All solicitors practising in South Australia in personal injury litigation should have the 3 year limitation period at the forefront of their minds when diarising the last date to issue proceedings.

There are some obvious exceptions to the 3 year rule and in particular those relevant to minors, persons under a legal disability and where the injury has been latent for some time (see section 36(1a), section 45 and section 45A of the Limitation of Actions Act).

There are, however, some other not so obvious exceptions, which can and have had ramifications for South Australian solicitors.

Recently Law Claims was faced with two separate claims arising from a solicitor’s failure firstly to identify a potential cause of action and secondly to realise the applicability of another exception to the '3 year rule'.

**The Facts**

On 10 April 1993 a 12 year old boy from South Australia was on holidays in Victoria with his family when he went for a 'paid' joy ride on a hang glider.

On landing the hang glider collided with a tree and as the boy attempted to alight from the glider he fell from a tree branch several metres on to the ground below, sustaining injury.

In late May 1993 the boy's mother approached South Australian solicitors for advice with respect to her son's personal injury claim.

She was informed that given her son's age the relevant time limit for any such claim would not expire until 3 years following her son's 18 birthday (October 2001).

Thereafter there was some intermittent (but limited) contact between the solicitor and the boy and his mother.

In 2003, proceedings were issued in Victoria on the boy's behalf, against both the gliding club and the pilot.
Although the claim was successful at first instance, on appeal the Victorian Court of Appeal upheld the defendants' contention that the claim was statute barred.

Specifically the defendants pleaded that the claim was subject to the provisions of the Civil Aviation (Carriers Liability) Act 1961 (Victoria) and by virtue of section 5 of that Act, the relevant limitation period was that as set forth in the Civil Aviation (Carriers Liability) Act 1959 (Commonwealth) – namely 2 years after the date upon which the aircraft (the glider) ought to have arrived at its destination (ie 10 April 1995).

The Court’s findings were to the effect that the claim related to the carriage of a passenger in an aircraft which was operated by the holder of an airline licence.

Accordingly, the boy's claim for damages failed and thereafter his new solicitors pursued a claim for damages for professional negligence against the original solicitors.

In November 2001 the boy’s mother was referred to see a consultant psychiatrist as she was presenting with anxiety and stress like symptoms. A psychiatrist diagnosed major depression, which in his view had as a substantial cause the distress and anxiety occasioned by the boy’s mother witnessing the aftermath of her son's hang gliding accident.

The mother attempted to pursue a claim for nervous shock against the gliding club and the pilot, both of whom maintained a complete denial of liability on the same basis – namely that the claim in question had a 2 year limitation period and accordingly any such claim ought to have been instituted on or prior to 10 April 1995.

Ultimately, the solicitor who had first seen the boy and his mother in 1993 was served with a letter of demand foreshadowing a claim against him for breach of his duty of care in failing to advise the boy's mother of the potential for her to pursue a claim for damages for nervous shock and of advising her of the appropriate time limit.

It was apparent that for whatever reason, the solicitor had not turned his mind to the potential for the mother to pursue a nervous shock claim. It was alleged he had failed to make appropriate enquiry with regard to the mother’s psychiatric wellbeing having regard to the unusual circumstances of the accident and in particular the fact that she was at the accident site and had observed the immediate aftermath.

**Could The Claims Have Been Avoided?**

This was not a standard personal injury claim. Had counsel, with appropriate expertise, been retained at the outset, the potential application for Civil Aviation (Carriers Liability) Act (Commonwealth) may have been identified.

The mother had witnessed the immediate aftermath of the accident – the circumstances of which would have been quite frightening. Appropriate questions ought to have been directed to the mother at the time of the first interview to ascertain whether there was any possibility that she may have sustained a psychiatric injury sufficient to found a claim for damages for nervous shock. The details of the conversation should have been documented and, if sufficiently canvassed, would have been a defence to any later allegation of inadequate advice.

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For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PI Risk Manager, Gianna Di Stefano on 8410 7677.