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# *MURRAY v MOREL* AND THE SHAKY FOUNDATIONS OF REASONABLE DISCOVERABILITY IN NEW ZEALAND

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*Murray v Morel* and the shaky foundations of reasonable discoverability in New Zealand

*TABLE OF CONTENTS*

## I INTRODUCTION

What can a court do when faced with a plaintiff whose remedy is ostensibly time barred despite the plaintiff not knowing all or some of the facts giving rise to the cause of action? Two general answers are open, and both relate to the meaning attached to the phrase that time runs from the "date on which the cause of action accrued".[1] The first approach regards this as laying down a statutory test of when time starts to run. This test may either be that a cause of action has accrued upon the occurrence of the facts constituting the cause of action,[2] or upon the plaintiff's knowledge or reasonable discoverability of those facts.[3] The second approach regards accrual as a matter for the common law.[4] It argues that whether the accrual of a cause of action requires the plaintiff's knowledge or reasonable discoverability of facts depends on if this can be accommodated within the substantive cause of action.[5] As it is a matter for the common law the application of the rule by analogy to other fact scenarios will be possible where knowledge can similarly be placed within the cause of action.

In *Murray v Morel & Co Ltd* the majority of the Supreme Court declined the appellant's submission the Limitation Act 1950 should be interpreted as laying down a knowledge or discoverability based test, or a so called general doctrine of reasonable discoverability.[6] At the same time the Court did not wish to overrule the earlier Court of Appeal decisions in *S v G* and *Searle* which held that reasonable

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[1] Limitation Act 1950, s 4(1) and used throughout the Limitation Act 1950. Similar language has been used in limitation statutes throughout the Commonwealth, see Nicholas J Mullany "Limitation of Actions and Latent Damage: An Australian Perspective" (1991) 54 MLR 216, 216.

[2] *Cartledge & Ors v E Jopling & Sons Ltd* [1963] 1 All ER 341, 343 [*Cartledge*]; *Pirelli General Cable Works Ltd v Oscar Fable & Ors* [1983] 2 AC 1 [*Pirelli*].

[3] *Kamloops v Nielsen* [1984] 2 SCR 2 [*Kamloops*]; *Central Trust Company v Rafuse* [1986] 2 SCR 147 [*Rafuse*].

[4] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) [*Hamlin* (CA)]; [1996] 1 NZLR 513 (PC) [*Hamlin* (PC); *Sparham-Souter v Town and Country Developments* [1976] QB 858 [*Sparham-Souter*]. This is not the only way the common law has dealt with latent damage. In the context of professional negligence, it has been recognised that in cases of contingent liability, no loss occurs until the contingency arises, see *Thom v Davys Burton* [2008] NZSC 65.

[5] This approach is not inconsistent with an occurrence based test. See the discussion at Part III C New Zealand.

[6] *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (Gault J dissenting) [*Murray*].

discoverability applied to the facts of those cases.[7] Furthermore, McGrath, Henry, and (arguably) Gault JJ sought to preserve the possibility of extending the application of a reasonable discoverability by analogy,[8] while Tipping and Blanchard JJ did not. Several commentators have suggested this means it is still advisable for plaintiffs to argue reasonable discoverability ought to be extended to their particular situation,[9] and it clear from post-*Murray* case law such arguments are being made.[10]

In this paper I argue that the notion of extension by analogy does not sit comfortably with the doctrinal basis of these two decisions and therefore courts will very wary of extending the reach of reasonable discoverability beyond the confines of those cases. The basis of this argument is as follows. *S v G* and *Searle* can only be rationalised at a doctrinal level if they are regarded as recognition of a knowledge based test of accrual because in those cases knowledge or reasonable discoverability could not be brought within the substantive elements of the cause of action. If a knowledge based test is rejected, as it was in *Murray*, the doctrinal foundations of those cases start to break down and are better regarded as exceptions. The assertion these exceptions can be extended by analogy relies for authority on the common law approach, but as that approach is not the doctrinal basis of *S v G* and *Searle* it is argued the notion of extensions by analogy is not really appropriate. This will mean courts will be very wary of going beyond the narrow confines of the already established exceptions. Though legislative reform introducing a statutory reasonable discoverability test is hoped to be on the way in the near future,[11] presumably this will not apply retrospectively. The nature of latent damage means that questions of delayed knowledge will continue to arise under the present legislation for some time.

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[7] *S v G* [1995] 3 NZLR 681 (CA) Cooke P, Richardson, Casey, Hardie Boys and Gault JJ. *GD Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) Richardson P, Gault and Henry JJ [*Searle*].

[8] Gault J's position is discussed at Part V C Extension By Analogy.

[9] Andrew Beck "Limitation in the Supreme Court" [2007] NZLJ 213, 216; Hannah, Brown "'Reasonable Discoverability': the final word?" [2007] NZLJ 183, 185.

[10] See for example *Earl White v Attorney-General* (28 November 2007) HC WN CIV 2001-485-864 Miller J [*Earl White*]; National Pacific Commercial Equities Limited Formerly Known As Highwell Investment Group Limited (7 February 2008) HC AK CIV 2007-404-5832 Doogue JA [*National Pacific*].

[11] Draft Limitation Defences Bill 2008 (an earlier version of which is available at www.lawcom.govt.nz/UploadFiles/Publications).

In Part II I discuss the functions and purposes of limitation law, and the Limitation Act 1950. Part III looks at the pre-*Murray* case law in England, Canada and New Zealand. Part IV sets out the reasoning of the judgments in *Murray*, and part V analyses this reasoning. In Part VII I set out some concluding remarks.

## *II LIMITATION LAW: FUNCTION AND PURPOSE*

### *A Function and Purpose*

Limitation law is a creature of statute "there being no principle of limitation at common law."[12] Its function is to bar an otherwise meritorious civil claim by setting a time when it can no longer be brought.[13] In New Zealand the Limitation Act 1950 has a core limitation period of six years.[14] Generally speaking limitation law is procedural in nature. It is said to bar a plaintiff's remedy and not his or her right.[15] In New Zealand for a limitation bar to be engaged it must be pleaded by the defendant and proven on the balance of probabilities.[16]

The purposes of limitation law are not stated in the Limitation Act. However, the three main purposes of limitation law relate to certainty, evidence and diligence.[17]

Certainty is regarded as the primary rationale of limitation law.[18] It recognises it is unfair a defendant "should have a claim hanging over him [or her] for an indefinite period and it is in this context that such enactments are sometimes described as 'statutes of peace'."[19] Apart from mitigating the harm to defendants of having

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[12] Andrew McGee *Limitation Periods* (4 ed, Sweet & Maxwell, London, 2002) 2. Although the courts of equity invented a time defence through the doctrine of laches.

[13] *Humphrey v Fairweather* [1993] 3 NZLR 91, (HC) Tipping J [*Humphrey*]. See also, Chris Corry *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, Wellington, 2007) para 6.

[14] Limitation Act 1950, s 4.

[15] McGee, above n 12, 30. However, there is a class of cases relating to land where the expiry of the limitation period extinguishes the right also.

[16] *Humphrey*, above n 13, 99.

[17] Alan Rosenfeld "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989) 12 Harv Women's LJ 206, 211. See also, Michael A Jones "Latent Damage: Squaring the Circle" (1985) 48 MLR 564, 564. This threefold classification was used in *W v Attorney-General* [1999] 2 NZLR 709, para 79-81 (CA) Thomas J [*W v A-G*]; *M (K) v M (H)* [1992] 3 SCR 6, 29-30.

[18] *W v A-G*, above n 17, para 77.

[19] Ibid,16.

litigation hanging over them, there are at least two other policy considerations driving the need for certainty. The first is the general public interest of living in a non-litigious society, or at least setting a definite time after which litigation may not be brought. In New Zealand, the particular weight given to the desirability of avoiding litigation is evident from the establishment of Accident Compensation Corporation in 1974, and the consequent removal of the common law right to sue for personal injury.[20]

The second consideration is the deleterious economic effects of uncertainty. Graeme Mew suggests two possibilities.[21] The first is the possibility open-ended liability may prevent, or provide a disincentive to, the entering into of transactions.[22] The second is that "the cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the consumer."[23]

The evidence rationale is an "objective consideration",[24] positing that trials should be held while evidence remains "fresh and reliable."[25] With the passage of time this becomes less likely because "[m]emories will fade, witnesses will die or move away, and documents and other records will be destroyed."[26]

The diligence rationale argues plaintiffs should be encouraged to commence litigation in a timely manner and not "sleep on their rights."[27] If a plaintiff fails to do so, limitation law will deny them a remedy. Considered in light of the other two rationales this seems entirely fair. However, the conundrum is how can a plaintiff be diligent if unaware of the facts giving rise to a claim?

### *C Limitation Act 1950*

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[20] Now contained in the Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317.
[21] Graeme Mew *The Law of Limitations* (Butterworths, Vancouver, 1991) 7-8. See also WS Schlosser "Some Recent Developments in the Law of Limitation of Actions, Concurrent Liability and Pure Economic loss" (1987) Alberta Law Rev 388, 388-389.
[22] Ibid, 7-8.
[23] Ibid, 7-8.
[24] Andrew McGee *Limitation Periods* (4 ed, Sweet & Maxwell, London, 2002) 16.
[25] Rosenfeld, above n 17, 211.
[26] Mew, above n 21, 7. See also McGee, above n 24, 16.
[27] *M (K) v M (H)*, above n 17, 29-30 cited in *Peixeiro v Haberman* [1997] 3 SCR 549, para 34 [*Peixeiro*].

Section 4 of the Limitation Act states:

> 4 Limitation of actions of contract and tort, and certain other actions
>
> (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say, -
>
> (a) Actions founded on simple contract or on tort
>
> ...
>
> (d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> ...

Cause of action has been defined at common law as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."[28] In contract this would be the existence of a contract and its subsequent breach.[29] In negligence it would be the "facts necessary to establish duty, breach and consequent loss."[30] The Limitation Act does not define when a cause of action has accrued, and as noted in the introduction the reasonable discoverability debate is about the appropriate meaning to be given to the phrase.

## *III PRE*-MURRAY *CASE LAW*

In order to understand the differing views about the place of knowledge in limitation law an historical sketch and an analysis of the leading cases is needed. The following addresses case law from England, Canada and New Zealand because the judgments in *Murray* focus on these jurisdictions. English law is particularly pertinent because the New Zealand act is modelled on Limitation Act 1939 (UK). Although it is conceptually clearer to address the cases in relation to the approach to 'accrues' each takes, addressing them according to jurisdiction better illustrates the affect of English

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[28] *Read v Brown* (1888) 22 QBD 128, 131 cited in *Cartledge & Ors v E Jopling and Sons Ltd* [1963] 1 All ER 341, 352 Lord Pearce, and in *Hamlin* (CA), above n 4, 536 McKay J.

[29] Mew, above n 21, 129.

[30] *BP Oil New Zealand Ltd v Ports of Auckland Ltd* [2004] 2 NZLR 208, para 92 Rodney Hansen J [*BP Oil*] citing *Stratford v Phillips Shayle-George* (2001) 15 PRNZ 573, 578 (CA) [*Stratford*].

decisions on the Canadian and New Zealand approaches and the different path each jurisdiction has taken.

### *A England*

The House of Lords ruled on the meaning of accrued in *Cartledge & Ors v E Jopling & Sons Ltd* in a case concerning negligence causing personal injury.[31] The plaintiffs developed pneumoconiosis through the inhalation of dust when working in the defendant's factory and thus sustained damage, but did not discover this for at least six years. Framing the issue as one of statutory interpretation, the Limitation Act was held to lay down an occurrence based test of accrual. Once all the facts constituting the cause of action were in existence, the cause of action had accrued. Thus, the plaintiffs' cause of action had accrued when they developed pneumoconiosis, and consequently the limitation period had expired.

Lord Pearce, who gave the only fully reasoned speech, based his decision upon two factors. One, case law from the previous statute of 1623 has been decided on the basis accrual was occurrence based.[32] Two, his Lordship pointed to the addition of a fraudulent concealment provision in section 26 of the 1939 English Act (section 28 of the New Zealand Act).[33] It was reasoned that this exception by which time did not run until the fraud or mistake has been, or could with reasonable diligence have been discovered, meant that in ordinary circumstances time began to run when all the facts necessary to bring the cause of action were in existence.[34] All judges expressed regret that this was the decision they felt bound to reach and had it been a matter for the common law a different result would have been reached.[35]

The English Parliament responded to the mischief occasioned by *Cartledge* by enacting the Limitation Act 1963, which amended the 1939 Act to exclude the operation of a limitation defence in personal injury cases where:[36]

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[31] *Cartledge*, above n 2, 343.
[32] Ibid, 351.
[33] Ibid.
[34] Ibid, 343.
[35] See *Pirelli,* above n 2, 14 Lord Fraser.
[36] Limitation Act 1963 (UK), s 1(3).

> it is proved that the material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff.

New Zealand did not follow suit with similar legislative reform.[37]

The issue of undiscovered damage was revisited in *Sparham-Souter v Town and Country Developments*.[38] This case concerned what was to become the familiar theme of damage to houses - resulting from inadequate foundations - not discovered until after the limitation period had expired. Negligence was alleged against the developer, who was also the builder, and against the council's surveyor.

*Cartledge* was distinguished on the basis that the damage happened upon inhalation of dust whereas in *Sparham-Souter* no damage was done to the "house until it began to sink and cracks appeared."[39] It was ruled that in the case of defective foundations "[t]ime did not start to run against [the plaintiff] until [the plaintiff] knows of the defective foundations, or could, with reasonable diligence, have discovered it."[40]

Lord Denning MR, giving the leading judgment, did not engage in an analysis of what accrued means or the relevance of the fraud exception.[41] Rather, his Lordship's reasoning was to state two propositions. Firstly, a cause of action in negligence does not accrue until the plaintiff sustains damage as the result of the defendant's breach of his or her duty of care. Secondly, "'[a] Statute of Limitations cannot start to run unless there are two things present – a party capable of suing and a party liable to be sued.'"[42] Although "equivocal" on the point,[43] his Lordship appears to assert the relevant damage is that to the defective foundations. He then argues a purchaser has sustained no loss, and therefore could not sue, until the house sank or

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[37] Christine French "Time and the Blamelessly Ignorant Plaintiff; A Review of the Reasonable Discoverability Doctrine and Section Four of the Limitation Act 1950" (1998) 9 OLR 255, 258.
[38] *Sparham-Souter*, above n 4.
[39] Ibid, 868.
[40] Ibid, 868.
[41] Neither did Roskill or Geoffrey LJJ.
[42] Ibid, 867 citing *Thomson v Lord Clanmorris* [1900] 1 CH 718, 728-729 Vaughan Williams LJ.
[43] Christine French, above n 37, 259 at note 27.

cracks appear because before then the house could be sold for full value.[44] Therefore, time did not start to run until this damage was discovered or reasonably discoverable.

Although not explicitly stated in this way by Lord Denning MR, Roskill, and Geoffrey LJJ it is submitted *Sparham-Souter* was the genesis of the common law approach because the issue of the plaintiff's knowledge was placed within the cause of action and was not considered a part of a statutory test. Indeed it was the genesis for reasonable discoverability in general, but as will be argued I have reservations about whether it provides a sound basis for a wider approach.

The House of Lords was asked to resolve these authorities in *Pirelli*, a case of a defectively built chimney.[45] Delivering the only substantive speech, Lord Fraser rejected *Sparham-Souter*. His Lordship argued Parliament's inclusion of a reasonable discoverability clause for personal injuries in the 1963 amendments meant Parliament was endorsing the application *Cartledge* in all other cases. His Lordship was careful to distinguish between a latent defect in foundations, and material damage resulting from these defects, but ruled that once damage is sustained time begins to run regardless of knowledge. Although economic loss and opposed to physical damage was a basis for distinguishing *Sparham-Souter*, his Lordship proceeded on the basis that what was being sued upon in all cases was physical damage.

Echoing a familiar concern Lord Fraser said changes to limitation law were the province of Parliament. In particular his Lordship was concerned the absence of a longstop provision, placing an ultimate time limit on the bringing of an action, could leave liability potentially open ended if a reasonable discoverability rule was recognised.[46] In response to *Pirelli* the UK Parliament amended the Limitation Act 1980 so that in actions in negligence not concerning personal injury, the time limit was six years from accrual or if six years had passed three years from:[47]

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[44] Jones, above n 17, 565.
[45] *Pirelli*, above n 2.
[46] Ibid, 19. See also Lord Scarman, 19.
[47] Limitation Act 1980 (UK), s 14A.

> the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

Once again New Zealand did not follow with similar reform.

### *B Canada*

In *Kamloops v Nielsen*, another case of defective foundations, the Canadian Supreme Court was faced with a situation where the Court of Appeal for British Columbia had applied *Sparham-Souter*, but since then the House of Lords ruled on the issue in *Pirelli*.[48] The Court was thus asked to decide which approach Canada would adopt. Wilson J, delivering judgment for the majority, ruled Canada would follow *Sparham-Souter* and endorsed a reasonable discoverability of damage test.

While identifying the approach in *Cartledge* was one of statutory interpretation, her Honour did not analyse the language of the relevant limitation provision. Section 738(2) of the Municipal Act 1960 required an action be brought within one year "after the cause of action shall have arisen".[49] No attempt was made to distinguish *Cartledge* and *Pirelli* on the basis of a lack of a concealed fraud provision, probably because an overlapping enactment the "the Statute of Limitations (RSBC) 194, c 191, afforded a similar basis for an argument as to legislative intent in s 38."[50] Instead her Honour weighed the harm to either party. On the one hand, it was unjust a plaintiff's claim is stature-barred before he or she knows of its existence. On the other hand, the "postponement of the accrual of a cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence."[51] She concluded the latter harm "to be much the lesser of two evils."[52]

Wilson J said she was applying the rule from *Sparham-Souter* that "the limitation period starts to run from the date on which the plaintiff actually discovers

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[48] *Kamloops*, above n 3.
[49] Municipal Act RS BC 1960, s 738(2).
[50] *Rafuse*, above n 3, para 76 Le Dain J.
[51] *Kamloops*, above n 3, 40.
[52] Ibid, 40.

the damage or should with reasonable diligence have discovered it."[53] However, *Sparham-Souter* was decided on the basis that *no* damage was sustained until it was discovered or reasonably discoverable. Here an ambiguous phrase was interpreted in a way felt best to accord with the interests of justice. Although the difficult issue of whether the relevant damage is the latent defect or the resultant damage to the building was addressed,[54] the distinction between economic and physical damage was not. The relevant damage seemed to be physical damage meaning knowledge was not placed within the cause of action itself; rather it formed part of a statutory test of accrual.

In *Central Trust Company v Rafuse* the Supreme Court revisited reasonable discoverability in the context of the professional negligence of solicitors.[55] Le Dain J, delivering the judgment of the Court, affirmed the rule of reasonable discoverability and extended its reach, stating it is:[56]

> a general rule that a cause of action arises for 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.

In several respects this definition goes further than any previously adopted in either England or Canada. Firstly, in *Kamloops* the rule was said to apply to the damage element of negligence, whereas in Le Dain J's version it applies to any material fact and thus element of a cause of action. Secondly, the rule is not phrased in a way limiting it to causes of action in negligence. The Canadian position seems to be that it is a rule of general application with the possible exceptions of Alberta, British Columbia (because of the reform addressed in the next paragraph), and Manitoba.[57] In a later case it was described as a "rule of construction" applicable whenever the language of accrual is used.[58] This seems to extend to claims in contract of indemnity also, but the Supreme Court is yet to rule on its application to contract

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[53] Ibid, 36.
[54] Although not entirely clear, physical damage seemed to be considered the relevant damage.
[55] *Rafuse*, above n 3.
[56] Ibid, para 77.
[57] Mew, above n 21, 105.
[58] *Fehr v Jacob* (1993) 14 CCLT (2d) 200, 206 (Man CA) Twaddle JA, approved by the Supreme Court in *Peixeiro*, above n 27, para 37.

simpliciter.[59] It is submitted the general tenor of the Canadian Supreme Court's position on this issue and the interests overall consistency suggests the rule does apply to claims in contract simpliciter. This is, of course, by no means a foregone conclusion.

It should be noted also that Le Dain J argues it is implicit in Wilson J's judgment in *Kamloops* that she rejected the notion the issue's resolution was best left to Parliament.[60] This underplays the likelihood Wilson J's willingness to recognise the rule was influenced by the introduction in British Columbia of the Limitation Act 1975 which contained a reasonable discoverability rule and a 30 year longstop.[61] Although it was not applicable *Kamloops* it was in subsequent cases (though obviously only within British Columbia).

### *C New Zealand*

In *Hamlin* the New Zealand Court of Appeal confirmed the application of a reasonable discoverability rule in New Zealand in the context of defective foundations.[62] Although the issue had arisen in New Zealand earlier, this was the first case to rule decisively on the point.[63] Perhaps unsurprisingly, Cooke P argued "the present case does not really turn on statutory interpretation. The Limitation Act does not define when a cause of action arises: it leaves that question to the common law."[64] Cooke P acknowledged that the statutory interpretation approach adopted in *Cartledge* was one rationally open.[65] However, he rejected the concealed fraud provision argument stating "that does not have to be treated as implying any legislative understanding, still less any legislative enactment, about when a particular

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[59] Mew, above n 21, 134.
[60] *Rafuse*, above n 3, para 76.
[61] Limitation Act S BC 1975 c 37, s 6 and s 8(1) respectively.
[62] *Hamlin* (CA) (McKay J dissenting), above n 4. Richardson J's judgment is not discussed as it focused solely on the issue of tort liability of local authorities and concurred with the majority on the limitation issue.
[63] See *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 23 (CA); *Askin v Knox* [1989] 1 NZLR 248 (CA).
[64] *Hamlin* (CA), above n 4, 523.
[65] Ibid.

cause of action arises at common law."[66] Casey J went even further, describing the argument as non sequitur.[67]

Rather than recognising a general rule, Cooke P "prefer[red] to proceed step by step."[68] Without saying so he followed in the footsteps of Lord Denning MR by ruling,[69] "time runs from date when a significant defect in the foundations is or ought to have been discovered."[70] His Honour explicitly recognised that in defective foundations cases this analysis was assisted by recognising the damage as economic because "until then the defect is latent and the market value of the property has not been diminished by it."[71] The same economic loss argument was endorsed by Casey and Gault JJ.[72] Although at the end of Cooke P's judgment he states a wider formulation of the rule referring to the discovery of defective foundations,[73] and not damage upon discovery, it is submitted this must be read in light of the overall discussion and its underlying rationale of economic loss.

Understanding the nature of Cooke P's reasoning is the key to understanding the claim being made in this paper. For Cooke P, accrual depended on the substantive law of the cause of action at issue not on any statutory test. In *Hamlin* reasonable discoverability could be brought within the substantive law of a cause of action so was considered applicable. It is submitted that in saying it was a matter for the common law and the court ought to proceed step by step, his Honour meant the further application of the rule would depend on whether a suitable analogy could be drawn between the facts of *Hamlin* and other cases in negligence. So, for instance, it would need to be shown that issues of knowledge were relevant to the existence of the facts necessary to constitute the cause of action.[74]

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[66] Ibid, 523. See also the comments of Casey J, 532. For a less restrained critique of the argument based on the concealed fraud provision argument see Sir Robin Cooke "Tort and Contract'' in PD Finn (ed) *Essays on Contract* (Law Book Company, North Ryde (NSW), 1987) 222, 226.
[67] *Hamlin* (CA), above n 4, 532.
[68] Ibid, 522.
[69] Chris Chapman "Limitation of Actions" [1996] NZLJ 161, 162.
[70] *Hamlin* (CA), above n 4, 522.
[71] Ibid, 522.
[72] *Hamlin* (CA), above n 4, Casey J, 533 and Gault J, 534.
[73] Ibid, 524.
[74] Cooke's view of accrual may partly explain his argument for negligence being recognised as a head of law in its on right regardless of whether the duty of care arises in tort, contract, or otherwise. That way, reasonable discoverability, as a part of the cause of action itself, would have a much wider bite.

Although not applicable to the proceedings in *Hamlin*, like in *Kamloops* it is likely the majority's willingness to recognise the rule was influenced by the introduction of section 91 of the Building Act 1991 which set a ten-year longstop on claims.[75] In the earlier case *Askin v Knox* Cooke P expressed concern about recognising the rule in the absence of a longstop and noted only Parliament could introduce one.[76]

McKay J, dissenting, argued the matter was one of statutory interpretation and New Zealand ought to follow the occurrence based test set in *Cartledge*. However, he was not convinced by the fraudulent concealment argument. Rather, he pointed out "if all the necessary facts are in existence, it is difficult to say that the cause of action has not accrued merely because the plaintiff is not aware of them."[77] For McKay J knowledge was not one of those facts.

When analysed closely, the debate between the majority and McKay J really seemed to be more about what facts constitute the cause of action than a disagreement about the meaning of the Limitation Act. Despite Cooke P's disavowal of the application of a statutory test, his approach is not inconsistent with the existence of one in that it is still about the facts which must occur before a cause of action accrues. This difference in approach is really one of focus.

*Hamlin* was appealed to the Privy Council on the basis that *Pirelli* should have been applied.[78] Delivering judgment, Lord Lloyd of Berwick essentially confirmed the approach of the majority of the Court of Appeal. His Lordship explained more clearly why economic damage is said to occur when the defective foundations are reasonably discoverable to the homeowner. This is because "defects would then be obvious to a potential buyer, or his expert".[79] Defining damage as economic meant any definitive ruling on the status of *Pirelli* or a general rule of reasonable

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His Honour sets out this argument extra-judicially in "Tort and Contract", above n 66. A brief mention of it is made in *Askin v Knox*, above n 63, 254.

[75] Now in the Building Act 2004, s 393.

[76] *Askin v Knox*, above n 63, 256.

[77] *Hamlin* (CA), above n 4, 538.

[78] *Hamlin* (PC), above n 4.

[79] Ibid, 526.

discoverability was unnecessary.[80] This approach was not without its critics because it failed to account for the fact damages in tort for economic loss can be calculated not only for diminution in value but also for remedial work.[81]

It is important to note that in *Murray*, Tipping, McGrath and Gault JJ all suggest that in *Hamlin* the Privy Council recognised a narrower test than the Court of Appeal.[82] The Court of Appeal is said to have laid out a rule that a cause of action in negligence does not accrue until the defects were discovered, or reasonably discoverable, whereas the Privy Council by defining the loss of as economic kept the discoverability rule within the cause of action itself. Although there is dicta in *Hamlin* supporting this wider framing of the ratio,[83] the above analysis, and other commentators, have suggested that the Court of Appeal decided the issue on the same "narrow basis" of economic loss.[84]

In *S v G* a full bench of the Court of Appeal was asked to extend reasonable discoverability to a case concerning psychological injury.[85] This appeal came before the Court prior to the Privy Council delivering its judgment in *Hamlin*. The causes of action were in negligence, trespass to the person and breach of fiduciary duty. The actions arose from alleged medical neglect, sexual, physical and emotional abuse. In this case, however, the psychological damage was already known to the victim, but at first instance it was accepted that in sexual abuse cases the causal connection to the abuse is often not known until therapy is undertaken, and this is was a case of this kind.

Gault J, delivering the judgment of the Court stated "that a cause of action accrues when all of its elements are subsisting."[86] However, it is postponed, inter alia, when "the plaintiff reasonably has not discovered all of the elements (*Invercargill*

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[80] Ibid, 526-527.
[81] See Chapman, above n 69, 161; New Zealand Law Commission *Limitation of Civil Actions: A discussion paper* (PP39, Wellington, 2000), para 27; French, above n 37, 261. Contrast Mullany, above n 1, 227.
[82] *Murray*, above n 6, Tipping J, para 44; McGrath J, para 96; Gault J, para 111.
[83] *Hamlin* (CA), para 523 Cooke P.
[84] This includes Christine French who acted as counsel for the plaintiff in *Hamlin*. See French, above n 37, 260 and 264. See also Chapman, above n 69, 162.
[85] *S v G*, above n 7.
[86] Ibid, 686.

*City Council v Hamlin*)."[87] This formulation of the rule is clearly much wider than that recognised by the Court of Appeal or the Privy Council in *Hamlin*.[88] Its wording parallels that the Canadian cases which framed the matter as one of a construction.[89] However, Gault J stated it was not a matter of statutory interpretation, rather, "[i]t is a question of when as a matter of law the cause of action accrues for the purposes of the Limitation Act."[90] He then drew an analogy between a home owner who has seen some cracks around the house but has not, and could not reasonably have, discovered the defective foundations, and a sexual abuse victim who despite knowing of the abuse "reasonably has not linked serious psychological and emotional damage to the abuse."[91] Such plaintiffs, he argued, did not have their cause of action accrue until "the psychological damage is or reasonably should have been identified and linked to the abuse."[92]

His Honour accepted the same rule applies to knowledge of consent in relation the causes of action in assault and battery.[93] This was significant because the issue of discoverability was now considered applicable beyond negligence to a per se cause of action. Reasonable discoverability in relation to consent has subsequently been applied cases such as *S v Attorney-General.*[94]

Although Gault J's approach was to proceed by analogy it is submitted it cannot be said that causation requires knowledge in the same way as economic loss, so that knowledge remains within the cause of action itself. The cause is there, whether known or not. This means, despite comments to the contrary, the application of the rule in *S v G* was much closer to that of *Rafuse* than *Hamlin.* As French points out, the use of the word "postpone" represents a movement away from "the realm of the common law and into the imposing a gloss on the clear words of a statute."[95] It is submitted the postpone position sits in an uneasy limbo between accrual being a matter for the common law and it being a statutory test.

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[87] Ibid, 686 (citation omitted).
[88] This is so, even if it is accepted the Court of Appeal's formulation was wider than the Privy Council's.
[89] French, above n 37, 264.
[90] *S v G*, above n 7, 687.
[91] Ibid, 687.
[92] Ibid.
[93] Ibid.
[94] *S v Attorney-General* [2003] 3 NZLR 450, paras 30-39.
[95] French, above n 37, 264.

Subsequent to *S v G* and the Privy Council decision in *Hamlin* the Court of Appeal was asked to rule on reasonable discoverability in *GD Searle & Co v Gunn.*[96] This case alleged negligence causing physical injury. The respondent had an intrauterine device inserted, which as a result of pain was removed after a couple of weeks. Not long after this she was diagnosed with pelvic inflammatory disease which led to a number of ectopic pregnancies and eventually infertility. The link between the insertion of the device and the disease was not discovered until the respondent read about it in a magazine. At the time the link was discovered, the elements of the cause of action had already occurred and the limitation period had ostensibly expired.

Henry J, delivering judgment for the Court confirmed that reasonable discoverability applied to the element of causation in this case also. After noting that *S v G* took the *Hamlin* principle "one step further and applied it to a personal injury claim of a specific kind",[97] his Honour stated:[98]

> [i]t is still a question of what is meant in s 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 framing of the issue as one of statutory interpretation marked a clear shift from the decidedly common law approach of *Hamlin* and a further step from the "postpone" position of *S v G.* Admittedly, the discussion that follows is carefully restricted to accrual in personal injury claims.[99] However, although there is no sweeping statement about a new breadth for the rule like that in Canada, if the definition of accrued is a matter of statutory interpretation, as a matter of principle, the meaning given to it should be applied consistently throughout the Limitation Act.[100] Although as Rodney Hansen J noted in *BP Oil* the weight of High Court authority was against any further extension, his Honour argued *S v G* and *Searle* represented a convergence with the Canadian approach.[101] In light of the logic of

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[96] *Searle*, above n 7.
[97] Ibid, 132.
[98] Ibid, 132.
[99] New Zealand Law Commission *Tidying the Limitation Act* (NZLC R61, Wellington, 2000) para 10.
[100] French, above n 37, 277.
[101] *BP Oil*, above n 30, para 104.

*Searle* and Rodney Hansen J's comments proponents of extending the application of the rule had reason to believe this is where New Zealand was heading.

### *D Summary of Pre-*Murray *Case Law*

There are three possible approaches to the relevance of knowledge to accrual which have a clear doctrinal basis. As Cooke P recognised the statutory interpretation approach is one rationally open.[102] It is submitted the ambiguity of the statutory language is such as to support either the English occurrence based test or the Canadian knowledge based test. The *Hamlin* common law approach is a legitimate one also, notwithstanding the critique of the reasoning in that particular case,[103] in that one of the facts constituting the cause of action is knowledge or reasonable discoverability of damage. However, it is very difficult to rely on the underlying doctrinal basis of *Hamlin* to extend the reach of reasonable discoverability. Just which approach *S v G* and *Searle* fell within was not entirely clear, there being a good argument they indicated the recognition of a general doctrine.

## *IV* MURRAY v MOREL: *RESOLUTION AT LAST?*

A chance to resolve this issue was presented to the Supreme Court in *Murray*, the pertinent facts of which are briefly set out below. In a case like the *Murray*, where five individual judgments with differing reasoning are delivered, discerning a single ratio is problematic. Beck suggests the ratio can be summarised in three points.[104] Firstly, there is no general doctrine of reasonable discoverability in New Zealand. Secondly, *S v G* and *Searle* should not be overruled. Thirdly, the application of the reasonable discoverability rule "might be extended beyond the situations accepted in *S v G* and *Searle & Co* on a case by case basis: McGrath, Gault, Henry JJ."[105] Though this is last point is probably correct and has been accepted in several subsequent judgments,[106] my concerns with it are considered below.[107] Beck also notes Gault and

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[102] See text above n 65.
[103] See text above n 69.
[104] Beck, above n 9, 215.
[105] Ibid, 215. This formulation has subsequently been applied in *National Pacific*, above n 10, para 40; *Earl White*, above n 10, para 405.
[106] Ibid.
[107] See Part V C Extension by Analogy.

Henry JJ are not permanent members of the Supreme Court Bench so it is unclear the Supreme Court would deal with the issue in the same way in future cases.[108] A recent obiter comment of Elias CJ in a case concerning negligent professional advice, suggested she may have been willing to consider an "extension of the approach adopted in the case of latent damage to buildings in *Invercargill City Council v Hamlin*",[109] if it had been material to the outcome of the limitation point. What the Chief Justice meant by the approach adopted in *Hamlin* remains to be seen.

The pertinent facts for this analysis are as follows. Section 56 of the Securities Act 1978 allows investors who subscribe based on untrue statements to recover subscriptions along with interest and compensation. In 1994 the Murrays, along with other investors, subscribed for securities in a forestry scheme on the basis of a prospectus which they alleged contained untrue statements. The Murrays did not discover the untrue statements until 1999 (just over six years since the statements were made). The statement of claim sought, inter alia, compensation pursuant to section 56. As this was an action "to recover any sum recoverable by virtue of any enactment",[110] and had occurred more than six years since the claim was brought, it was ostensibly time barred under section 4(1)(d) of the Limitation Act.

Two issues were raised on appeal from the Court of Appeal's decision to reinstate eight of the ten causes of action struck out by the High Court. The first was the validity of allotments made under section 28 of the Securities Act. The Supreme Court ruled the allotments were valid, which reduced the remaining causes of action to one for breach of fiduciary duty and one under section 56 of the Securities Act. The second issue, which is the focus of this paper, was whether the Murrays could rely on a general doctrine of reasonable discoverability to save the ostensibly time-barred cause of action under section 56.

The remainder of this part outlines the reasoning of the judgments, which are grouped according to their views about the possibility of extension. Firstly, the judgments in favour of further extension are discussed, which are further divided into

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[108] Elias CJ recused herself and Anderson J sat on the Court of Appeal in this case. See Beck, above n 9, 213.
[109] *Thom v Davys Burton*, above n 4, para 15.
[110] Limitation Act, s 4(1)(d).

the approach of McGrath and Henry JJ, then that of Gault J.[111] Following this, the reasoning behind Blanchard and Tipping JJ's unwillingness to extend the application of the rule is discussed. Dealing with the judgments in this way narrows the discussion of the judgments to the reasoning underlying arguments for and against further extension.

### *A McGrath and Henry JJ*

McGrath and Henry JJ did not express concern about the status of *Searle* and *S v G* in light of the Privy Council decision in *Hamlin*. McGrath J noted the Privy Council did not rule on the issue of reasonable discoverability beyond the particular facts of *Hamlin*, so "the Court of Appeal remained free in *Searle* when the question arose to apply the enlightened approach it had taken in *Hamlin* and *S v G*."[112] Henry J expressly declined to engage in the debate about the basis of *S v G* and *Searle* saying:[113]

> [w]hether or not the rationale of these those two judgments can be supported by an analysis such as that carried out by Tipping J or as being an adoption of Cooke P's reference in *Invercargill City Council v Hamlin* to preferably proceeding step any step, I am satisfied they do not form an adequate basis or springboard to warrant acceptance of a general principle.

McGrath J agreed these decisions did not "[lay] down reasonable discoverability as a generally applicable principle in New Zealand tort law."[114]

McGrath J argued that in the absence of Parliamentary action the rules "further application "remains a matter of judgement to be made in particular situations having regard to decided cases and analogies that can be fairly drawn from them.[115] Henry J did not state this to be his preference, but expressly declined to consider whether a reasonable discoverability test applied in *Murray* because "no argument specific to the

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[111] The same division is used by Brown, above n 9. Contrast Beck, above n 9;
[112] *Murray*, above n 6, para 100.
[113] Ibid, para 148
[114] Ibid, 101.
[115] Ibid, para 100.

pleaded causes of action" was made.[116] As Beck notes, "that must mean that it would be legally possible for such an argument to be made".[117]

McGrath J, despite there being no specific argument considered whether the rule ought to be applied to section 56. He proceeded in a way that appears similar to Wilson J in *Kamloops* noting that when deciding to apply the rule:[118]

> it must be borne in mind that the unfairness to plaintiffs, if damage is treated as arising before they knew or ought to have known it, in some situations will be matched and outweighed if allegations of wrongful conduct can be raised many years after what is complained of happened.

His Honour concluded the rule did not apply to the "statutory tort" created by section 56 of the Securities Act, because to do so "without limitation, to my mind, has the potential to create great unfairness to the issuers of securities, in particular where there is volatility over time in the value of investments."[119] On this basis he concluded there was no analogy between *Murray* and the preceding cases and therefore reasonable discoverability did not apply.

### *B Gault J*

Gault J was the only judge to consider it appropriate to apply reasonable discoverability to the cause of action in *Murray*. His Honour stated:[120]

> [i]n my view it is preferable to adopt some flexibility in interpreting when the cause of action accrues under s 4 of the Limitation Act according to particular causes of action where that serves the ends of justice … Of course the matter must be approached in a principled way but I find no difficulty in the proposition for New Zealand that a cause of action has not arisen when a plaintiff does not know and cannot reasonably ascertain that a claim exists. I am well aware that the position of potential defendants must be considered but in my view the balance is in favour of the ignorant plaintiff.

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[116] Ibid, 148. Perhaps a little unfair in the sense counsel were instructed by Tipping J to pitch their oral argument to the recognition of a general rule, see the trial transcript, 72. Available at http://www.courtsofnz.govt.nz/from/transcripts/supreme.html (Accessed June 19 2008).
[117] Beck, above n 9, 215.
[118] Ibid, para 101.
[119] Ibid, para 102.
[120] *Murray*, above n 6, para 115.

Two points arise from this. One, Gault J seems to be reconsidering the view he took in *S v G* that the issue was not one of statutory interpretation.[121] Two, it is not clear whether his Honour was saying the rule should be applied in this particular case only, or in general. He started by saying it depends on the particular cause of action, but the rule is stated in a much balder form. That his Honour viewed the rule as one of general application is supported by his comments that a return to *Cartledge* should be avoided and "this Court should not turn back from the development through the New Zealand cases culminating in *Searle*."[122] Gault J's approach is thus more in line with, if not the same as, the Canadian position.

### *C Tipping and Blanchard JJ*

Tipping J argued there was no general doctrine of reasonable discoverability in New Zealand, a point Blanchard J concurred with without giving separate reasons.[123] Tipping J argued that, since at least the time of *Cartledge* the Limitation Act has been regarded as laying down an occurrence based test of accrual, and the concealed fraud provision is a strong indicator of this.[124] *Hamlin* dealt with knowledge or discoverability by placing this within the cause of action itself, but before the Privy Council could rule decisively on this point the Court of Appeal drawing on its decision in *Hamlin* chose in *S v G* to apply a qualitatively different version of reasonable discoverability to the elements of causation and consent. This approach placed a 'gloss' on the established meaning of accrual which his Honour considered unsupported by the ratio of the Privy Council decision in *Hamlin* or the established meaning of accrual.[125] He rejected dicta of Rodney Hansen J in *BP Oil* that this move represented a convergence with the Canadian general rule of construction.[126]

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[121] Contrast Brown, above n 9, 185, who argues the Judges in *Murray* "have remained consistent in their view of the law."
[122] *Murray*, above n 6, para 114.
[123] Ibid, para 2.
[124] Ibid, para 66.
[125] As already addressed, his Honour did not go so far as to suggest that the approach in *S v G* was not justified in light of the Court of Appeal judgment in *Hamlin*.
[126] *BP Oil*, above n 30, para 104.

Tipping and Blanchard JJ viewed both *S v G* and *Searle* as exceptions.[127] Although neither wished to overrule those decisions because of the injustice this would occasion "on the limited number of plaintiffs who may be relying upon *S v G* or *Searle*",[128] they did not believe their application should be extended beyond the fact pattern of the cases.[129] Tipping J argued if they are exceptions, rather than a basis for a general doctrine, it was necessary to provide alternative basis on which to justify them.[130] Blanchard J was not convinced such a basis existed,[131] arguing the decisions needed to be understood in their context. He argued New Zealand limitation law had not been amended as it had in England, so the Court felt able to interpret the Limitation Act as including a reasonable discoverability component where the application of *Cartledge* would have been "so repugnant to justice that they could not countenance it."[132] Furthermore his Honour pointed out reforms of the Injury Prevention, Rehabilitation and Compensation Act 2001 to cover persons in *S v G*[133] and *Searle*[134] type situations limited the application of those cases in the future.

Tipping J argued the exceptions can be rationalised on the following bases (but qualifies this by saying other bases might be available also). He argued that in *S v G* the fiduciary duty and the duty of care in negligence were essentially the same.[135] Furthermore, breach of fiduciary duty is an equitable cause of action, and equitable actions are not subject to statutory limitation periods. This gave the Court of Appeal licence to make an exception to the usual occurrence rule because even if the cause of action in negligence was barred, the cause of action arising out of the same duty in equity was not. His Honour then concluded a claim for breach of a duty of care by a fiduciary causing bodily injury:[136]

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[127] *Murray*, above n 6, para 63. Though his Honour does not use the word exception, the surrounding discussion suggests this how he regarded *S v G* and *Searle*.
[128] Ibid, para 5 Blanchard J.
[129] Ibid, para 77.
[130] Ibid.
[131] Ibid, para 3.
[132] Ibid, para 4.
[133] Injury Prevention, Rehabilitation, and Compensation Act 2001, s 21A.
[134] Ibid, s 20(2) read with s 32.
[135] Ibid.
[136] Ibid, para 80.

> ...can properly be regarded as not accruing until the link between the wrongdoer's conduct and the plaintiff's damage is known to or ought to be known to the plaintiff. Indeed, on this basis s 4 would not apply as it is directed at common law claims in tort.

Thus in Tipping J's view *S v G* only remained good law in analogous factual situations involving a breach of fiduciary duty, and not for any claim bought additionally or solely for a breach of a duty arising in tort. He argued that section 4(9) of the Limitation Act, whereby actions in equity analogous to those barred by the Act are barred also, can be applied "on a basis which recognises the need for a reasonable discoverability approach."[137]

His Honour admitted to having greater trouble reconciling the decision in *Searle*. He suggests that if it is possible, like in *Hamlin*, to place discoverability within the cause of action the rule applies. Therefore, in *Searle* type cases, an action:[138]

> would not exist unless and until the plaintiff knows or ought to know that there is a causal link between the defendant's conduct and the harm suffered by the plaintiff. If mental harm is the foundation of the claim that could be said to justify making a distinction from the ordinary position that applies to physical harm.

The question of whether these cases provide a compelling justification for the exceptions is discussed in the next part.[139]

## *V ANALYSIS*

### *A The Doctrinal Question: a Debate Worth Having?*

Against this backdrop, the first question that needs addressing is, is the doctrinal debate one worth having? Few people, if anyone, familiar with the facts of *S v G* or *Searle* would disagree that justice in those cases favoured allowing the plaintiffs to seek a remedy in a court of law. An attempt therefore to analyse the underlying foundations of these cases, like that in this paper, is susceptible to criticism

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[137] Ibid.
[138] Ibid, para 81.
[139] Part V D Justifying *S v G* and *Searle*.

for focusing too heavily on legal niceties and not giving the Court of Appeal sufficient credit for breaking new ground.[140] This argument has weight. The problem is that the Court of Appeal, in its willingness to extend the rule's application, was probably operating on the assumption these developments would be met with attendant legislative reform like in England and to an extent Canada.[141] While there has been some ad hoc reform, the Limitation Act has remained unchanged. This has led to attempts by plaintiffs in different factual scenarios to have the rule applied to them. Thus, courts in New Zealand have had to grapple with the underlying doctrinal basis of the rule culminating in the issue being place before the Supreme Court in *Murray*.[142]

This part first addresses the rejection of a general doctrine of reasonable discoverability. It then critiques the assertion the extension of *S v G* and *Searle* is possible through a process of analogy. From here it turns to Tipping J's alternative rationalisations of those cases and concludes these are unconvincing.

### *B No General Doctrine*

The rejection of an across the board doctrine of reasonable discoverability was a course rationally open to the Supreme Court. The weight of authority seems to favour an occurrence based test.[143] It is possible, like in Canada, to interpret the Limitation Act as setting down a test of accrual that includes a reasonable discoverability component. French argues, "[t]o say a cause of action 'accrues' when the damage is reasonably discoverable does not in anyway do violence to the word 'accrues'."[144] Additionally, the fraudulent concealment provision argument is at best equivocal. Then again, in the absence of a statutory longstop, the reluctance to interpret 'accrues' this way is understandable; particularly in light of the certainty and evidentiary rationales. Although other controls might be available such as the High

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[140] See Beck, above n 9, 216.
[141] *Murray*, above n 6, para 4 Blanchard J; para 69 Tipping J.
[142] See for instance *BP Oil*, above n 30; *Stratford*, above n 30; *Jackson v ANZ Banking Group (NZ)* (29 October 1998) HC AK NP 1447/97, Paterson J; *Saunders & Co v Bank of New Zealand* [2002] 2 NZLR 270, O'Regan J; *Pangani Properties Ltd v Owens Transport Ltd* (9 July 2002) HC AK CP 332-SD01, Williams J; *Bomac Laboratories Ltd F Hoffman-La Roche Ltd* (2002) 7 NZBLC 103,627 Harrison J.
[143] *Murray*, above n 6, para 69 Tipping J; Beck, above n 9, 216.
[144] French, above n 37, 258.

Court Rules relating to strike out,[145] a modified version of laches,[146] the passage of time,[147] and the requirement of reasonable diligence,[148] none are particularly convincing or provide the certainty of a statutory longstop. Additionally, there may be wider policy implications of extending the rule beyond the confines of tort law that are better considered by Parliament. Indeed wider policy concerns were a significant factor in McGrath J's reluctance to extend the rule to section 56 of the Securities Act.[149]

### *C Extension by Analogy*

Before turning to a critique of the foundations of extension by analogy, it is worth considering whether Gault J's judgment supported this approach. He certainly supported the extension of the approach, but his basis for so holding was quite different to McGrath and Henry JJ's. It was much closer to a rule of general application, indeed the editors of the New Zealand Law Reports record his Honour as dissenting on the rejection of a general doctrine of reasonable discoverability.[150] This raises an interesting question of the permissibility, as a matter of principle, of relying on Gault J's endorsement of a general test as authority for an extension by analogy approach. With this concern raised the paper proceeds on the basis this is a legitimate step to take.

Moving now to the doctrinal issue, the problem with applying the extension of the exceptions by analogy is as follows. The incrementalist approach advocated by Cooke P in *Hamlin* was based on a line of reasoning that regarded the accrual of a common law cause of action a matter for the courts to decide. If an element of the cause of action required knowledge or the reasonable discoverability of it, then this could be incorporated into the substantive law of the cause of action. Moreover,

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[145] High Court Rules, rr 186 and 477. See Ministry of Economic Development "Business Law Reform Bill - Clause 20 - Summary" (5 September 2000) para 20. Discussed in the context of the inclusion of a reasonable discoverability rule in the Fair Trading Act 1986 which does not have a longstop provision. For a critique of this suggestion see New Zealand Law Commission *Tidying Up the Limitation Act* (NZLC R61, Wellington, 2000) para 18.

[146] Schlosser, above n 21, 397. For a critique of this suggestion see French, above n 37, 284.

[147] *Peixeiro v Haberman* (1995) 42 CPC (3d) 37, para 15.

[148] *Murray*, above n 6, para 116.

[149] Ibid, McGrath J, para 102 and Henry J, paras 144-145.

[150] *Murray* , above n 6, para 2 of the headnote. Contrast Brown, above 9, 185.

common law method meant that courts could reason by analogy that knowledge was relevant to the occurrence of the elements of other causes of action. The problem faced by the Court of Appeal in *S v G* and *Searle* was it was not possible to place knowledge within the cause of action itself. Those cases must therefore either be exceptions to an occurrence based test, or evidence of a recognition of a discoverability based test.[151] The problem is if the answer is the former, then the assertion made in *Murray* that those cases can be applied in other cases by analogy draws its authority from an entirely different doctrinal foundation. Any extension of the rule is thus not based on common law reasoning by analogy but a policy choice of whether to extend an exception to an established statutory test.

This problem raises a wider question about the role of the legal system which is worth mentioning, but can only be addressed briefly. That is, the law is all about making policy choices and the weighing of competing interests.[152] And no body is better suited than the judiciary to decide what course the common law ought to take. The application of reasonable discoverability in *S v G, Searle* and *Hamlin* and the denial of its application to section 56 of the Securities Act is a reflection of "[t]he law's greater protection of persons than property and property than merely economic interests."[153] The problem, however, is that limitation law is a creature of statute, and is essentially procedural in nature. The engaging in a weighing exercise on a case by case basis in regards to a procedural point does not sit comfortably with the recognition of an occurrence based statutory test of accrual. Furthermore, it undermines the rationale of certainty.

These concerns are, in a way, reflective of a wider debate more commonly associated with public law about the degree to which the courts may depart from the established meaning of a statute in order to reach the desired result,[154] particularly

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[151] Cooke P was a member of the Bench in *S v G* suggesting he endorsed the reasoning in that decision, but this does not undermine the fact it represented a departure from the logic of *Hamlin*.
[152] See David M O'Brien "Of Judicial Myths, Motivations and Justifications: a postscript on social science and the law" (1981) 64 Judicature 285.
[153] *Dicks v Hobson Swan Construction Ltd* (22 December 2006) HC AK CIV 2004-404-1065, para 43 Baragwanath J citing *Naysmith v Accident Compensation Corporation* [2006] 1 NZLR 40, para 80.
[154] Particularly in the Bill of Rights Act context. See *R v Hansen* [2007] 3 NZLR 1 (NZSC). See generally Claudia Geiringer "The Principle of Legality and the Bill of Rights: A Critical Examination of *R v Hansen*" (2008) 6 NZJPIL 59.

when the legislature has not "fulfil[led] its part of the constitutional bargain."[155] It also brings up the issue of the appropriate relationship between statute and the common law. Furthermore, when considering the unwillingness to recognise a general rule, it must also be kept in mind that the judgment in *Murray* came at a very early time in the Supreme Court's history,[156] and it may have seemed like a rather radical step for such a new court to take.

All this is not to say that McGrath and Henry JJ were not cognisant of the problems underlying extension by analogy and the wider issues at play, but rather they did not regard these issues as fatal to further extension. Perhaps this is acceptable as long as it is recognised that what is occurring is a form of 'judicial legislating' in order to remedy a problem caused by legislative inertia, and it is only restricted to the most pressing of cases. It may turn out that is all that was intended. However, that McGrath J was willing to consider whether the rules application to section 56 of the Securities Act suggests a willingness to extend reasonable discoverability beyond the confines of the current exceptions. I doubt this will happen because as Blanchard J notes *S v G* and *Searle* currently have very little practical application, so in the rare cases where they are applicable they will just be a continuation of a recognised exception. The moment they are used to support the extension of reasonable discoverability beyond the context of bodily injury, the same thorny issue of the doctrinal basis of doing so raises its head again.

A further problem is that very little guidance is given on the how the choice to extend should be made. McGrath J engaged in weighing of the relative harms to litigants under section 56, and concluded that justice favours an occurrence based test. Gault J's weighing up, though at a greater level of generality, reached the opposite conclusion.

### *D* *Justifying* S v G *and* Searle

[155] Tom Weston "Limiting limitation (2)" [2007] NZLJ 169, 170.
[156] See Peter Blanchard "The Early Experience of the New Zealand Supreme Court" (2008) 6 NZJPIL 175, 178.

If one regards these problems as fatal to any further extension, but wishes to retain the existing exceptions, then one can do as Tipping J did and rationalise them on alternative grounds. Like Blanchard J, for the reasons that follow I am not convinced these grounds are particularly compelling. Therefore, if the Supreme Court does tackle this issue again and decides the exceptions should stand but no further extension is appropriate Blanchard J's reasons for so holding should be preferred.

Even if one accepts the logic Tipping J used to reach the fiduciary overlay argument, it is unclear a reasonable discoverability approach is applicable in equity. Generally, to succeed in a cause of action for a breach of fiduciary a plaintiff must show the existence of a fiduciary duty and a breach of that duty.[157] Although this cause of action not subject to a statutory time bar, the equitable doctrine of laches requires due diligence "after there has been such notice or knowledge as to make it inequitable to lie by and not pursue that claim."[158] Thus a time limit of sorts will start to run, and the cause of action will, in a sense, accrue, once the plaintiff has knowledge or notice. There is room for the argument reasonable discoverability is synonymous with notice.[159] However, this has to be reconciled with the general rule that "a defendant will not succeed with a plea of laches if the plaintiff or claimant was unaware of its position."[160] Actual knowledge, therefore, seems to be the standard.

Tipping J conceded *Searle* presents even greater difficulties. His suggestion that where reasonable discoverability of causation can be accommodated within the cause of action it might be applicable, at least has the advantage of doctrinal clarity in that it follows what this paper has argued is the *Hamlin* approach.[161] However, it is unclear this actually works in practice. The Court of Appeal was not able to do this convincingly in *S v G* or *Searle* which led to the problems under discussion. Of course, there is always the possibility of creative legal reasoning be employed in future cases in order to accommodate issues of knowledge and discoverability into the substantive law of a cause of action.

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[157] *The Laws of New Zealand* (Butterworths, Wellington, 2008) Equity, para 120. French makes a similar point in a different context, above n 37, 284.
[158] Ibid, para 275.
[159] Mew, above 21, 25,
[160] Ibid.
[161] Notwithstanding the critique of the particular way this was achieved in *Hamlin*.

## *VII CONCLUSION*

If a knowledge or reasonable discoverability based test, or so called general doctrine of reasonable discoverability is rejected as applicable in New Zealand, then *S v G* and *Searle* must be regarded as exceptions to an occurrence based test. Extending what are exceptions to an occurrence based rule beyond the facts of those exceptions is a process that is lacking in a clear doctrinal foundation. The exceptions were carved out in the context of cases so compelling the courts felt they had no choice but to read a rule of reasonable discoverability into the statute for those particular cases. The practical application of those cases now is very limited, so there is not point in being overly troubled about the basis on which they were made. However, any further extension of the application of the rule recognised in these cases inevitably reopens the question of the doctrinal and precedential basis for doing so. In the end, the question whether to do so is a policy choice, and it may be a good thing that the Supreme Court has left itself the option of making further exceptions in the future. Litigants would be well advised not to pin their hopes on this happening even in what may be regarded as fairly analogous situations. Following *Murray* courts in New Zealand are likely to be very wary of reopening a question the ultimate resolution to which must come from Parliament.

It is appears Parliament will soon remedy this state of affairs. This is the appropriate forum to weigh the competing rationales of limitation law and the wider policy implications of extending reasonable discoverability beyond its current confines. Hopefully this reform will lay foundations sturdy and flexible enough to future proof limitation law in New Zealand.

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