JAMES MALCOLM DUNPHY

PIRELLI OR SWIM

A case comment on Pirelli General Cable v. Oscar Faber and an examination of the law concerning the date on which a cause of action in tort accrues

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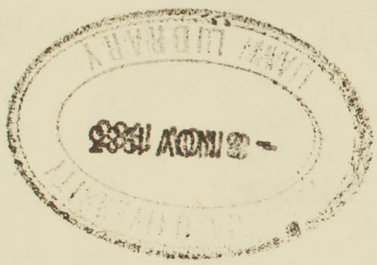


1. INTRODUCTION

The House of Lords decided in the case of Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1] that a cause of action in tort for negligence in the design or workmanship of a building accrued at the date when physical damage occurred to the building as a result of the defect, whether or not the damage could have been discovered with reasonable diligence at that date by the plaintiff. The object of this paper will be to examine the effect that this decision has had on the previous common law position. This will necessarily involve a discussion of the relevant English and New Zealand cases. Following this analysis, consideration will be given to the ways in which a court, seeking not to follow the Pirelli decision, might distinguish Pirelli or otherwise sidestep the decision. It is submitted that application of the reasoning in Pirelli will undoubtedly lead to unjust results in future cases and thus as a matter of principle the New Zealand courts should attempt to find a way around that decision.

A. Legislation

The legislation which applies is the Limitation Act 1950. The relevant provision is found in S.4(1) which provides that:

> The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:- (a) actions founded on simple contract or on tort ...

This provision is the same as S.2(1) of the English Limitation Act 1939. While this Act has now been repealed and replaced by the English Limitation Act 1980 the relevant provision remains substantially unchanged. The other relevant section is S.28 of the New Zealand Limitation Act 1950 (S.26 of the English Limitation Act 1980) which provides that in circumstances where fraud or mistake is involved:

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

Reference to "the Limitation Act" in the paper indicates that the passage is equally applicable to each of the New Zealand Limitation Act 1950, the English Limiation Act 1939 and the English Limitation Act 1980.

B. The Decision in Pirelli

The defendants in Pirelli were a firm of consulting engineers which negligently designed a chimney to be built at the plaintiffs' works. The chimney was built during June and July 1969. The trial judge decided that cracks must have occurred in the top of the chimney by April 1970. The writ was issued in October 1978. The judge found further that the defendants had not established that the plaintiffs ought, with reasonable diligence to have discovered the damage six years before the writ was issued. Thus on the basis of the earlier decision in Sparham-Souter v. Town & Country Developments (Essex) Ltd [2] it was held by the trial judge that the cause of action had accrued within the six year limitation period.

The sole issue contested before the House of Lords was on the question of law as to the date at which a cause of action accrued. The result was that the cause of action accrued to the plaintiffs when cracks appeared in the top of the chimney. Therefore, the plaintiffs' cause of action was statute-barred as the writ had not been issued before April 1976.

C. General Principles

The following principles relevant to a negligence action have now become indisputable:

(1) In an action for damages for negligence there must be a tortious act committed by the defendant causing damage to be suffered by the plaintiff before a cause of action will accrue. [3]

(2) A cause of action accrues not at the date of the negligent act or omission but at the date when damage is sustained by the plaintiff. [4]

(3) A cause of action cannot accrue unless there is a person in existence capable of suing and another person in existence who can be sued. [5]

(4) Where an act is actionable only on proof of actual damage, successive actions will lie for each successive and distinct accrual of damage. [6]

D. Area of Dispute

Disputes most frequently arise when a latent defect exists in a building owned by the plaintiff. In most cases the plaintiff is unaware of this defect until such time as the defect causes some observable structural damage. At this stage the plaintiff will sue the defendant who will set up as a defence S.4(1)(a) of the New Zealand Limitation Act 1950. The outcome will depend upon the selection of the date upon which damage occurred sufficient to give rise to the cause of action. In selecting this date the courts have had to consider the following questions:

(1) What damage is sufficient for time to begin to run under the Limitation Act?

(2) What is the relevance of the plaintiff's knowledge of the defect?

(3) Is the damage sufficiently distinct from earlier damage to give rise to a new cause of action?

Of these the second has caused the most debate.

II. THE ENGLISH CASES

A detailed examination of only three of the English cases decided prior to the decision in Pirelli will be made:

(i) Cartledge v. E. Jopling & Sons Ltd [7]

(ii) Sparham-Souter v. Town & Country Developments Essex Ltd [8]

(iii) Anns v. Merton London Borough [9]

A. Cartledge v. Jopling

The plaintiffs were workmen who were employed as steel dressers in the defendants' factory. Due to the failure of the defendants to provide adequate ventilation, the workmen contracted pneumoconiosis which is a disease caused by the inhalation of noxious dust. The evidence established that those who were suffering from the disease would have suffered substantial injury before it could have been discovered by any means known to medical science. The workmen were unable to establish any breaches of statutory duty by the defendant company making any material contribution to their injuries in the six years prior to the issue of their writs. In an attempt to get around a strict application of S.2(a) of the English Limitation Act 1939 counsel for the plaintiffs advanced three main arguments:

(1) injury to the workmen must be taken to have first occurred when the man first became aware of his disease since a man who does not feel any symptoms or have any knowledge of his physical disease has suffered no injury;

(2) even if a cause of action accrued when the unknown injury was done to the lungs, a fresh cause of action accrued when the damage was

discovered;

(3) in case of injury by such insidious diseases as pneumoconiosis the courts should import into the words of the Limitation Act 1939 a gloss that the cause of action does not accrue, or time does not begin to run, until such time as the plaintiff knows, or ought to have known, that he has suffered injury.

The House of Lords unanimously rejected the plaintiffs' arguments and held that their claims were statute-barred.

In rejecting counsel's first argument Lord Pearce observed that:

> And in no case is it laid down that hidden physical injury of which a man is ignorant cannot, by reason of his ignorance, constitute damage. [10]

Acceptance of counsel's second argument would, according to Lord Pearce, have entailed acceptance of the proposition that a fresh cause of action accrued as soon as the results of the x-ray photographs became known. Lord Pearce rejected this submission as absurd.

The most significant aspect of the decision was the unanimous agreement amongst the Law Lords that they were unable to read into the words of S.2(a) the gloss for which counsel had contended. The reason for this was the plain implication to be drawn from S.26 of the Act. That section expressly states that in cases involving fraud the state of the plaintiff's knowledge concerning his available cause of action affects the date of accrual of the cause of action. Section 2(a) however makes no provision for the state of the plaintiff's knowledge to be taken into account. Thus it was decided that it would be contrary to the intention of Parliament to make the plaintiff's knowledge a relevant consideration when determining the date of the accrual of a cause of action under S.2(a).

It should be noted that in rejecting counsel's arguments the House of Lords did not rely on the particular facts of the case. Neither the fact that the damage for which damages were claimed was personal injury, nor the fact that the damage was caused by the disease pneumoconiosis, was influential in denying the plaintiffs a remedy.

Each of the Law Lords in fact expressed a personal dissatisfaction with the state of law in view of its denial of a remedy to the plaintiffs in Cartledge. Lord Pearce in particular called for Parliament to rectify this situation. Parliament did so by passing later that year the Limitation Act 1963.

B. The Limitation Act 1963

Lord Fraser in Pirelli summed up the effect of this Act as follows:

> It extended the time limit for raising of actions for damages where material facts of a decisive character were outside the knowledge of the plaintiff until after the action would normally have been time-barred, but it applied only to actions for damages consisting of or including personal injuries. [11]

Counsel have used this Act to develop an argument that the English Parliament intended to leave the law in respect of negligent damage to property unchanged from the position as it was laid down in Cartledge v. Jopling. The argument was that the Limitation Act 1963 made the state of the plaintiff's knowledge regarding the damage he had suffered a relevant consideration only where the damage was in the nature of personal injury. The 1963 Act was not concerned with damage in which personal injury was not involved. Thus the implication to be drawn is that Parliament deliberately left the law unchanged in respect of property damage.

No corresponding amendment has been made to the N.Z. Limitation Act 1950. Reference to the significance of this fact will be made later in this paper [12] but one point requires mention at this stage. In N.Z. no claims may be brought for compensatory damages for personal injury in a negligence action by virtue of S.5(1) of the Accident Compensation Act 1972.

C. Sparham-Souter v. Town Developments

This was an action brought by the plaintiffs who were the owners of two houses which had become uninhabitable. The first defendants were the developers of a new housing estate in Essex. The second defendants were the local council.

The Court of Appeal was asked to decide a preliminary issue expressed in the order of the trial judge as follows: 'Whether the plaintiffs' cause of action was brought within six years from the date on which the cause of action accrued.'

The relevant facts of the case were as follows: in October 1964 the council granted planning permission to the developers and passed the developers' plans subject to the builders complying with the building by-laws. In May 1965 work was started on the two houses. In December 1965 the Council certified the legality of the work carried out under the building by-laws. In November 1965 and January 1966 the conveyances were completed to the purchasers. Two or three years later several cracks appeared in the brickwork of the houses and they eventually became uninhabitable. The alleged cause of this damage was that the foundations were inadequate to support the houses. The plaintiffs alleged that this was due to, firstly, the negligent

construction of the builders and secondly, the negligence of the council inspector in passing the work as satisfactory when he ought not to have done so. In October 1972 the plaintiffs issued a writ for damages.

There are three aspects of the decision which I wish to examine:

(1) When damage occurred

(2) When the cause of action accrued

(3) The assignability of causes of action

(1) Damage

The area of enquiry under this heading can be divided into two questions:

(i) What is meant by "damage" in the context of the principle that a cause of action accrues not at the date of the negligent act or omission but at the date when damage is sustained by the plaintiff?

(ii) When does this damage first occur?

Let us consider the first of the above questions. The damage which the plaintiffs in Sparham-Souter alleged that they had suffered was the diminution in the value of the houses and/or the cost of repairing the defects which had become apparent. Lord Denning did not regard the purchasers of a house with defective foundations as having suffered damage simply due to the fact that the house they had bought had such a defect. Roskill and Geoffrey Lane LJJ agreed with Lord Denning's view that the purcha-

sers might resell the house at a full price and consequently suffer no damage.

All the judges agreed also upon when it was that damage occurred - "when the faults emerged", [13] "when the defective state of the property first appeared" [14] or "when the house sank and the cracks appeared" [15]

It should be noted that in answering the question : 'has damage been suffered?' - the focus is not upon when the building suffers damage but when the plaintiff suffers damage. This point was made expressly by Geoffrey Lane LJ while commenting upon the decision of Mars-Jones J in Higgins v. Arfen Borough Council [16] when he (Geoffrey Lane LJ) says:

> It seems to me that he [Mars-Jones J] fails to distinguish between damage to the building and damage to the plaintiff. (my emphasis) [17]

This approach is common to both of the other judgments.

Thus, all three judges in Sparham-Souter agreed upon the following points:

(1) that the mere existence of a defect does not consitute damage. The reason is that the house may be resold at no financial loss.

(2) damage will be said to have occurred when the defective state of the property appears.

(3) the question of whether damage has occurred is to be framed in terms of : 'Has the plaintiff suffered damage?'

(ii) When does the damage first occur? Both Roskill and Geoffrey Lane LJJ agreed that the earliest moment at which a plaintiff in the position of a first (or subsequent purchaser) could be said to have suffered damage was when he acquired an interest in the defective property. Both judges stressed that it was not necessarily at this date that the plaintiff suffered damage because the defects may only manifest themselves later.

Both Lord Denning and Geoffrey Lane LJ determined the date on which damage was suffered by the plaintiffs in Sparham-Souter differently from the manner in which the same date was determined in Cartledge v. Jopling.

Lord Denning simply asserted that in Cartledge v. Jopling

> the damage to the man was in fact done when the dust was inhaled - even though it was not discovered till later. Here there was no damage to any purchaser of the house until it began to sink and cracks appeared. [18]

Geoffrey Lane LJ agreed with these comments of Lord Denning and added that the feature distinguishing a case of unobservable physical injury from a case of an unobservable defect in a house was that in the latter case the plaintiff could get rid of his house before any damage was suffered, while in the former case the plaintiff could not get rid of his body before it could be said that he had suffered damage.

(2) When the Cause of Action Accrues

Lord Denning and Geoffrey Lane LJ both saw the plaintiff's knowledge of the damage as a relevant consideration in determining when the cause of action accrued. Roskill LJ however made no

reference to this point. It will be sufficient to state the conclusion of Lord Denning only as the conclusion reached by Geoffrey Lane LJ was substantially the same. Lord Denning expressed his conclusion as follows:

> I have come to the conclusion that when building work is badly done - and covered up - the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it. [19]

This conclusion is clear and does not require elucidation but the question which must be asked is how it relates to the decision of the House of Lords in Cartledge v. Jopling.

It has already been noted that Cartledge v. Jopling held that the state of the plaintiff's knowledge concerning the damage suffered by him could not affect the date on which the cause of action accrued due to the plain implications to be drawn from S.26 of the English Limitation Act 1939. On the other hand in Sparham-Souter it was held by 2 of the 3 members of the court that the cause of action would not accrue until the plaintiff knew or ought to have known that he had a cause of action.

In reaching this result neither Lord Denning nor Geoffrey Lane LJ referred to the contextual argument upon which the House of Lords in Cartledge reached its conclusion on this point. Nevertheless both judges (as did Roskill LJ) quoted the passage in Lord Reid's speech in Cartledge where he commented upon the harshness and unreasonableness of the result that the Law Lords felt forced to reach. The conclusion to which one is inevitably drawn is that the Court of Appeal was making a covert departure from the deci-

sion in Cartledge. This might explain why no reference was made to the contextual argument advanced in Cartledge. Distinguishing Cartledge from Sparham-Souter on its facts would not affect the binding nature of this contextual argument because the argument proceeded independently from the particular facts of the case.

(3) Assignment of the Cause of Action

Lord Denning and Roskill LJ expressed apparently contradictory views on this point. Lord Denning's view was that:

> the only owner who has a cause of action is the owner in whose time the damage appears. He alone can sue for it unless, of course, he sells the house with its defects and assigns the cause of action to his purchaser. [20]

Roskill LJ advanced the following opinion:

> There is no assignment of any pre-existing cause of action in tort in the plaintiffs' favour from their predecessors in title. Nor do I understand how, as this argument presupposed, there can be some inchoate or floating cause of action in tort existing in vacuo which can suddenly enure to the plaintiff's benefit upon their acquisition of a legal or equitable title to the property in question. Furthermore, the present plaintiffs have clearly not acquired such a benefit by contract or by statute, and I fail to see upon what principle they can be said to have acquired it by operation of law. [21]

Thus, Lord Denning suggested that a cause of action in tort is assignable whereas Roskill LJ clearly rejected the argument that the cause of action came with the property. Can the views be reconciled? Roskill LJ implies that a cause of action in tort may be acquired by contract but clearly the contract must be more than a simple contract for the sale of the property, as the cause of action in Sparham-Souter, according to Roskill LJ, did not

simply come with the property. Lord Denning however does not expressly indicate what, if anything, besides the sale of the house is required to assign the cause of action.

The problem of whether the plaintiffs in Sparham-Souter were in fact assigned their causes of action did not arise on the facts of the case. The plaintiffs were the original purchasers of the house so it was difficult to envisage exactly how a cause of action in respect of the damage they suffered could have accrued prior to their purchase.

The question of assignment of the cause of action is however an important one. If, as Lord Denning indicates, an owner can sue only for that damage which occurs during his ownership, a valid assignment of the cause of action to a successive owner would provide an exception to this rule. If a cause of action does not simply come with the property, what more is required? The answer does not appear from the judgments in Sparham-Souter but Roskill LJ does not imply that a cause of action may be assignable by contract.

One additional point requires mention at this stage. It has already been noted that Geoffrey Lane and Roskill LJJ decided that the earliest moment at which a plaintiff in the position of a first or subsequent purchaser could be said to suffer damage was when he acquired an interest in the defective property. Consider the situation where damage occurs in 1980 during the ownership of A, who without suing the negligent builder, sells to B in 1985. If B sues the builder between 1986 and 1991 will she be precluded from recovering damages by S.4(1) of the N.Z. Limitation Act 1950?

Applying the approach of Roskill LJ (and Geoffrey Lane LJ) in Sparham-Souter the answer will be that B will not be precluded by the Limitation Act. The reasoning would be that while a cause of action accrued to A in 1980, six years had not run before the house was sold to B. A's cause of action is not assignable to B and as the earliest moment at which B suffered damage was in 1985, B's cause of action cannot be statute-barred before 1991. Would Lord Denning's approach lead to the same result? There are apparently two possible answers. A's cause of action was assigned to B, and thus B's cause of action would be statute-barred after 1986. Alternatively, B's cause of action does not accrue until she discovers the damage, or, ought with reasonable diligence to have discovered it. On this basis B's cause of action did not accrue before 1985. Probably Lord Denning would prefer the second alternative because he was obviously intent upon avoiding a result which would render a plaintiff's cause of action statute-barred before the plaintiff was even aware that he had a cause of action.

D. Anns v. Merton London Borough [22]

This was another case of damage to a building caused by a latent defect. The plaintiffs were lessees of flats in a two storey block which had been constructed upon inadequate foundations.

The block was completed in 1962 following which long leases were granted. In 1970 structural movements began to occur in the building and these resulted in cracks in the walls and sloping of floors. The defendants were the local council. The major issue in the case was whether the defendants owed a duty to the plaintiffs, and the limitation question was dealt with only briefly.

Lord Wilberforce, with whom 3 other members of the court concurred, agreed with the decision of the Court of Appeal in Sparham-Souter at least in as far as ...

> it abjured the view that the cause of action arose immediately upon delivery, i.e., conveyance of the defective house. [22]

Clearly then an original purchaser's cause of action could not accrue before he acquired an interest in the house. It is also evident that Lord Wilberforce agreed that the plaintiff would not suffer damage due simply to the fact that the house he had bought had a latent defect.

Lord Wilberforce, observed further that the cause of action -

> can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it. [23]

It is clear that the damage which had to be present before the cause of action would accrue was related to the statutory duty which the defendant council had to perform under the Public Health Act 1936. Thus the mere appearance of cracks would not be sufficient damage to give rise to a cause of action against the council unless the cracks were, or should have been, indicative of some danger to the health or safety of the inhabitants.

The inference which may be drawn from this is that according to Lord Wilberforce the damage which has to be present before the cause of action will accrue must be indicative of the duty which has been breached.

The Court of Appeal in Sparham-Souter agreed that damage occurred when the defective state of the property appeared. There was no requirement that the damage had to indicate the nature of the duty which the

second defendants (the local council) had breached before the damage would be sufficient to give rise to a cause of action. Lord Wilberforce's standard for the damage which must be present before the cause of action may accrue is therefore more favourable to the plaintiff, at least in theory, than the standard set by the Court of Appeal. In practice however once damage manifests itself, if it is sufficient to indicate the defective state of the property it will also indicate a breach of duty.

Lord Salmon in Anns was also content to follow the decision in Sparham-Souter that the cause of action in negligence accrued as soon as damage was sustained as a result of the negligence. He did indicate however, that the cause of action might accrue before the damage was detected but stated that:

> since in fact no damage manifested itself until February 1970 it may be very difficult to prove that damage had in fact occurred four years previously. [24]

Clearly then Lord Salmon thought that something more than the existence of a defect was necessary before the cause of action could accrue. Lord Salmon agreed with Lord Wilberforce that the damage had to be such as to endanger the safety of its occupants or visitors, before the cause of action would accrue.

Neither Lord Wilberforce nor Lord Salmon referred to the view advanced by Lord Denning and Geoffrey Lane LJ that the cause of action could not accrue before the plaintiff knew, or ought to have known of the existence of the damage. Lord Salmon did observe however that damage could have occurred four years before it was detected; and in spite of the fact that the damage was undetected the statute could still begin to run from the date of the damage. Clearly this is incompatible

with what was said in Sparham-Souter as there it was held that the plaintiff's knowledge of the damage could affect the date on which the cause of action accrued.

Thus it is unlikely that the House of Lords in Anns adopted the whole of the reasoning in Sparham-Souter as being sound and good law. It adopted at least part of the reasoning but it is submitted that the House of Lords did not adopt the Court of Appeal's decision in Sparham-Souter that the cause of action cannot accrue before the plaintiff knows, or ought to know of, the existence of the damage.

E. Summary of the English Position Prior to Pirelli

The House of Lords in Cartledge v. Jopling had reluctantly decided that the plaintiff's knowledge of the damage which he had suffered could not affect the date on which the cause of action accrued. To allow the plaintiff's knowledge to be a relevant consideration under S.2(a) of the English Limitation Act 1939 would be contrary to the rules of statutory interpretation due to the plain implications to be drawn from S.26 of the same Act.

The Court of Appeal in Sparham-Souter covertly departed from the decision of the House of Lords in Cartledge and made it easier for a plaintiff to succeed on the limitation issue. Firstly, the plaintiff could not be said to have suffered damage before he acquired an interest in the property. Secondly, damage could not occur before the defective state of the property appeared. Thirdly, the plaintiff's cause of action would not accrue until the plaintiff was, or ought to have been, aware of the damage.

The decision in Sparham-Souter was followed in subsequent cases and its reasoning was partly adopted by the House of Lords in Anns while

dealing with the limitation question as a secondary issue.

The effect of the Court of Appeal's decision was that a cause of action might be postponed indefinitely but this was seen as preferable to the alternative which was that a plaintiff's cause of action might be statute-barred even before he was aware that he had a cause of action. There were however problems with the Sparham-Souter approach. How could a subsequent purchaser bring a claim on the basis of damage which had occurred during the ownership of his predecessor in title, if that subsequent damage was not distinct from the earlier damage? Only Lord Denning was prepared to hold that the cause of action was assignable. This is however contrary to the general rule that a cause of action in tort is not assignable.[25]

Lord Wilberforce in Anns offered an alternative formulation of the type of damage which had to be present before the cause of action could accrue. The damage had to be such that there was present or imminent danger to the health or safety of the occupants. Clearly the damage which had to be present was related to the statutory duty which the defendant council was bound to discharge. Under this formulation it was possible that the date on which it could be said that damage had occurred sufficient for time to begin to run under the Limitation Act could be later than the date on which the defective state of the property appeared.

There was no support in Anns for the argument that the cause of action could not accrue before the discoverability date - that is when the plaintiff was, or ought to have been aware of the damage.

III. THE NEW ZEALAND POSITION

There are two decisions of the Court of Appeal which require examination: Bowen v. Paramount Builders [26] and Johnson v. Mt. Albert Borough [27].

A. Bowen v. Paramount Builders

This was an action brought by the owner of a house against the builders who also brought a Mr McKay, the original owner of the house, into the proceedings as a third party. The house had been built on a sub-foundation of peat for which inadequate foundations were used. When the construction was nearing completion Mr McKay noticed that some bricks had cracked in one of the exterior side walls. There was also evidence of further defects in the house: (i) the ridge of the roof had dropped about ½ an inch at its middle point; (ii) there was a fall of approximately 2½ inches at the centre dividing internal wall. The builders erected a carport to cover up the cracks in the side wall. McKay was however unhappy with the state of the flats and before completion sold them to the plaintiffs. The plaintiffs took possession in June 1969. Within three or four months doors started jamming but it was not until early in 1970 that the plaintiffs realised that something was seriously wrong. Late in 1970 the writs were issued.

The limitation question was discussed by one member only of the Court of Appeal as the major issues in the case concerned questions of duty and breach. Richmond P stated that:

> I accept the view arrived at in Sparham-Souter v. Town and Country Developments (Essex) Ltd that, in a situation like the present, the damage does not occur at the time

> when the builder negligently erects a house on inadequate foundations and sub-foundations. It occurs when the negligence of the builder results in actual structural damage to the building which is more than minimal. [28]

How much of the Sparham-Souter reasoning does Richmond P actually adopt? Clearly he agrees that the mere existence of the defect does not mean that damage has occurred. Richmond P refers to "actual structural damage" as the requisite damage to give rise to the cause of action. This formulation appears to be consistent with the view of the English Court of Appeal that there has to be some manifestation of the defect before it may be said that the plaintiff has suffered damage.

No reference is made by Richmond P to the argument adopted by Lord Denning and Geoffrey Lane LJ that the plaintiff's cause of action would not accrue until he was, or ought to have been, aware of the damage. Richmond P did however advance his opinion concerning the relevance of the plaintiff's knowledge:

> There may be difficulty in accepting the mere discovery of a latent defect as itself amounting to damage. If, however, a purchaser by some means discovered the defect after he had purchased the building then it would seem reasonable that he should at least be able to sue for the cost of repairs actually incurred to prevent threatened damage. [29]

It is important to note that the emphasis is on the plaintiff's knowledge of the defect rather than the plaintiff's knowledge of the damage. According to Richmond P knowledge of the defect will not result in the accrual of the cause of action as damage (a component part of the cause of action) has not occurred. In spite of this, in his view, the plaintiff will be able to sue to recover the cost of repairs actually incurred in preventing the threatened damage. This seems anomalous as it seems that a plaintiff will be able to recover

damages even before the cause of action has accrued. Perhaps there is no anomaly if the money actually spent in preventing the threatened damage can be regarded as the damage necessary to complete the component parts of the plaintiff's cause of action.

The anomaly does arise from the judgment of Woodhouse J when he indicates that if a defect is discovered then the owner should be able to claim the sum needed to repair it "before the reparatory work is carried out". [30] There is a compelling policy reason to allow this result - an owner may find it financially impossible to effect the repairs without first obtaining the cost from the builder. The difficulty however is that allowing an owner to recover damages from a negligent builder before damage has been suffered would permit the owner to succeed in a cause of action lacking a component part (damage) of his cause of action.

The view of Cooke J on this point seems to be preferable to that of Woodhouse J. Cooke J preferred the view that once damage had been suffered the owner ought to be able to recover the cost of reasonably necessary remedial work whether already incurred or about to be incurred. [31] There is no difficulty involved in allowing the recovery of this future expense when damage has already occurred.

There is no indication in any of the judgments that the date of accrual of the cause of action would be delayed until the plaintiff was, or ought to have been, aware of the <u>damage</u>. On the other hand there is no rejection of the conclusion arrived at in <u>Sparham-Souter</u>.

1. <u>Causation</u>

Woodhouse J indicated that the state of the plaintiff's knowledge of the defect might be relevant in another way. He remarked

that:

> ... a purchaser who had such knowledge [of the defect] or a purchaser who ought reasonably to have obtained that knowledge by inspection could scarcely suggest that the builder was responsible for the trouble he had really brought upon himself. [32]

Thus where a purchaser fails to discover the defect, when it could reasonably be expected that he would discover the defect, his claim will be defeated upon proof by the defendant that this failure broke the chain of causation.

Richmond P also indicated that an intermediate examination by a purchaser might break the chain of causation and prevent the purchaser from subsequently recovering damages from the builder. The reason for the rule against assignment of tort actions is the prevention of causes of action from becoming a marketable commodity. [32A] The rule could be replaced by this intermediate examination doctrine, as once it is proved that the purchaser had knowledge of the defect the chain of causation would be broken as the effective cause of the purchaser's loss would be his purchase of the house knowing of the defect.

2. Classification of the Damage

Richmond P concluded that:

> In the present case the evidence shows that substantial damage occurred after the Bowens had purchased the building. It does not however, establish that more than minimal damage had occurred before they purchased. In those circumstances no question can arise as to the cause of action against Paramount having arisen prior to their purchase ... (my emphasis) [33]

It has already been noted that the evidence established that the following damage had occurred prior to the Bowens' purchase of the

house: (i) some bricks had cracked in one of the exterior side walls; (ii) the ridge of the roof had dropped about 1/2 an inch at its middle point; (iii) there was a fall of approximately 2 1/4 inches at the centre dividing internal wall. In spite of the existence of this damage, in particular the cracks in one of the exterior walls which were covered up by a carport, Richmond P was willing to classify the damage as insufficient for the cause of action to accrue. Arguably Richmond P was concerned that if he decided that more than minimal damage had occurred prior to the purchase of the house the plaintiffs would not have been able to establish a valid cause of action.

One way in which the harsh result which may be involved in determining when a cause of action has accrued, may be avoided is by classifying damage as either minimal or substantial. Clearly the damage which occurred prior to the Bowens' purchase fell outside the operation of the principle of de minimis non curat lex. [34] In subsequent cases the classification of damage as "minimal" and thus insufficient to give rise to a cause of action, may be used to reach a fair result by effectively postponing the date of accrual of the action to enable the plaintiff to succeed (if this would in fact be a just result).

Neither Woodhouse J nor Cooke J discussed the distinction drawn by Richmond P. Cooke J was prepared to hold however that the damage to the building was not continuous and that there was "a difference and an interval marked enough to justify treating the latter damage as distinct". [35] This statement was preceded by reference to the principle that where there is more than one instance of

damage, successive actions will only be possible when the later damage is distinct from the earlier damage.

Thus Bowen offers two alternatives to a plaintiff who is confronted by the statutory limitation of his cause of action. He may argue firstly that the initial manifestation of the defect was "minimal damage only and therefore insufficient to give rise to the cause of action". Alternatively, if the earlier damage was substantial it could be argued that the later damage was distinct from the earlier damage and gave rise to a new cause of action. Cooke J indicated that the determination of whether later damage was distinct from earlier damage was "a question of fact and degree". [36] Presumably also the classification of damage into minimal and substantial must also be a question of fact and degree. A fact and degree test provides the Court with a flexible tool with which to reach equitable results.

B. Mt Albert Borough v. Johnson

A building had been erected by Sydney (the second defendants) on land which was known to have been filled. The Council (the first defendants) inspected the foundations before the concrete was poured. In 1967 cracks appeared in the front concrete steps, the outside roughcast plaster and also in the ceiling of the lounge. Remedial work not going to the root of the problem (subsidence) was carried out. In 1970 the plaintiff bought the house. The condition of the house at this stage was "immaculate". Towards the end of 1970 slight cracks began to appear. These cracks became significantly worse and the general condition of the house deteriorated. The cracking which appeared in 1970 corresponded to some extent with the cracking in 1967

but the later cracking was significantly worse and more extensive. In 1973 the plaintiff issued the writ.

The outcome depended mainly upon whether the damage which occurred in 1970 could be regarded as distinct from the damage which occurred in 1967. The response of Cooke and Somers JJ, with whom Richardson J agreed on this point, was that the damage which occurred in 1970 was sufficiently distinct from the earlier damage to give rise to a new cause of action. As the judges indicated, the determination of whether damage is sufficiently distinct to result in a separate cause of action is a question of fact and degree. However, the following factors were considered as significant: (i) there was no evidence of further subsidence between 1967 and 1970; (ii) there was an interval between the initial and subsequent damage; (ii) the damage which occurred in 1970 was more serious than the earlier damage.

Thus the possibility for categorisation of damage as distinct from earlier damage suggested by Cooke J in Bowen was repeated by the same judge in conjuction with Somers J in Johnson to ensure that the plaintiff was not denied a remedy by virtue of the fact that the original damage had not occurred during the course of her ownership.

The dicta of the Court of Appeal must also be considered. Cooke and Somers JJ observed that:

> Such a cause of action must arise, we think, either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution. [37]

Cited as authority for this statement were, inter alia, Lord Reid in Cartledge v. Joping, Lord Wilberforce in Anns and Geoffrey Lane LJ in Sparham-Souter. On the basis of the above statement it is submitted

that it is unlikely that the New Zealand Court of Appeal would hold that a cause of action accrued while damage was unable to be detected. The reason is that the words "apparent or manifest" indicate that the damage must be detectable before the cause of action will accrue. On the other hand the fact that the damage did go undetected would not prevent the cause of action from accruing if the damage were detectable. The reason is that in neither of the judgments in Johnson is approval given to the decision in Sparham-Souter that a cause of action could not accrue before the damage was, or ought to have been detected.

1. Assignment of the Cause of Action

All the members of the Court of Appeal agreed that Miss Johnson could sue only for damage which had occurred during her ownership as there was in this case no assignment of the cause of action to the plaintiff. It must be remembered that it was not argued for the plaintiff that any cause of action was assigned to her because a claim for the 1967 damage was already time-barred. Richardson J expressed his opinion as follows:

> And, except where an existing right of action is assigned to a purchaser, he can sue only in respect of damage which occurs during the period of his ownership or occupation. [38]

There are two possible interpretations of these statements made by the Court of Appeal. Firstly this situation is not one which provides an exception to the general rule that a cause of action is not assignable. Secondly, the cause of action was here assignable but was in fact not assigned. The second alternative offends the basic rule that causes of action are not assignable and there is little authority to support such an exception. But

the latter explanation appears to be more logical particularly when it is remembered that Lord Denning in Sparham-Souter suggested that a cause of action in tort might be assignable.

2. The Nature of the Damage

The question of whether the dicta in Anns were applicable to the facts of Johnson was tentatively approached by Somers and Cooke JJ. Anns decided that the cause of action would accrue only when the state of the building was such that there was present or imminent danger to the health and safety of the occupants. This conclusion was linked to the duties which the council was bound to discharge under the Public Health Act. Cooke and Somers JJ stated in deference to this conclusion in Anns that :

> if (contrary to the view that we prefer) imminent danger to personal safety were essential, the separation of the outside steps from the house and the sloping of the floor would no doubt satisfy such a test. [39]

It is unclear from the judgments in Johnson under which statute the Mt. Albert Borough Council was operating when it issued the building permit to Sydney and subsequently inspected the adequacy of the foundations. It is submitted that if the purposes of the Act from which the council in Johnson derived its powers to issue building permits were similar to the purposes of the English Public Health Act 1936, the view that the damage had to present imminent danger to personal safety before the cause of action would accrue, would be correct. The reason is that damage causing imminent danger to the personal safety of the occupants of the building would then indicate a breach of the Council's statutory duty.

C. Summary of the New Zealand Position Prior to Pirelli

The Court of Appeal has approved parts only of the decision in Sparham-Souter. Clearly it has adopted the view that a plaintiff has not suffered damage simply from the fact that he is the owner of a defective property. There must be some damage caused by the defect before the owner's cause of action will be complete. According to Bowen this will be when "actual structural damage" occurs which is more than minimal. According to Johnson the requisite damage will have occurred when "the defect becomes apparent or manifest". Both cases are in agreement that the damage must be observable but need not be actually observed before time will begin to run under the Limitation Act 1950. The above formulation in Johnson seems more favourable to a prospective plaintiff than the formualation in Bowen. Under Johnson the damage, in addition to being actual structural damage must indicate the existence of the defect before the cause of action will accrue. Under Bowen the damage need only be caused by the defect before time will begin to run.

In neither case was it held (as it was in Sparham-Souter) that the date on which the cause of action accrued would be delayed until the plaintiff knew, or ought to have been aware of, the damage.

Is there any support for Lord Denning's view that a cause of action in tort is assignable? Richmond P in Bowen quoted the passage from Sparham-Souter where Lord Denning expressed his opinion on this point. Richmond P thought that even if a cause of action were assignable the plaintiffs' claim could be defeated on the basis that his conduct in buying a house with the knowledge of the defects broke the chain of causation. Richardson J in Johnson indicated that an assignment of a

cause of action could create an exception to the general rule that a plaintiff may recover for the damage which has occurred during his ownership only. However, no suggestion was offered as to how a cause of action could be assigned. Thus, there was some support for Lord Denning's view that a cause of action is assignable but little help to determine how the assignment could be made.

It is unclear what impact Anns has had in New Zealand in respect of its decision that the cause of action in that case accrued when the state of the building was such that there was present ~~an~~ or imminent danger to the health and safety of its occupants. Cooke J in Johnson expressed the view that the cause of action in Johnson might have accrued at the time indicated by Anns but this opinion was offered as an alternative to the preferred view that the cause of action accrued when the defect became apparent or manifest. Richardson J in Johnson also stopped short of deciding whether the Anns test for when the cause of action accrued was applicable on the facts of Johnson.

There are however difficulties with the Court of Appeal's decision in Bowen, whereby a plaintiff if he discovers a defect may sue to recover the cost of repairing the defect before those expenses are actually incurred. The problem is that in this situation the plaintiff will in theory be able to succeed in a damages claim before all the component parts of his cause of action (no damage suffered) are present.

Thus, there appear to be three arguments available to a plaintiff who wishes to sue on the basis of damage he has suffered when damage has already occurred during the ownership of his predecessor in title. Firstly, he may argue that the previous owner assigned the cause of action to him. Secondly, he may argue on the basis of the distinction

drawn in Bowen that the earlier damage was minimal only and that substantial damage occurred during his ownership only. Thirdly, he may argue that the later damage was distinct from the earlier damage and that accordingly a new cause of action accrued at the date of this later damage. However, only the second two arguments would have the effect of giving the plaintiff more time in which to bring his action, as presumably if a cause of action is assigned the plaintiff will acquire his right of action subject to the time which has already run under the Limitation Act.

IV. PIRELLI GENERAL CABLE WORKS v. OSCAR FABER & PARTNERS [40]

A. The Decision

The defendants, a firm of consulting engineers, negligently designed a chimney which was to be built at the plaintiff's works. The chimney was built during June and July 1969. The trial judge found that cracks must have occurred in the top of the chimney by April 1970. The plaintiffs discovered the cracks in November 1977. The writs were issued in October 1978.

The trial judge held that the plaintiffs could not with reasonable diligence have discovered the damage before October 1972. Accordingly, on the basis of Sparham-Souter he decided that the cause of action had accrued within the six-year limitation period.

The sole issue contested before the House of Lords was on the question of law as to the date at which a cause of action accrued. The result was that the cause of action accrued when the cracks appeared in the top of the chimney. Thus the plaintiff's cause of action was statute-barred as the writ had not been issued by April 1976.

In the course of his speech Lord Fraser criticised three aspects of the decision of the Court of Appeal in Sparham-Souter:

(1) that there is a difference between the situation where the plaintiff's body, though unknown to him, has suffered some injury (as in Cartledge) and the situation where the plaintiff's house has a latent defect in the foundations

(ii) that a cause of action accrues only when the plaintiff is or ought to be aware of the damage

(iii) that the earliest moment at which time could begin to run against each successive owner of the defective property was when he bought or agreed to buy the property

1. The Question of Damage

Geoffrey Lane LJ thought that the distinction between a latent defect in a building (as in Sparham-Souter) and an unnoticed physical injury (as in Cartledge) was that in the former case the owner could resell the house at no financial loss whereas in the latter case he could not get rid of his body at no financial loss. Lord Fraser disagreed that there was such a distinction:

> Just as the owner of the house may sell the house before the damage is discovered, and may suffer no financial loss, so the man with the injured body may die before pneumoconiosis becomes apparent, and he also may suffer no financial loss. But in both cases they have a damaged article when, but for the defendant's negligence, they would have a sound one. [41]

In spite of finding that the Cartledge situation was analagous to the Sparham-Souter situation, Lord Fraser nevertheless decided that damage had not occurred before the cracks in the chimney came into existence. Thus the date when damage occurred was not the date when the chimney was negligently designed or constructed. Therefore the existence of the defect did not mean that damage had occurred. Clearly there must be some manifestation of the defect before damage will have occurred. In this respect at least the decision of the House of Lords agrees with the reasoning in Sparham-Souter.

Does the reasoning in Pirelli depart from the reasoning in Sparham-Souter on the question of when damage will be said to have occurred? Lord Fraser's conclusion was that :

> I would hold that the cause of action accrued in spring 1970 when damage, in the form of cracks near the top of the chimney, must have come into ~~evidence~~ existence. I avoid saying that 'cracks' appeared because that might seem to imply that they had been observed at that time. [42]

From this passage it is clear that a plaintiff's cause of action may arise, as it did in Pirelli, before the damage is observed. But Lord Fraser went further than this and held that the plaintiff's cause of action may accrue before the damage is even observable.

> The plaintiff's cause of action will not accrue until damage occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable. [43]

It is evident from the above passage that on the basis of Pirelli damage will be held to have occurred often well before it would be held to have occurred on the basis of either Sparham-Souter or Johnson.

In Sparham-Souter it was held that damage occurred when the cracks appeared and in Johnson the N.Z. Court of appeal preferred the view that damage occurred only when the defect became "apparent or manifest". Clearly on the basis of these two cases damage could not have occurred before the damage became observable. Therefore the cases are incompatible upon this point.

Pirelli can be seen as compatible with Cartledge upon this point. In Cartledge it was held that damage could have occurred regardless of the fact that the sufferer was unaware of his injury. Often in cases of pneumoconiosis the disease could not be detected for a number of years even with the aid of x-rays.

Nevertheless it was held in Cartledge that damage would have occurred in spite of the fact that it was even clinically unobservable.

2. When the Cause of Action Accrues

Lord Fraser rejected the discoverability date - that is the date when the plaintiff ought with reasonable diligence to have discovered the damage - as the date when the cause of action accrued. He concluded that there was no support in Anns for the view that the discoverability date was the date on which the cause of action accrued.

It is submitted that there has been no significant support for the view of Lord Denning and Geoffrey Lane LJ in Sparham-Souter that the cause of action could not accrue before the damage was, or ought to have been, discovered. The House of Lords in Anns did not adopt this approach, nor did the New Zealand Court of Appeal in Bowen or Johnson. The House of Lords in Cartledge expressly rejected this approach because of the plain implications it drew from S.26 of the English Limitation Act of 1939. In reaching its conclusion the Court of Appeal in Sparham-Souter was unable to distinguish Cartledge satisfactorily to enable it to reach its contrary view.

Thus the House of Lords in Pirelli was really only reaffirming its earlier view in Cartledge that the discoverability date could not be the date on which a cause of action accrued.

3. The Earliest Date of Accrual

Lord Fraser decided that the correct view on this point was not that expressed by Roskill and Geoffrey Lane LJJ in Sparham-Souter - that is that the earliest moment at which time could begin to run against each successive owner was when he bought, or agreed to buy, the defective property. Lord Fraser expressed his opinion as follows:

> I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title. [44]

B. Comment

Implicit in Lord Fraser's conclusion that time runs against not only the owner but also his successors in title is an acceptance by him of the view that a cause of action in tort is assigned upon sale of the property. Is there any basis for this view? According to Winfield & Jolowicz:

> It is a familiar rule in the law of assignment of choses in action that, while property can be lawfully assigned a bare right to litigate cannot. Consistently with this, a right of action in tort is not in general assignable .... It is obvious that if the rule were otherwise, speculation in lawsuits of an undesirable kind would be encouraged. [45]

Salmond and Heuston state a number of exceptions to this general rule. The rule does not apply to a case in which the assignee has any lawful interest in the subject matter sufficient to exclude the doctine of maintenance. [46] Cited as authority for this exception is Trendtex Trading v. Credit Suisse [47] where Lord Denning advocated that the law permit assignments of causes of action in tort provided the assignment is for good and sufficient consideration.

This helps to explain the contradictory views of the judges in Sparham-Souter. Whereas Roskill and Geoffrey Lane LJJ appeared to favour the general rule, Lord Denning was in the process of developing an exception to the rule. In Trendtex Trading Lord Denning seems to restate the rule by altering the presumption and adding a proviso - that the assignment must be for good and sufficient consideration. [48] Presumably if there is not sufficient consideration - for example if the price of the house is reduced due to the damage - the assignment will be ineffective. Alternatively, where a purchaser buys a house at a reduced price an argument might be made that there has been an intervening cause between the defendant's negligence and the loss of the plaintiff. But where there is an assignment by the previous owner of his cause of action the argument of intervening cause could not deny the plaintiff a remedy.

The comments made by Lord Denning in Trendtex Trading also explain the dictum of Richardson J in Johnson.

Allowing an assignment of a cause of action must provide an exception to the general rule that an owner may only recover for damage which has occurred during his ownership. But this exception must be justified if the reasoning in Pirelli is to be at all just. Consider the situation where undetected damage occurs during the ownership of A who then sells to B at a price which does not take into account the undiscovered damage. When B discovers the damage she ought to be able to recover for this loss in spite of the fact that under the Pirelli approach damage occurred during the ownership of A. Given that Pirelli rejects firstly that B's cause of action cannot have accrued prior to her purchase, and secondly that B's cause of action

accrued when she discovered, or ought to have discovered the damage, it would be grossly unfair if she was held not to have been assigned A's cause of action.

C. Effect of Pirelli

Pirelli has overruled the Court of Appeal decision in Sparham-Souter. Under Pirelli a cause of action will accrue when damage occurs "which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable". [49]

It is as yet unclear what the effect of Pirell has been on the New Zealand Court of Appeal decisions in Bowen and Johnson. Both cases offered different formulae for determining when a cause of action accrued. According to Bowen the cause of action will accrue when there is "actual structural damage which is more than minimal". The Court of Appeal in Johnson preferred the view that the cause of action could not arise before "the defect becomes apparent or manifest".

There are two questions which must be approached here:

(1) Is there any way in which Pirelli might be distinguished in New Zealand?

(2) Are there any ways in which a plaintiff might get around Pirelli?

(1) Can Pirelli be distinguished?

The Privy Council in de Lasala v de Lasala [50] decided that courts of jurisdictions which have a right of appeal to the Privy Council ought to consider themselves bound by House of Lords' decisions

when they are considering recent legislation identical to English legislation with the same history. While Pirelli was concerned with an interpretation of the English Limitation Act 1980, its New Zealand counterpart (the Limitation Act 1950) is not recent legislation. Thus on the basis of de Lasala, New Zealand courts need not consider themselves bound by Pirelli. On the other hand Pirelli is really concerned with determining what damage is sufficient for the cause of action to accrue. Thus Pirelli is a decision on the common law position rather than merely an interpretation of the English Limitation Act 1980. This would therefore lend support to the argument that New Zealand courts ought to follow Pirelli.

Pirelli also decides that a cause of action cannot accrue on the discoverability date. This decision was based on the contextual argument advanced in Cartledge that as the discoverability date was expressly made the date on which the cause of action accrued in cases of fraud only (S.26 of the English Limitation Act 1939) the discoverability date could not be the date on which a cause of action accrued under S.2(1) of the English Limitation Act 1939. Should the New Zealand courts consider themselves bound by this dictum in Pirelli? An argument could be made that the legislative histories of the English Limitation Act 1980 and the New Zealand Limitation Act 1950 are different and accordingly the New Zealand courts need not follow Pirelli on this point. The argument is that there is no New Zealand equivalent of the English Limitation Act 1963 which altered the limitation period where personal injury was involved only. The implication which may be drawn is that the 1963 Act made Parliament's intention clear in

respect of the appropriate limitation periods: as it left the limitation period unaltered in respect of damage to property from the position laid down in Cartledge it intended that the law should remain unchanged in respect of property damage. As there is no equivalent of the English Act of 1963 it is more difficult to deduce exactly what Parliament's intention was in New Zealand.

In support of an argument that the New Zealand courts should adopt the discoverability date as the date on which a cause of action accrues in respect of damage to property is the suggestion [51] that at the time the Limitation Acts were passed in both England and New Zealand, Parliament did not consider that damage could occur without a reasonable opportunity of discovering that damage. Thus Parliament's intention is far from being as clear as was suggested in Cartledge, and the situation is a suitable one for the discoverability date to be adopted under the auspices of S.5(j) of the Acts Interpretation Act 1924. The lack of support for the discoverability date as the appropriate date for the cause of action to accrue in any of Anns, Bowen or Johnson should not discourage the courts as in none of these cases did the question require consideration.

(2) Alternative arguments for the Plaintiff

There appear to be two arguments available to a plaintiff who is confronted by a bar to his action by the Limitation Act 1950. Firstly, he may invoke the minimal damage/substantial damage distinction put forward in Bowen. It might also be argued that later damage is distinct from earlier damage, based on Johnson and Bowen. If these arguments are accepted time will begin to

run (six years) from the date on which the substantial damage or the distinct damage occurred. As indicated in both Bowen and Johnson the determination of whether later damage is distinct from earlier damage is a question of fact and degree.

Presumably the question of whether damage at one stage is minimal or substantial must also be a question of fact and degree. It is worthy of reminder that Richmond P in Bowen adopted a somewhat flexible approach to decide whether damage fell into one or the other of these categories.

It should be noted that Richardson J in Johnson appeared to treat these two arguments as being merged. He observed that:

> If the later damage is treated as distinct, as I think it should be, there is no warrant for the view that more than minimal damage had occurred before the respondent purchased the property. [52]

But whether the two arguments are distinct or not is of no practical importance provided that the courts are prepared to recognise that where more serious damage similar to earlier damage occurs, that damage is distinct from the earlier damage.

D. A Remaining Problem

Assuming that Pirelli is adopted by the New Zealand courts, injustice may arise where the damage which occurs is continuous - that is the state of the property becomes progressively worse as opposed to a deterioration by stages as there was in Johnson. Unless the courts adopt a liberal approach to determining when damage is substantial or distinct, the cause of action will accrue at the earliest date of the damage which may render the plaintiff's action time-barred. If a

liberal approach is adopted, certainty in the law will be waived and litigation on questions of limitation may well increase. Clearly a more satisfactory approach to limitation questions would be to have it settled that a cause of action will accrue at the discoverability date - that is when the plaintiff is or ought to be aware of the damage. The policy underlying the Limitation Act 1950 is that plaintiffs are prevented from sleeping on their claims. [53] This objective could still be maintained by adopting the discoverability date as the date on which causes of action accrue.

V. CONCLUSION

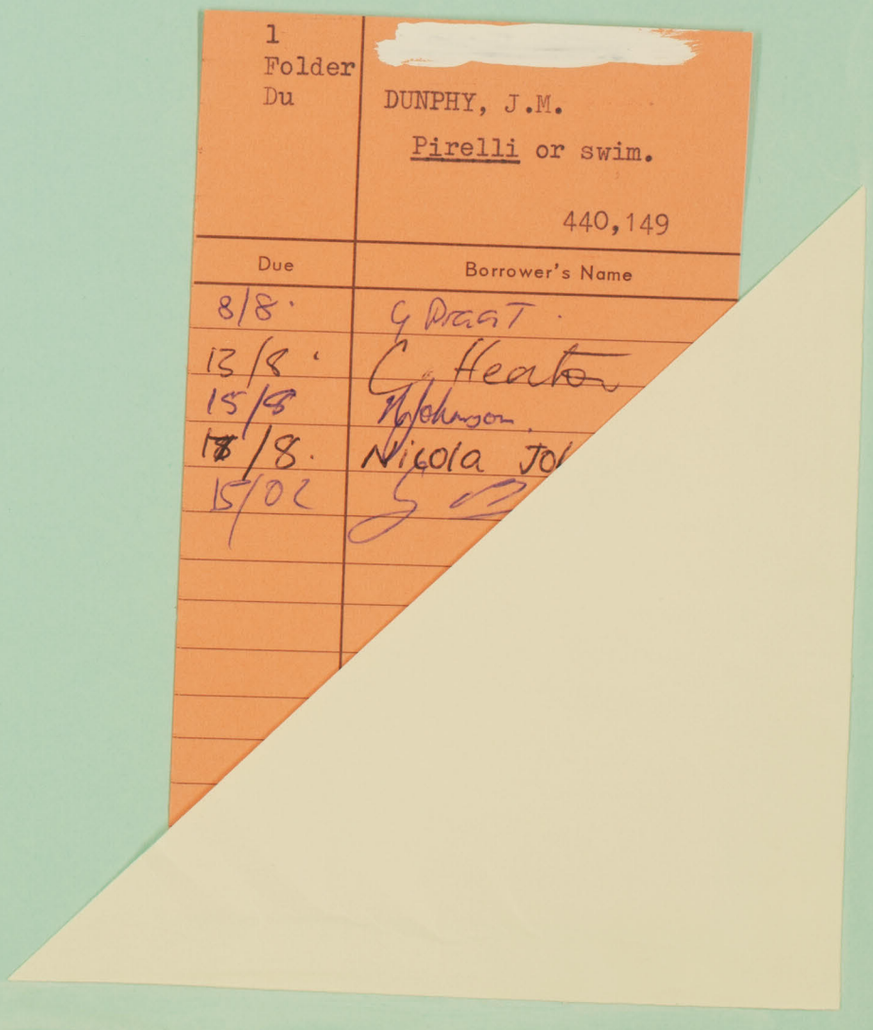
It is submitted that it will not be until the matter is brought before the New Zealand Court of Appeal that it may be predicted with any degree of certainty whether a plaintiff's cause of action arising in circumstances described in the preceding paragraph will be time-barred by S.4(1) of the Limitation Act 1950. It is to be hoped that Pirelli will not be followed and that the discoverability date will determine the date of accrual of a cause of action.

FOOTNOTES

1. [1983] 1 All E R 65
2. [1976] 1 Q.B. 858
3. Winfield & Jolowicz on Tort (11th Ed.) P66
4. Halsbury's Laws of England (4th Ed.) Vol. 28, para 623
5. Thomson v Lord Clanmorris [1900] 1 Ch. 718, 728-729
6. Salmond on Torts (16th Ed.) 607
7. [1963] A.C. 758
8. Supra n.2
9. [1977] 1 W.L.R. 1024
10. op. cit. n.7, 778
11. op. cit. n.1, 69
12. See p. 39
13. op. cit. n.2, 880
14. ibid, 875
15. ibid, 868
16. [1975] 1 W.L.R. 524
17. ibid, 880
18. supra n. 15
19. idem
20. idem
21. op. cit. n.2, 873
22. op. cit. n.9, 1039
23. idem.
24. idem.
25. Fleming, The Law of Torts (6th Ed.) 590
26. [1977] 1 N.Z.L.R. 394
27. [1979] 2 N.Z.L.R. 234
28. op. cit. n.26, 414
29. idem
30. op. cit. n.26, 418
31. ibid, 425
32. supra n.30

32A. See p.36

33. idem
34. The law takes no notice of trivialities.
35. op. cit. n.26, 424
36. idem
37. op. cit. n.27, 239
38. ibid, 242
39. supra n.37
40. supra n.1
41. op. cit. n.1, 70
42. ibid, 72
43. supra n.41
44. op. cit. n.1, 71
45. op. cit. n.3, 702
46. Salmond & Heuston Law of Torts (18th Ed.) 566
47. [1980] Q.B. 629
48. ibid. 657
49. supra n.41
50. [1980] A.C. 546
51. J. Allin - June [1983] N.Z.L.J. 165
52. op. cit. n.27 244
53. See James Wallace Proprietary v. William Cable Ltd 1980 CA 25/78 at 17.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