

**Tort and the Statute of Limitations
after *Pirelli***

by

Joseph Windmeyer*

Joint Winner of the Law Review Prize for 1985

I. INTRODUCTION

Negligence and negligent breach of statutory duty are not actionable *per se*: no cause of action arises unless and until the plaintiff suffers injury. Section 4 of the Limitation Act 1950 provides that an action founded on tort must be brought within six years of the date on which that cause of action accrued — that is, in an action founded on negligence, within six years of the plaintiff suffering “actual injury”. What then is “actual injury”? For an action founded on the negligent design or construction of a building there are at least three possible candidates:

- (i) creation of a latent defect;
- (ii) accrual of real (as opposed to minimal) physical damage; or
- (iii) discovery of such real damage.

If (iii) is accepted it follows that time will not begin to run against a plaintiff until the damage is discovered, or ought, with reasonable diligence, to have been discovered. This is the “discoverability test”. However in 1983 in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*¹ the House of Lords held unanimously that it was the accrual of real physical damage that constituted actual injury. Under this, the “*Pirelli* test”, time will begin to run against a plaintiff even before it is possible to discover any injury and therefore before it is possible to raise any cause of action.

In Section II of this paper the writer submits that *Pirelli* was rightly decided, not only on the ground of precedent but also under the rules of

* LLB(Hons), BCom.

¹ [1983] 2 AC 1.

statutory interpretation. The third section of this paper will consider the effect of *Pirelli* on the law of New Zealand. In a fourth and final section some related points will be addressed such as the position of successors in title under s4 of the Limitation Act 1950.

II. PIRELLI GENERAL CABLE WORKS LTD v OSCAR FABER & PARTNERS.

Oscar Faber & Partners, a firm of consulting engineers, were engaged by Pirelli General Cable Works Ltd to advise them in relation to the building of a new services block at their works. The new block included a chimney about 160 feet high which was designed and supplied by a nominated subcontractor who went into liquidation before the action was commenced.² The chimney was built during June and July 1969. It was found by his Honour Judge Stubb QC³ that physical damage, in the form of cracks at the top of the chimney, could not have occurred later than April 1970; but that Pirelli could not with reasonable diligence have discovered the damage before October 1972.⁴ The damage was actually discovered by Pirelli in November 1977 and eleven months later a writ was issued against Oscar Faber claiming damages for negligence in passing the design of the chimney. Oscar Faber were found to have been negligent in passing the design and his Honour held that because the damage could not reasonably have been discovered more than six years before the writ was issued, the action was not time barred.

From this decision Oscar Faber appealed first to the Court of Appeal, which also embraced the discoverability test, and subsequently to the House of Lords.

In the House of Lords Lord Fraser delivered the leading judgment.⁵ It was held that:

A cause of action in tort for negligence in the design or workmanship of a building accrues at the date when physical damage occurs to the building, e.g. by the formation of cracks, as a result of a defect, whether or not the damage could not have been discovered with reasonable diligence at that date by the plaintiff.⁶

It followed that Pirelli's claim was time-barred. Whereas the writ had not been issued until October 1978:

... 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 existence. I avoid saying that cracks 'appeared' because that might seem to imply that they had been observed at that time.⁷

The Lords acknowledged that the result was "unreasonable and contrary to principle"⁸ but held that the law was so firmly established that

² It was found that Oscar Faber had accepted responsibility for the design. This finding was not challenged on appeal.

³ Sitting as official referee.

⁴ A date selected; being six years before the issue of the writ.

⁵ The House consisted of: Lord Fraser of Tullybelton, Lord Scarman, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Templeman.

⁶ See headnote, *supra*, note 1 at 2.

⁷ *Supra*, note 1 at 19, *per* Lord Fraser.

⁸ *Ibid.*

only Parliament could alter it:

[t]he true way forward is not by departure from precedent but by amending legislation.⁹

The same point of statutory construction had come before the House for consideration in *Cartledge v E Jopling & Sons Ltd*,¹⁰ a case decided twenty years before *Pirelli*. Mr Cartledge was employed in the defendant's factory. Due to inadequate ventilation between 1939 and 1950, which amounted to a breach of ss4 and 47 of the Factories Act 1937 (UK), he contracted pneumoconiosis, an industrial disease which gave no indication of its presence during its early stages. On 1 October 1956 Mr Cartledge began an action against the defendant claiming damages for the injury he suffered as a result of the defendant's breach of statutory duty.

The trial judge found that Mr Cartledge contracted and so suffered damage from the disease prior to October 1950. However it was held that in the circumstances his conduct was neither "dilatatory nor unreasonable."¹¹

The House of Lords, in affirming the Court of Appeal, held that in a personal injury by negligence claim:

a cause of action [accrues] as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown and cannot be discovered by the sufferer.¹²

It was further held that only one action might be brought in respect of all damage from a personal injury, so that no new cause of action accrued when the plaintiff first became aware that he was suffering from the disease. In *Cartledge* the Lords felt the result to be "unreasonable and unjustifiable in principle",¹³ but held themselves to be bound by the existing case law in general and by the wording of the limitation provision in particular. Section 26 of the Limitation Act 1939 (UK) made special provision where fraud or mistake was involved: it provided that time did not begin to run until fraud was or could with reasonable diligence have been discovered:

The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered.¹⁴

Thus the decision in *Cartledge* was directly on point: counsel in *Pirelli* did not even attempt to confine the rule in *Cartledge* to cases of personal injury; and Lord Fraser made it clear that if they had, that argument would have failed:

. . . *Cartledge v Jopling* depended mainly on the necessary implication from section 26 of the [Limitation] Act of 1939, and section 26 is not limited to claims for personal in-

⁹ *Supra*, note 1 at 19, *per* Lord Scarman.

¹⁰ [1963] AC 758.

¹¹ *Ibid*, 761, *per* Lord Pearce.

¹² *Ibid*, 771-772, *per* Lord Reid.

¹³ *Ibid*, 772, *per* Lord Reid.

¹⁴ *Ibid*.

juries. Indeed, fraud or mistake are much more likely to be in issue where the plaintiff is claiming for damage to property than for personal injuries.¹⁵

Pirelli must therefore be viewed, not as establishing a new test under the Limitation Act, but as confirming a test stated by the House of Lords some twenty years previously.

One last legacy of *Cartledge* remains to be noted. When delivering judgment the Court of Appeal called for the law to be reformed.¹⁶ A committee was established to report on the limitation of personal injury actions. Within five months of the House of Lords' decision the Limitation Act 1939 (UK) was amended to extend the time limit in actions where material facts of a decisive character were outside the knowledge of the plaintiff. This extension applied, however, only to actions for personal injury. Lord Fraser saw this as significant in that it implied that the law was deliberately left unchanged by the United Kingdom Parliament in so far as it related to other causes of action.¹⁷

In the intervening period between *Cartledge* and *Pirelli* the English Court of Appeal had three opportunities to consider the question of limitation in an action founded on negligence. The Court opted for creation of the latent defect as amounting to actual injury in *Bagot v Stevens Scanlon & Co Ltd*¹⁸ and in the case which followed *Bagot, Dutton v Bognor Regis Urban District Council*;¹⁹ but in neither case was *Cartledge* cited. *Sparham-Souter v Town and Country Developments (Essex) Ltd*²⁰ was the third in this trilogy of cases. There the Court of Appeal recanted from its earlier view and held that where a house is built with inadequate foundations the cause of action does not accrue until such time as the plaintiff discovers, or ought, with reasonable diligence to have discovered, the damage caused by the inadequate foundations.²¹ Thus from the creation of the latent defect, the test least favourable to plaintiffs, the Court of Appeal moved to embrace the most favourable of tests, the discoverability test. But for the purposes of this paper, the most important aspect of the *Sparham-Souter* decision is the treatment that *Cartledge* suffered at the hands of their Lordships. Roskill LJ and Geoffrey Lane LJ distinguished *Cartledge* on the basis that *Cartledge* concerned a personal injury action rather than structural damage to a building.²² The distinction was that:

¹⁵ *Supra*, note 1 at 14, *per* Lord Fraser.

¹⁶ *Supra*, note 10 at 773, *per* Lord Reid; 774, *per* Lord Evershed; 776, *per* Lord Morris; 784, *per* Lord Pearce who noted that a committee had already reported on the case after the Court of Appeal drew its attention to it.

¹⁷ *Supra*, note 1 at 14.

¹⁸ [1966] 1 QB 197.

¹⁹ [1972] 1 QB 373.

²⁰ [1976] QB 858.

²¹ *Ibid*, 866, *per* Lord Denning MR; 875, *per* Roskill LJ; 880, *per* Geoffrey Lane LJ.

²² The third member of the court, Lord Denning MR, took Lord Reid's observation in *Cartledge*, that the decision therein was "unreasonable and unjustifiable in principle" (*supra*, note 10 at 772) as support for the discoverability test. It is respectfully submitted that the passage taken by Lord Denning MR from Lord Reid's judgment was quoted out of context.

. . . until the owner had discovered the defective state of the property he could resell it at a full price, and, if he did so, he would suffer no damage . . . There is no proper analogy between this situation and the type of situation exemplified in *Cartledge v E Jopling & Sons Ltd* . . . where a plaintiff due to the negligence of the defendants suffers physical bodily injury which at the outset and for many years thereafter may be clinically unobservable. In those circumstances clearly damage is done to the plaintiff and the cause of action accrues from the moment of the first injury albeit undetected and undetectable. That is not so where the negligence has caused unobservable damage not to the plaintiff's body but to his house. He can get rid of his house before any damage is suffered. Not so with his body.²³

Lord Fraser in *Pirelli* was content to dismiss the opinions in both *Bagot* and *Dutton* as obiter dicta, and the facts of each case clearly show they were. *Sparham-Souter* again obiter, received more serious consideration. His Lordship felt unable to accept the distinction drawn between personal injury and structural damage to buildings — because:

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 had a sound one.²⁴

It was argued by counsel for the plaintiffs that the discoverability test established in *Sparham-Souter*²⁵ was accepted by Lord Wilberforce in *Anns v Merton London Borough Council*.²⁶ There it was held that on the facts as pleaded the action was not time-barred because the cause of action only arose when the state of the building was such that there was present or imminent danger to the health or safety of the persons occupying the building. That case therefore turned primarily not on the appropriate limitation test but on the nature of the duty owed by councils under the Public Health Act 1936 (UK). Accordingly Lord Fraser emphasised that all observations made by the Lords on limitation in *Anns* had to be read in that light.²⁸ For example, when Lord Wilberforce expressly approved a passage in *Sparham-Souter* to the effect that the cause of action did not arise immediately upon conveyance of a house with a latent defect, it cannot be said that his Lordship was adopting the discoverability test.²⁹

In summary then, it is submitted that the decision in *Pirelli* was correct in terms of precedent; and the writer respectfully adopts the reasoning of their Lordships on the Limitation Act in *Cartledge*.³⁰ *Dove v*

²³ *Supra*, note 20 at 880, *per* Geoffrey Lane LJ.

²⁴ *Supra*, note 1 at 16, *per* Lord Fraser. See *Dennis v Charnwood Borough Council* [1983] QB 40 where Templeman LJ and Lawton LJ expressed similar views.

²⁵ *Supra*, note 20.

²⁶ [1978] AC 728.

²⁷ *Ibid*, 760, *per* Lord Wilberforce; 761, *per* Lords Diplock and Simon of Glaisdale; 770, *per* Lord Salmon; 771, *per* Lord Russell of Killowen.

²⁸ *Supra*, note 1 at 17.

²⁹ The position of councils in relation to s4 of the Limitation Act 1950 will be further considered in the following section of this paper.

³⁰ *Supra*, note 20.

Banhams Patent Locks Ltd,³¹ a decision of Hodgson J and the only reported English case on the point after *Pirelli*, indicates that it may sometimes be possible to reach a just and reasonable result even working within the strict confines of *Pirelli*. There the defendants, "burglary protection specialists", were instructed by the then owners of a building to carry out security work on that property. The plaintiff purchased this property in 1976. In 1979 the property was burgled after the burglar gained entry by forcing a gate which the defendants had negligently installed in 1967. The plaintiff brought an action for damages in negligence against the defendants for the value of the stolen property. The defendants contended that the cause of action arose when the work was carried out so that the proceedings were outside the limitation period. His Honour, who regarded *Pirelli* as "the leading case in this field of law",³² held that the action was not time-barred because the cause of action arose not at the time the faulty work was completed but when the fault first manifested itself: that is, when the gate gave way after the burglar applied force to it. The defective work was thus seen not as the damaging event but as a latent defect.

III. THE EFFECT OF PIRELLI IN NEW ZEALAND

In order to assess the impact of *Pirelli* on the law in New Zealand it will first be necessary to consider the position in this country under the Limitation Act at the time *Pirelli* was decided. Three cases in particular warrant consideration.³³ The first is *Gabolinscy v Hamilton City Corporation*³⁴ which was decided one year before the English Court of Appeal created the discoverability test in *Sparham-Souter*.³⁵ In this case the defendants, a council, filled land and eventually sub-divided it. The plaintiffs obtained a building permit in November 1959 and by July 1960 had erected a house. In July 1970 cracks appeared in the corner of the house caused by settlement of the land beneath. The plaintiffs sought to recoup the cost of repair in proceedings issued in 1972.

Moller J relied on a passage in *Salmond on Torts*³⁶ and *Charlesworth on Negligence*³⁷ which both cited *Cartledge* as authority for the proposition that:

In an action of negligence, the cause of action accrues at the time when the damage is actually caused, even though its consequences may not be apparent until later. As a general rule the dates of the damage and the negligence will be the same but circumstances can occur otherwise.³⁸

³¹ [1983] 1 WLR 1436.

³² *Ibid*, 1441.

³³ *Ferbert v Otago Hospital Board* High Court, Dunedin, 19 May 1983 (A62/80) will not be discussed as it adds nothing new — simply being an example of the approach advocated by Moller J in *Gabolinscy v Hamilton City Corporation* *infra*, note 34.

³⁴ [1975] 1 NZLR 150 (SC).

³⁵ *Supra*, note 20.

³⁶ Salmond, *Law of Torts* (16th ed) 1973 London, Sweet and Maxwell Ltd, 611–612.

³⁷ Charlesworth, *Negligence* (5th ed) 1971 London, Sweet and Maxwell Ltd, 683–638, para 1142.

³⁸ *Supra*, note 10.

His Honour held that:

the negligence of the council had ceased by about 1959 and, therefore, if the period of limitation were to run from the act causing the damage, the council's defence under the Limitation Act would succeed. But it seems to me that in this case the time begins to run from the date of the damage. . . .³⁹

The plaintiff's evidence established that the first real damage occurred within six years of the writ being issued. His Honour therefore held that the claim was not time-barred. Moller J declined to follow the obiter dicta of *Bagot*⁴⁰ and *Dutton*.⁴¹

The second case for consideration is *Bowen v Paramount Builders*,⁴² an appeal from a first instance decision of Speight J, which was decided in 1977 — after *Sparham-Souter*⁴³ but before *Pirelli*. The action was brought within the limitation period and the point directly in issue was whether a purchaser of a house was entitled to sue the builder for substantial damage to the house when there was evidence that minor damage had occurred before his purchase. However the issue of limitation was touched on in passing. Richmond P said:

I accept the view arrived at in *Sparham-Souter* . . . that . . . the damage does not occur at the time when the builder negligently erects a house on inadequate foundations. . . . It occurs when the negligence of the builder results in actual structural damage to the building which is more than minimal.⁴⁴

It is respectfully submitted that this statement is contradictory. Under the *Sparham-Souter* approach the cause of action accrues when the damage is discovered, or ought, with reasonable diligence to have been discovered, not when real damage accrues. The latter is the *Pirelli-Cartledge* test; the former is the discoverability test.

*Mt Albert Borough Council v Johnson*⁴⁵ was the last New Zealand case to consider the point before *Pirelli*. There Sydney, a development company, bought and developed land for sub-division. The company knew that the land had been "filled" and not adequately packed down. A number of flats were built but with inadequate foundations. The first defendant, the Mt Albert Borough Council, also knew that the land had been filled but issued the permit without imposing any additional conditions in respect of the foundations. Subsidence occurred causing considerable damage to a number of flats. The owners sued the council and the company. At first instance Mahon J found Sydney negligent in failing to construct adequate foundations. The council was also found to be negligent for failing to exercise reasonable care when issuing the building permit and in failing to observe the inadequacy of the foundations during its inspections. The proceedings were begun more than six

³⁹ *Supra*, note 34 at 159.

⁴⁰ *Supra*, note 18.

⁴¹ *Supra*, note 19.

⁴² [1977] 1 NZLR 394 [CA].

⁴³ *Supra*, note 20.

⁴⁴ *Supra*, note 42 at 414.

⁴⁵ [1979] 2 NZLR 234 [CA].

years after completion of the flats but less than six years after the defects had first become apparent and only three years after the plaintiff had bought her flat.

On the question of limitation Mahon J said at first instance:

In my view, the "damage" in cases of this kind occurs when the hidden defect comes into existence, and the combination of negligence and the creation of the defect results in the accrual of the cause of action in terms of the Limitation Act.⁴⁶

That is, Mahon J's personal preference was for the latent defect approach of *Bagot* and *Dutton*. However the learned Judge concluded that the persuasive authority of *Sparham-Souter* required him to adopt the discoverability approach "irrespective of [his] own opinion of the point."⁴⁷ The case was taken on appeal where the major issue, as in *Anns*,⁴⁸ was the nature of the duty owed by councils. From the rather perfunctory comments on limitation, it seems that Cooke and Somers JJ would have preferred the more "reasonable" discoverability test:

. . . a cause of action must arise . . . either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution.⁴⁹

Richardson J interpreted the equivocal approval of *Sparham-Souter* in *Bowen v Paramount Builders* noted above as support for the *Pirelli-Cartledge* test:

where the occurrence of damage is an essential ingredient, a cause of action does not arise until there is real or material damage as distinct from minimal harm.⁵⁰

Clearly then, the law in New Zealand in this area was far from settled when *Pirelli* was decided. It is submitted that whether *Pirelli* will prevail in New Zealand must turn on the following three points:

- (i) the persuasiveness which attaches to a House of Lord's decision per se;
- (ii) the persuasiveness of the reasoning in *Cartledge*; and
- (iii) the degree of unreasonableness of the *Pirelli* test.

If the *Pirelli* test is felt to be sufficiently unreasonable it might be possible to persuade our Court of Appeal to embrace the discoverability test, notwithstanding that the case in which that test was created has recently been overruled by the House of Lords. But for that course to be open to our Court of Appeal a way must be found around the reasoning in *Cartledge*.⁵¹

The apparent tensions in this area are well illustrated in the case of *Paaske v Sydney Construction Ltd*,⁵² a New Zealand case directly on

⁴⁶ [1977] 2 NZLR 530, 534 (SC).

⁴⁷ *Ibid.*

⁴⁸ *Supra*, note 18.

⁴⁹ *Supra*, note 45 at 239.

⁵⁰ *Supra*, note 45 at 244.

⁵¹ *Supra*, note 10. In an address to the Auckland District Law Society 28 July 1984, McMullin J indicated that the Court of Appeal in New Zealand would prefer not to follow the *Pirelli* decision.

⁵² High Court, Auckland, 24 June 1983 (A387/74) Thorp J.

point subsequent to *Pirelli. Paaske*⁵³ is yet another installment in the unfortunate saga of Begbie Place. It was argued on behalf of the defendants that following *Pirelli* all remaining claims were out of time. Thorp J began with a consideration of *de Lasala v de Lasala*⁵⁴ to see whether a House of Lords decision interpreting common legislation between a Commonwealth country and the United Kingdom, must be treated as strictly binding on the Commonwealth court. His Honour concluded:

... the Privy Council in *de Lasala* was careful to avoid a statement that decisions of the House of Lords binds Commonwealth courts, and I believe the decision can and should be read as a declaration that in areas where England and Commonwealth legal systems are similar, as with recent and identical legislation, the persuasive power of the House of Lords should be recognised by Commonwealth courts as being very high indeed.⁵⁵

Thorp J then noted that “the statutory provisions are not identical”.⁵⁵ The amendment of s2(1) of the Limitation Act 1939 (UK) in response to the call for statutory reform in *Cartledge* was not matched by any similar action in New Zealand. The provisions set out in the original New Zealand codification of the rules relating to limitation, the Limitation Act 1950, are in quite different and distinct form from the rules which have developed in England. New Zealand legislation on personal injury claims is also significantly different from the English position. Thorp J stated that it therefore followed that

the inference which Lord Fraser drew (ie that when Parliament made the amendment it must be taken that Parliament deliberately left the law unchanged so far as actions for damages of other sorts was concerned)⁵⁷ . . . cannot be drawn in New Zealand.⁵⁸

His Honour felt that although this was only one factor which led Lord Fraser to his decision in *Pirelli* it was sufficient to remove that case from the class of decisions of the House of Lords which *de Lasala*⁵⁹ holds must be recognised as of the highest persuasive authority. Thorp J continued:

While *Pirelli* clearly held that as against a builder or designer time runs from the occurrence of damage, Lord Fraser specifically noted that the majority in *Anns* had held that in respect of a claim against a local authority, in circumstances such as existed both in *Anns*’ case and in this, the material time was when the building reached the stage of “present or imminent danger to the health or safety of persons occupying it.” Nothing said by Lord Fraser there or elsewhere in the course of his speech indicates any disapproval of the position taken by the majority in *Anns*’ case.⁶⁰

And later:

I do not believe it is justified to regard [*Pirelli*] as over-ruling the view expressed by the majority in *Anns* on the same topic.⁶¹

⁵³ *Ibid.*

⁵⁴ [1980] AC 546.

⁵⁵ *Supra*, note 52 at 17.

⁵⁶ *Ibid.*, 18.

⁵⁷ *Supra*, note 1 at 14.

⁵⁸ *Supra*, note 52 at 18.

⁵⁹ *Supra*, note 54.

⁶⁰ *Supra*, note 52 at 22.

⁶¹ *Ibid.*

After a thorough review of the authorities his Honour concluded that:

1. In respect of claims against the council as a local authority . . . I must treat discoverability as the primary criterion and distinguish between minimal and real or significant damage.⁶²

Anns, which was accepted as correct by the New Zealand Court of Appeal in *Johnson's*⁶³ case, was cited as authority for this proposition:

2. As against the builder . . . I conclude that the principles declared in *Pirelli's* case should be accepted as having such persuasive authority as to outweigh the suggested, but not expressed, preference in *Bowen's* case for discovery as distinct from the occurrence of damage . . . [and] I am still bound to recognise the significance of real as distinct from minimal damage.⁶⁴

It is respectfully submitted that *Anns* need not be seen as creating an exception to *Pirelli*. In an action brought against a council time begins to run against a plaintiff as soon as damage sufficient to support that cause of action has been suffered, irrespective of whether that damage has been discovered or ought to have been discovered. But because councils are under a less stringent duty than other tortfeasors, that damage must be such as to constitute a present or imminent danger to the health or safety of occupants, as opposed to only real damage which is sufficient to support a cause of action against other tortfeasors. Whether *Anns* is seen as creating an exception to *Pirelli* or merely as the result of an application of the *Pirelli* test to another duty will not generally be important, because as a matter of fact damage which is such as to constitute a present or imminent danger to the health or safety of occupants will usually be discoverable.

Regardless, however, of the true position of councils within the *Pirelli* framework it would seem that unless a way can be found around the reasoning in *Cartledge* New Zealand courts have little option but to apply the *Pirelli* test to tortfeasors — and while the amendment of the Limitation Act in the United Kingdom may negate one of the grounds of the *Pirelli* decision, it affords no assistance in distinguishing *Cartledge*, on which *Pirelli* was based.

IV. SOME RELATED POINTS

1. *Successors in Title*

In the course of the Court's examination in *Pirelli* of *Sparham-Souter* the Lords expressed disagreement with the view, there held by Roskill LJ and Geoffrey Lane LJ, that time only runs against an owner

⁶¹ *Ibid*, 26.

⁶³ *Supra*, note 45.

⁶⁴ *Supra*, note 52 at 26.

after he acquires an interest in the property.⁶⁵ The preferred view of the Court was 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.⁶⁶

To hold otherwise would be to postpone the period of limitation indefinitely — a consequence which Geoffrey Lane LJ regards as “less obnoxious than the alternative”.⁶⁷

It should be noted that the statement in *Pirelli* is obiter as there was no question of a disposition of the property under consideration. Further, there is nothing in the decision to indicate that the Lords heard argument on this point. Thorp J in *Paaske*⁶⁸ recognises this and clearly is of the view that *Pirelli* does not affect the New Zealand position that time can only run from the acquisition by the claimant of an interest in the property in question, as decided in *Bowen v Paramount Builders Ltd*⁶⁹ and *Johnson*.⁷⁰

2. Claims in Respect of Distinct Damaging Events

Thorp J held that *Pirelli* does not affect the rule that successive and distinct damage, determined in a pragmatic way, can give rise to successive causes of action. This was recognised in New Zealand in *Johnson's* case where all three members of the Court of Appeal concluded that the damage suffered by the plaintiff was sufficiently distinct from earlier damage to the property to result in a separate cause of action accruing to the plaintiff.

3. Discovery of the Latent Defect and *Junior Books Ltd v Veitchi Co Ltd*⁷¹

Where the latent defect itself is discovered before real physical damage has accrued, is a plaintiff obliged to wait until there is real physical damage and then sue for its repair; or may he sue for repair of the defect so as to prevent such damage occurring? Prior to the House of Lord's decision in *Junior Books* the New Zealand courts had expressed the view that damages for repair of the defect could be recovered. Richmond P stated (obiter) in *Bowen's* case:

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 the repairs actually incurred to prevent threatened damage.⁷²

⁶⁵ *Supra*, note 20 at 881, *per* Geoffrey Lane LJ.

⁶⁶ *Supra*, note 1 at 18, *per* Lord Fraser.

⁶⁷ *Supra*, note 20 at 881.

⁶⁸ *Supra*, note 52.

⁶⁹ *Supra*, note 42.

⁷⁰ *Supra*, note 45.

⁷¹ [1983] 1 AC 520.

⁷² *Supra*, note 42 at 414.

Lord Denning MR in *Dutton*⁷³ and the dissenting view of Laskin J (with whom Hall J concurred) in *Rivtow Marine Ltd v Washington Iron Works*⁷⁴ were cited in support. Again in *Bowen's* case Woodhouse J said:

... if a defect is discovered then it should be possible to claim the sum needed to repair it either before or after the work has been carried out. . . . [I]f proper settlement were made then any actual loss suffered by a subsequent owner would seem to result not from the activity of the builder but from an intervening cause associated with the acts or omissions of those buying or selling the property after he had made the settlement.⁷⁵

Then in *Junior Books Ltd v Veitchi Co Ltd*⁷⁶ it was held that where the proximity between a person who produced defective work or a defective article and the user was sufficiently close, the scope of the duty of care owed by the producer to the user was not limited to a duty to prevent physical harm being done by the defective work or article but included a duty to avoid faults being present in the work or article itself. In *Junior Books* the economic loss sustained as a consequence of breach of this duty was held to be recoverable.

Does this mean that time runs from a different date in an action based on economic loss? In a recent article⁷⁷ Todd has suggested that in such an action time does not begin to run until the damage is discovered, for up to this point a prospective plaintiff can sell the damaged article before he sustains economic loss. There is a passage in Lord Fraser's judgment which here is particularly apposite. Said Lord Fraser:

It seems to me that there is a true analogy between a plaintiff whose body has, unknown to him, suffered injury by inhaling particles of dust, and a plaintiff whose house has unknown to him sustained injury because it was built with inadequate foundations or of unsuitable materials. 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 had a sound one.⁷⁸

Thus in the case of a latent defect, injury, — be it physical damage or economic loss — is sustained as soon as the defect manifests itself. Discovery of the defect is merely a procedural problem. The cause of action is complete when real physical damage is sustained, but on a pragmatic level a plaintiff cannot issue proceedings until the damage is discovered. If the prospective plaintiff dies from other causes before pneumoconiosis becomes apparent or sells the house before the damage is discovered, the fact that the damage was not discovered is a factor relevant to the quantum of damages recoverable rather than the ques-

⁷³ *Supra*, note 19.

⁷⁴ (1973) 40 DLR (3d) 530, 542.

⁷⁵ *Supra*, note 42.

⁷⁶ *Supra*, note 71.

⁷⁷ S. Todd "Latent Defects in Property and the Limitation Act: A Defence of the "Discoverability" Test" (1983) 10 NZULR 311.

⁷⁸ *Supra*, note 1 at 16.

tion of whether the plaintiff has a cause of action.

It is further submitted that in an action founded on economic loss time may begin to run as soon as the latent defect is created. Whereas in an action for physical injury it is real physical damage that gives rise to the cause of action, it is creation of the latent defect itself that is the damaging event in an action based on economic loss.

4. *Concealed Fraud*

It is submitted that the position in New Zealand prior to *Pirelli* was as stated by Moller J in *Gabolinscy v Hamilton City Corporation*.⁷⁹ The reason that this point is significant is that time does not begin to run under s4 of the Limitation Act 1950 where the cause of action is concealed by the fraud of the defendant or his agent — s28.

Where the creation of the latent defect was held to be the cause of action s28 could play an important role.

If a plaintiff can show that the right of action was concealed by fraud time will not begin to run under the Limitation Act until the plaintiff has become aware of the damage — see s28. For example, in *Applegate v Moss*⁸⁰ a builder put in foundations which were defective and which eight years later led to the house being uninhabitable. Lord Denning MR said:

... if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim.⁸¹

In *Dutton* Lord Denning MR cites *Applegate* to the effect that:

If [the builder] covered up his own bad work, he would be guilty of concealed fraud, and the period of limitation would not begin to run until the fraud was discovered.⁸²

In *Gabolinscy* Moller J said:

... if a man *knowingly* commits a wrong. . . in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim. . . . In order to show he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrongdoing. . . . It is sufficient that he *knowingly* committed and did not tell the owner anything about it. . . . In order to find this kind of fraud on the part of the council it is not enough that it ought to have known of the existence of the rubbishy fill. It must be shown that it knew it was there.⁸³

Concealed fraud therefore operates as a statutory exception to the *Pirelli* rule, so that where the damage suffered was not discovered because the defect was fraudulently concealed, s28 will apply.

It should be noted that this exception is not in any way inconsistent with the reasoning in *Pirelli*, for the ratio in *Pirelli* itself is based upon

⁷⁹ *Supra*, note 34.

⁸⁰ [1971] 1 QB 406.

⁸¹ *Ibid*, 413.

⁸² *Supra*, note 19 at 397.

⁸³ *Supra*, note 34 at 160.

the assumption that Parliament intends time to run from an earlier date where fraud is not involved.