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Section 13 of the Nuclear Liability Act: Proposed Amendment

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I. INTRODUCTION

The limitation provision (ie. the period of time within which a legal action must be brought) under the Nuclear Liability Act, R.S.C. 1970, supp., c.24 is in urgent need of revision.

One of the physical injuries from radiation exposure for which a claimant could seek compensation under this Act is cancer, which often manifests itself only after an indeterminable and long period of time. It may be difficult or impossible for potential claimants under the Act to realize that they have contracted cancer until many years after the period of time for bringing an action under the present legislation has elapsed.

II. The Nuclear Liability Act - Interpretation of Section 13

The Nuclear Liability Act provides for absolute liability for damages caused by the breach of duty of an operator of a nuclear installation (s.3,4). The period of time within which an action under the Act must be brought or limitation period is set out in s.13:

No action under this Part shall be brought:

- (a) after 3 years from the earliest date upon which the person making the claim had knowledge or ought reasonably to have knowledge of the injury or damage, or
- (b) in the case of a claim for loss of life,
 - (i) after 3 years from the date of the death of the person for whose loss of life the claim is made, or
 - (ii) where conclusive evidence of the death of that person is not available, after 3 years from the date an order presuming the person to be dead is made by a court having jurisdiction in such matters,

and in no such case shall any such action be brought after ten years from the date the cause of action arose.

The above provision allows a claim for injury under the Act to be brought within three years from the time the injury was reasonably traceable but no action can be brought after ten years from the date the cause of action arose.

Although s.13 reveals the length of time during which an action must be brought, it does not indicate when the cause of action arises in relation to the ten year limitation period.

At common law, the general rule is that the limitation period begins to run when all the essential elements of the action have occurred. The problem of application of this rule arises when damage occurs of which the plaintiff was not or could not reasonably be aware, as in the case of cancer. At present, the issue as to when a cause of action begins to run when the complainant could not reasonably be aware of the damage caused by another party's negligence remains undecided.

In the case of the Nuclear Liability Act, it is obvious that the ten year limitation period will not begin to run as of the date of discovery of the physical injury since the three year period under s.13 begins to run from that time. Otherwise, the ten year period provided in the section would be superfluous.

Other possible times from which the ten year period may begin to run are:

- (i) from the date of radiation exposure or the time of the breach of duty of the operator of the nuclear installation or,
- (ii) from the date that the injury first occurred, ie. the time at which cells are first set

on the path to cancer development by ionizing radiation.

Neither of these possibilities is truly acceptable. The difficulty with the latter alternative is that the initial damage that may be diagnosed as cancer years later may begin in a single cell and therefore is non-detectable at the outset. This single cell may divide many times before it can produce the billions of cells necessary to become clinically observable. It would be difficult to determine the time at which the injury to the cell or cells first began. Alternative (i) seems to be a definable and detectable point in time but does not necessarily include the point at which the damage first occurred and that is an essential element of a personal injury action.

As can be seen, there are problems of interpretation of Section 13 in relation to when the cause of action does arise for the ten year period to begin running.

III. Cancer, Radiation Exposure and the Latency Period

Medical knowledge is that cancer is a cellular disease caused by exposure to a carcinogen which creates a pre-malignant or precancerous condition, which may develop into cancer in an often indeterminable length of time.

It is also fairly common medical knowledge that different forms of solid cancers in humans can be caused by ionizing radiation. In the case of cancer, there is often a long time interval between the causal event and the manifestation of cancer to the victim. The time period between exposure to ionizing radiation and the appearance of cancer is called the latency period.

Little is known about those factors which determine what the length of the latency period is for a particular cancer. Medical research has not yet been able to

determine the rate of cell divisions of cancer in its early stages. A number of factors, such as the nature of the host of the radiation injured cell, decidedly have an impact on the length of the period although their precise impact has not yet been scientifically determined.

To date, it is a fairly common assumption of cancer researchers that victims of radiation exposure may suffer from cancer more than ten years from the time of radiation exposure. In some cases, cellular damage may remain in a latent, precancerous state for more than thirty years.

IV. The Problem with Section 13

It is apparent then, that for a victim of radiation exposure who later discovers cancer, the conventional limitation of liability to what may be considered to be a reasonable time period is unfair. If a potential claimant does not discover the physical damage caused by radiation exposure until more than ten years later, that individual shall be "out of time" for bringing a claim for compensation under the Nuclear Liability Act. The limitation period would begin to run at the time of cellular damage although the claimant could know nothing of the damage at that time.

One of the purposes of the Nuclear Liability Act is to provide accessible remedies to claimants seeking compensation for damage caused by the negligent operation of a nuclear installation. It is essential that the limitation period of this legislation reflect a reasonable amount of time from the beginning of the cause of action so that a claimant actually does have the right to seek compensation.

Rather than extending the qualifying ten year limitation period to a longer period to cover most but not all latency

periods, deletion of the ten year qualifying limitation period would simplify interpretation of the provision and have the same effect. The limitation period would then run from the date of knowledge of the damage only. As is now the case, the claimant would have to establish a casual relationship between the injury and the breach of duty of an operator of a nuclear installation in bringing a claim under the legislation. Such an amendment is preferable as it would preclude the necessity of determining when the cause of action for the ten year period actually arose. It would also assist in resolving the present conflict between the prescribed time period for bringing an action and the time period that may actually be necessary for cancer to become manifest to a potential claimant.

The need for revision of the Nuclear Liability Act is urgent. In the past decade, more information has come to light concerning the effects of radiation exposure because of nuclear accidents and leaks at Chalk River, Port Hope and elsewhere. With the present limitation provision, the Nuclear Liability Act is inadequate to meet the problems that may arise from the widespread use of nuclear power.

Statutes of limitation are designed to compel the exercise of a right within a reasonable time period, their main purpose being to avoid stale or fraudulent claims. This policy is a valid legal concern but it ought not to be used to deny a right which has not been able to ripen into a cause of action before being declared stale.

There would be no hardship caused by having the cause of action run from the date of discovery of the injury only. The merits of any case arising under this legislation would remain unchanged by an extended limitation period. The hardship presently caused to potential claimants could be alleviated and the public would know with certainty that individuals injured in nuclear accidents

could not be barred from taking legal steps for compensation by an unnecessary technicality in the statute.

V. Recommendations

It is therefore recommended that the following amendment to s.13 be made:

"No action under this Part shall be brought:

- (a) after 3 years from the earliest date upon which the person making the claim had knowledge or ought reasonably to have knowledge of the injury or damage or,
- (b) in the case of a claim for loss of life,
 - (i) after 3 years from the date of the death of that person for whose loss of life the claim is made, or
 - (ii) where conclusive evidence of the death of that person is not available, after 3 years from the date an order presuming the person to be dead is made by a court having jurisdiction in such matters.