TIME AND THE BLAMELESSLY IGNORANT PLAINTIFF: A REVIEW OF THE REASONABLE DISCOVERABILITY DOCTRINE AND SECTION 4 OF THE LIMITATION ACT 1950

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Introduction

Nothing is more calculated to strike dread in the heart of any plaintiff's lawyer than the realisation that an otherwise meritorious claim may be statute barred — especially if there has been a delay in issuing proceedings!

Time limitation issues have been very much to the fore recently in New Zealand. This is largely due to the convergence of three developments: the expansion of negligence liability for pure economic loss, the resurgence of personal injury claims (especially those involving claims for sexual abuse) and the development of what has become known as "the reasonable discoverability" doctrine.

The reasonable discoverability doctrine is a judge-made doctrine with "a somewhat chequered history".[1] Concerned with identifying the point in time at which limitation periods start to run, it had its genesis in a series of cases concerning hidden defects in buildings but now seems likely to be of much wider application.

This article traces the development of the reasonable discoverability doctrine in New Zealand and its impact on Section 4(1) of the Limitation Act 1950. It identifies some current uncertainty as to the scope of the doctrine, assesses its desirability in policy terms and engages in some crystal ball gazing.

The Traditional Approach

> The statute leaves no scope for considerations of equity and reasonableness[2]

As is well known, section 4(1) of the Limitation Act 1950 provides that actions founded on simple contract or tort cannot be brought after the expiration of six years from the date on which the cause of action accrued.

There has never been much controversy about the meaning of "cause of action" (every material fact which the plaintiff must prove in order to be able to succeed[3] — for example, in contract, the agreement and the breach; in negligence, the duty, the breach and the damage). The more contentious question has been "when does the cause of action accrue?" and in particular "to what extent does accrual under section 4(1) depend on the plaintiff's state of knowledge?".

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1 *T* v *H* [1995] 3 NZLR 37 at 52 per Hardie Boys J.

2 *White* v *Taupo Totara Timber Co* [1960] NZLR 547 at 551 per Gresson J.

The first New Zealand judge to rule that the plaintiff's knowledge was in any way relevant to the inquiry under section 4(1) appears to have been a magistrate, Mr Stewart Hardy SM in 1959. However his decision was quickly overruled on appeal.[4] The case concerned a claim in contract under the Sale of Goods Act 1908. The plaintiff, a Mr White, had purchased some roofing materials. Unbeknowns to him, the material had a latent defect which only manifested itself some seven years later. Although there was no suggestion that the defendant vendor had been guilty of fraud, the magistrate nevertheless held that he was precluded from relying on a limitation defence because Mr White could not reasonably have discovered the deterioration in the roofing material until very shortly before issuing his proceedings.

On appeal, Gresson J had little hesitation in rejecting this reasoning as fundamentally flawed. The court held that for the purposes of section 4(1), a cause of action accrues when all the material facts or constituent parts of the cause of action first come into existence. Thus, in an action for breach of contract, the cause of action accrues when the breach actually occurs or happens. Here, the roofing material was of defective quality at the time it was supplied. The breach therefore occurred at that date and so it was then that the cause of action accrued and time started to run. In the absence of fraud, the fact that Mr White had no knowledge of the breach and was therefore unaware that he had reason to bring proceedings against anyone was quite irrelevant.

The same principle — that ignorance of a material fact does not prevent a cause of action accruing — was said to be equally applicable in tort as well as in contract. Thus, in negligence where the damage will usually be the last event in time, the issue is when was damage first sustained, not when did the plaintiff first become aware of it:

> Neither ignorance of right of action nor unawareness of damage can prevail to defeat the plain words of the statute.[5]

In so holding, Gresson J relied on a series of old English decisions.[6] He was also influenced by the existence of Section 28 of the Limitation Act 1950[7] (the concealed fraud provision), reasoning that section 28 would be rendered superfluous if as a matter of *general* principle, lack of knowledge was always

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3 *Cooke* v *Gill* (1873) LR 8 CP 107 at 116.

4 *White* v *Taupo Totara Timber Co* supra n 2.

5 Ibid at 550.

6 *Battley* v *Faulkner* (1820) 3 B & Ald 288, 106 ER 668; *Brown* v *Howard* (1820) Brod. & B 73, 129 ER 885; *Howell* v *Young* (1826) B & C 259, 108 ER 97; *Smith* v *Fox* (1848) 6 Hare 386, 67 ER 1216; *Wood* v *Jones* (1889) 61 LT 551; *Bean* v *Wade* (1885) 2 TLR 157.

7 Section 28 provides:

> **28. Postponement of limitation period in case of fraud or mistake** — Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
> (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
> (c) The action is for relief from the consequences of a mistake, — 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.

relevant whether occasioned by fraud or not. There was a policy concern too, namely that a general delayed discovery rule would result in claims being brought many years after the events in issue:

> In fixing an arbitrary period of time within which action must be brought — namely, six years — the legislature in my view intended to provide a degree of commercial stability and finality, notwithstanding that this might result in hardship in individual cases.[8]

Gresson J's reliance on English authorities would have been applauded by the sponsors of the 1950 Limitation Act. For, somewhat ironically in the light of subsequent developments, government ministers of the time supported the 1950 legislation on the grounds that it would bring New Zealand law into uniformity with the UK legislation and so give New Zealand courts the advantage of looking at English decisions in order to ascertain the meaning of the equivalent New Zealand section.[9]

Three years after *White*, the House of Lords delivered its infamous decision in *Cartledge* v *E Jopling & Sons Ltd.* [10]The decision reaffirmed the "occurrence" accrual rule and its application to a negligence claim. Although it was physically impossible for Mr Cartledge to know he had contracted pneumoconiosis, the fact remained that his lungs had suffered damage and as soon as that had occurred, time started remorselessly to run. Damage was not any the less damage simply because a man was ignorant of its existence. The only consolation for plaintiffs arising out of *Cartledge* was that in formulating the occurrence of damage rule, the House of Lords stressed that to start the clock ticking the damage had to be "material", not minimal. However that was no comfort for the statute-barred plaintiffs in the case itself.

While deploring the obvious injustice of the result, their Lordships considered their hands were tied because the issue was one of statutory interpretation and the statute was clear. Like Gresson J in *White*, they were particularly influenced by the old authorities[11] on which, it was said, the Act must have been based and also by the need to give meaning to the concealed fraud provision. Its very existence as an exception to the general rule bore on the meaning of the general rule. In a well known passage,[12] Lord Reid stated that if this had been a matter governed by the common law as opposed to being a matter of statutory interpretation, he would have followed an American decision[13] and ruled that a cause of action ought not to be held to accrue until either the injured person discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law, His Lordship said, ought never to produce a wholly unreasonable result nor ought

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8 *White* v *Taupo Totara Timber Co*, supra n 2 at 551.
9 (1950) NZPD 4129, 4130.
10 [1963] AC 758.
11 Supra n 6.
12 *Cartledge*, supra n 10 at 772.
13 *Urie* v *Thompson, Trustee* (1948) 337 US Rep 163.

existing authorities to be read so literally as to produce an unreasonable result in circumstances never contemplated when they were decided.

Arguably, Lord Reid was too hasty in disavowing a role for the common law. The Limitation Act does not in fact define the term "accrued" and there is actually nothing in the *express* wording of the Act which necessarily requires a remorseless date of damage rule. To say a cause of action in negligence "accrues" when the damage is reasonably discoverable does not in any way do violence to the word "accrues".

Their Lordships of course considered the matter was not so much one of *express* wording, as one of necessary implication because of the existence of the concealed fraud provision. That analysis has been described as "the sort of pseudo-logical argument which seems to have an insidious appeal to lawyers, even great ones like Lord Reid".[14] But had the then rules of statutory interpretation permitted, Lord Reid might have derived support from the Law Revision Committee Report[15] which led to the enactment of the modern limitation legislation. That report actually expressly declined to recommend a general discovery-linked accrual test. On the other hand, for a court desirous of change, section 28 (the concealed fraud provision) does not *have* to be treated as implying any legislative understanding. After all, why should Parliament be imputed with the intention to produce a harsh and unreasonable result? In any event, it is possible to conceive of situations where although the damage would be discoverable, yet the right of action has been concealed by fraud, thereby justifying the need to have an additional specific concealed fraud provision.

The Act was of course passed in the light of old authorities.[16] And, so the argument runs, had the legislature intended to change the law it would have said so. However, not one of those decisions pre-dating the English Limitation Act 1939 (with the possible exception of *Howell* v *Young*[17] whose status as a tort case is equivocal[18]) concerned a case of negligence and latent damage. The old authorities could have easily been distinguished or simply overruled as Lord Reid would have done had he not considered there to be a statutory impediment.

Whatever the merits of *Cartledge* in terms of legal analysis, there seems to have been an underlying belief, at least on the part of the majority of law Lords, that Parliament rather than the court was the appropriate instrument of reform, since Parliament was better placed to balance the competing interests.[19]

Shortly after *Cartledge*, reforming legislation along the lines of Lord Reid's dicta was enacted in England.[20] It was limited to personal injury claims. Similar legislation was never enacted in New Zealand. Presumably, it was considered

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14 Sir Robin Cooke, "Tort and Contract" ch 8 of *Essays on Contract* (1987) at 226.

15 Law Revision Committee Fifth Interim Report *Statutes of Limitation*, 1936, Cmd 5334 (UK) at 12.

16 Supra n 6.

17 Supra n 6.

18 *Henderson* v *Merrett Syndicates* [1995] 2 AC 145 at 188 per Lord Goff.

19 The same view was taken by a differently constituted House of Lords some 20 years later in *Pirelli* v *Oscar Faber & Partners* [1983] 2 AC 1.

20 Limitation Act 1963 (UK).

unnecessary because of the pending Accident Compensation scheme and the anticipated demise of personal injury claims.[21]

However, the problem of latent damage did not go away in New Zealand. It was brought into sharp focus by a series of building cases.

The Building Cases

In 1972 the English Court of Appeal created a new category of negligence liability, holding both builders and local authorities liable in damages to owners of defective buildings.[22] Because defects in buildings are by nature typically hidden, the limitation issue soon raised its head. At first, it was thought the cause of action accrued when the defect was first created[23] (i.e. when the house was built) but subsequently it was held in *Sparham Souter* v *Town and Country Planning Developments Ltd*[24] that time started to run when the damage was reasonably discoverable.

The "reasonable discoverability of damage" test, as it became known, was soon followed in New Zealand, being approved obiter by the Court of Appeal[25] and then applied by the High Court.[26] However judicial formulations of the test were not always consistent. Sometimes it was difficult to ascertain what it was that had to be reasonably discoverable — was it the latent defect itself (the foundation problem) or was it the physical symptoms of that defect (the cracks, jamming doors etc.).[27] Because claims of this sort had been conceptualised as claims for physical damage and the test was after all "reasonable discoverability of *damage*", it was hardly surprising that some trial judges concentrated on when cracks and jamming doors were first discoverable.[28]

In the ultimate analysis, the differences in formulation did not affect the outcome of cases. This was because where the court adopted a "discoverability of physical damage" formula, at the same time it also held (usually through the rubric of the *Cartledge* distinction between minimal and material damage) that to start the clock ticking, the physical damage discoverable must be of a kind which would put the reasonably diligent houseowner on notice that they have a problem with their foundations. Damage which could reasonably be regarded by a lay person as caused by something else would not qualify as "material".[29]

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21 See the discussion in *G* v *S* unreported High Court Auckland 22 June 1994 CP 576/93 Blanchard J at 22. *Cartledge*, supra n 10 was applied in at least one New Zealand personal injury case: *Ferbert* v *Otago Hospital Board* unreported HC Dunedin 18 May 1983 A62/80 Roper J.

22 *Dutton* v *Bognor Regis UDC* [1972] 1 QB 373.

23 Ibid at 396.

24 [1976] 1 QB 858.

25 *Mount Albert Borough* v *Johnson* [1979] 2 NZLR 234.

26 *Bell* v *Hughes and Hamilton City Council* unreported HC Hamilton 10 October 1984 Tompkins J A110/80; *Sloper* v *W H Murray Ltd* unreported HC Dunedin 22 November 1988 A31/85 Hardie Boys J; *Lester* v *White* [1992] 2 NZLR 482; *Paaske* v *Sydney Construction Ltd* unreported HC Auckland 24 June 1983 A387/74 Thorp J; *Gillespie* v *Mount Albert Borough* unreported HC Auckland 18 June 1987 A1162/81 Thorp J.

27 Even in *Sparham Souter* supra n 24, the judgments are equivocal on this point.

28 See eg *Paaske* and *Sloper* supra n 26.

29 Idem.

Applied in this way, discoverability of physical damage was in effect discoverability of the latent defect. They were one and the same.

Whatever the form of words, all were agreed that the test was an objective one.[30] If the particular plaintiff was found to have acted as an ordinary prudent homeowner, then actual discovery and discoverability would normally coincide. However, homeowners could not shut their eyes to the obvious with impunity.

At first blush, adopting a "reasonable discoverability of damage" test seemed to fly right in the face of *Cartledge*. Such was the view subsequently taken by the House of Lords in *Pirelli* v *Oscar Faber & Partners*.[31] Declaring *Sparham Souter* as contrary to *Cartledge* and so wrongly decided, their Lordships held that the cause of action accrued when physical damage caused by the hidden defect first occurred. This was so regardless of whether the physical damage or the underlying defect were reasonably discoverable or not.

New Zealand trial judges refused to abandon the reasonable discoverability test and continued to follow *Sparham Souter*.[32] This somewhat defiant stance was ultimately tested on appeal in *Invercargill City Council* v *Hamlin* and upheld both by the New Zealand Court of Appeal[33] and the Privy Council.[34] Significantly, it was upheld by both courts on a narrow basis — a basis which does not involve rejecting the *Cartledge* "occurrence of damage" accrual test. For, by the time *Hamlin* came to be decided, the loss or damage sustained in building cases had been reclassified. Properly understood, the claim was not one for physical damage at all (as *Pirelli* had assumed), but economic loss (the diminution in value of the building).[35] Once that was accepted, it opened the way for the argument that such loss can, as a matter of logic, only occur when the defect becomes reasonably discoverable.[36] Only when the house is showing obvious signs that point to a foundation problem does its value drop. Until then, the owner suffers no loss whatsoever. A house with a hidden defect retains its value and can be sold.

By adopting this analysis, it is possible to reconcile use of the "reasonable discoverability" test with the traditional view espoused in *Cartledge* that a cause of action in negligence accrues when loss occurs. In the building context, it is discovery that actually causes the loss to occur. Finding out about the defect makes all the difference. In contrast, finding out that your lungs are damaged will make no difference to the fact that you have damaged lungs. While it is true the house never existed without the defective foundations, its value and hence the owner's financial interests remain unaffected until discovery. At the date of acquisition, the owner suffers no actual loss. They receive an asset which so long as the defect remains hidden is worth what they paid for it. It is the

30 See the decisions cited at n 26.

31 Supra n 19.

32 See the decisions cited at n 26 and also *Askin* v *Knox* [1989] 1 NZLR 249.

33 [1994] 3 NZLR 513.

34 [1996] 1 NZLR 513.

35 *Murphy* v *Brentwood District Council* [1991] 1 AC 398 (HL).

36 It also disposes of the need to rely on the "successive and distinct damage" doctrine used in *Mount Albert Borough* v *Johnson* supra n 25. See further Todd *"Latent Defects in Property and the Limitation Act: A Defence of the Discoverability Test* (1983) 10 NZULR 311 at 327.

emergence of the defect, not the purchase, that causes the loss. The existence of the damage (the economic loss) is thus dependent in a real way on discovery.

Not everyone is persuaded by this reasoning however. One commentator was moved to talk of "The Horrible Heresies of Hamlin"[37] while others have suggested that as in *White's* case,[38] the economic loss in fact occurs at the time the homeowner first acquires the defective house.[39] They point out that if fortuitously the homeowner were to engage an engineer and discover the hidden defect, they would still undoubtedly be entitled to sue even although to all outward appearances the house would still appear perfectly sound and so retain its market value. There is no easy answer to that argument other than to say that in such a situation the market value has in fact been adversely affected because on discovery the homeowner will come under an obligation to disclose the defect to prospective purchasers. The existence of a duty to warn was tentatively suggested in *Bowen* v *Paramount Builders (Hamilton) Ltd*[40] but admittedly is still in the process of evolving.

There is also criticism that because the measure of damages usually awarded is the cost of repairs, diminution in market value is not really the issue at all.[41] However, in these days of remedial flexibility, such criticism seems overly technical.[42]

Adopting a date of acquisition accrual test does of course have the potential to cause great injustice. It would make time start running even earlier than under *Pirelli*. It would also create problems when, as commonly happens, the house is sold through a chain of purchasers. Does time start to run against all future buyers when the first owner buys, in which case there is the spectre of time running against a person who, having no proprietary interest, is not capable of suing? Or, would the limitation period be rejuvenated on each successive owner's purchase, the first cause of action expiring six years after the purchase, with a new cause of action arising on each subsequent sale? In either scenario, there appear problems of principle. In contrast, the discoverability test is on balance analytically more attractive. Under the discoverability test, there is only one cause of action which accrues to the person in whose period of ownership the defect manifests itself.

In building cases, the limitation period is now governed by a specific provision in the 1991 Building Act. The section — section 91 — does not change the date of accrual but makes the six year period running from the date of accrual subject to an overall ten year long stop which dates from the negligent act or omission. Thus, in a situation where a latent building fault becomes apparent eight years after construction, liability no longer runs from year eight to year fourteen, but ceases in year ten. The section — with its implicit Parliamentary endorsement of a discovery linked accrual date — applies to claims filed after 1 July 1993. It is clearly based on the premise that the correct accrual test for limitation purposes

37 Dugdale, "There's a Long Long Tail A Winding" unpublished paper presented to an Auckland District Law Society Seminar in August 1995.

38 Supra, n 2.

39 See eg Chapman, "Limitation of Actions" [1996] NZLJ 161.

40 [1977] 1 NZLR 394. See also *Lawrence* v *Power* [1997] 3 NZLR 503.

41 Chapman, supra n 39.

42 Cf *Nykredit Bank* v. *Edward Erdman Group* [1998] 1 All ER 305 at 308 (HL).

in building cases is the reasonable discoverability test and that Parliament approved of the continued use of that test subject to an over-riding long stop.[43]

There are still some questions about section 91 — for example what is the effect of fraud on the 10 year long stop? One would have imagined that the long stop would not prevail in the event of fraud or concealed fraud. However, on a literal interpretation, that is what the section appears to be saying.[44]

Australia and Canada

As stated above, the Privy Council has endorsed the use of reasonable discoverability in the building context.[45] But it did so in a way that does not involve a departure from the traditional occurrence of damage accrual test. This approach is consistent with that adopted in Australia, but not Canada.

In Canada, the courts have developed a general overriding discoverability doctrine. It is now a settled principle of Canadian law that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.[46] This rule is said to mirror the delayed discovery rule developed in the United States and known as the "blamelessly ignorant plaintiff" rule.[47]

The leading Canadian authority *Central Trust Co* v *Rafuse*[48] concerned a claim against solicitors for drafting a defective mortgage. Their negligence was only discovered some nine years later when the borrower defaulted and the plaintiff client attempted to enforce its security. The Supreme Court agreed that the plaintiff had sustained actual damage at the time the faulty mortgage was first executed and the monies advanced. Under a *Cartledge* approach, time would then have started to run. However, although the limitation provisions in issue were indistinguishable from those in *Cartledge*, the Supreme Court held that time did not start to run until the validity of the mortgage was first challenged. For that was the earliest the plaintiff discovered or ought with the exercise of reasonable diligence to have discovered that its lawyers had been negligent.

A rather curious feature of the case is that the plaintiff decided not to pursue its alternative claim in contract for breach of the solicitor's implied duty of care. That claim was conceded to be statute barred. Accordingly, the Supreme Court was concerned solely with tortious negligence. However, despite this and despite the fact that there is no discussion of the merits of the plaintiff's concession, it is submitted that the court's general statements about discoverability are sufficiently wide to encompass *all* causes of action, and not just tortious

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43 (1991) 520 NZPD 5490.

44 See *Hamilton City Council* v *Rogers*, H C Hamilton 23 April 1998 A 92/97 Robertson J. The inter-relationship between s91 of the Building Act 1991, s14 of the Limitation Act 1950 and s17(1) of the Law Reform Act 1936 (inter-tortfeasor contribution provisions) was considered by Hansen J in *Cromwell Plumbing & Drainage Services Ltd* v *De Geest Brothers Construction Ltd* unreported HC Dunedin 19 December 1995 AP 66/95.

45 *Invercargill City Council* v *Hamlin*, supra n 34.

46 *Central Trust Co* v *Rafuse* (1986) 31 DLR (4th) 481 (SCC).

47 *M(K)* v *M(H)* (1993) 96 DLR (4th) 289 (SCC) at 305.

48 Supra n 46.

negligence. Such an approach would of course do much to remove the possibility of a claim in contract being statute barred but an alternative claim in tort arising out of the same set of facts being within time — a situation generally regarded as anomalous and unsatisfactory.[49]

In *Hawkins* v *Clayton*,[50] the High Court of Australia declined counsel's invitation to follow *Rafuse*, preferring instead to continue to follow the traditional English approach to accrual. In the view of Deane J:

> It is inevitable that a Statute of Limitations will, on occasion, lead to injustice in the special circumstances of particular cases. Such injustice, when it occurs, is an unavoidable cost of the benefits involved in ensuring that plaintiffs act promptly and that defendants are not subject to the litigation of stale claims.[51]

According to Brennan J there was no reason to doubt the applicability of the orthodox view.[52] The wider Canadian approach was again rejected by Deane J in *Wardley Australia Ltd* v *State of Western Australia*.[53] The focus, therefore, was on when the damage occurred.

However, having regard to the approach taken in other cases, it is likely that on the facts of *Rafuse*, the High Court of Australia would have reached the same result as the Canadians — not by invoking a reasonable discoverability doctrine, but by holding that on the facts no damage was sustained until the borrower defaulted. So long as the borrower continued to repay the loan, there was no loss and therefore time did not start to run. This analysis would not, of course, save a contractual claim (actionable without proof of loss) from being statute barred.

New Zealand Post-Hamlin

1 *S v G*[54] and *G D Searle & Co v Gunn*[55]

Since *Hamlin*, the New Zealand Court of Appeal has considered the reasonable discoverability test in a new context — namely that of personal injury claims. In *S* v *G*[56] a case of alleged sex abuse, the plaintiff sued her abuser for trespass to the person (assault and battery), negligence and breach of fiduciary duty. Although the events in issue had occurred between the years 1979 and 1980 and the resulting damage (depression and other psychological problems) manifested itself in the early 1980s, it was not until 1990 that the plaintiff herself came to appreciate the causal link between the past abuse and her psychological problems. This "discovery" was the result of counselling therapy. There was also evidence that at the time of the abuse, the abuser had duped the plaintiff, then aged only 14, into believing that his abusive conduct was normal. Other

[49] *Re ERAS EIL Appeals* [1992] 2 All ER 82 at 85.
[50] (1988) 164 CLR 539.
[51] Ibid at 589-590.
[52] Ibid at 599-600.
[53] (1992) 109 ALR 247 at 264.
[54] [1995] 3 NZLR 681.
[55] [1996] 2 NZLR 129.
[56] Supra, n 54.

decisions and general academic literature would suggest that such facts present a typical case scenario of sexual abuse.[57] The tensions such cases raise for the law of limitation are obvious. It has been said that the statute of limitations remains the primary legal stumbling block for adult survivors of incest.[58]

In New Zealand, civil claims against the perpetrators of abuse are restricted to claims for exemplary damages.[59] Being claims for personal injury, they are also subject to a very short two year limitation period.[60] While the court has power to grant leave to bring the proceedings out of time, it is a necessary condition precedent that the cause of action did not accrue more than six years prior to the date the application for leave was filed.[61] In *S* v *G* the application for leave was filed in October 1993. Clearly, for the purposes of the negligence claim, the damage (the psychological problems) had occurred well outside the limitation period. The plaintiff also knew she had suffered that damage. What she did not know, until she was within the six year limitation period, was what had caused her damage. Unlike negligence, trespass to the person is a tort actionable without proof of damage. It is complete where A has applied force to B without the consent of B or other lawful justification.[62]

In determining when the plaintiff's tortious causes of action accrued, the Court of Appeal significantly extended the reasonably discoverability doctrine. It did so by mis-stating the effect of its own decision in *Hamlin*.[63] First, in one passage[64] the court appeared to suggest that the effect of the reasonable discoverability doctrine is to *postpone* an already accrued cause of action rather than determining the moment of accrual itself. This may seem a semantic quibble. However, to talk about *postponing* an already accrued cause of action is potentially dangerous, for it would seem to take the court outside the realm of the common law and into imposing a gloss on the clear words of a statute.

Secondly, the court held[65] that the *Hamlin* decision involved rejecting *Cartledge*, whereas for the reasons already discussed, that in fact is not the case. *Hamlin* and *Cartledge* are perfectly reconcilable and both the Court of Appeal itself and the Privy Council decided *Hamlin* in a way that avoided any conflict.[66] Conflict only arises when the occurrence of the damage and the reasonable discoverability of it happen at different times.

Thirdly, whereas in the building cases the doctrine was known as the "reasonable discoverability of damage test", the Court of Appeal treated *Hamlin* as authority for the proposition that time will not run where the plaintiff

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57 See the discussion in *G* v *S* supra n 21 at 18-19.

58 *M(K)* v *M(H)* supra n 47 at 293.

59 A claim for compensatory damages being precluded by the Accident Compensation legislation.

60 Section 4(7) Limitation Act 1950.

61 Idem.

62 *P* v *T* [1998] 1 NZLR 257 at 258 per Richardson P.

63 Supra n 33.

64 *S* v *G* supra n 54 at 686. The same phraseology was repeated in *Daniels* v *Thompson* unreported 12 February 1998 CA 86/97 at 45.

65 Ibid at 687 per Gault J.

66 Although admittedly the Court of Appeal in *Hamlin* was critical of *Cartledge*.

reasonably has not discovered *all* of the elements of the cause of action.[67] This approximates to the Canadian position. Once a general overriding reasonable discoverability test is adopted, such an extension to all elements seems only sensible. After all, the focus has only been on the element of damage because usually that will be the last element in time. There is no logical reason to confine it to the one element and exclude others such as causation.

Because of the way it interpreted *Hamlin*, the court was able to assert that in the case before it the plaintiff's negligence claim "would seem to permit a relatively straight forward application of the reasonable discoverability approach favoured in *Hamlin*".[68] It followed that only when the plaintiff's psychological damage was or reasonably should have been identified and linked to the abuse, could it be said that the elements of the negligence cause of action were known and only then did the cause of action accrue.

In a further significant extension of the doctrine, the Court of Appeal accepted that it applied to the plaintiff's trespass action as well. Accordingly, until the plaintiff reasonably discovered that she had not truly consented to the abusive conduct, time did not start to run against her in trespass. An alternative analysis was to invoke section 28 and to hold that the defendant's conduct in duping the plaintiff amounted to fraudulent concealment of the right of action.

Thus, the court effectively adopted the Canadian position — rejecting a strict occurrence test and applying the reasonable discoverability doctrine to all elements of a cause of action and not only to the negligence cause of action.

While the Court of Appeal's formulation of the test is sometimes phrased in terms of actual discovery by the plaintiff herself, the court stressed that the test is still an objective one. However, it is submitted that inevitably a more subjective element must be involved in cases of this sort. How in practice can a court really assess whether the reasonable victim of abuse would have come to an earlier realisation than the plaintiff did? Does it take 10, 20 or 30 counselling sessions?

S v *G* was reaffirmed by the Court of Appeal a year later in *G D Searle & Co* v *Gunn*,[69] except that on this occasion the court correctly acknowledged the limited effect of *Hamlin* and the extension that *S* v *G* represented. Like *S* v *G*, *Searle* involved a personal injury claim and the delayed discovery of the causal nexus between the defendant's actions and the resulting damage. It was not however an abuse case but rather a negligence claim involving the manufacture and distribution of an intrauterine device. It was only when the plaintiff read a New Zealand Women's Weekly article that she first realised the likely cause of a pelvic inflammatory disease suffered some 10 years earlier.

Although *S* v *G* was arguably distinguishable on the grounds that there the defendant's wrongful conduct was by its nature the very reason for the causal link not being recognised, the court saw no logical justification for confining the principle to such a situation:[70]

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67 Supra n 54 at 686.

68 Ibid at 687.

69 Supra, n 55.

70 Ibid at 132 per Henry J. Cf *Hawkins* v. *Clayton*, supra n 50 at 590.

> It is still a question of what is meant in section 4 by the date on which the cause of action accrued. The phrase must be given a consistent meaning which is applicable to differing factual situations ...

The court went on to say that[71] "the time has now come to state definitively that *Cartledge* does not represent New Zealand law". The rationale of *Cartledge* — seen as dependant on the concealed fraud provision — was "not convincing", while the court saw "no need for statutory intervention to achieve a result which is consonant with justice and which gives effect to the overall legislative intention".[72] The court therefore had no hesitation in holding that a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant. This result was seen as in accord with Canadian law and as avoiding the illogicality of differing rules applying depending on whether loss is classified as physical or economic.[73] The court also derived support from the United States (citing the same decision[74] once rejected in *Cartledge*) as well as from legislative changes in the United Kingdom[75] and a European Economic Community directive.[76]

However the court rejected a wider test submitted by counsel which would require not only that the link between injury and act or omission be reasonably discoverable, but also that the plaintiff know or should know that the breach was wrongful. The court saw no need for such a wider test.[77] However, that *is* the test enunciated in the Canadian incest case *K(M)* v *H(M)*[78] which was cited with approval elsewhere in the judgment. And it is also the practical effect of requiring in trespass cases that the absence of genuine consent be discoverable.[79] Perhaps what the court meant was that ignorance that the conduct is actionable in law will not stop time running (i.e. ignorance of the existence of a legal remedy does not count, as opposed to ignorance of the existence of the material facts which in law give rise to that remedy).

2 *Subsequent High Court Decisions*

Since *S* v *G* and *G D Searle & Co* v *Gunn* there have been numerous applications before the High Court under section 4(7) seeking to rely on the reasonable discoverability doctrine.[80] However these numbers may decline in the future

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71 Idem.
72 Idem.
73 Ibid at 133.
74 Supra n 13.
75 Limitation Act 1963 and the Latent Damage Act 1986.
76 Supra n 55 at 133.
77 Idem.
78 Supra, n 47.
79 This may explain why the Court of Appeal has since stated in *P* v *T*, supra n 62 and again in *Daniels* v *Thompson*, supra n 64 that when the tort is trespass to the person and the plaintiff is not a child the question of reasonable discoverability will seldom arise.
80 See eg *A* v *D* unreported HC Wellington 16 October 1996 Tipping J CP 90/95; *B* v *R* unreported HC Auckland 15 February 1996 Morris J 1957/93; *H* v *H* unreported HC

given more recent pronouncements by the Court of Appeal restricting the right to claim exemplary damages.[81]

While *S* v *G* and *Searle* were decided in the context of personal injury claims, the reasoning and the general thrust would seem to be of universal application. Thus, one would have expected that no cause of action — be it tort or contract — could be held to have accrued under section 4(1) until all its constituent elements were reasonably discoverable. However, the High Court appears reluctant to take this obvious next step. It has continued to apply the occurrence rule in contract[82] and even in professional negligence cases.[83]

This is somewhat surprising. After all, the rationale on which *Cartledge* depended and which the Court of Appeal has now rejected as flawed is the same rationale underpinning *White*,[84] a contract case. There seems no reason in logic or principle why the same rule should not apply to all causes of action. In *Rabadan* v *Gale*[85] the court considered it was "arguable" that the reasonable discoverability doctrine was limited to the building cases. However, that just cannot be right in the light of *S* v *G* and *Searle* which were not building cases.

In *Utting* v *BNZ*,[86] the court expressed strong preference for the view that "in New Zealand the reasonable discoverability test is confined to latent deficits [sic] and actions for bodily injury". Master Thomson reached this conclusion first, because of the fear that any extension of reasonable discoverability into commercial cases will render the protection afforded by section 4(1) "completely illusory" and secondly, because of certain dicta in *S* v *G* and *Searle*. However, it is respectfully submitted that the dicta quoted do not necessarily support any limit on the doctrine along the lines suggested. The passage selected from *Searle*[87] is simply a summary of the development of the reasonable discoverability doctrine — hence its reference to the building cases and personal injury claims — while the passage selected from *S* v *G* is the passage where the Court of Appeal refers to having some difficulty in applying the doctrine:[88]

> ... to causes of action of which damage is not an element *and all other elements are known* unless ss24 and 28 of the Limitation Act can be invoked. Even in cases of negligence, where some *recognised* damage flows immediately from the alleged conduct, the limitation period commences to run, subject only to postponement

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Wellington 20 March 1997 Eichelbaum CJ 213/96; *Dobson* v *AG* unreported HC Wellington 19 August 1997 Greig J CP 307/96.

81 *Ellison* v *L* [1998] 1 NZLR 416; *Daniels* v *Thompson* unreported CA 12 February 1998 CA 86/96.

82 See eg *Rabadan* v *Gale* [1996] 3 NZLR 220. In *Simms Jones Ltd* v *Protochem Trading NZ Ltd* [1993] 3 NZLR 369 (decided before *S* v *G* and *Searle*) Tipping J at 383 discusses the desirability of a general discoverability doctrine applying to both contract and tort but considered legislative reform the way to achieve it.

83 See eg *Gilbert* v *Shanahan* unreported HC Wellington 12 September 1997 CP 503/93 Gallen J.

84 Supra n 2.

85 Supra n 82 at 224.

86 Unreported HC Wellington 14 February 1997 CP 245/96 Master Thomson at 13.

87 Supra n 55 at 132-3.

88 Supra n 54 at 687.

> under the Act by reason of disability s24 (or fraudulent concealment s28). (Emphasis added)

When one has regard to the italicised words, it seems clear that the Court of Appeal's professed difficulty is no indicator of any dissatisfaction with the doctrine but simply that it was logically incapable of stopping time running where there was knowledge. It is particularly difficult to understand why the Court of Appeal's dicta should be seen as imposing any obstacle to use of the reasonable discoverability doctrine in cases of professional negligence, especially as the Court of Appeal approved the solicitor/client case of *Rafuse*. Why would *Cartledge* have been definitively rejected? What too of the Court of Appeal's reference to their reasoning being in accord with the UK legislation, reference being made not only to the personal injury reforms but also to product liability reforms. What of the dicta in *Searle* that:[89]

> The phrase [the date on which the cause of action accrued] must be given a consistent meaning which is applicable to differing factual situations.

To add to the confusion, yet a third approach has been suggested by the High Court in *Bradley West Clarke List* v *Keeman*.[90] The case concerned (inter alia) a claim against a solicitor for failing to provide adequate advice about the extent of a personal guarantee. For some reason, the claim was not brought in tort but in contract alone. Pankhurst J held that time did not start to run until the creditor sought to enforce the guarantee against the plaintiffs who only then fully appreciated the nature and scope of the obligations they had assumed. In so holding, the court did not rely on reasonable discoverability but rather on section 28(a) of the Limitation Act. But section 28(*a*) is concerned with claims of fraud and does not seem at all appropriate. Even if it were section 28(*b*) that was intended, that would also seem inappropriate. For, according to the leading New Zealand authority on section 28(b),[91] the sub-section concerns causes of action which, although not actions of fraud themselves, have been concealed by fraud. Fraudulent concealment encompasses deliberate or reckless concealment of the right of action (such as where a builder deliberately covers up foundations he knows to be inadequate) as well as non-disclosure of the material facts in breach of a fiduciary duty.

The analysis adopted in *Bradley West* seems to be that because the solicitor/client relationship is a fiduciary relationship, there is an obligation on the solicitor to disclose the material facts comprising the cause of action and until that disclosure is made the limitation period is postponed. This would effectively mean that section 28(b) applies to *every* claim brought against a solicitor by a client. This is not the way section 28(b) has been interpreted in the past. The approach adopted in *Bradley West* was not followed by Gallen J in the later case of *Gilbert* v *Shanahan*.[92] In *Shanahan*, the court preferred to adopt the traditional occurrence rule.

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89 Supra n 55 at 132.

90 Unreported HC Timaru 19 March 1997 Pankhurst J, CP 16/94.

91 *Inca Ltd* v *Autoscript (NZ) Ltd* [1979] 2 NZLR 700 (HC).

92 Supra n 83.

Whether the High Court's apparent reluctance to embrace a universal "reasonable discoverability test" is due entirely to policy misgivings or simply a matter of precedent is difficult to determine.

For its part, the Court of Appeal in 1997 again reaffirmed the reasonable discoverability doctrine but the case in question[93] could be categorised as another building case and so not necessarily indicative of the court approving a general test. Indeed, the court only discussed the doctrine when considering the tort claim and did not refer to it at all under the contract head. However, it is submitted that nothing of significance can be read into the apparently different treatment of the two causes of action as that was the result more of the way counsel's submissions were structured rather than any considered dicta. But until the Court of Appeal makes some definitive pronouncement, the uncertainty will obviously continue.

Reasonable Discoverability and Policy

> The purposes of a limitation statute are said to be three fold — to give a potential defendant security against being held to account for an ancient obligation, to prevent litigation being determined on stale evidence and to require due diligence of a plaintiff in pursuing a cause of action.[94]

It must give some pause for thought that the High Court of Australia[95] has expressly declined to adopt a universal reasonable discoverability test, while in England the issue was seen as a matter for Parliament with two Law Reform Committee reports[96] opposing a general discoverability doctrine and the only legislative reform[97] being limited in scope. The chief policy concerns are first, that the discoverability test is inherently imprecise and will cause uncertainty; and second, that it results in claims being brought many years after the events in issue, thereby imposing too onerous and unfair a burden on defendants and the insurance industry.

1 Uncertainty of Application

Because the starting point of a limitation period is so vital, it is obviously desirable that it be a date which can be easily and accurately fixed. According to some critics however, determining when a potential plaintiff ought with reasonable diligence to have discovered their right of action is an exercise fraught with uncertainty. There is no definition of "reasonable diligence" and in practice, cases are likely to turn on the intuitive responses of individual judges. As the

93 *All Seasons Properties Ltd* v *Smith* unreported CA 28 May 1997 CA 151/96 (claim by building owner against engineer for cost of replacing defective air conditioning unit).

94 *Searle*, supra n 55 at 131.

95 *Hawkins* v *Clayton*, supra n 50.

96 See the 1936 Wright Report, supra n 15 and Law Reform Committee's 21st Report *Final Report on Limitation of Actions* September 1977 Cmnd 6923.

97 The Limitation Act 1963 was limited to personal injury claims. The Latent Damage Act 1986 while extending a discoverability doctrine to negligence actions not involving personal injuries is limited to negligence.

trial judge acknowledged in *Hamlin* [98] "ultimately there is no way of measuring these matters to any fine degree." Outcomes, so the critics say, cannot be predicted with certainty and therefore litigation about limitation issues will continue to proliferate.

A recent High Court decision, *Andrew Housing Ltd* v *Tutbury*,[99] demonstrates the difficulties that may arise. The homeowner had sought engineering advice after discovering cracks and jamming doors in her house. Without undertaking very substantial and costly investigations, it was impossible for the engineer to be sure what was causing the problem. He identified defective foundations as one possibility; another possible cause was certain earthworks which had recently been carried out in the vicinity. The court held that "under those circumstances it would have been unrealistic to have expected a legally aided person to immediately spend large sums of money possibly chasing shadows".[100] Accordingly, the ensuing six year delay (while the plaintiff battled Legal Services for funding and the engineer carried out piece-meal investigations which finally established the true cause), was not fatal. The court rejected an argument that once the point in time is reached when a prudent householder will investigate, time starts to run notwithstanding the investigation may not have been completed. It is respectfully submitted that the court was right to reject such an absolute proposition. In the ultimate analysis, it must turn on what is reasonable diligence. The more problematic issue is to know whether reasonable diligence should be assessed according to the particular plaintiff's financial means and if it is to be so assessed, does that not introduce a somewhat subjective element into what was supposed to be an objective test?

Criticism that the reasonable discoverability test is imprecise undoubtedly has some force. However, the criticism is predicated on the assumption that the alternative accrual test — the occurrence test — provides a significantly greater degree of certainty. In fact, that is not always so, particularly in tort cases involving economic loss. In those cases, determining when the damage has occurred is often far from straight forward. Indeed, trying to reconcile the various decisions makes the reasonable discoverability test by comparison look an attractively simple proposition and one that is more intellectually honest. Take for example negligence claims by clients against their solicitors. The nature of legal work is such that it is typically third parties, rather than the solicitor, who are the immediate cause of losses. Does time start to run when the third party makes their move, or when the client first acts in reliance on the solicitor's advice or document? The facts of *D W Moore & Co Ltd* v *Ferrier*[101] provide a useful illustration. There, a solicitor drafted what turned out to be an unenforceable restraint of trade covenant. Until the employee chose to leave and work for a competitor, the covenant was of course never tested and losses caused by being powerless to prevent his departure never sustained. The English Court of Appeal held that actual damage occurred at the time the faulty restraint agreement was

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98 *Hamlin* v *Bruce Stirling Limited* [1993] 1 NZLR 374 at 378.

99 *Andrew Housing Ltd* v *Tutbury* unreported HC Invercargill 28 November 1997 Chisholm J AP 34/97.

100 Ibid at 8. In *Dobson*, supra n 80 at 4 the test was said to be an objective test based upon the reasonable person in the position of the intended plaintiff.

101 [1988] 1 WLR 267 (CA).

first executed, since the plaintiff then received a worthless covenant rather than a valuable chose in action. The plaintiff would then have had the right to sue the solicitor.[102] Australian and New Zealand courts applying an occurrence of damage test would be more inclined to stress that what is required is actual and quantifiable damage, and that until the employee resigned any loss was speculative and contingent.[103]

While the liberal Australasian approach seems more in keeping with the realities of the situation, how far does one take this? Whether or not the restraint was in fact defective may, for example, have been far from clear cut. Could it be said the plaintiff only suffered actual loss when the court refused to issue an injunction against the disloyal employee? It has been argued that a deceit action based on the loss of certain goods only crystallised when the disputed ownership of the goods (Goldcorp bullion) was judicially determined in associated proceedings.[104] Until then the plaintiff could not bring a claim as he had not suffered any loss. The High Court rejected that submission but the fact that such arguments are being raised demonstrates the difficulties that can arise even under an occurrence test. The discussion by Tipping J in *Matthews Corporation Ltd* v *Edward Lumley & Sons (NZ) Ltd*[105] and *Simms Jones Ltd* v *Protochem Trading (NZ) Ltd*[106] also draws attention to the variety of accrual dates possible under an occurrence régime.

In the solicitor/client context, English courts have always been consistently strict[107] (or "overly refined"[108] depending on your point of view). To similar effect is a line of authority concerning pre-contractual misrepresentations where English courts have held that actual damage (as opposed to notional, potential or prospective damage) is sustained on the moment of entry into the disadvantageous transaction, notwithstanding that the full extent of the plaintiff's financial loss is incapable of ascertainment until some later date and subsequent events which may or may not transpire.[109] Reconciling this strict approach with

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[102] Had they known about the defect but under an occurrence of damage test, knowledge is irrelevant.

[103] See eg the approach taken in *Broadcasting Corporation of NZ* v *Progeni International Ltd* [1990] 1 NZLR 109; *Matthews Corporation Ltd* v *Edward Lumley & Sons (NZ) Ltd* [1995] 8 PRNZ 388, *Wardley*, supra n 53; *Gilbert*, supra n 82.

[104] *Liggett* v *Goldcorp Exchange* unreported HC Auckland 14 June 1996 CP 41/94 Robertson J. The court referred (at 9) to the ramifications arising from an approach in which a cause of action comes and goes depending on the point that an associated case is on the litigation ladder. That particular problem could of course be overcome by tying the accrual point to the expiry of the appeal period. For present purposes, the judgment is also relevant because Robertson J appears to view the discoverability test with some disfavour, although the citation of *White* v *Taupo Totara* seemingly as authority supporting the discoverability test is puzzling.

[105] Supra n 103.

[106] Supra n 82.

[107] See eg *Forster* v *Outred & Co* [1982] 1 WLR 86 (CA); *Bell* v *Peter Browne & Co* [1990] 2 QB 495; *Baker* v *Ollard & Bentley (a firm)* (1982) 126 SJ 593. The English common law position is now regulated by the Latent Damage Act 1984.

[108] *Wardley Australia Ltd*, supra n 53 at 277 per Toohey J.

[109] *Islander Trucking Ltd* v *Hogg Robinson Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826; *Iron Trade Mutual Insurance Co Ltd* v *J F Buckenham Ltd* [1990] 1 All ER 808.

the Privy Council analysis of occurrence of damage in the building context[110] is extremely difficult. The inherently defective house is, arguably, to all intents and purposes, indistinguishable from the defective restraint of trade covenant.

Even more problematic are the cases concerning lenders who rely on professional advice about the creditworthiness of a prospective borrower or the adequacy of a security. Some authorities hold that the loss occurs immediately the monies are advanced;[111] others that the loss occasioned by the unsatisfactory bargain lies in the future.[112]

While candidly acknowledging that judges have been "driven to draw narrow and some would say unconvincing distinctions",[113] the English courts have not really attempted any coherent rationalisation. One commentator[114] confidently predicts that even the most recent House of Lords decision[115] will generate a growing body of judicial analysis and re-analysis. Criticisms about the inherent uncertainty of reasonable discoverability need therefore to be seen in perspective.

2 Stale Litigation

If the only policy aim of the Limitation Act were to encourage plaintiffs to be diligent and not sleep on their rights, then the reasonable discoverability doctrine could not be seen as undermining that policy. For how can you sleep on rights of which you are unaware? However, encouraging plaintiffs to be diligent is only one of the policies underlying the legislation:

> Another and I think equally important principle behind these Acts is that there shall be an end of these matters and that there shall be protection against stale demands.[116]

While the reasonable discoverability test is far from creating a totally open-ended system of liability, it can result in defendants having to defend claims about events long past. This is generally seen as its major drawback.

While it is true that the same thing can happen under an occurrence regime (eg where a defective machine malfunctions and causes personal injury many years after manufacture,[117] or if a liberal approach is taken to occurrence of economic loss)[118] it will not happen to the same extent as under a general reasonable discoverability doctrine.

Even the most ardent supporter of a general reasonable discoverability test would have to concede that it does pose significant practical problems in terms

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110 *Hamlin*, supra n 34.

111 *Howell* v *Young*, supra n 6.

112 *UBAF Ltd* v *European American Banking Corp* [1984] 2 All ER 226; *First National Commercial Bank PLC* v *Humberts (a firm)* [1995] 2 All ER 673.

113 *First National Commercial Bank PLC* v *Humberts*, ibid at 680.

114 Beck, *Casenote* [1998] NZLJ 18 at 19.

115 *Nykredit Bank* v *Edward Erdman Group*, supra n 42.

116 *RB Policies at Lloyds Butler* [1949] 2 All ER 226 at 229.

117 See eg *Davie* v *New Merton Board Mills Ltd* [1959] 1 All ER 346.

118 See cases cited supra n 103.

of the cost of record keeping, the availability and cost of insurance, the deterioration of evidence, the unfairness of subjecting an individual indefinitely to the threat of being sued, the inability to plan with certainty for the future, the erosion of individual financial mobility, and the unfairness to a professional adviser who perhaps long after retirement is unexpectedly confronted with a claim dating back many years. As was recognised by the Law Commission,[119] both society and individuals have an interesting in quieting claims. There are substantial policy reasons for "shutting down" untimely proceedings and the courts must be careful not to be so overwhelmed by their instinctive distaste for what appears to be a technical defence as to overlook this.

On the other hand, to statute bar claimants before they have reason to even know they have a problem seems morally indefensible and liable to bring the law into disrepute, as indeed it did in the cases of *Cartledge* and *Pirelli*. Both decisions were universally condemned.

Further, in the 1990s it is not now possible to say (as the English Law Reform Committee did in 1977)[120] that such injustices are confined to a relatively insignificant member of cases. Once the courts expanded negligence liability for economic loss and recognised the right to claim exemplary damages in personal injury cases, the problem of latent damage became much more widespread.

How then to strike a better balance between the competing interests while still preserving a fundamental policy aim of the legislation?

The Need for Legislative Intervention

There is a strong body of opinion that the solution lies in retaining the reasonable discoverability test but tempering its disadvantages by enacting an overriding long stop period. This was the view of our own Court of Appeal in *Askin* v *Knox*[121] (a building case) and the New Zealand Law Commission in its 1988 report.[122] While favouring the introduction of a long stop provision, the Court of Appeal stressed that it was beyond their power to do so. It could only be done by legislation. The inability of the court to introduce a long stop was again reaffirmed in *S* v *G*.[123] The arguments for a long stop provision seem compelling — even, it is submitted, in the sensitive area of abuse cases, provided of course that the period of the long stop is not too short. Section 28 would still be available as a useful mechanism to accommodate the special aspects of these abuse cases.[124]

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119 Law Commission Report No 6 *Limitation Defences in Civil Proceedings*, October 1988.

120 Law Reform Committee 21st Report, supra n 96.

121 Supra n 32.

122 Supra n 119. It was also the view of the House of Lords in *Pirelli*, supra n 19 and the Law Reform Committee 24th Report *Latent Damage* November 1984 Cmnd 9390 (UK). The Law Commission's survey of legislation in other jurisdictions shows that where a version of reasonable discoverability is enacted, it is invariably accompanied by an over-riding long stop. The Law Commission's own recommendations included a new standard three year limitation period (to replace the current six year period) dating from the time of the act or omission on which the claim is based but with an extension of the period up to a possible maximum of 15 years in the event of delayed discovery.

123 Supra n 54.

124 As suggested in *S* v *G*, supra n 54.

Although the arguments for a long stop are compelling, the New Zealand legislature has been slow to respond. It has enacted section 91 of the Building Act 1991,[125] but that provision is limited to the building context. Meanwhile, the reasonable discoverability doctrine is being extended into other areas and now seems destined to be a doctrine of general application. The answer is not for the Court of Appeal to retreat from extending the reasonable discoverability doctrine any further. That would only create anomalies and an unprincipled situation whereby "accrual" under section 4(1) would have different meanings for different purposes. It is difficult to know why the legislature has been so slow. While one can accept that there are other priorities on the legislative programme, it is now some 10 years since the Law Commission Report. If the thinking is that the Limitation Act has worked well since 1950 so why change it, then the legislators are not keeping pace with the change in judicial interpretation.

Continued inertia on the part of the legislature may drive the Court to create their own version of a long stop. After the *Rafuse* decision, one Canadian commentator speculated that the equitable doctrine of laches might provide an answer to the long stop problem without the need for legislative intervention.[126] However, that would necessitate significant changes in thinking. First, it would require applying an equitable defence to common law actions. Secondly — and more radically — it would require changing the principles of the laches doctrine itself. No longer could there be a rule that laches is only allowed where there is no statutory bar,[127] for section 4(1) and its six year limitation period would still exist. Under current law, we have the moment of accrual (reasonable discoverability) plus six years. If laches were to make any practical difference, it would need to be able to shorten the *post* reasonable discoverability six year period. How the courts could justify that in the face of the clear wording of section 4(1) is difficult to see. Unless substantially revamped, laches could not kick in *before* the moment of reasonable discoverability because its chief element is acquiesence and acquiesence depends on knowledge.[128] Laches would also be a rather unsatisfactory substitute for a long stop from the point of view of certainty. For it works on a case by case basis, requiring the circumstances of each particular case to be considered.[129] Legislative reform therefore seems essential.

The unfairness to defendants of not having a long stop is further heightened by the fact that it is defendants who bear the onus of proof. It is for the defendant to prove the claim is out of time, not for the plaintiff to prove it is within time. While there is English authority to the contrary,[130] it is respectfully submitted that Tipping J was correct when he held in *Humphrey* v *Fairweather*[131] that the persuasive onus does rest on the defendant. Under a reasonable discoverability régime — especially one with some subjective components — this does however

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125 See above.

126 Schlosser, *Some Recent Developments in the Law of Limitation of Actions* (1987) 15 Alberta Law Review 388 at 397.

127 *Archbold* v *Scully* (1861) 9 HL Cas 360 at 383.

128 *Halsbury's Laws of England* (4th ed) Vol 16 para 927.

129 *Smith* v *Clay* (1767) 3 Bro CC 639n.

130 *Maugham* v *Walker* (1790) 2 Peake 220; *Cartledge*, supra n 10 at 784; *London Congregational Union Inc* v *Harriss* [1988] 1 All ER 15.

131 [1993] 3 NZLR 91. See also *Pullen* v *Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.

create obvious problems for defendants. Significantly, in *Humphrey* v *Fairweather*,[132] Tipping J was influenced in his thinking on onus by the existence of section 91 of the Building Act 1991 which he saw as ameliorating the position for defendants to a significant extent. In *non*-building cases, the continued absence of any long stop means the concerns for defendants must therefore remain.

Should a general long stop provision ever be enacted, it is likely the period chosen will be the same as was adopted for the Building Act, namely ten years. Whatever period is selected, it will not please everyone. However, it is submitted that ten years is demonstrably too short.

The history of the Building Act legislation makes for interesting reading. When the Bill was first introduced and referred to a Select Committee on 4 September 1990, it did not contain any limitation provision. In October 1991, the Minister's advice to the Select Committee was for a long stop period of 15 years,[133] this being the recommendation of the Law Commission supported by the Justice Ministry and Internal Affairs. When the Select Committee's report was presented to Parliament on 31 October, it endorsed a 15 year period.[134] However, only 20 days later when the Bill was given its second reading on 20 November, the 15 years had become ten following "representations from the building industry".[135] It seems the Minister received information to the effect that insurance for building certifiers for 15 year cover was unobtainable. However, that was clearly not the advice the Law Commission had received and given the speed with which the Government changed its mind, one wonders at the quality of the information and the decision. After all, the Law Commission had no vested interest and had devoted much time and study to determining what an appropriate period would be. Its recommendation that a 15 year period strikes the right balance between justice for claimants and certainty for defendants should have been followed.[136]

Conclusions

1 It is fundamentally unjust that potential plaintiffs should be deprived of their rights of action before they have reason to even know they have a claim. This is as true for claimants in contract as in tort.

2 It is no longer good law in New Zealand that the circumstances provided for in section 28 of the Limitation Act 1950 are the only circumstances in which the plaintiff's ignorance of a material fact can prevent time running under section 4(1) Limitation Act 1950.

3 The reasonable discoverability doctrine enunciated in *G D Searle & Co* v *Gunn* should be regarded as being of general application, applicable to all elements of all causes of action, both contractual and tortious, regulated by section 4(1) of the Limitation Act 1950. It would follow that for the purposes of section 4(1) of the Limitation Act 1950 a cause of action accrues when the material

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132 Supra, n 131.

133 Letter dated 10 October 1991 from Minister of Internal Affairs to Chairman Internal Affairs and Local Government Select Committee.

134 (1991) 520 NZPD 5296.

135 (1991) 520 NZPD 5490.

136 Supra, n 122. A 15 year period was also favoured by the 1984 English Report, supra n 120.

facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

4 Some recent High Court decisions suggesting different tests for different causes of action should not be followed.

5 A long stop provision is needed to redress the balance in the interests of certainty and fairness to defendants.

6 There is a pressing need for legislative intervention.

7 The period of the long stop should be 15 years.