Sparham-Souter v Pirelli:

The New Zealand Conclusion

(A response to Windmeyer)

by

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The lead article in the 1985 Auckland University Law Review (Vol 5, No 2), and the joint winner of the Law Review Prize for that year was *Tort and the Statute of Limitations After Pirelli* by Joseph Windmeyer. Windmeyer there suggested that *Pirelli* confirmed existing law, and was therefore "correct". He also concluded that New Zealand courts would "have little option but to apply the *Pirelli* test".

Ms Olsen, herself as assistant editor in 1985 and an editor-in-chief in 1986, here takes a different view.

In any action where a negligent breach of a duty of care has been established, compensation is awarded only upon proof of actual damage. Because such a breach, unlike a breach of contract, is not actionable *per se,* the focus of the court must of necessity be upon determining what constitutes compensatable damage in the instant case.

However, in a narrow class of cases, in which the limitation period is an issue, it must also be determined when actual damage caused by the breach can be said to have occurred. The answer to this question has vexed the courts on occasions when the damage is caused by a hidden or latent defect resulting from the breach. Until most recently the courts have applied the "discoverability test"[1] to determinations of this type. However, that test has been considered and rejected by the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)*[2] and insofar as the English courts are concerned, the date upon

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[1] See *Sparham-Souter v Town and Country Developments (Essex) Ltd.* [1976] QB 858 per Lord Denning at 868, Roskill LJ at 875, and Geoffrey Lane LJ at 881. But see Windmeyer, "Tort and the Statute of Limitations after Pirelli" (1985) 5 AULR 123 at 125-6.

[2] [1983] 1 All ER 65 (HL).

which damage can be said to have occurred is now settled by that case as the date when physical damage first occurred whether or not it could have been discovered with reasonable diligence. The effect of this decision on New Zealand law, and a critique of the *Pirelli* decision forms the subject of this examination.

1. The Pre 1983 Position

England

Section 2 of the Limitation Act 1980 indicates that a cause of action founded on simple contract or tort expires six years from ". . . the date on which the cause of action accrued". Judicial interpretation of this provision and its predecessor — section 2 (1) of the 1939 Act — has been contradictory[3] and in the case of personal injury has led to clear injustices calling for Parliamentary intervention[4]; however, a clear statement of principal and the test to be applied in cases involving this statute had emerged prior to 1983.

In *Cartledge v E. Jopling & Sons Ltd.*[5] the plaintiffs had contracted pneumoconiosis caused by the defendant's breaches of its statutory duty as determined by sections 4 and 47 of the Factories Act 1937. The plaintiffs discovered that they had the disease during the early 1950's and issued writs against the defendant on August 1, 1956. However, the cause of the scarring of the lung tissue, inhaling fragmented silica, had occurred prior to 1950. Furthermore, because in interpreting section 2 of the Limitation Act 1939, particularly with reference to section 26 of that Act,[6] it is implied time begins to run whether or not the damage could be discovered. It was held at first instance[7] in the Court of Appeal[8] and in the House of Lords that the plaintiffs' cause of action was time barred. Despite the ruling, Lord Reid labelled the results[9]

> "unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible . . . to raise any action."

And Lord Pearce commented that the argument of Counsel for the plaintiffs[10]

> would produce a result according with common sense and would avoid the harsh-

[3] Compare the decisions in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 CA and *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] Q.B. 858 (CA).

[4] The decision in *Cartledge v E. Jopling & Sons Ltd.* [1963] AC 758 (HL) led to statutory reform by the Limitation Act 1963. The present law governing claims for personal injury and death is contained in ss 11-14 Limitation Act 1980.

[5] [1963] AC 758 (HL).

[6] By section 26 of the Limitation Act 1939 time ran from the date of discoverability in cases of fraud or mistake.

[7] 10 June 1959 QBD per Glyn Jones J.

[8] [1962] 1 QB 189.

[9] Supra note 5, at 772.

[10] Supra note 5, at 778.

> ness and absurdity of a limitation that in many cases must bar a plaintiff's cause of action before he knows or ought to have known that he has one.

Parliament in 1963 passed the necessary legislation to deal with the mischief disclosed by *Cartledge's* case[11] but this remedy applied only to actions for damages consisting of or including personal injuries. While, in cases of this type at least, the injustice suffered by the plaintiff in *Cartledge v Jopling* was not to be repeated, it was still not conclusively decided how cases concerning latent damage to property were to fare in the light of the strong critical comments from the House of Lords. The obiter comments of Lord Denning M.R. in *Dutton v Bognor Regis Urban District Council*[12] provided the first clue. Here it was said that damage — in this case subsidence — is done when the foundations are badly constructed, and that from this date the period of limitation begins to run. Clearly this was to indicate that the inequities of *Cartledge v Jopling* would be replicated in the "building cases". However, Lord Denning specifically recanted on what he had said in Dutton in the later case of *Sparham-Souter v Town and Country Developments (Essex) Ltd.*[13] a decision which marked the next major development in interpreting the provisions of the Limitation Act when hidden damage was at issue.

In the *Souter* case houses had been built on inadequate foundations between December 1964 and September 1965. The plaintiffs purchased their houses in November 1965 and January 1966. Cracks appeared in the houses three years later, and sometime thereafter the houses became uninhabitable. The plaintiffs issued a writ in October 1971 — clearly out of time if the cause of action occurred when Lord Denning said it did in *Dutton.* The Court of Appeal was unanimous in deciding that a cause of action occurred only when the defect was discovered or ought, with reasonable diligence, to have been discovered. The first chance for such a discovery was the appearance of the cracks less than six years before the issue of the writ.

Cartledge's case had to be distinguished by the court to achieve this result, and it was Geoffrey Lane L.J. who best expressed the "economic argument" used to do so:[14]

> There is no proper analogy between this situation and the type of situation exemplified in *Cartledge v E. Jopling & Sons Ltd.* . . . 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.

The discoverability test might be viewed as judicial legislation; as an attempt to over-rule Parliament's deliberate course of non-action — in

[11] The Limitation Act 1963 extended the time limit for the bringing of actions for damages, when material facts were outside the plaintiff's knowledge, until after the action would normally have been time barred.
[12] [1972] 1 QB 373 at 396 (CA).
[13] [1976] QB 858.
[14] Ibid, at 880.

relation to damage to property — in failing to rectify statutory provisions the House of Lords had viewed as unreasonable and unjustifiable; or, as I will argue later, the only logical and sustainable test given the nature of a latent defect. Whatever the view, however, the discoverability test was happily applied in the English courts until *Pirelli,*[15] and in the view of some commentators was adopted by the House of Lords in *Anns v Merton London Borough Council.*[16]

New Zealand

The first recent discussion of damages incurred from a latent defect is that of Mr Justice Moller in *Gabolinscy v Hamilton City Corporation.*[17] Here, the defendant City Council filled land previously used as a gravel pit, sub-divided it and sold it to the plaintiffs in 1958. They (the plaintiffs) had built their house on it, after having obtained the requisite building permit, by July 1960. Ten years later, in July of 1970, cracks, the direct result of subsidence, appeared in the house, and the plaintiffs sought to recover the costs of repairs. His Honour, having found the Council negligent in tort, had to decide whether the action was barred by the Limitation Act 1950: his decision depended upon his analysis of when actual damage occurred. Relying on passages in *Salmond on Torts*[18], *Charlesworth on Negligence*[19] and *24 Halsbury's Laws of England*[20], where the editors' note at paragraph 348 that

> "where damage is the cause of action, or part of the cause of action, the statute runs from the date of the damage and not of the act which causes the damage . . ".

Moller J. concluded that[21]

> "Here the negligence of the Council had ceased by about 1958 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 . . ".

The next point to be decided, therefore, was what was damage in the instant case. Here His Honour relied on the dictum of Lord Evershed in *Cartledge v E. Jopling & Sons Ltd.* that the damage must be ". . . real damage as distinct from purely minimal damage".[22] On the facts, His Honour found that the first real damage occurred in 1967 and consequently the action was not time barred; although it is important to

[15] *Lewisham London Borough v Leslie & Co* (1979) 250 EG 1289; *Eames London Estates Ltd. v North Herts. District Council* (1981) 259 EG 491; *Crump v Torfaen Urban District Council* (1982) 261 EG 678; *Dennis v Charnwood Borough Council* [1982] 3 WLR 1064. See Todd, "Latent Defects in Property and the Limitation Act: A Defence of the 'Discoverability' Test" (1983) 10 NZULR 311, at n.26.

[16] [1977] 2 All ER 492.

[17] [1975] 1 NZLR 150.

[18] (16th ed) 611-612.

[19] (5th ed) 682-683 para. 1142.

[20] (3rd ed) 195.

[21] Supra note 17, at 159.

[22] Supra note 5, at 774.

note that no express ruling was made on the relevance or otherwise of the owner's discovery of damage since this was not at issue on the facts of this case.

In the course of his judgment Mr Justice Moller did, however, review the obiter comments of Lord Denning M.R. in *Dutton's* case and those both of Diplock L.J. in *Bagot v Stevens Scanlan & Co. Ltd.*,[23] cited by Lord Denning in support, and rejected the inference that damage occurs at the time the contracted for item is improperly built and that anything happening later is a mere consequence of that damage. His Honour concluded both were ". . . not an authority governing the situation with which I have to deal".[24]

The next case to note is of *Bowen v Paramount Builders (Hamilton) Ltd.*[25] where the first question to be decided by the court was whether a builder owed a legal duty of care to the Bowens, with whom he was not linked by contract, and if so what the nature of that duty was. The Court of Appeal were unanimous in finding that[26] ". . . a builder is liable for the negligent creation of a hidden defect which is a source of danger to third persons whom he ought reasonably to foresee as likely to suffer damage either in the form of personal injury or injury to their property". The court was divided, however, on whether the facts disclosed negligence on the part of this particular defendant.[27]

The limitation period was not at issue in this case; however, President Richmond commented that he accepted the view arrived at in *Sparham-Souter* and elaborated that[28]

> . . . 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 subfoundations. It occurs when the negligence of the builder results in actual structural damage to the building which is more than minimal.

Commentators have viewed this statement as both contradictory[29] and falling short of an express ruling that the damage should be discovered or discoverable.[30] With respect to both these views I would suggest that His Honour's comments must be read as a whole: that is, prefaced by his acceptance of the *Sparham-Souter* discoverability test and concluded by the comments that[31]

> . . . 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 costs of repairs actually incurred to prevent threatened damage.

[23] [1966] 1 QB 197, 203.
[24] Supra note 17, at 160.
[25] [1977] 1 NZLR 394 (CA).
[26] Ibid., at 406 per Richmond P.; see also 418 per Woodhouse J. and 422 per Cooke J.
[27] Richmond P., dissenting, found the facts inconclusive to prove negligence.
[28] Supra note 25, at 414.
[29] Windmeyer, supra note 1 at 123, 124.
[30] Todd, "Latent Defects in Property and the Limitation Act: A Defence of the 'Discoverability' Test" (1983) 10 NZULR 311, 314.
[31] Supra note 25 at 414 (emphasis added).

It is submitted that His Honour clearly had in mind that *discovery* is the vital requirement for accrual of a cause of action. Arguably it is for this reason that he takes such care to note that the damage must be *more* than minimal: the clear implication being that minimal damage may be overlooked or *not discovered* by a prospective plaintiff. As well, his further careful consideration of the case of the *discovery* of a *latent* defect suggests that His Honour forsees the situation where a claim for damages may arise when in fact no loss has actually occurred.[32] Such an hypothesis is only open for consideration if he considers that he has stressed "discoverability" is the key factor.

If this analysis is rejected more specific support for the discoverability test can be found in the final case in New Zealand on point before *Pirelli: Mount Albert Borough Council v Johnson.*[33] This too was another case of subsidence, occurring this time in apartments which had been built with inadequate foundations on filled land. Mr Justice Mahon, at first instance, found both the Company and the Council negligent: the company for failing to construct adequate foundations, and the Council for failing to exercise reasonable care in issuing a building permit and inadequately inspecting foundations. However, the apartments at issue had been built in 1965 and sold and resold until Miss Johnson purchased hers in 1970. It was not until the end of that year that significant cracking appeared and she sought an engineer's advice, issuing a writ in 1973. In deciding whether Miss Johnson had a cause of action the court, therefore, had to determine when actual damage accrued — did it occur in 1967 when when cracking first occurred and an earlier owner had the cracks patched, or in 1970 when Miss Johnson first *rediscovered* the cracking?

It is important to note that none of the justices of the Court of Appeal considered that the damage was done in 1965 when the negligent foundations were first laid. While they do not *expressly* state this view, it can be inferred from their concentration on the events of 1967 in determining Miss Johnson's success. Their attempts to classify that damage as sufficiently distinct[34] from the 1970 damage so that her claim was not statute barred would be entirely unnecessary if damage occurred from the date of building. Thus, this case impliedly rejects those earlier, albeit *obiter,* comments to the opposite effect of Diplock L.J. in *Bagot's* case and settles the law in New Zealand as to this issue at least.

In the course of their judgment the Limitation Act was considered. Mr Justice Cooke and Mr Justice Somers concluded[35] that a cause of

[32] On this point President Richmond finds persuasive the reasoning of the minority in *Rivtow Marine Ltd. v Washington Iron Works* (1973) 40 DLR (3d) 530, 552 per Laskin J. (Hall J. concurring).

[33] [1979] 2 NZLR 234.

[34] Ibid., at 243 where Mr Justice Richardson states that "in the light of the earlier analysis of the facts I consider that the present structural damage to the building cannot be regarded simply as a continuation of the damage that was manifested early in 1967 . . . the damage that first became apparent late in 1970 should in my view be treated as separate and distinct from the early subsidence.

[35] Supra note 33, at 239.

action arises ". . . either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution". Quite clearly discoverability is the important factor; although, this opinion is hardly surprising given that Cooke J. was a member of the court in the *Bowen* case and heard President Richmond's clear directive on this issue. Mr Justice Richardson, on the other hand, stated that it does not arise[36] ". . . until there is real or material damage as distinct from minimal harm", a comment which is viewed by most commentators as falling short of requiring that the damage be discoverable.[37] However, if one notes that he quotes as authority for that proposition *Bowen v Paramount Builders,* and if one accepts the earlier analysis of that passage, it is clear that Richardson J. was merely by implication suggesting that in the eventuality of real or material damage having occurred, discovery would be likely. Thus, it is submitted that rather than the law ". . . in New Zealand in this area . . . [discoverability] being far from settled . . ."[38] the justices of the Court of Appeal had developed a consistent view and had clearly endorsed the *discoverability* test of *Sparham-Souter.*

2. Post 1983 Period

England

In 1969 Pirelli General Cable Works Ltd engaged Oscar Faber & Partners, a firm of consulting engineers, to design a chimney and oversee its erection by sub-contractors at their factory. The chimney was completed in July of 1969; however, unsuitable material had been used for lining the chimney and by April 1976 cracks had developed at the top. Pirelli discovered these cracks in November 1977 and eventually part of the chimney had to be demolished and rebuilt. In October 1978 Pirelli issued a writ claiming damages *inter alia* for negligence by Oscar Faber in the design of the chimney. Both the judge at first instance, and the Court of Appeal applied the discoverability test to the facts and found the cause of action accrued when the cracks near the top of the chimney must have come into existence. Since this date was found on the facts to be early 1970, the action was statute barred.

In reaching this decision, Lord Fraser, who gave the leading judgment, reviewed *Cartledge v Jopling* concluding that although[39] ". . . this was not a case of personal injury, the plaintiffs did not dispute that the principle of the decision was applicable to the present case." He further reasoned that until the *Sparham-Souter* decision[40]

> . . . such authority as exists is to the effect that in cases of latent defects to buildings,

[36] Supra note 33, at 244.
[37] Supra note 30, at 315.
[38] Supra note 29, at 130.
[39] Supra note 2, at 68.
[40] Supra note 2, at 69.

> the cause of action accrues and the damage occurs when the defective work is done, even if that was before the date of discoverability

and relied, first upon the obiter comments of Diplock L.J. in *Bagot's* case and upon Lord Denning M.R. in *Dutton* for this proposition. Quite clearly he views the *Sparham* decision as judicial creativity and without adequate foundation, but in case this argument could be rebutted, he next finds that the "economic" argument in *Sparham-Souter,* used to distinguish *Cartledge* is faulty.[41]

> 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 the 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,* that would have had a sound one.

Finally, his finding that the speech of Lord Wilberforce in *Anns v Merton London Borough*[42] does not approve *Sparham-Souter* since it postulated a cause of action arising when there was imminent danger to the person's occupying a building, allows him to reject outright the discoverability test while at the same time confirm the demise of the view associated with Diplock L.J. in *Bagot.*[43]

> The only express approval in that passage is to the Court of Appeal's decision that the cause of action did *not* arise immediately the defective house was conveyed. His Lordship did not say, nor in my opinion did he imply, that the date of discoverability was the date when the cause of action accrued.

Having then disposed of the alternate tests for when damage occurs His Lordship postulates one of his own based on the *Cartledge* line of reasoning.[44]

> It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurred to the building . . . even though that was before the date of discoverability.

On the facts, and applying such a test the action was time barred because the cracks were the initial damage.

A secondary proposition, although strictly obiter, that if time runs against one owner, it also runs against all his successors in title, emerges from the case.[45] Such a proposition leaves virtually no room for *Pirelli* to be distinguished on the facts, a necessity it would seem, if the English Parliament was to be prompted by its result to heed the call for reform of a law which is "harsh and absurd".

[41] Supra note 2, at 70, emphasis added.
[42] Supra note 16, at 505.
[43] Supra note 2, at 71.
[44] Supra note 2, at 72.
[45] Supra note 43.

New Zealand

Ferbert v Otago Hospital Board[46] was the first case to be decided in New Zealand after *Pirelli.* Mr Ferbert suffered a hernia and was admitted to hospital in 1973 to have it repaired. During the course of the operation a nylon suture, negligently inserted, impeded the flow of blood to a testicle; as a result, it later "died". This was not discovered until Mr Ferbert, after experiencing considerable pain from 1975 onward, had surgery in May 1978, and it was not until after further surgery and discomfort in 1980 that he sought to bring an action for damages against the original surgeon. The issue then was when did Mr Ferbert's cause of action accrue. Since it was a case of personal injury the decision of the House of Lords in *Cartledge v Jopling* was directly on point. However, although Mr Justice Roper accepted the dictum of Lord Evershed in that case that there must be ". . . material damage as distinct from minimal harm", His Honour reasoned that the statutory changes made in the U.K. (and Australia) as a result of the *Cartledge* decision and which required the plaintiff to have knowledge of the material facts in personal injury cases were never necessary in New Zealand since in this country there has been a more liberal view of the Limitation Act. Thus, on the facts of this case, the relevant date was 1975 when the first pains occurred and by inference the material facts of the damage came to the plaintiff's attention, and not earlier when the damage which caused the pain may have been medically apparent albeit undiscovered. In essence, it is submitted, that this finding impliedly supports both the continuing emphasis in New Zealand upon plaintiff discoverability *and* makes clear that both personal injury and physical damage apply the same test as to the date of accrual — this latter point can be inferred from the fact that the legislature here never saw any injustice which required remedying and that could only be the case if the court's interpretation of the statute was different than it was elsewhere in the Commonwealth.

The final case to note is *Paaske & Ors v Sydney Construction Ltd. & Ors*[47] another piece of litigation arising from Begbie Place in the Mount Albert Borough. The defendant claimed that since the decision in *Pirelli* all outstanding unsettled claims were out of time since the plaintiff's discoverability of the damage was no longer the relevant factor in determining the date of accrual of the cause of action. Mr Justice Thorp concluded that discoverability remained the primary criterion in

[46] H.C. Dunedin, 18 May 1983 (A. 62/80) Roper J.

[47] H.C. Auckland, 24 June 1983 (A. 387/74) Thorp J; note also *Williams, Nightengale and Benjamin v The Mount Eden Borough Council* (A. 360/85) H.C. 2 April 1986 Casey J. His Honour confirms here that the *Paaske* decision concludes that *Pirelli* should not be followed in New Zealand. Further, he finds a cause of action arising only after the Council required them to repair the latent defects — in this case some 13 years after cracks first appeared. Since the Council's action would flow directly from the plaintiffs' initial discovery, it is clear Casey J. is applying none other than the discoverability test without directly saying so.

any claims against the Council[48] and cited the *Johnson* decision as binding on him in this regard; he did accept that *Pirelli* applied as against the builder since it ". . . outweighed the *suggested,* but not *expressed,* preference in *Bowen's* case for discovery as distinct from the occurrence of damage . . .".[49]

While indeed this may be the case as regards the expression of a *majority* opinion in this narrow and, it is submitted, merely semantic point in cases concerning builders, it is of no real general significance since as His Honour indicated[50] ". . . I am still bound to recognise the significance of real as distinct from minimal damage, developed in *Gabolinscy* and *Bowen* and confirmed in *Johnson,*" and on earlier analysis this results in the implied, although not always acknowledged, application of what has come to be known as the "discoverability test". Thus, Mr Justice Thorp's careful analysis far from creating "tensions in this area"[51] merely confirms the New Zealand position as distinct from that which developed in England by *Pirelli.*[52] However, it is also impliedly calls upon the Court of Appeal to unanimously assert President Richmond's preference for discovery as distinct from occurrence of damage in cases concerning builders so that the final nail can be driven once and for all into the coffin of *Pirelli.*

3. The Effect of Pirelli

The Authority of the House of Lords

The initial argument is that decisions of the House of Lords in areas where the legislation is similar must be considered as highly persuasive.[53] However, *Bognuda v Upton & Shearer*[54] shows that New Zealand Courts are not bound to follow the House of Lords, and in any event, the statutory provisions being considered are not identical[55] nor has the development of law by the judiciary proceeded along similar lines.[56] Thus, it follows that the New Zealand position in regard to the Limitation Act

[48] Page 22 of the judgment.
[49] Page 26 of the judgment.
[50] Ibid.
[51] Supra note 38.
[52] See *Burgchard v Holroyd M.C.* [1984] 2 NSWLR 164, 173 per Roden J. for the Australian position on *Pirelli.* "What appears to have emerged from that [Pirelli] decision is that the common law as interpreted and applied in England corresponds with the common law as interpreted and applied in Australia (as in *William v Milotin),* namely that the cause of action is complete when the damage occurs".
See also *Do Carmo v Ford Excavations* [1980] 2 NSWLR 59 as regards personal injury cases which follow the *Cartledge* reasoning.
[53] *de Lasala v de Lasala* [1980] AC 546.
[54] [1972] NZLR 741.
[55] The amendment of section 2 (1) of the Limitation Act 1939 (UK) after *Cartledge* was not matched with any equivalent action in New Zealand and the law on personal injury claims is also significantly different in New Zealand from the English position.
[56] Compare *Gabolinscy* and *Bagot* on the issue of the initial negligence being equivalent to damage.

is analogous to that of Australia's, in relation to exemplary damages, prior to the decision in *Australia Consolidated Press Ltd. v Uren.*[57] In that case, Lord Morris, who delivered the advice of the Board concluded[58]

> There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines . . .. But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling. Furthermore, a decision on such a question . . . must be much affected by the fact, if fact it be, that in a particular country the law is well settled.

House of Lords precedent, therefore, does not form a convincing rationale for following *Pirelli.*

4. A Critique of the Test

The Definition of Damage

It is important to note that in Lord Fraser concluding as he does *when* damage occurs, he also is required to define what *type* of damage is actionable. Damage which remains a "mere defect" he regards as analogous to a ". . . predisposition or natural weakness in the human body which may never develop into disease or injury"[59] and as such is not actionable even although that weakness is discovered or is blatantly apparent. Although, he admits that it would be possible for the latent defect to be so gross that a cause of action will accrue as soon as a structure is built, he limits these cases to the exceptional.

However, a natural weakness does more than have a propensity to cause structural or physical damage; it also from the moment of its inception causes the economic value of the item — be it a body or a building — to be diminished in relation to the ideal. If the defect is discovered or apparent, this financial loss is as much damage suffered by the plaintiff as is any physical damage consequent upon the creation of the defect may be. However, it is only the plaintiff's knowledge of the defect which gives rise to his loss, for it is only then that he can measure the product he has against the ideal, or that which he bargained for. It must be remembered that it was to this point that Geoffrey Lane L.J. alluded in the *Sparham* decision when he reasoned that until discovery a plaintiff suffers no harm at all since he may rid himself, without loss, of the defective goods.

There is no onus upon a plaintiff to repair the cause of the economic loss once discovered; rather the costs of repair are merely indicative of the value of the harm for which he must be compensated. Once, however, a plaintiff has discovered a defect, he has an imposed legal duty, in cer-

[57] [1969] 1 AC 590 (PC).
[58] Ibid., at 641.
[59] Supra note 2 at 70.

tain circumstances, to share his knowledge[60] or even to repair to protect third parties. Thus, regardless of whether he disposes of the goods or not, or whether he judges his loss to be a real one or one which is so minor so as to exist not at all, he has sustained as a result of these supra-added burdens what must always be considered as a potential economic loss.

In contract economic damage is recoverable and in tort *Junior Books v Veitchi Co. Ltd.*[61] concluded that the scope of a duty of care owed by a producer to a user was not limited to preventing physical harm but included a duty to avoid faults being present in the work itself since a breach of this duty would cause economic loss.

Further, in *Bowen's* case President Richmond showed a distinct unwillingness to accept the illogicality of having discovered apparent latent defects in buildings give rise to *no* claim for damages in tort. His discomfort was due to his acceptance of discoverability as the dominant test for damages without, at that time, there being recognition for the recovery in tort for economic loss. However, if that criterion is abandoned in favour of a physical event such as actual damage, it becomes clear that in any claim for the manifestation of the damage, compensation for economic loss becomes only the *method* by which the physical damage is assessed. It is, if you like, grafted upon the physical loss as the practical way of measuring that physical loss, *but* it does not exist as a distinct head of damages *per se.* It is submitted, with respect, therefore, that Lord Fraser's test fails to recognise what the House of Lords in *Junior Books* had recognised the year prior in *Pirelli,* and what President Richmond had wanted to give effect to in *Bowen:* that damage can be both physical and economic and depending upon proximity and reliance both heads are separately recoverable. On this point alone it is clear that Lord Fraser has postulated the wrong test.

Practical Consequences

The practical result of Lord Fraser's test is that a party must be presumed to have knowledge of a cause of action as soon as physical damage occurs since it is from this point that time turns against him regardless of whether or not there has been discovery. Arguably then if he must be taken to know of the damage, he must also be taken to have *knowledge* of any breach of duty which arises from this physical damage. For example, consider the facts of the *Pirelli* case itself. Here the plaintiff's cracked chimney may have been so damaged as to be a source of danger to third parties — workers or passers-by. The plain-

[60] See Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (3rd ed 1984) para. 706. Note also that this point is expressly confirmed in the *Williams* decision (supra, at note 47 at 25) since here the plaintiffs' cause of action only arose when requisitioned by the Council to repair the defects, but their knowledge of the defects obliged them to warn potential purchasers and would have obliged them to sell their units for $65,000 less than ones which were damage free.

[61] [1983] 1 AC 520.

tiffs must be considered in breach of their duty to these third persons as soon as the cracks, which signify the damage and the resultant hazard, have occurred and no remediation has taken place. Since, in this case, these cracks went undiscovered for many years, had a third person suffered damage from a falling brick, the company would be entirely liable and could not seek to recover on such a claim from the defendant engineers. Their liability had been extinguished under the Limitation Act. Further, if *Pirelli* had a public liability insurance policy to protect it against just such claims, a claim under the policy may be barred. Generally such policies are renewable annually; it is arguable that once the cracks appeared, damage occurred which altered the nature of the risk. Disclosure of material facts affecting the risk is a duty imposed upon the insured, and failure to disclose only excused if the facts are not within his knowledge. In our hypothetical case, however, since *Pirelli's* cause of action runs from the date of the cracking, and the court imposes knowledge of the damage from this date, might it not also be argued that such imposed knowledge imported a duty to disclose? If so the insurer would have grounds for repudiating the policy for a failure to do so.

The discoverability test leads to none of these results, however, since knowledge is not imposed upon a plaintiff; rather *responsibility* is once the facts have been or ought to have been discovered.

Finally, the *Pirelli* test requires that no owner or prospective buyer of a building can afford to ignore even the slightest manifestation of what might potentially be held to be the initial damage. Any crack must be investigated in order to ascertain its cause; foundations must be religiously inspected for overt signs that damage may yet be around the corner so that its earliest manifestation can be noted. Engineer's reports will become a normative part of the building owner's life if the onus is on him to uncover the undiscoverable so as to avoid having his cause of action found out of time. Instead of introducing certainty into this area of law, the *Pirelli* test has the opposite effect and couples it with the fear of a failure to note what might be damage and, thus, a fear of losing all rights to claim for repairs.

Successive Owners

The consequence of the obiter comments of Lord Fraser, to the effect that a cause of action once accrued runs against the owner and all his successors in title[62], is that a purchaser of a building which has a defect which has manifested itself in some undiscovered albeit extant damage, takes over the cause of action as at the date that physical damage occurs. Thus, if Pirelli had sold its premises in 1972, two years after the cause of action occurred, the new purchaser would have four years in which to issue its writ.

Such an argument defies logical analysis. No plaintiff can sue unless

[62] Supra note 2 at 72.

he has suffered damage. It is unclear then why a potential future owner should be taken to have suffered the damage prior to the time he actually acquires an interest, and, thus, prior to his acquiring anything to damage. To read the statute in such a way is to allow time to run against a person *before* his cause of action, on any test, accrues.

Further, it is quite clear that causes of action do not, like covenants, run with the land; they must be assigned to one plaintiff from his predessor in title. Lord Fraser's comments are unclear on this point, but if taken literally they seem to either ignore or dispense with this requirement.

The New Zealand Court of Appeal in *Johnson's* case clearly stated that time can only run from the date the plaintiff acquires an interest in the property in question. If there has been no assignment of the cause of action, then there must be fresh damage sufficiently distinct from that originally occurring to found a new and separate cause of action.[63] The court did not consider any distinction between economic or physical damage and, as such, the decision can be taken to apply to both. The expressed rule accords with that view of the law taken by the English Court of Appeal in *Sparham-Souter*[64] and is one which maintains logic and clarity. Except for Lord Fraser's *obiter dictum* in *Pirelli,* there seems no convincing reason to re-examine the rule.

The Anns Decision

In the view of the trial judge in *Pirelli,* the discoverability test had been specifically approved by the House of Lords in this earlier decision. McGregor, too, in *McGregor on Damages*[65] agrees with this view of *Anns;* while the English Law Reform Committee in its *Final Report on the Limitation of Actions*[66] concludes that the *Anns* decision left the law in some state of uncertainty ". . . it not being clear whether the decision in *Sparham-Souter* had been approved or disapproved".[67]

Lord Fraser, it is submitted, sees himself as the one to dispose of the controversy once and for all. While it is clear that any further comments on *Anns* would only be ones additional to the debate and as such superfluous, Lord Fraser's analysis of the case does, however, fall properly to be examined since it is his decisive dismissal of *Anns,* and in particular Lord Wilberforce's judgment, which allows him the freedom to postulate his own test in *Pirelli.*

The facts of the *Anns* case are quite simple and need only briefly be reviewed. The plaintiffs were lessees under long term leases of flats which were built in 1962. At the time of the construction the building plans for the block were deposited as per the by-law requirement. In 1970 structural movements in the foundations — which had been built

[63]. Supra note 34.
[64]. Supra note 13, at 875 per Roskill LJ.
[65] Supra note 16.
[66] (1977, Comnd. 6923).
[67] Supra note 30.

to an inadequate depth and contrary to the deposited plans — resulted in cracks in the walls, sloping floors and other damage. The plaintiffs filed their writs in 1972.

The case initially came to the House of Lords not on the damage point at all, but on the issue of the limitation period. That is, Mr Justice Fay, at first instance, followed *Dutton v Bognor Regis* and held the claims were statute barred. Before the plaintiffs appealed the *Sparham-Souter* case had been decided and the discoverability test had been accepted by Lord Denning who expressly recanted his earlier dictum in *Dutton's* case. On this view, therefore, none of the claims were statute barred. The appeal concerned this point and also the issue of whether the Council was under any duty to care to the plaintiffs at all — a point never decided by Judge Fay since it was irrelevant once he accepted the *Dutton* decision as determination of the plaintiffs' cause of action.

Lord Wilberforce, with the concurrence of three other law Lords, considers the question in this appeal to be whether the defendant Council was under a duty of care, the nature of the duty, and also *if* the Council under such a duty, at what date the plaintiffs' cause of action arose.[68] Lord Fraser, in *Pirelli,* however, summarises[69] ". . . the main issue in the appeal by the time it reached this House . . .[as] whether any duty was incumbent on the local authority". By narrowing the issues in such a way he is able to restrict the ratio of *Anns* and to limit consideration of the date postulated ". . . as related to the particular duty resting on the defendants as the local authority".[70] The thrust of Lord Wilberforce's decision as regards the date from which any cause of action accrues was thus not finally determined at House of Lords level. Clearly the controversy as to the effective date remains, but it is now only relevant to the very narrow facts of this particular case. Without considering then Lord Wilberforce's argument in any depth, Lord Fraser dismisses it as not relevant to the general issue of whether the discoverability test, as applied in *Sparham-Souter,* is the appropriate one. Regardless of what His Lordship did mean in *Anns,* Lord Fraser's discussion, it is submitted, can not be considered conclusive of the matters since it raises more questions than it answers.

The *Anns* decision is important in determining whether New Zealand ought to follow *Pirelli* for three reasons:

1. It defines for the purposes of the limitation issue damage as material, physical damage and quotes the dissenting judgment of Laskin J. in *Rivtow Marine Ltd v Washington Iron Works*[71] and the judgments of the New Zealand Court of Appeal in *Bowen's* case as of assistance in determining what is recoverable;
2. it argues a cause of action can only arise when the state of the build-

[68] [1978] AC 728 at 751. Lord Russell, Lord Diplock and Lord Simon concurring.
[69] Supra note 2 at 71.
[70] Ibid.
[71] [1973] 6 WWR 692, 715.

ing is such that there is present or imminent danger to the health or safety of persons occupying it; and

3. it allows recovery against a builder by subsequent owners in a suitable case; that is, when a cause of action arises.

In short, Lord Wilberforce, in defining when damage occurs, hypothesizes that discovery is a key element. There is no other reason for him to examine the *Rivtow* case if not to clarify what happens when discovery without damage occurs. It is on this point that he finds *Bowen* of assistance even although he never fully articulates the reason why since this very issue, which can only arise if one accepts the discoverability test, troubled President Richmond too.

Further, the test he formulates follows from his thinking and approval of the "foreign" judgments he has read. A building which is of *danger* to the health or safety of occupiers is one whose *damage* ought to be readily apparent. Such a test impliedly confirms the importance of discovery; however, it also goes further and surmounts the problem in *Rivtow* of needing to discover *damage* before recovery is possible since it is not only apparent damage, but latent also, which poses a *danger* to health and safety. Of course, Lord Fraser can correctly say that he sees nothing in the decision which relates to the discoverability of damage; it is to the discoverability of *danger* that the *Anns* test is directed. If this view is accepted, then Lord Salmon's speech becomes clear. He can, on the one hand, confirm his acceptance of Lord Wilberforce's judgment while at the same time seem to dissent from it. His view that a cause of action could arise before *damage* was discovered is consistent with accepting that a prior *danger* without actual damage may give rise to the cause. His only concern, as in *Rivtow,* is that evidence need prove the risk is a real one and[72]

> whether it is possible to prove that damage to the building had occurred four years before it manifested itself is another matter . . ..

Since it is impossible to appreciate how danger can arise to a plaintiff prior to his actually becoming an owner and occupier of a premises and discovering it, he infers that time runs from this point. Thus, on this view, since the test is danger and not damage, a subsequent owner could have a better claim than his predecessor in title — a view opposed to what Lord Fraser in *Pirelli* postulates as possible, but entirely consistent with the view expressed in *Johnson.*

Conclusion

The object of this paper has been to point to the reasons why the discoverability test ought properly not in New Zealand to give way to the test contained in *Pirelli.* The injustice which can only arise from such a test, need not be imported given that it is the suspect reasoning of Lord Fraser which forms its basis. Why such a decision occurred when

[72] Supra 68, at 771.

what was merited was a careful analysis and restatement of the ratio of *Anns,* can only be guessed at. Perhaps it was the composition of the bench in *Pirelli;* more probably it was the need to prompt the English Legislature, which had not heeded earlier calls from the House of Lords, to settle once and for all the law by amending the Limitation Act in order to bring cases of physical damage into harmony with those of personal injury and to sanctify by statute a test based upon defined criteria in order to avoid injustice. If this be the case, *Pirelli* ought to remain a peculiarly English decision followed only in those jurisdictions, like Australia, where the statute, its interpretation and amendments, parallel exactly the English law. New Zealand, for the reasons already canvassed, is not such a jurisdiction.

But perhaps the most compelling reason why *Pirelli* ought not be followed is contained in the mere fact that a second *English Law Reform Commission Report*[73] on latent damage has been directly occasioned by the *Pirelli* rule. That report contained various recommendations which *The Times* of November 7, 1985 reports have been adapted unchanged into proposed legislation expected to be introduced to the U.K. Parliament shortly. This legislation would allow the period in which to bring an action arising from latent damage to be extended to three years from the date the damage was or reasonably could have been discovered providing this period did not exceed fifteen years from the negligent act itself. It is clear that this statutory recognition of the test proposed in *Sparham-Souter* would dispose forever with the *Pirelli* inequities. Interestingly it also would afford some protection to builders and others, who do the work, by imposing a type of "remoteness" test: a fifteen year limit after which liability no longer attaches. This may be too short a period if one recalls that the *Williams* action was brought over thirteen years after the negligent acts were performed. It does, however, attempt to reconcile the concerns of all parties.

The final word on *Pirelli* must go to Madame Justice Bertha Wilson and the Supreme Court of Canada in *City of Kamloops v Nielsen*[74] who concludes

> There are obvious problems in applying *Pirelli.* To what extent does physical damage have to have manifested itself? Is a hairline crack enough or does there have to be more substantial manifestation? And what of an owner who discovered that his building is constructed of materials which will cause it to collapse in five years' time? According to *Pirelli* he has no cause of action until it starts to crumble. But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence. Lord Fraser and Lord Scarman were clearly concerned over this but considered themselves bound by *Cartledge.* The only solution in their eyes was the intervention of the Legislature.

Now that these two Lords have achieved their goal, surely any *raison l'etre* for applying *Pirelli* in New Zealand has evaporated.

(1984 Comnd. 9390).
(1984) 10 DLR (4th) 641 at 684-685.