after an adjournment. By the time of this hearing, Perron had filed his reply to Macdonald's defence that Perron's claims are barred by s. 3(1) of the Act. Perron in his reply also claims the benefit of the postponement provisions of s. 6 of the Act whereby the commencement of the two-year limitation period pursuant to s. 3(1) of the Act does not commence to run until June 21, 1988. Notably, this date of June 21, 1988 is considerably later than March 22, 1987 before which date Perron states in para. 2 of his reply that he had no knowledge of the existence of a duty owed to him by Macdonald and that its breach was the cause of his damage or loss until March 22, 1987 when he received legal advice to that effect. Notably,

also, the date of June 21, 1988, pleaded in the reply for commencement of the limitation period, is one day after Perron's commencement of the action which he clearly would not have started without earlier legal advice. Such earlier legal advice would have triggered the commencement of the limitation period some time before the commencement of the action. This date of June 21, 1988 is suspect.

The second chambers judge refused Macdonald's renewed application to dismiss the action and granted Perron's application for leave to file the proposed reply. Macdonald obtained leave to appeal and directions that the two appeals be heard together.

The following extracts from counsel's notes of the reasons given by the second chambers judge are enlightening and make it obvious that neither of these two Supreme Court chambers hearings came to grips with the matter of postponement of the limitation period, and that matter has yet to be decided. Counsel's notes read in part as follows:

> We heard an interesting discussion of Section 6(3) of the Limitation Act under which a Plaintiff may answer a claim to postponement. It is conceded by the Plaintiff that the time limit has expired unless he can convince this court that the period was postponed. I am disposed to dismiss the Defendants application, but hasten to say that I do not thereby indicate that the Plaintiff has satisfied this court that the limitation period has been postponed under Section 6(3). That is an issue raised

> in the reply but is one which I am not disposed to deal with today, under Section 19(24).
>
> The onus remains with the Plaintiff to prove that postponement has occurred. The onus is on the Defendant to show that rule 19(24) is the appropriate rule in which to apply to strike out the pleading on the ground that it discloses no reasonable claim, notwithstanding that it is clear that the statute is a complete bar to the Plaintiff's claim.
>
> * * *
>
> In my view, on the material before me, it is not plain and obvious that the two year limitation applies to defeat the Plaintiff's claim. With regard to various arguments as to the existence of facts and what knowledge was within the means of knowledge of the Plaintiff, I refer only to Judge Van der Hoop where he refers to Section 6(4)(b) "facts - which includes the existence of a duty. If that is a material fact which was or was not in the Plaintiff's means of knowledge, I cannot conclude here.
>
> The Plaintiff in his Affidavit and the Affidavit of Mr. Stanton, addressed that point. I think that Mr. Giles concedes there is some difficulties in the assertion. It is clear from the evidence that this assertion is something that can not be determined in any way and I conclude that the Defendant has not made out it's application under Rule 19(24)(d), and I dismiss it again.

In this case a chronological sequence of fact is important. It is also useful to have in mind while reviewing the facts the pertinent wording of s. 6 of the Act under the heading "Running of time postponed" to be found in s-ss. 3, 4 and 5 thereof as follows:

> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> (a) for personal injury; . . .
>
> (e) in which material facts relating to the cause of action have been wilfully concealed; . . .
>
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.
>
> (4) For the purpose of subsection (3),
>
> (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;
>
> (b) "facts" include
>
> (i) the existence of a duty owed to the plaintiff by the defendant; and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff; . .
>
> (5) The burden of proving the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.
>
> (my emphasis)

According to his statement of claim, Perron was born November 22, 1952 and that at 13 years of age began smoking Export cigarettes manufactured by Macdonald. In 1976 at age

24 Perron began to suffer loss of circulation, pain and discomfort in his lower extremities, which increased to such a degree that in 1980 his left leg had to be amputated. Following an autopsy of his severed limb, Perron was informed that he suffered from Buerger's Disease, known medically as thromboangiitis obliterans (TAO). Essentials of diagnosis of TAO include the fact that it almost always occurs in young men who smoke and, through inflammatory occlusions of the more distal arteries results in circulatory insufficiency of extremities. The course of TAO is intermittent and amputation may be necessary especially if smoking is not stopped. At the time of diagnosis of TAO, Perron was also informed by his doctor, probably not for the first time, that smoking may have a deleterious effect on people who suffer from this disease.

Because of his self-confessed addiction to and dependence upon smoking Macdonald's cigarettes and notwithstanding that he was advised by his doctor to quit smoking, Perron continued to smoke following the amputation of his left leg and in 1983 his right leg was amputated to give him relief from the extreme pain and discomfort he suffered as a result of TAO in combination with effects of smoking Macdonald's cigarettes. Following loss of his right leg, he stopped smoking tobacco and since that time the disease has remained dormant and his health and general condition have improved.

At this juncture it is useful to examine some of the pleadings.

Perron alleges the nature of the negligence of Macdonald in paras. 5, 6, 7 and 8 of the statement of claim as follows:

> 5. The Plaintiff's loss of both legs was caused or contributed to by the negligence of the Defendant in that:
>
> a) It failed to carry out proper research to determine the effect of tobacco upon smokers who suffered from Buerger's Disease, to determine whether it represented a danger to them.
> b) It failed to test and research adequately the risk to tobacco use, and in particular, the association between tobacco use and Buerger's Disease when it knew, or ought to have known, that the use of tobacco by victims of the said disease exacerbated or made worse its symptoms and effects.
> c) It failed in its duty to inform itself fully of the characteristics of and potential hazards associated with its product, and in its duty to warn users who may run an unusual risk of harm.
> d) It failed to warn doctors, retailers, and consumers properly, or at all, of the effect of tobacco in association with Buerger's Disease.
> e) It failed to warn adequately the public and in particular, members of the public suffering from Buerger's Disease, that the association of tobacco with Buerger's Disease was unsafe and harmful to their health.
> f) The Plaintiff states further, and in the alternative, that if any warning was given by the

> Defendant, it was inadequate to apprise him or other users suffering from Buerger's Disease of the medical risks involved in smoking, and that any warning given by the Defendant was, knowingly and wilfully, negated, nullified and vitiated by the artful and insidious advertising in which it was contained.
>
> g) It failed to warn the Defendant that cigarette smoking was addictive and caused physical and psychological dependancy.
>
> 6. The Plaintiff states that the Defendant sold to the public a substance dangerous to the victims of Buerger's Disease, of which he is one, and therefore is strictly liable for the injuries sustained by him.
>
> 7. The Plaintiff states that as a result of the failure of the Defendant to warn him of the risk involved in his continued use of tobacco while suffering from Buerger's Disease, he lost both his legs by amputation.
>
> 8. The Plaintiff states that the Defendant expressly warranted that smoking its cigarettes did not present any danger to his health, and pleads and relies upon Section 18 of the Sale of Goods Act, R.S.B.C. 1979, Chapter 370.

Perron states his grounds in reply to Macdonald's allegation that the action is statute barred and claims the benefit of the postponement provisions of s. 6 of the Act, as follows:

> 1. The Plaintiff states that the cause of action upon which his action is based is not for personal injury based upon a single act of the Defendant, but for a continuing breach of a duty to warn as a result of which he suffered continuous and increasing injury to his person and that the duty to warn has

continued from the time he commenced smoking until he quit smoking in 1984.

2. In order for the Plaintiff, as a reasonable man, to have taken "appropriate advice" pursuant to Section 6(3) of the Limitation Act R.S. Chapter 236 it was necessary for him to be aware of the existence of a duty owed him by the Defendant and that its breach was the cause of his damage or loss. The Plaintiff states that he had no knowledge of the existence of such a duty until March 22, 1987, when he received legal advice to that effect.

3. The Plaintiff states that, by failing to warn him of the risks involved in the association of tobacco with TAO of which the Defendant was aware, the Defendant wilfully concealed from the Plaintiff material facts relating to his cause of action. The Plaintiff further states that the time for commencement of his action did not begin to run until he acquired knowledge on March 22, 1987, of the misconduct of the Defendant in concealing such material facts.

4. It was only in June, 1988 that the Plaintiff, as a reasonable man, had within his means of knowledge sufficient facts that a reasonable man, knowing those facts, and having taken appropriate advice a reasonable man would seek, would regard those facts as showing that his action would have a reasonable prospect of success and that he ought to be able to bring an action. These facts including the following:

a) The fact that the Defendant owed him a duty to inform him of the harmful relationship between smoking and TAO;

b) The fact that this information had wilfully and fraudulently been withheld by the Defendant;

c) The fact that, in the opinion of competent medical experts there was a causal connection between smoking and TAO;

> d) The fact that, in the opinion of competent legal experts, experienced in tobacco litigation, there was a reasonable prospect of success;

I glean from these pleadings that Perron's fundamental assertion of negligence against Macdonald is essentially that of a breach of duty (which Macdonald disputes) to carry out research to determine and have knowledge of a causal relationship between smoking tobacco and TAO (which causal relationship is not admitted by Macdonald and which the medical world has not been shown to have itself established). Perron also asserts failure on the part of Macdonald to warn doctors, retailers and consumers properly about such a causal relationship and the consequences thereof (which assertion is also in dispute). Material in the appeal book indicates that the question whether smoking tobacco causes disease in human beings is still an open one. Perron's course is set with many evidentiary hurdles.

The Act, ss. 6(3), (4) and (5), as quoted above, sets those evidentiary hurdles which Perron must overcome to establish that there has been a postponement of statutory limitation in this case. Perron has the burden of proving that the running of time has been postponed. To get within the postponement of limitation provisions of s. 6 of the Act entails establishing that, until less than two years prior to his commencement of action against Macdonald on June 20, 1988,

Perron did not have knowledge of material facts relating to the cause of action which have been wilfully concealed. To do so Perron would have to show what those facts were and that they were wilfully concealed by Macdonald.

Perron would have to prove that those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice, a reasonable man would seek on those facts, would regard those facts as showing that an action on the cause of action would have a reasonable prospect of success.

According to the Act, s. 6(4)(b), "facts" includes the existence of a duty owed to the plaintiff by the defendant. Perron would have to prove on a balance of probabilities in the face of Macdonald's denial, the existence of Macdonald's duty to do the suggested research and discover material facts relating to the cause of action. Perron would then have to prove further that those facts, yet to be discovered by Macdonald's undone research, were indeed material to the cause of action and were wilfully concealed by Macdonald. Finally, Perron would have to persuade the court that, had these material facts been known to him, they would have been such as to satisfy the "reasonable" requirements of the Act, s. 6(3) referred to in the preceding paragraph hereof.

In this latter regard, Esson, J.A. (as he then was) commented on the tests to be applied in these circumstances in Bera v. Marr and Attorney General for British Columbia (Intervener) (1986), 1 B.C.L.R. (2d) 1 at pp. 26-7, as follows:

> It is important to observe that s. 6(3) does not postpone the running of the limitation period until the plaintiff "has taken appropriate advice" but, rather, until he has within his means of knowledge facts that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard as demonstrating the two matters. The test is an objective one. What s. 6(3) does is to state, in the precise but rather complex language typical of modern statutes, essentially the same test stated by the court in Sparham-Souter [1976] Q.B. 858, [1976] 2 W.L.R. 493, [1976] 2 All E.R. 65 (C.A.)] i.e. the date on which the plaintiff should, with reasonable diligence, have discovered the damage. It is a matter of two forms of words intended to define the same concept. I find support for that view of the matter in the language of Wilson J. who said at p. 50 (W.W.R.) [in Kamloops v. Neilsen, [1984] 2 S.C.R. 2 at 42, [1984] 5 W.W.R. 1]:
>
> > It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in Sparham-Souter by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action.

Macdonald has taken the stance that a reasonable man in the position of Perron would be as well informed about his claim in 1980 when he first lost a leg or even in 1983 when he lost the second leg because of a disease which may be aggravated by

smoking tobacco, as he would have been in 1987 when Perron finally elected to take legal advice. A reasonable man would not have waited seven years to take legal advice.

It follows from this that the essential issues before this Court relating to postponement of limitation are ones of fact or mixed fact and law. These matters are contested. The onus on Perron remains to prove, in fact, that a postponement of limitation has occurred. Perron's reply to Macdonald's defence of limitation has not yet been put to the test of the Act, s. 6. This Court simply does not have before it the competent and relevant evidence upon which to assess and determine material matters of fact.

The material matters of fact to be canvassed in evidence to determine whether there has been a postponement of limitation may well go beyond the evidence relating to wilful concealment of fact, which has just been discussed. Perron might pursue such matters as his personal injury being based, not a single act occurring on a certain day, but rather as continuing breach of a duty to warn and of his having no knowledge of that duty until March 22, 1987 when legally advised. Evidence of material fact respecting these, and possibly other, matters ought to be led and tested in court.

On these appeals, counsel for Macdonald has taken the position that the decisive facts with respect to Perron's

knowledge of his claim in 1983 are uncontested and, on a proper construction of the postponement of limitation provisions of the Act, would establish that those uncontested facts were sufficient to end any postponement in 1983. The uncontested facts referred to are that Perron was told in 1980, after the amputation of his left leg, that he had Buerger's Disease and that smoking might have a deleterious effect on him in relation to his disease. Nevertheless, Perron went on smoking until 1983. His disease got worse and his right leg had to be amputated. He gave up smoking in 1983. His disease has been dormant since then. On those facts, Macdonald says that any postponement of the limitation period had expired before June 21, 1986, that is two years before the writ of summons was issued. Macdonald says that on those facts, and on those facts alone, the defence of limitations is completely made out and that the action is bound to fail.

That may be so if the evidentiary issues were or could be restricted to those uncontested facts. But here there are other areas of relevant evidence to be explored, particularly in relation to the facts and deemed facts to be adduced in accordance with the provisions of s. 6(4) of the Act. Furthermore, the law in this area is uncertain.

Issues of fact are not ordinarily for determination in the first instance in this Court, certainly not on the limited

material at present available. That proof must initially take place in the trial court where discoveries may be had, witnesses may be heard, cross-examination may occur, and the material facts properly established and found. There the law applicable can be determined and applied. I observe that the issue of postponement of limitation would, in view of notice requiring the trial to be by a judge with a jury, probably be before a court so composed.

In all these circumstances, I would dismiss both of Macdonald's appeals and refer the matter back to the trial court for determination of the issue of postponement of limitation of commencement of action in this case.

"The Honourable Mr. Justice Carrothers"

I AGREE: The Honourable Mr. Justice Hutcheon

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ROGER PERRON	)	
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PLAINTIFF	)	
(RESPONDENT)	)	**REASONS FOR JUDGMENT**
AND:	)	
	)	**OF THE HONOURABLE**
R.J.R. MACDONALD INC.	)	
	)	**MR. JUSTICE LAMBERT**
DEFENDANT	)	
(APPELLANT)	)	
	)	

Before: The Honourable Mr. Justice Carrothers
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Hutcheon

Counsel for the Appellant: J. Giles, Q.C.
J. A. Angus

Counsel for the Respondent: D. Stuart

Vancouver, British Columbia
February 2, 1990

I have had the advantage of reading Mr. Justice Carrothers' reasons for judgment. Those reasons set out the facts and the parts of the pleadings which disclose the nature of the plaintiff's claim. I will not repeat the facts or the pleadings. But for convenience of reference I will set out again the relevant

postponement provisions in s-s.(3), (4)and (5) of s.6 of the Limitation Act:

> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> (a) for personal injury;
>
> ...
>
> (e) in which material facts relating to the cause of action have been wilfully concealed;
>
> ...
>
> is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that
>
> (i) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.
>
> (4) For the purpose of subsection (3),
>
> (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;
>
> (b) "facts" include
>
> (i) the existence of a duty owed to the plaintiff by the defendant; and
>
> (ii)that a breach of a duty caused injury, damage or loss to the plaintiff;
>
> ...
>
> (5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

(my emphasis)

I

The postponement provisions that I have quoted are very difficult. I propose to follow the advice of Mr. Justice Seaton in Grayson v. Canada Safeway Ltd., °1981! 2 W.W.R. 321 at 326, and confine myself to the points of interpretation that directly affect the outcome of these appeals. There seem to me to be seven such points.

The first point relates to the fact that the plaintiff is relying on two separate grounds for postponement, namely, first, that his action is one for personal injury, and second, that his action is one in which material facts relating to the cause of action have been wilfully concealed. The postponement provisions will apply separately with respect to each separate ground, so that, if there is any basis for postponement at all, there may be two separate postponement periods. The longer of those two periods will be the one which should apply.

The second point is that the determination of whether there should be a postponement has both objective and subjective elements. The objective elements are introduced by the concept of the "reasonable man" which forms an explicit part of the test established by the legislation. And see Bera v. Marr (1986), 1 B.C.L.R. (2d) 1, (B.C.C.A.), particularly the reasons of Mr. Justice Esson at pp.26-27. But there is also a subjective element in the test. It is

embodied in the words "those facts within his means of knowledge". Those words may well have an objective aspect in the determination of what the plaintiff might be thought to have the means of knowing, but they must also have a subjective aspect in relation to the plaintiff's own circumstances as those circumstances affect his actual knowledge and, perhaps in combination with objective factors, as those circumstances affect his means of knowledge.

The third point is that the word "facts" is given an artifically extended definition in s-s.(4). "Facts" are defined to include both "the existence of a duty owed to the plaintiff by the defendant" and the circumstance "that a breach of duty caused injury, damage, or loss to the plaintiff". Usually those elements of a plaintiff's case would both be regarded as a mixture of fact and law.

The fourth point also relates to the definition of the word "facts". The definition is said to be "For the purpose of s-s.(3)". But para.(a) of s-s.(4), in the definition of "appropriate advice", twice uses the word "facts". It would be absurd to contemplate that the word "facts" was intended to have a different definition for the purposes of s-s.(4) than it was to have for the purposes of s-s.(3). I would avoid the absurdity by giving the word "facts" its defined meaning for the purposes of both s-s.(3) and s-s.(4).

The fifth point is about the meaning of the words "a reasonable prospect of success" in sub-para.6(3)(i). Those words cannot mean any particular absolute percentage chance. The chance of success that is to be regarded as reasonable must vary from case to case. I think the words should be given a meaning to the effect that the action would have such a chance of success that a reasonable person in the position of the plaintiff, and guided only by factors relevant to the litigation, including its costs and tribulations, but not including such things as the age or moral outlook of the particular plaintiff, would bring the action with a determination to push it to a conclusion.

The sixth point also relates to the words "a reasonable prospect of success". It is possible for such things as the overruling of a previous decision to change a lawyer's or a layman's perception of whether an action has a reasonable prospect of success. An action may, on undisputed facts, be thought to have no reasonable prospect of success when the cause of action arises. But ten years later it may, for the first time, be considered to have had, when it arose, a reasonable prospect of success. On the basis of the present wording of the postponement provisions, there is, in my opinion, no alternative but to conclude that in those circumstances the limitation period would be postponed throughout the period when the action was reasonably thought to have no reasonable prospect of success, and to start to run only when the action was reasonably thought to have a

reasonable prospect of success. Changes in general knowledge about the significance of relevant facts might have a somewhat similar effect.

The seventh and final point is that the burden of proof provision in s-s.(5) describes an ultimate burden of proof. It is not applicable on a motion to dismiss an action under Rule 19(24). It comes into operation only when the parties have had an opportunity to discover and lead all the evidence that they wish to lead on the limitation question.

III

I turn now to the application of the postponement provisions to this case, in the context of the defendant's application to dismiss the plaintiff's action as being bound to fail because of the expiry of the limitation period.

The defendant's position is that the uncontested facts are themselves sufficient to show that the limitation period of two years must have started running by 1984 at the latest. Those uncontested facts are: that the plaintiff started smoking Export cigarettes in 1965; that in 1976 he began to suffer discomfort in his feet and legs; that in 1980 his left leg had to be amputated; that in 1980 he learnt that he was suffering from Buerger's Disease, and received advice from his doctor that smoking might have adverse effects on people who suffer from Buerger's Disease; that in 1983 his

right leg had to be amputated; and that in 1983 or 1984 he stopped smoking.

In my opinion those facts are not in themselves sufficient to show that the limitation period of two years must have started running by 1984 at the latest. The reason is that, while the plaintiff knew in 1980 that cigarette smoking might have adverse effects on him, it is not clear, based only on the uncontested facts, that in 1980, or at any time before 21 June, 1986 (two years before the action was started), the complex interaction of the state of medical knowledge, the state of the law, the state of knowledge of the defendant, and the state of the plaintiff's knowledge about the state of the defendant's knowledge, was such that a person in the position of the plaintiff, as far as knowledge and means of knowledge were concerned, would have been told, if he had taken appropriate medical and legal advice, that a cause of action against the defendant for breach of a duty to warn sufferers from Buerger's Disease, between 1980 and 1984, of the dangers of smoking, would have had a reasonable prospect of success.

IV

The principal question in the action itself is whether the defendant had a duty to warn the plaintiff, between 1980 and 1984, of the dangers of smoking to sufferers from Buerger's Disease. The basic question in relation to

the limitation defence is when a reasonable person, with the knowledge and means of knowledge of the plaintiff would have considered that an action based on such a breach of duty would have had a reasonable prospect of success. In short, was that time before or after 21 June, 1986? (To be sure, there are other questions in this litigation, but it is not necessary to consider them at this time).

In my opinion the answer to the limitation question is dependent on, and more complex than, the answer to the principal question in the action about the existence of a duty to warn. In those circumstances, the discovery and trial processes are even more necessary to the reaching of a proper answer on the limitation question than they are to the reaching of a proper answer on the principal question in the action itself.

I would dismiss both appeals. I agree with Mr. Justice Carrothers that the question of whether the limitation period has expired should be left to be determined by the trial court.

"The Honourable Mr. Justice Lambert"