A

APPEAL CASES

before

B

THE HOUSE OF LORDS

(English, Irish and Scottish)

and

C

THE JUDICIAL COMMITTEE

of Her Majesty's Most Honourable

PRIVY COUNCIL

D

VOLUME 2

E

[HOUSE OF LORDS]

PIRELLI GENERAL CABLE WORKS LTD. . . . RESPONDENTS

AND

OSCAR FABER & PARTNERS (A FIRM) . . . APPELLANTS

F

1982 Nov. 2, 4, 8, 9; Dec. 9

Lord Fraser of Tullybelton, Lord Scarman, Lord Bridge of Harwich, Lord Brandon of Oakbrook and Lord Templeman

Limitation of Action—Negligence—Accrual of cause of action—Negligent design of chimney — Damage occurring outside limitation period—Date of discoverability of damage within limitation period—Whether claim statute barred—Limitation Act 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2 (1)

G

In about March 1969 the plaintiffs engaged the defendants, a firm of consulting engineers, to advise on and design an addition to their factory premises, including the provision of a chimney. The chimney was built in June and July 1969. A material was used in its construction which was unsuitable for the purpose, and not later than April 1970 cracks developed at the top of the chimney. The plaintiffs discovered the damage in November 1977, and it was found that they could not with reasonable diligence have discovered it before October 1972.

H

Extensive remedial work had in due course to be carried out, and in October 1978 the plaintiffs issued a writ claiming damages for, inter alia, negligence by the defendants in relation to the design of the chimney. The defendants in their defence pleaded, inter alia, that the claim was barred by the Limitation Act 1939. The judge held that the design of the chimney, for which the defendants were responsible, was negligent, that the plaintiffs' cause of action accrued when the damage was discovered or ought with reasonable diligence to have been discovered, and that since that date was less than six years before the issue of the writ and therefore within the limitation period prescribed by section 2 (1) of the Act of 1939,[1] the defendants were liable. The defendants appealed, the question at the hearing of the appeal being confined to that of limitation. The Court of Appeal dismissed the appeal.

On appeal by the defendants:—

Held, allowing the appeal, that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or should with reasonable diligence have been discovered; that the plaintiffs' cause of action therefore accrued not later than April 1970, when the cracks occurred in the chimney, and that since that date was more than six years before the issue of the writ, the claim was statute barred (post, pp. 18G—19A, D, H—20B).

Cartledge v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, H.L.(E.) applied.

Dicta in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, 875, 880, 881, C.A. disapproved.

Per curiam. The duty of builders and local authorities to owners of property is owed to the owners as a class, and once time begins to run against one owner, it runs against all his successors in title (post, p. 18E).

Decision of the Court of Appeal reversed.

The following cases are referred to in the opinions:

Anns v. *Merton London Borough Council* [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.).

Bagot v. *Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197; [1964] 3 W.L.R. 1162; [1964] 3 All E.R. 577.

Cartledge v. *E. Jopling & Sons Ltd.* [1963] A.C. 758; [1963] 2 W.L.R. 210; [1963] 1 All E.R. 341, H.L.(E.).

Darley Main Colliery Co. v. *Mitchell* (1886) 11 App.Cas. 127, H.L.(E.).

Davie v. *New Merton Board Mills Ltd.* [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346, H.L.(E.).

Dennis v. *Charnwood Borough Council* [1983] Q.B. 409; [1982] 3 W.L.R. 1064; [1982] 3 All E.R. 486, C.A.

Dutton v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373; [1972] 2 W.L.R. 299; [1972] 1 All E.R. 462, C.A.

Forster v. *Outred & Co.* [1982] 1 W.L.R. 86; [1982] 2 All E.R. 753, C.A.

Higgins v. *Arfon Borough Council* [1975] 1 W.L.R. 524; [1975] 2 All E.R. 589.

Howell v. *Young* (1826) 5 B. & C. 259.

[1] Limitation Act 1939, s. 2 (1): see post, p. 12H.

Miliangos v. *George Frank (Textiles) Ltd.* [1976] A.C. 443; [1975] 3 W.L.R. 758; [1975] 3 All E.R. 801, H.L.(E.).

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.).

Sparham-Souter v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858; [1976] 2 W.L.R. 493; [1976] 2 All E.R. 65, C.A.

The following additional cases were cited in argument:

Acrecrest Ltd. v. *W. S. Hattrell & Partners* [1983] Q.B. 260; [1982] 3 W.L.R. 1076, C.A.

Baker v. *Ollard & Bentley* (1982) 126 S.J. 593, C.A.

Batty v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554; [1978] 2 W.L.R. 500; [1978] 2 All E.R. 445, C.A.

Bluett v. *Woodspring District Council* (unreported), May 24, 1982, Judge Stabb Q.C.

Crump v. *Torfaen Borough Council* (1981) 19 B.L.R. 84.

Eames London Estates Ltd. v. *North Hertfordshire District Council* (1980) 18 B.L.R. 50.

Esso Petroleum Co. Ltd. v. *Mardon* [1976] Q.B. 801; [1976] 2 W.L.R. 583; [1976] 2 All E.R. 5, C.A.

Junior Books Ltd. v. *Veitchi Co. Ltd.* [1983] 1 A.C. 520; [1982] 3 W.L.R. 477; [1982] 3 All E.R. 210, H.L.(Sc.).

Melton v. *Walker & Stanger* (1981) 125 S.J. 861.

APPEAL from the Court of Appeal.

This was an appeal by leave of the Court of Appeal by Oscar Faber & Partners, defendants in an action brought by the plaintiffs, Pirelli General Cable Works Ltd., from an order of the Court of Appeal (Ormrod and Dunn L.JJ. and Sir Sebag Shaw) dated February 3, 1982, dismissing an appeal by the defendants from an order dated August 1, 1980, of Judge William Stabb Q.C., circuit judge assigned to official referees' business, holding inter alia that the plaintiffs' action was not statute barred and giving judgment for them on the issue of liability.

The facts are stated in the opinion of Lord Fraser of Tullybelton.

Desmond Wright Q.C. and *Jeremy Storey* for the defendants. The short point in the appeal is whether the limitation period runs from the time when damage occurred, or from the time when it ought reasonably to have been discovered. The defendants contend for the former alternative; the cause of action accrues when damage occurs and time starts to run then, and to the extent that it held the contrary, *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 was wrongly decided.

Although the defendants did not themselves design the chimney, they had overall responsibility for the design, and their negligence consisted in breach of a duty to design the chimney properly. The defendants must show, in order to succeed, that both the breach of duty and the consequent damage occurred before October 1972, i.e. more than six years before the issue of the writ. The judge held that the damage in the chimney could not with reasonable diligence have been discovered by the plaintiffs before October 1972, and that the cause of action accrued when the plaintiffs first discovered the damage in November 1977. The judgment of the Court of Appeal, upholding the judge, is not long because it was conceded

that the court was bound by *Sparham-Souter*. The defendants submit that there are three possible dates when the cause of action accrued: (1) in about June 1969, when the plaintiffs agreed to the nomination of specialist sub-contractors, and so acted on the defendants' advice to instal a chimney which in the event was certain to fail and to be less valuable than it would have been but for the negligence; (2) in July 1969, when the chimney was built, and the plaintiffs had a less valuable chimney; or (3) when cracks first arose in the chimney in 1970.

The Limitation Act in force at the material time was the Limitation Act 1939, which has now been repealed by the Limitation Act 1980, which came into force on May 1, 1981. The Act of 1980 alters the framework and the wording of the material provisions a little, but there is no substantial change. Section 2 (1) (*a*) of the Act of 1939 provided for a limitation period, for actions founded on simple contract or tort, of six years from the date on which the cause of action accrued. By section 1, that had to be read subject to Part II of the Act. Some of the sections in Part II extended the limitation period, leaving the accrual of the cause of action at the same date, and some postponed the date of accrual: see, for example, sections 22 and 23, respectively. Section 26 provided that in certain cases of fraud and mistake, the limitation period was not to begin until the plaintiff had discovered the fraud or mistake or could with reasonable diligence have discovered it. That was a powerful indication that the normal rule was that time ran from the date when the damage took place even though the plaintiff did not know about it; otherwise section 26 would not have been necessary.

The courts developed the doctrine of "constructive fraud," especially in building cases, based on section 26 (*b*). "Fraud" was not confined to its common law sense, but was extended to its equity meaning of "against conscience," and time ran from the date that the plaintiff discovered the "fraud," in that sense, or could with reasonable diligence have discovered it. By section 7 of the Limitation Amendment Act 1980 Parliament redrafted section 26, providing in (*b*) that time was postponed where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him" by the defendant. The section was re-enacted in section 32 of the Limitation Act 1980. There again, the clear implication is that normally time runs from the date the damage occurs, irrespective of the plaintiff's knowledge, but relief is to be given in certain cases. The doctrine developed by the courts was included in the amendment, albeit in a modified form. If *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 were right, the amendment would have been wholly unnecessary.

The central principle of *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 is that it was immaterial in personal injuries cases that damage was not known about by the plaintiff. The House of Lords thought that the rule was unreasonable, but held that in 1963 it was too late to change it. Judgment in that case was given on January 16, 1963. On July 31, 1963, the royal assent was given to the Limitation Act 1963, whereby Parliament reversed the *Cartledge* v. *Jopling* rule, but only with respect to personal injuries. Section 1 provided that where the damage claimed consisted of or included damage in respect of personal injuries, section 2 (1) of the Act of 1939 afforded no defence (provided the court had granted

leave) if material facts relating to the cause of action were or included facts of a decisive nature which were outside the plaintiff's knowledge until certain specified dates. It is submitted that in cases not involving personal injuries, the rule to be applied was the same as that in regard to personal injuries before 1963, and the majority of the cases bear that out: see *Bagot* v. *Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197, where it was held that damage occurred when negligent work took place; *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373 (the first of the local authority cases), at pp. 396, 405 and 414, and *Higgins* v. *Arfon Borough Council* [1975] 1 W.L.R. 524, whose facts embodied the "discoverability" concept, but where the principle of *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 was applied.

In the year after *Higgins*, however, the Court of Appeal held in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 that in the case of a house built with defective foundations, the cause of action only accrued when the owner discovered or could with reasonable diligence have discovered the damage. The concept of discoverability was not before the court of first instance, but only came into the case by way of a respondent's notice in the Court of Appeal: see pp. 861–862. The court's decision on that point was inconsistent with *Cartledge* v. *Jopling*, and was wrong. There is no essential difference between damage to the body and damage to a house, or between defective lungs and defective foundations or a defective chimney: see *Dennis* v. *Charnwood Borough Council* [1983] Q.B. 409, 419, 423.

Time might run differently depending on what type of duty is involved. All types of damage give rise to a cause of action, but whereas in the case of a snail in a ginger beer bottle, there is no damage until the bottle is opened and shock occurs, where a house is built with bad foundations, the cause of action accrues when the foundations are laid, because the owner then has a less valuable house than he would have had but for the negligence. Another example of the first category is where an employee is injured by a negligently made tool, as in *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604. There is only a cause of action when the injury occurs, whatever the age of the tool. By contrast, the employer's cause of action against the manufacturer would arise immediately the tool is acquired, because the employer has a less valuable asset. Hence, there is no inconsistency between *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 and *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604. *Cartledge* is right on the principle that the cause of action arises when the body suffers damage, even though it is not known about, and there is nothing in *Davie* to the contrary. In *Davie*, the tool was made and bought by the employers in 1946, and a piece of metal off it went into the plaintiff's eye seven years later, in 1953. For a proper analogy with the *Cartledge* facts, the piece of metal would have had to have gone into the eye in 1947 and not have been known about until 1954. The builder of a building has a duty not only to the building owner, but also to passers-by, and it is the latter duty which is analogous to the manufacturer's duty to the ultimate user of the tool. If Mr. Cartledge had been run over by a bus before the pneumoconiosis developed, his estate would still have been entitled to damages (albeit no doubt nominal), because he had damage in

the form of a depreciated lung, even though as yet there was no pain. Similarly, if a person has a piece of shrapnel in his body and a doctor negligently fails to find it, the cause of action arises then even if the shrapnel stays where it is and never does any harm. The test is whether there is a likelihood or possibility of damage arising in the future: see *Batty* v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554.

It is accepted that on a common sense approach, a plaintiff ought to know that he has a cause of action before time starts to run against him. But there is another common sense point, namely, that there should come a time when defendants can relax and know that actions against them are time-barred. That is the whole point of the Limitation Acts. If the law is wrong, it should not be put right by the House, but only by Parliament.

In *Anns* v. *Merton London Borough Council* [1978] A.C. 728, *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 was approved, but not on the discoverability point. The holding in the report of *Anns* says that *Sparham-Souter* was "applied." That is doubtful. The issue of discoverability was not really dealt with in *Anns*. The case was concerned with the scope of a local authority's duty. At [1978] A.C. 728, 760B–C, Lord Wilberforce said that the Court of Appeal in *Sparham-Souter* were "right," but he did not allude specifically to the discoverability point. The "present or imminent danger" test applied by him at p. 760C is in any event quite different from the *Sparham-Souter* test, as it does not take knowledge into account at all. The immediately preceding passage is explained by the special category of local authorities in regard to the scope of their duty of care in carrying out inspections; as against them it is not sufficient to prove merely damage, but present or imminent danger to health or safety also has to be shown. Lord Diplock, Lord Simon of Glaisdale and Lord Russell of Killowen agreed with Lord Wilberforce. Lord Salmon accepted part of *Sparham-Souter*, but not all of it, and by inference he took the opposite view on the knowledge point: see p. 771. He was addressing himself essentially to an evidential point; damage normally arises at the same time as it manifests itself, he said, but if it can be proved that the damage arose before it manifested itself, time starts from the earlier date.

The present case, unlike *Anns* [1978] A.C. 728 and *Sparham-Souter* [1976] Q.B. 858, is not a Public Health Act case involving breach of bye-laws or regulations. If *Anns* does support the discoverability test, it should be departed from.

In *Batty* v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554, the date of accrual of the cause of action was not in issue, and nothing was said about discoverability. The meaning of "imminent" in *Anns* was explained. One point that emerges from the case is that the cause of action there must certainly have arisen when the building became dangerous to human habitation. The defendants would say that in fact it arose earlier, when the building was built on an unstable site. *Eames London Estates Ltd.* v. *North Hertfordshire District Council* (1980) 18 B.L.R. 50 was wrongly decided, since Judge Edgar Fay Q.C. applied the *Sparham-Souter* discoverability principle: see pp. 74 and 77. The judge was also wrong to hold that the cause of action arises anew in favour of every subsequent purchaser of the house. On one view that is in line with what

was said by Lord Salmon in *Anns* [1978] A.C. 728 and by Geoffrey Lane L.J. in *Sparham-Souter* [1976] Q.B. 858. It is submitted that the true position is that once the cause of action has arisen, time starts to run from that date and keeps running, for the purposes of all potential plaintiffs. The point does not arise in the present case, but it is part of the general problem.

Crump v. *Torfaen Borough Council* (1981) 19 B.L.R. 84 is also wrong since again the decision there is based on the discoverability test: see pp. 93, 97 and 98. In *Bluett* v. *Woodspring District Council* (unreported), May 24, 1982, there was held to be no liability because although there was damage, it was not sufficiently grave to be a present or imminent danger. The case was dealing with a local authority, and supports the proposition, based on *Anns*, that a local authority can only be liable if there is imminent danger. *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1983] 1 A.C. 520 held that there is a general duty to avoid causing economic loss, and it is not necessary to establish physical damage for that purpose. On that footing, since in the present case there was economic loss when the chimney was built (quite apart from physical damage), the cause of action must have arisen in 1969.

Liability for bad design is akin to liability for giving bad advice, and in the bad advice and solicitors' negligence cases it has been held that the cause of action arises when damage (either physical damage or economic loss) is suffered, and that it is not necessary for the plaintiff to appreciate that he is suffering or has suffered damage or economic loss. For the solicitors' negligence cases, see *Howell* v. *Young* (1826) 5 B. & C. 259; *Forster* v. *Outred & Co.* [1982] 1 W.L.R. 86; *Melton* v. *Walker & Stanger* (1981) 125 S.J. 861 and *Baker* v. *Ollard & Bentley* (1982) 126 S.J. 593. The cause of action arises when the negligent advice is given and acted on.

In the Defective Premises Act 1972, Parliament was still proceeding on the basis that a cause of action in respect of a duty relating to the building of dwellings arose when the dwelling was completed: see section 1 (5).

The defendants adopt the view of the Lord Chancellor's Law Reform Committee in their 21st report, Final Report on Limitation of Actions (September 1977) (Cmnd. 6923), that the test in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 should be abrogated and that there should be no rule of law that damage does not occur until it is reasonably discoverable: see para. 2.38, p. 16. The committee made a number of recommendations. Those in regard to section 26 of the Limitation Act 1939 were carried into effect (see ante), but those in regard to latent damage were not. The inference is that Parliament decided to leave the law, as decided in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, as it was. The committee's proposals were considered by the Law Reform Committee Sub-committee on Latent Damage in their Consultative Document (July 1981).

In the Prescription and Limitation (Scotland) Act 1973, Parliament created a new 5-year prescription period for actions of, inter alia, delict, but by section 11 (3) extended the time for cases of delayed discovery of loss, injury or damage. By section 7, there is a final "longstop" of 20 years in any event. There is no relevant distinction between "prescrip-

tion" and "limitation." The Act implemented the recommendations of a law reform body. There was nothing in Scots law about discoverability before 1973, and there is no reason why *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, although an English case, should not have been applied in Scotland. See generally the note in *Current Law Statutes Annotated* (1973), commenting on the Act (1973 c. 52). The clear inference from the passing of that Act is that Parliament decided to change the law in Scotland, but to leave it unchanged in England, so that *Cartledge* v. *Jopling* still prevails in England as regards non-personal injury actions.

It is true that if the submissions are right, circumstances could arise in which a builder would escape liability as against the house owner, but the local authority would still be liable. For example, time could run against the builder between 1970 and 1976, but against the local authority between 1973 and 1979, on Lord Wilberforce's principle in *Anns* v. *Merton London Borough Council* [1978] A.C. 728. But although a writ issued in 1978 would then be statute-barred as against the builder, the builder could be brought to account in contribution proceedings: see section 4 (1) and (2) (*b*) of the Limitation Act 1963.

In conclusion, the defendants' propositions are as follows. (1) The discovery principle in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 is wrong. (2) The discovery principle does not apply to professional negligence cases. (3) *Anns* v. *Merton London Borough Council* [1978] A.C. 728 does not approve the discovery principle. (4) *Anns* puts forward Lord Wilberforce's test for local authorities only. (5) The *Anns* test applies even though the damage is not known to the plaintiff. (6) Damage takes place and the cause of action arises when either economic loss or physical injury takes place: (a) if the duty is performed in such a way as to result in a defect, the damage arises at the same time as the defect arises; (b) if the duty is performed in such a way that a defect later arises, there is damage when the defect later arises; (c) if the duty is performed in such a way that it is likely or reasonably foreseeable that a defect will arise, there is damage when the duty is performed. (7) Where there is a string of purchasers, the duty is owed to a class (purchasers, owners or occupiers) and not to individuals; once the class is in existence together with damage, time begins to run. (8) In the present case, all breaches of duty took place in 1969, and damage took place when (a) the plaintiffs acted in reliance on the defendants' advice to instal a chimney which was bound to fail (1969); or (b) the chimney was installed (1969); or (c) cracks first occurred in the chimney (1970). (9) Further injury arising from the same act at a later date does not give rise to a further cause of action: *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, 773.

Patrick Garland Q.C., *John Dyson Q.C.*, *Jeremy Richards* and *David Marshall* for the plaintiffs. No challenge is made to the basic proposition that subject to statute time runs from the accrual of the cause of action. In the tort of negligence, given that there is a competent plaintiff and competent defendant, the accrual of the cause of action is determined, by the common law, when there is (1) a breach of the relevant duty of care and (2) damage suffered by the plaintiff which is caused by that breach. If the breach of duty results in the creation of a latent defect in a building

or structure and a court is considering damage suffered by the plaintiff in respect of that building or structure itself, i.e. rather than personal injury or injury to other property, the question is when damage is suffered. The answer must be when the plaintiff discovers or could with reasonable diligence have discovered the damage, because the owner of a latently defective building cannot be said to have suffered damage if he sells or deals with the building with no loss to his pocket. As long as the plaintiff can deal with the building on the footing that there is nothing wrong with it, he cannot be said to have suffered damage. There can be a latent defect before the plaintiff suffers damage. The important question is always when the *plaintiff*, not the building, suffers damage. It is that that gives rise to a distinction between a body and a building. When a person's lungs are injured, he suffers damage then, even if he does not know about it.

The builder's duty is owed to the first owner and/or occupier who with reasonable diligence could discover the defect, and he is the only possible plaintiff; a subsequent owner is without remedy. Lord Salmon's indications to the contrary in *Anns* v. *Merton London Borough Council* [1978] A.C. 728 are at odds with what Lord Wilberforce said in that case, and with *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, except perhaps *per* Roskill L.J. at p. 874G. *Eames London Estates Ltd.* v. *North Hertfordshire District Council*, 18 B.L.R. 50 is not supported on this point. The test must be an objective one. If devaluation is the damage, it must be devaluation qua the world at large, and not devaluation qua any particular owner subjectively. The question is whether on the facts the defect was discoverable with reasonable diligence.

The plaintiffs do not seek to put a gloss on section 26 of the Limitation Act 1939. Section 26 is only relevant after the cause of action has accrued, i.e. in tort, after damage has in fact been suffered by the plaintiff, and it cannot therefore have any bearing on the question when the cause of action accrues, which is what the discoverability test is tied to. Section 22 of the Act of 1939 shows that the Act is purely procedural and is not concerned with when the cause of action accrues, which is determined by common law. In any event section 26 is of general application, and therefore also applies to contract, where the cause of action always accrues on the date of the breach of contract. All that the section does is to say that in certain instances the terminus a quo of the limitation period is not the date of accrual of the cause of action, but is some other time. The section does not say that the accrual itself is deemed to be some other time. There may be different termini for different types of damage, e.g., injury to the person, damage to other property, or damage to the thing itself.

It is not asserted that *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 is wrong. It was decided on the basis that the men had in fact suffered severe physical damage to their lungs, although they did not know about it. The plaintiffs were devalued when they got pneumoconiosis, even though they did not know it. It is the devaluation which is the crux of the accrual of the cause of action. Until the world at large knows that the chimney is doomed, there is no loss to the plaintiff because the building is not devalued. As Judge Stabb Q.C. said in the present case, " the cause

of action, in negligence cases such as this, arises when the plaintiff and not the building suffers damage." *Cartledge* is to be confined to the position after damage has been suffered.

The Defective Premises Act 1972 was passed before the very rapid development of the law of tort that has occurred since 1976, with *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858; *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801; *Batty* v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554 and *Anns* v. *Merton London Borough Council* [1978] A.C. 728. Section 1 (5) of the Act should be seen in that light. Before 1972, the purchaser of a defective house only had a remedy in contract; the Act remedied that. After 1976, duties in tort were greatly expanded, and new problems arose on limitation and other matters. The discoverability test did not appear until 1976. The Act of 1972 has an arbitrary limitation period for the new statutory tort created by the Act. The Act is wholly additional to the common law: see section 6 (2). In any event the present case is not concerned with a dwelling house. The case should not be determined on that Act.

Sparham-Souter v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 was correctly decided. Lord Denning M.R. at p. 868 supports the proposition that it is damage to the plaintiff that counts. The passage at p. 867D–E could perhaps usefully be excised, but from E onwards is adopted, except that the involvement, on p. 868, of Lord Reid's observations in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, 772 is unnecessary. Geoffrey Lane L.J.'s reference to that passage, at [1976] Q.B. 858, 881, is not part of his reasoning for a conclusion he has already reached, but is a prelude to a possible argument about public policy which then follows.

There are three relevant periods: (1) the period of latency, when there is a latent flaw or defect; (2) when the defect has some physical consequence which has not been discovered or could not have been discovered with reasonable diligence; and (3) when the defect becomes manifest and is discovered. Predisposition to disease should not be regarded as a latent defect. There was therefore no stage (1) in *Cartledge* v. *Jopling*: the case went straight to damage.

In *Anns* v. *Merton London Borough Council* [1978] A.C. 728, Lord Wilberforce was giving more weight to discoverability than might first appear. Strong tacit approval is suggested by the passage at p. 750G, and pp. 753 and 758–760 seen in the light of that. Lord Salmon envisaged an intermediate stage between the occurrence of damage and its manifestation. Discoverability was strongly stressed in *Sparham-Souter*. It is surprising that if it is wrong, *Anns* did not say so, or at least make cautionary noises. *Anns* certainly says that the cause of action does not necessarily arise when the building is built.

In *Acrecrest Ltd.* v. *W. S. Hattrell & Partners* [1983] Q.B. 260, the point was taken that because the *Sparham-Souter* and *Anns* duty arose under the Public Health Act 1936, it could not be owed to a non-occupier. The Court of Appeal held that that was not so; the duty was owed to anyone who was adversely affected financially. *Dennis* v. *Charnwood Borough Council* [1983] Q.B. 409 illustrates the three stages referred to, ante. The discoverability test was there applied, albeit in a local authority

context. There was a longer time span there than in the present case, with some form of manifestation over a long period before there was sufficient damage to support an action against the local authority.

The question in the solicitors' negligence cases is not one of latency. What the court has to decide in dealing with the consequences of negligent conduct by a solicitor is when the damage was first caused. It might be when the plaintiff was first saddled with, for example, the wrong lease or the defective conveyance. There is no true analogy with latent defects in a building, because while a building or large chattel can be dealt with as an undamaged thing until the damage occurs, the defect in the subject matter in a solicitors' case will come to light immediately there is an attempt to deal with it.

Wright Q.C. in reply to points raised by Lord Bridge of Harwich. Once time has started running, it must keep running; it runs against the owner or occupier for the time being. The builder's duty is owed to a class of people, not to individuals. Otherwise a subsequent owner who bought the house more than six years after the occurrence of the damage would have a better title to sue than the earlier owner, in whose time the damage occurred, and the duty would in effect go on for ever. That must be unacceptable. In any event, the Limitation Act says that the limitation period is six years from the accrual of the cause of action.

In *Anns* v. *Merton London Borough Council* [1978] A.C. 728, not much was said in argument about discoverability. Lord Wilberforce seems to approve *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858, but he almost carefully does not say anything about discoverability. It is accepted that it is surprising that nothing was said, but perhaps their Lordships preferred to leave the point, since it was not necessary for the decision.

There is no difference in kind between damage to the body and damage to property. It is not necessary for the plaintiff's pocket to be affected. Physical damage is enough to found a cause of action; it need not be economic or financial loss.

The parties have come to an accommodation on costs, and accordingly no order is sought by either party.

Their Lordships took time for consideration.

December 9. LORD FRASER OF TULLYBELTON. My Lords, this appeal raises once again the question of whether time can begin to run, for the purpose of the Limitation Acts, in an action founded on negligence in the design or workmanship of a building, at a date before damage to the building has been discovered, or ought with reasonable diligence to have been discovered, by the plaintiff. The writ in this action was issued on October 17, 1978. The appellants (defendants) are a firm of consulting engineers. In or about March 1969 they were engaged by the respondents (plaintiffs) to advise them in relation to the building of a new services block at the respondents' works at Southampton. The new block included a chimney about 160 feet high. It was designed and supplied by a nominated sub-contractor, now in liquidation, but the

judge found that the appellants had accepted responsibility for the design and his finding is not now challenged. The chimney was made of pre-cast concrete, and had four flues. Unfortunately the concrete used for the refractory inner lining was partly made of a relatively new material, called Lytag, which was unsuitable for the purpose. Cracks developed and eventually the chimney had to be partly demolished and replaced.

The respondents originally sued for damages both for breach of contract and for tort, but they accepted that their claim for breach of contract was time barred and their claim is now confined to tort. The judge held that the appellants had been negligent in passing the design and his decision in that respect also is not challenged. The chimney was built during June and July 1969. Damage, in the form of cracks near the top of the chimney, must have occurred not later than April 1970, more than eight years before the writ was issued. The damage was not discovered by the plaintiffs until November 1977, and the judge found that the defendants had not established that the plaintiffs ought, with reasonable diligence, to have discovered the damage before October 1972, that is, six years before the writ was issued. I shall hereafter use the expression " date of discoverability " to mean the date on which the damage was actually discovered, or the date on which it ought with reasonable diligence to have been discovered, whichever is the earlier. For reasons which will appear, the judge held that the date at which the respondents' cause of action accrued was the date of discoverability and, as that date was not more than six years before the writ was issued, he held that the action was not time barred.

All the judge's findings of fact are now accepted by both parties and the sole issue between them is on the question of law as to the date at which a cause of action accrued. The respondents maintain that the judge came to the right conclusion on that matter and that the action is not time barred. The appellants maintain that the cause of action accrued more than six years before the writ was issued. They suggest three possible dates as the date of accrual. The earliest suggested date is that on which the plaintiffs acted in reliance on the defendants' advice to instal the chimney, which was bound to be defective and eventually to fall down unless previously demolished. They did not fix this date precisely but it must have been between March and June 1969, well outside the limitation period. The second suggested date is that on which the building of the chimney was completed, namely, July 1969. The third is that on which cracks occurred, namely, April 1970. These three dates are all more than six years before the issue of the writ, which as already mentioned, was October 17, 1978. If any of them is the correct date, the action is time barred.

The Act which applies in this case is the Limitation Act 1939, as amended. It has been repealed and replaced by the Limitation Act 1980 but the relevant provision remains substantially unchanged. It is the following provision in section 2 of the Act of 1939:

> " (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—(*a*) actions founded on simple contract or on tort; . . ."

As already mentioned, the findings of fact made by the learned judge (Sir William Stabb Q.C., circuit judge assigned to official referees' business) are now all accepted. He held as a matter of law that he was bound by the decision of the Court of Appeal in the case of *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 to decide that the action was not time barred. He expressed his reason with admirable brevity and lucidity in the following words:

> "I regard the Court of Appeal in *Sparham-Souter* as having laid down that the cause of action, in negligence cases such as this, arises when the plaintiff and not the building suffers damage, and that the plaintiff only suffers damage when he discovers, or ought with reasonable diligence to have discovered, damage to the building. This decision seems to have been applied by the House of Lords in *Anns* v. *Merton London Borough Council* [1978] A.C. 728, and I certainly regard it as binding upon me."

The Court of Appeal also felt bound by its own decision in *Sparham-Souter* and by the decision of this House in *Anns* and it gave leave to appeal to this House without going fully into the law. Ormrod L.J. in a short judgment, with which Dunn L.J. and Sir Sebag Shaw agreed, explained why the leapfrog procedure had not been used.

My Lords, it was decided by this House in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 that, in the words of Lord Reid, at p. 771:

> "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action."

Lord Reid went on, however, to say, at p. 772:

> "It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has 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 ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided. But the present question depends on statute, the Limitation Act 1939, and section 26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation, but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage

could be discovered. So the mischief in the present case can only be prevented by further legislation." A

All the other members of the House who took part in deciding that appeal expressed similar reluctance or regret at being obliged to decide as they did. Thus Lord Pearce, at p. 778, said that the argument of counsel for the plaintiff in that case

> "would produce a result according with common sense and would avoid the harshness and absurdity of a limitation that in many cases must bar a plaintiff's cause of action before he knows or ought to have known that he has one." B

Although *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 was a case of personal injuries, the respondents did not dispute that the principle of the decision was applicable in the present case. In that C respect the respondents were in my opinion exercising a wise discretion because the decision in *Cartledge* depended mainly on the necessary implication from section 26 of the Act of 1939, and section 26 is not limited to claims for personal injuries. Indeed, fraud or mistake are much more likely to be in issue where the plaintiff is claiming for damage to property than for personal injuries. Moreover, Lord Pearce seems to D have regarded the two types of claim as being subject to the same rules. In the course of his speech, at p. 780, he relied upon the observations of Lord Halsbury in *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App.Cas. 127, 132, as follows:

> "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once E and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged nonetheless [then] to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the F consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the [original] damage done, and consequent upon the injury originally sustained."

Cartledge v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 was decided by your Lordships' House on January 16, 1963. Later the same year Parliament passed the Limitation Act 1963, which received the royal assent G on July 31, 1963, and was evidently passed to deal with the mischief disclosed by *Cartledge*. It extended the time limit for raising of actions for damages where material facts of a decisive character were outside the knowledge of the plaintiff until after the action would normally have been time barred, but it applied only to actions for damages consisting of or including personal injuries. It must, therefore, be taken that H Parliament deliberately left the law unchanged so far as actions for damages of other sorts was concerned. It is, therefore, not surprising that until the decision in *Sparham-Souter* v. *Town and Country Develop-*

A ments (Essex) Ltd. [1976] Q.B. 858 such authority as exists is to the effect that in cases of latent defects to buildings, the cause of action accrues and the damage occurs when the defective work is done, even if that was before the date of discoverability. In *Bagot* v. *Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197, 203, Diplock L.J. said that damage from breach of duty by an architect in failing to see that the drains for a new house were properly built must have occurred when they were improperly B built. But that was obiter dictum and I mention it only because it was relied on by Lord Denning M.R. in *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373. *Dutton* was an action by the owner of a building against a local authority for the negligence of one of their servants in inspecting the foundations of the building. The question of limitation arose only as part of an argument on behalf of the defendants, to the effect that if they were liable they would be exposed to C endless claims. Lord Denning M.R. quoted from the opinion of Diplock L.J. in *Bagot* and said, at p. 396: "The damage was done when the foundations were badly constructed." That was, I think, also obiter dictum. In any event, it would not necessarily identify the beginning of the limitation period in the present action against the consulting engineers, because Lord Denning M.R. went on to say that, although D the local authority would be protected by a six-year limitation, the builder might not be because he might be guilty of concealed fraud by covering up his own bad work, so that the period of limitation would not begin to run until the fraud was discovered. Sachs L.J., at p. 405, distinguished *Bagot* v. *Stevens Scanlan & Co. Ltd.* [1966] 1 Q.B. 197, and expressed no concluded view as to when a cause of action in negligence would arise. Nor did Stamp L.J., the third member of the court.

E The obiter dicta of Diplock L.J. in *Bagot* and Lord Denning M.R. in *Dutton* were applied by Mars-Jones J. in *Higgins* v. *Arfon Borough Council* [1975] 1 W.L.R. 524, when he held an action against a local authority to be time barred.

But in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 the Court of Appeal took a different view and said F that, where a house is built with inadequate foundations, the cause of action does not accrue until such time as the plaintiff discovers that the bad work has done damage, or ought, with reasonable diligence, to have discovered it. Lord Denning M.R. expressly recanted his dictum in *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373. The limitation question was tried as a preliminary issue, on which the facts as pleaded had to be assumed to be true. The latest act of negligence G pleaded was less than six years before the issue of the writ, so that, once again, the observations as to the date on which the cause of action accrued were, strictly speaking, obiter. The main reason for the view of the Court of Appeal was that, until the owner had discovered the defective state of the property, he could resell it at a full price, and, if he did so, he would suffer no damage: see *per* Roskill L.J. [1976] Q.B. H 858, 875H, and Geoffrey Lane L.J., at p. 880F. Geoffrey Lane L.J. contrasted the position of the building owner in *Sparham-Souter* with that of the injured person in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 and said, at p. 880F:

> "There is no proper analogy between this situation [sc. the situation in *Sparham-Souter*] and the type of situation exemplified in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 where a plaintiff due to the negligence of the defendants suffers physical bodily injury which at the outset and for many years thereafter may be clinically unobservable. In those circumstances clearly damage is done to the plaintiff and the cause of action accrues from the moment of the first injury albeit undetected and undetectable. That is not so where the negligence has caused unobservable damage not to the plaintiff's body but to his house. He can get rid of his house before any damage is suffered. Not so with his body."

My Lords, I find myself with the utmost respect unable to agree with that argument. It seems to me that there is a true analogy between a plaintiff whose body has, unknown to him, suffered injury by inhaling particles of dust, and a plaintiff whose house has unknown to him sustained injury because it was built with inadequate foundations or of unsuitable materials. Just as the owner of the house may sell the house before the damage is discovered, and may suffer no financial loss, so the man with the injured body may die before pneumoconiosis becomes apparent, and he also may suffer no financial loss. But in both cases they have a damaged article when, but for the defendant's negligence, they would have had a sound one. Lord Pearce in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 showed how absurd it would be to hold that the plaintiff's knowledge of the state of his lungs could be the decisive factor. He said, at pp. 778–779:

> "It would be impossible to hold that while the X-ray photographs are being taken he cannot yet have suffered any damage to his body, but that immediately the result of them is told to him, he has from that moment suffered damage. It is for a judge or jury to decide whether a man has suffered any actionable harm and in borderline cases it is a question of degree."

It seems to me that exactly the same can rightly be said of damage to property.

I think, with all respect to Geoffrey Lane L.J., that there is an element of confusion between *damage* to the plaintiff's body and latent *defect* in the foundations of a building. Unless the defect is very gross, it may never lead to any damage at all to the building. It would be analogous to a predisposition or natural weakness in the human body which may never develop into disease or injury. The plaintiff's cause of action will not accrue until *damage* occurs, which will commonly consist of cracks coming into existence as a result of the defect even though the cracks or the defect may be undiscovered and undiscoverable. There may perhaps be cases where the defect is so gross that the building is doomed from the start, and where the owner's cause of action will accrue as soon as it is built, but it seems unlikely that such a defect would not be discovered within the limitation period. Such cases, if they exist, would be exceptional.

For the reasons I have tried to explain I do not find the distinction between personal injuries and damage to property drawn in the case of

Sparham-Souter v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 convincing. I observe that in *Dennis* v. *Charnwood Borough Council* [1983] Q.B. 409, 419C, Templeman L.J. referred to the distinction as "delicate and surprising" and Lawton L.J., at p. 423E, found reconciling *Sparham-Souter* with the reasoning in *Cartledge* as "difficult." I agree.

Part of the respondents' argument in favour of the date of discoverability as the date when the right of action accrued was that that date could be ascertained objectively. In my opinion that is by no means necessarily correct. In the present case, for instance, the judge held that the plaintiffs as owners of a new chimney, built in 1969, had no duty to inspect the top of it for cracks in spring 1970. But if they had happened to sell their works at that time, it is quite possible that the purchaser might have had such a duty to inspect and, if so, that would have been the date of discoverability. That appears to me to show that the date of discoverability may depend upon events which have nothing to do with the nature or extent of the damage.

Counsel for the respondents argued that in *Anns* v. *Merton London Borough Council* [1978] A.C. 728, Lord Wilberforce, and the other members of this House who agreed with his speech, had approved of the observations in *Sparham-Souter* to the effect that the discoverability date was the date when the cause of action accrued. But I do not so read my noble and learned friend's speech. At p. 750 he simply narrated the conflict between the cases of *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373 and *Sparham-Souter* without indicating any preference. He posed the question "When does the cause of action arise?" and he answered it as follows, at p. 760:

> "In my respectful opinion the Court of Appeal was right when, in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 it abjured the view that the cause of action arose immediately upon delivery, i.e., conveyance of the defective house. It can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it."

The only express approval in that passage is to the Court of Appeal's decision that the cause of action did *not* arise immediately the defective house was conveyed. His Lordship did not say, nor in my opinion did he imply, that the date of discoverability was the date when the cause of action accrued. The date which he regarded as material (when there is "present or imminent danger to . . . health or safety") was, of course, related to the particular duty resting upon the defendants as the local authority, which was different from the duty resting upon the builders or architects, but I see nothing to indicate that Lord Wilberforce regarded the date of discoverability of the damage as having any relevance. He was not considering the question of discoverability, no doubt because the main issue in the appeal by the time it reached this House was whether any duty at all was incumbent on the local authority: see p. 751A. Three other noble and learned Lords expressed agreement with Lord Wilberforce. Only Lord Salmon delivered a separate reasoned

speech and he clearly considered that the cause of action could arise before damage was discovered or discoverable, although he recognised that proof might be difficult. He said, at p. 771B: "Whether it is possible to prove that damage to the building had occurred *four years before it manifested itself* is another matter, but it can only be decided by evidence." (Emphasis added). Neither Lord Salmon, nor the other Lords, seems to have considered that he was dissenting from the majority view on that matter. In these circumstances I do not think that the majority in *Anns* are to be taken as having approved the discoverability test applied in *Sparham-Souter*.

There is one other matter on which I am, with the utmost respect, unable to agree with the reasoning in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858. Both Roskill L.J., at p. 875, and Geoffrey Lane L.J., at p. 880, held that the earliest moment at which time could begin to run against each successive owner of the defective property was when he bought, or agreed to buy, it. If that is right, it would mean that if the property happened to be owned by several owners in quick succession, each owning it for less than six years, the date when action would be time barred might be postponed indefinitely. Indeed, Geoffrey Lane L.J., at p. 881E, expressly recognised that the period of limitation might be postponed indefinitely, and he accepted that result as

> "less obnoxious than the alternative, which is that a house owner may be deprived of his remedy against a negligent defendant by the arbitrary imposition of a limitation period which started to run before the damage caused by the defendant could even be detected."

While I see the force of that view I cannot agree that it is one which is open to me to accept. I think the true view is that the duty of the builder and of the local authority is owed to owners of the property as a class, and that if time runs against one owner, it also runs against all his successors in title. No owner in the chain can have a better claim than his predecessor in title. The position of successive owners of property is, in my opinion, to be contrasted with that of workers in a case such as *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604, where a separate duty of care is owed by the maker of a machine to each worker who uses it, and a new worker is not a successor in title to a former holder of his job.

Counsel for the appellants submitted that the fault of his clients in advising on the design of the chimney was analogous to that of a solicitor who gives negligent advice on law, which results in the client suffering damage and a right of action accruing when the client acts on the advice: see *Howell* v. *Young* (1826) 5 B. & C. 259 and *Forster* v. *Outred & Co.* [1982] 1 W.L.R. 86. It is not necessary for the present purpose to decide whether that submission is well founded, but as at present advised, I do not think it is. It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building. In the present case that was April 1970 when, as found

by the judge, cracks must have occurred at the top of the chimney, even though that was before the date of discoverability. I am respectfully in agreement with Lord Reid's view expressed in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758, that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it. Postponement of the accrual of the cause of action until the date of discoverability may involve the investigation of facts many years after their occurrence—see, for example, *Dennis* v. *Charnwood Borough Council* [1983] Q.B. 409—with possible unfairness to the defendants, unless a final longstop date is prescribed, as in sections 6 and 7 of the Prescription and Limitation (Scotland) Act 1973. If there is any question of altering this branch of the law, this is, in my opinion, a clear case where any alteration should be made by legislation, and not by judicial decision, because this is, in the words of Lord Simon of Glaisdale in *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443, 480: "a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system—the sort of review compassed by an interdepartmental committee." I express the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject.

I would hold that the cause of action accrued in spring 1970 when damage, in the form of cracks near the top of the chimney, must have come into existence. I avoid saying that cracks "appeared" because that might seem to imply that they had been observed at that time. The action is, therefore, time barred and I would allow the appeal. We were told that parties had reached agreement as to costs, and there should therefore be no order on that matter.

LORD SCARMAN. My Lords, I agree that the law is now as set out in the speech of my noble and learned friend, Lord Fraser of Tullybelton. But it is no matter for pride. It must be, as Lord Reid said in *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758 and quoted by my noble and learned friend in his speech, unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result, as Lord Pearce, also quoted by my noble and learned friend, said in the same case, is harsh and absurd.

It is tempting to suggest that in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234, the House might consider it right to depart from the decision in *Cartledge*. But the reform needed is not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. The true way forward is not by departure from precedent but by amending legislation. Fortunately reform may be expected, since the Lord Chancellor has already referred the problem of latent damage and date of accrual of cause of action to his law reform committee.

Accordingly, for the reasons given by my noble and learned friend, I would allow the appeal.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Fraser of Tullybelton, with which I fully agree, I would allow this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in advance the speech prepared by my noble and learned friend, Lord Fraser of Tullybelton. I agree with it, and for the reasons which he gives I would allow the appeal.

LORD TEMPLEMAN. My Lords, for the reasons given by my noble and learned friend, Lord Fraser of Tullybelton, I too would allow the appeal.

Appeal allowed.

Solicitors: *Beale & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

M. I. H.

[PRIVY COUNCIL]

FALEMA'I LESA . . . . . APPELLANT

AND

ATTORNEY-GENERAL OF NEW ZEALAND . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1982 July 15, 19; 28

Lord Diplock, Lord Elwyn-Jones, Lord Keith of Kinkel, Lord Brandon of Oakbrook and Sir John Megaw

New Zealand—Citizenship—Qualifications—Person born in Western Samoa in 1946*—Whether natural-born British subject—British Nationality and Status of Aliens (in New Zealand) Act* 1928 (*Statutes of New Zealand, No.* 58 *of* 1928), *s.* 7 (1)

Section 7 of the British Nationality and Status of Aliens (in New Zealand) Act 1928 provides:

"(1) Subject to the provisions of this section, this Act shall apply to the Cook Islands and to Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; and the term 'New Zealand' as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa."

The plaintiff was born in Western Samoa on November 28, 1946, at a time when the Act of 1928 was in force. She travelled to New Zealand and was granted a permit to stay for a limited period. She stayed for longer than that period and was charged with an offence under the Immigration Act 1964. She applied to the High Court for a declaratory order determining the question whether on the true construction of the