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SURVEY OF ILLINOIS LIMITS AND LIMITATIONS

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While time limits or statutes of limitations are commonplace in the practice of law, attention usually focuses upon a particular rule or application rather than upon the whole area of the law of limitations. As is true in many areas of social and political interest, some time-honored legal concepts are being reexamined and several are changing. Governmental immunity in tort,[1] manufacturer's strict liability in tort,[2] and indemnity by operation of law,[3] are a few illustrations of modern attempts to keep the substantive law of Illinois abreast of the considered needs of the people. Frequent revisions of the Illinois Civil Practice Act and rules of court and case law changes on topics such as long arm jurisdiction[4] seek the same result in the procedural law. The concept of time limit or statute of limitations operates in both the substantive and procedural law and finds application and involvement in a large number of cases across many varied fields of law. This renders reexamination more difficult and the overall development is less apparent. This paper attempts to survey the law of limits and limitations in Illinois.

Generally, the concept of time limit or statute of limitations is neither complicated or unfamiliar. While it is involved in actions at common law or under statutory remedies, chancery also effectuates a similar concept under the doctrine of laches or the maxim that equity follows the law. Basically, the statute of limitations specifies the time within which a particular action must be brought or right asserted. While the limitation for many of the real and personal actions are set forth in the General Statute of Limitations, the statute is not all inclusive.[5] Some statutes creating causes of action specify their own limitations.[6] Where the enabling statute specifies the time within

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[1] *See* Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); ILL. REV. STAT. ch. 85 (1967).

[2] Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

[3] Muhlbauer v. Kruzel, 39 Ill. 2d 226, 234 N.E.2d 790 (1968).

[4] Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

[5] ILL. REV. STAT. ch. 83 (1967). No attempt will be made to deal with limitations in the field of conflict of laws.

[6] ILL. REV. STAT. ch. 70, §§1-2 (1967) (Wrongful Death Act); ILL. REV. STAT. ch. 43, §135 (1967) (Dramshop Act).

which the action must be brought as a condition of liability, the time limitation may be construed to be an integral part of the substantive law which must be pleaded and satisfied by the plaintiff. An example of this is in the action for wrongful death under the Illinois Injuries Act.[7] Where the time limitation is a general one and is not construed to be a condition of liability, the limitation is procedural, and it can be waived if not raised in due time.[8] Whether or not the rationale was influenced by the common law pleas in bar or abatement, sophisticated jurists were wont to verbalize the point by stating that the statute of limitations merely barred the remedy and did not extinguish the right.[9]

MANNER OF APPLYING THE BAR

Apart from the substantive conditions of liability, not every procedural limitation which is timely asserted is necessarily effective to bar an action. The avowed purpose of the ordinary statute of limitations is to avoid the litigation of stale claims after opportunity for fruitful investigation and preparation of defense is past or likely to be greatly impaired.[10] It is thus held that if one has timely notice or knowledge of a claim, the statute of limitation will not be applied to bar the addition of a late action.[11] On the other hand, neither staleness nor lack of timely notice or knowledge will preclude suit where the plaintiff is a minor, though a claim asserted within the second year after reaching majority for an injury sustained in the first year of life may be very stale indeed.[12] In the instance of insanity or mental illness, the action brought may be not only stale but ancient. Moreover, the incompetence attending insanity or men-

[7] Wilson v. Tromly, 404 Ill. 307, 89 N.E.2d 22 (1949) (Provision of Limitation Act has no application to action under Injuries Act); Shelton v. Woolsey, 20 Ill. App. 2d 401, 156 N.E.2d 241 (1959) (General Limitations Act does not apply to action under Dramshop Act).

[8] Shapiro v. Kartsonis, 330 Ill. App. 299, 71 N.E.2d 356 (1947); Stanley v. Chastek, 34 Ill. App. 2d 220, 180 N.E.2d 512 (1962); ILL. REV. STAT. ch. 110, §48(e) (1967).

[9] Glenn v. McDavid, 316 Ill. App. 130, 44 N.E.2d 84 (1942), also indicating that the defense may not be asserted by a stranger. *See also* Beery v. Hurd, 295 Ill. App. 124, 14 N.E.2d 656 (1938), indicating that a barred remedy cannot be revived.

[10] Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).

[11] Geneva Constr. Co. v. Martin Transfer & Storage Co., 4 Ill. 2d 273, 122 N.E.2d 540 (1954). In permitting the joinder of an employee's action for personal injuries to the employer's action for reimbursement more than four years after the date of occurrence, the court said that statutes of limitation must be construed in the light of their objective and that purpose was fully served in the case at bar. Echales v. Krasny, 12 Ill. App. 2d 530, 139 N.E.2d 767 (1957) (allowing widow to intervene into employer's action for reimbursement and bring action for wrongful death almost five years after date of death).

[12] ILL. REV. STAT. ch. 83, §22 (1967); Stanczyk v. Keefe, 384 F.2d 707 (7th Cir. 1967).

tal illness is not deemed to attend mental retardation for purpose of the statute extending time limitation.[13] In arriving at this conclusion, the court was impressed by the fact that the retarded person read, worked, drove; was alert and cooperative; had memory, sense and understanding.

The filing of a timely complaint does not always put at rest all further problems with limitations. Normally, a claim barred by limitations cannot be asserted through the subterfuge of amendment.[14] However, much has already been done with the principle of "relation back" in order to permit amendments under certain conditions after the initial time period has expired.[15] Except for mistake of name and the like, "relation back" is not generally employed to permit the bringing in of new defendants by amendment after the statute of limitations has run.[16] As between existing and proper parties, however, even barred counterclaims of a specified nature (usually those arising from the same transaction or occurrence) may be brought either initially or by amendment regardless of limitations.[17]

Avoidance of the bar of the statute has also been aided by the classic doctrines of estoppel. Estoppel exists as a bar to a statute of limitations independent of those things set forth in the statute itself as causing its suspension.[18] Settlement discussions which lull plaintiff into a false sense of security estop the negotiator from raising the bar.[19] Normally, a statute of limitations is applied prospectively only,[20] and while the mathematics of computing time is not particularly difficult, the proper points of reference for the calculation as to when the action accrues are not always easily identified and often depend on the nature of the liability. For example, if the recovery sought is for a direct personal injury, it is said that the action must be brought in two years, whether the remedy is tort or contract; but in medical

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[13] Peach v. Peach, 73 Ill. App. 2d 72, 218 N.E.2d 504 (1966). The court noted that the mentally retarded person was able to read, play pinochle, drive a car, work on a farm, maintain a checking account; was alert, cooperative and had memory sense and understanding.

[14] Pasos v. Pan Am. Airways, Inc., 17 FED. RULES SERV. 15a.34, Case 1 (S.D.N.Y. 1952).

[15] FED. R. CIV. P. 15(c). ILL. REV. STAT. ch. 110, §46 (1967).

[16] Horan v. Brenner, 57 Ill. App. 2d 83, 206 N.E.2d 488 (1965) (holding that where plaintiff had facts concerning the identity of defendant but did not seek to have corporation made defendant until after limitation period had expired, the action against the corporation was barred); Marsden v. Neisius, 5 Ill. App. 2d 396, 126 N.E.2d 44 (1955) (amended complaint correcting misnomer or mistake in name rather than mistake in identity held to relate back and was not time barred).

[17] ILL. REV. STAT. ch. 83, §18 (1967); Carnahan v. McKinley, 80 Ill. App. 2d 318, 224 N.E.2d 297 (1967).

[18] Sabath v. Morris Handler Co., 102 Ill. App. 2d 218, 243 N.E.2d 723 (1968).

[19] Devlin v. Wantroba, 72 Ill. App. 2d 383, 218 N.E.2d 496 (1966); Reat v. Illinois Cent. R.R., 47 Ill. App. 2d 267, 197 N.E.2d 860 (1964).

[20] Tatge v. Hyde, 84 Ill. App. 2d 310, 228 N.E.2d 179 (1967).

malpractice, if the action is on the oral contract, the limit is five years.[21] The two year limit for personal injury actions holds true in products cases where the manufacture was much earlier.[22] Generally speaking, the action accrues and the time runs from last act necessary to render the actor liable.[23]

Avoiding Bar Where Action Concealed

If circumstances operate to obscure the action, courts have been loathe to enforce the bar and have said so in no uncertain terms.[24] In *Simoniz v. J. Emil Anderson & Sons, Inc.*,[25] a complaint was filed to recover from a contractor for negligence in the performance of the work after it had been accepted. In holding the action barred by the five year limitation, the court said:

> It is asserted by the plaintiff that while the wrongful conduct took place in 1952 and 1953, no notice or knowledge of the wrongful conduct came to the attention of the plaintiff until the damages actually occurred in 1962. In seeking to meet the issues directly, Simoniz asserts that its cause of action was not barred by the general statute of limitations in actions governing recovery for damage to property. It recognizes that the general statute of limitations for actions to recover for damage of property provides that the suit must be commenced within five years after the cause of action accrues. It is contended by appellant, however, that insofar as such statute is concerned the cause of action did not accrue on September 20, 1953, when the building was completed and accepted but on August 6, 1962, when the roof collapsed, and as a consequence the action was filed well within the five-year period provided by such statute.[26]

The court refuted this contention, stating:

> Since there was no fraud or concealment on the part of any of the defendants and since the Illinois precedents and the statute of limitations as expressed in this State do not justify the adoption of the "know or ought to know" rule in cases such as we have before us, we must conclude that the trial court correctly determined that the action was barred by the five year statute of limitations applicable in this case. We have noted that the legislature, when confronted with the problem of the time of accrual of a cause of action in the malpractice cases, saw fit only to amend that act and limit it to malpractice cases. The amended act permits the injured party to count the time for commencement of action

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[21] Doerr v. Villate, 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966), allegation that pursuant to oral agreement that defendant's physician performed certain operation and made certain warranties respecting sterilization in reliance on which relations were had resulting in birth of retarded child was under five year statute of limitations rather than two year statute of limitations.

[22] Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968).

[23] *Id.*

[24] Mosby v. Michael Reese Hosp., 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964); Simoniz Co. v. J. Emil Anderson & Sons, 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

[25] 81 Ill. App. 2d 428, 225 N.E.2d 161 (1967).

[26] *Id.* at 432-33, 225 N.E.2d at 163-64.

> from the time he knows or should have known of the negligent act, but even in such case, the legislature limited the potential claim to a maximum of 10 years from the date of the incident giving rise to the malpractice claim.[27]

Continuing the court said:

> To seek to modify the limitation act by use of the "know or ought to know" principle in this case cannot be justified on the basis of precedents. In theory, damage actions would never be completely limited but might go on for 25 or 50 or even 100 years when it would be impossible to meet or cope with demands made. Modifying or changing the applicable time limitations, on the basis of the precedents in this State, must be left to the legislature.[28]

To alleviate the hardship of the bar in cases of fraudulent concealment, the legislature long ago passed a statute which postponed accrual of the cause of action to date of discovery and extends the time limit to five years. Section 23 of the Limitations Act provides:

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards.[29]

In the recent case of *Stein v. Baum*,[30] the appellate court indicated that before section 23 will extend the statute of limitation there must be both concealment and deception. Carmen Stein had been a patient of Dr. Baum at Presbyterian Hospital, where she received radiation treatments for carcinoma of the cervix. She pleaded that she received excessive doses and that the effects were not apparent until a later date. While the radiation therapy was apparently successful against the cancer, it caused radiation burns in the affected areas. In holding the limitations not extended and the action barred, the appellate court noted that the treatments were prescribed pursuant to a diagnosis of cancer and that the patient was forewarned that the radiation treatments would cause certain effects and that these had cleared up sufficiently to enable her to undergo an operation some two months after the treatment had stopped. During the post-operative treatment, her complaints were examined and at first they were attributed to the operation. Later they were related to the prior radiation treatments. In the court's opinion, the statements of the doctor appeared to be no more than medical opinions and disclosed no intent to deceive or conceal. Summary judgment against the patient was therefore affirmed and the existence or non-existence of fraudulent concealment was not an issue of fact.

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[27] *Id.* at 437, 225 N.E.2d at 166.

[28] *Id.* at 438, 225 N.E.2d at 166.

[29] ILL. REV. STAT. ch. 83, §23 (1967).

[30] Stein v. Baum, 89 Ill. App. 2d 142, 232 N.E.2d 96 (1967).

"Knew or Should Have Known" Rule

Concealment, however, need not result from a doctor's word but may result from the operation itself. Since the statute of limitations runs from injury rather than discovery, in *Mosby v. Michael Reese Hospital*[31] a claim was held barred where a surgical needle left in the body during an operation was not discovered until after the statute had run.

The appellate court reluctantly upheld the bar, stating:

> We cannot do what the legislature had failed to do and the order dismissing the plaintiff's complaint must be affirmed. We are not pleased with this result. The statute barred the plaintiff's claim before she knew she had been wronged. The defendant's admitted negligence was not ascertainable to her — she presumably was under anesthetic when it took place — and she certainly has not slept on her rights. It would be more equitable if the commencement of the limitation period were delayed until she discovered the reason for her illness, but the statute does not permit the construction necessary to obtain this equitable result.[32]

The Legislature responded with section 22.1 which provides:

> Whenever in the course of any medical, dental, surgical or other professional treatment or operation, any foreign substance other than flesh, blood or bone, is introduced and is negligently permitted to remain within the body of a living human person, causing harm, the period of limitation for filing an action for damages does not begin until the person actually knows or should have known of the facts of harm and damage to his body; provided that no such action may be commenced more than 10 years after such treatment or operation.[33]

This statute was involved in the recent case of *Mathis v. Hejna*.[34] In the *Mathis* case, a myelogram was performed upon the plaintiff during the course of which some contrast media called pantopaque was injected into the spinal canal. At the conclusion of the myelogram, the pantopaque was withdrawn, but it was alleged that not all of it was withdrawn and some of it was permitted to remain in the body, allegedly causing arachnoiditis. The plaintiff alleged that pantopaque is a foreign substance, other than flesh, blood or bone, and that she was unaware of the defendant's negligence until within a period of less than two years prior to suit. The trial court held that pantopaque is not a "foreign substance" within the meaning of section 22.1 and dismissed the complaint as barred by the two-year statute of limitations. The defendants argued that the statute only applied to items unwittingly left in the body and did not apply to procedures by which something is injected and some part of it remains. The appellate court noted that pantopaque

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[31] 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).
[32] *Id.* at 342, 199 N.E.2d at 636.
[33] ILL. REV. STAT. ch. 83, §22.1 (1967).
[34] Mathis v. Hejma, 109 Ill. App. 2d 356, 248 N.E.2d 767 (1969).

does not lose its identity in the body, and while medically it is seldom possible or desirable to remove the material completely, the latter was a fit subject of proof. The complaint having alleged that some pantopaque was permitted to remain through negligence, it was held to be reversible error to dismiss the complaint. In doing so, the appellate court interpreted the statute as follows:

> Ill. Rev. Stat. c. 83, §22.1 (1965) was adopted to achieve the more equitable result as suggested by the court in Mosby, that the cause of action accrues when the party "knew or should have known" of the injury . . . The legislative intent in enacting Ill. Rev. Stats., C83, §22.1, was to adopt the "knew or should have known" rule in malpractice cases. If the legislature intended the statute to apply only to those cases in which sponges, needles, clamps and like items are negligently left in the body of a patient, as the defendants contend, they would have chosen different wording to express that intent.
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> In *Prince v. Trustees of University of Pennsylvania*, the court in *dicta* discussed the purpose of the 'knew or should have known' rule. The court stated:
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> > The purpose of the "discovery rule" is clear: it is to prevent the plaintiff from being penalized unfairly for failing to redress an injury, the cause of which he could not reasonably have known.
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> The Illinois statute provides, in part, "any foreign substance other than flesh, blood or bone." . . . . We think the facts, as pleaded, come within the technical definition of the statute as well as the object and purpose of the statute. "Any" is defined as being one indiscriminately of whatever kind. "Foreign" is an adjective used to modify substance. "Other than" has been construed to create an exception. Although "substance" is not explicitly defined, it is defined by implication. "Substance" is any matter or thing other than flesh, blood or bone. Since pantopaque is a substance other than flesh, blood or bone, we hold it is a foreign substance within the meaning of the statute.[35]

OTHER LIMITS

After the first action is filed within the original or extended time limit, most cases probably proceed to a judgment or settlement which ends the litigation. The plaintiff, however, may suffer a nonsuit or a dismissal or other similar adverse result, which is not a legal bar to further proceedings in which event the law permits the commencement of a "new" action within one year.[36] The new action should be the same as the first action.[37] There is some indication also that the nonsuit involved should be

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[35] *Id.* at 360-61, 248 N.E.2d at 769-70.

[36] ILL. REV. STAT. ch. 83, §24(a) (1967). If the judgment is a bar, this refiling statute does not apply. Bonney v. Stoughton, 122 Ill. 536, 13 N.E. 833 (1887).

[37] Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965).

an involuntary one.[38] A dismissal for want of prosecution, though often voluntary, has been held to be a nonsuit allowing a refiling.[39] It has also been applied in the case of a federal court dismissal for lack of jurisdiction.[40]

Though the purpose of the refiling statute is to avoid disposition of cases on grounds not involving the merits of the controversy, a dismissal for violation of discovery rules is not within the statute permitting a refiling.[41] Furthermore, the statute does not permit the repeated commencement of nonsuited actions.[42] Illinois Supreme Court Rule 273 now provides that, unless otherwise specified by order of dismissal or a statute, an involuntary dismissal other than a dismissal for lack of jurisdiction, improper venue or lack of indispensable party, operates as an adjudication upon the merits.[43]

Other limitations exist which may be ostensibly procedural rather than substantive but are actually jurisdictional as in the case of the time for seeking post judgment relief during[44] or after the expiration of modern equivalent of term time[45] and in the filing of a notice of appeal.[46] There are also actions which seem not to have a specific time limitation such as the action for declaratory judgment.[47] In other actions of a secondary nature, such as indemnity, the five year limit does not begin to run until payment is made in the primary action.[48] If the plaintiff dies before the expiration of the time limited for bringing an action which survives death, then the time for bringing the action against the deceased's representatives is extended to one year from date of death.[49] On the other hand, if the defendant dies before the expiration of the time limited for bringing the action which survives death, then, the deceased's representatives may be sued within 9 months of the issuance of the representatives' letters, but the statute does not specify when letters must be sought. If death occurs after the action is brought and it is one that survives, the motion to substitute deceased's representa-

[38] Koch v. Sheppard, 223 Ill. 172, 79 N.E. 52 (1906).
[39] Casillas v. Rosengren, 86 Ill. App. 2d 139, 229 N.E.2d 141 (1967); Patrick v. Burgess Norton Mfg. Co., 56 Ill. App. 2d 145, 205 N.E.2d 643 (1965).
[40] Roth v. Northern Assurance Co., 32 Ill. 2d 40, 203 N.E.2d 415 (1965); Factor v. Carson, Pirie Scott Co., 393 F.2d 141 (7th Cir. 1968) *cert. denied*, 393 U.S. 836 (1968).
[41] Chavez v. Elgin, J. & E. Ry., 78 Ill. App. 2d 53, 223 N.E.2d 220 (1966); Jones v. Reuss, 70 Ill. App. 2d 418, 219 N.E.2d 75 (1966).
[42] Harrison v. Woyahn, 261 F.2d 412 (7th Cir. 1959).
[43] ILL. REV. STAT. ch. 110A, §273 (1967).
[44] ILL. REV. STAT. ch. 110, §50(5) (1967).
[45] ILL. REV. STAT. ch. 110, §72 (1967).
[46] ILL. REV. STAT. ch. 110A, §§301 & 303 (1967).
[47] ILL. REV. STAT. ch. 110, §57.1 (1967).
[48] Klatt v. Commonwealth Edison Co., 55 Ill. App. 2d 120, 204 N.E.2d 319 (1964).
[49] ILL. REV. STAT. ch. 83, §20 (1967).

tives must be filed within 90 days after suggestion of death, but the statute does not specify how soon the suggestion should be made or how much time may elapse.[50] If the defendant is not dead but absent from the state, the period of absence is not counted in computing the time limitation. The statute itself gives no recognition to situations where non-resident service outside the state is available but the case law tends in that direction.[51]

SUMMARY

While the law of limitations is scattered widely among statutes and case law, chapter 83 does try to approximate something of a codification of the law. Any time limit is by its nature arbitrary and in some instances may work a hardship. The law of limitations represents an attempt at imposing reasonable restrictions on the time one can take in the assertion of rights. Giving everyone a reasonable chance at having a day in court is balanced against the enforcement of stale or even fraudulent claims which have become indefensible. Rules to meet all future situations are difficult to draw if they are possible to achieve. The piecemeal approach to the statutes and common law rules has produced a workable pattern without too much rigidity. Section 22.1 seems to be a valuable addition to the law of limitations introducing the "knew or should have known" criterion.

What might yet be done is to eliminate stilted and legalistic distinctions. Neither the objectives of limitations nor the happenstance of whether death does or does not result from an injury, bears any reasonable relation to whether time limit is a condition of liability. Similarly, the judicial criteria used to absolve a mentally retarded person from the extended limitations accorded minors and the mentally ill, also absolves certain classes of teenagers and other minors from the same extended limitation. Allowing as much as 20 or more years to elapse before requiring litigation to be started ought to be conditioned upon a showing of the necessity to wait so long and the practical inability to bring suit earlier. While any specified age of reaching majority will be artificial for some persons, the structure of modern society seems to argue strongly that minority ends at least with the teens and many would contend that maturation occurs earlier. Regardless of how this matter is resolved in such other areas as voting and the like, it would seem that for purposes of limitations, the age of reaching majority could be lowered and the litigation at the maximum period circumscribed by reasonable conditions. In fact, section 22.1 suggests that for an average

[50] ILL. REV. STAT. ch. 110, §54 (1967).
[51] ILL. REV. STAT. ch. 83, §19 (1967).

person 10 years is a good maximum time limit even where there are extenuating circumstances.

Other phases of the law of limitations that could be tightened include the provision relating to death or absence from the jurisdiction. As to the latter express recognition could be given to the expanding concepts of jurisdiction over non-residents and the statute could forbid delaying the commencement of action on the grounds of absence where jurisdiction could be obtained on the non-resident. Similarly, where a party dies, the suggestion of death ought to be made within a specified period of time and the representative's letters ought to be sought within a specific time interval even where probate is not required. The time limits need not be oppressively short when death intrudes but they should be definite so everyone knows the limit. The failure of the statute to specify such time limits operates in some cases to extend indefinitely both the 90 day limit for substituting parties and the 9 month limit from issuance of letter for suing the personal representative.

While limitations are a somewhat arbitrary criteria, the law seems to create exceptions when the need arises. As the exceptions extend the time for specific reasons, it may be possible to shorten the initial period prescribed in an effort to keep pace with a fast-moving society. When the exceptions become too numerous, a new concept of limitations may result or have to be devised.