

## Court of Appeal finally makes the time limit for negligence claims clear

By Philippa Fee

For some years now practitioners and underwriters have been battling with the uncertainty that surrounds the question of when time begins to run for an action against a defendant in negligence.

The problem frequently arises in solicitor's negligence cases. For example, a solicitor may have been negligent by failing to notice an encumbrance on the title when acting for a client purchasing land. The client itself may not discover the problem until he/she comes to sell the land some years later. In a case such as this, does time begin to run when the negligent act was done or when the problem was discovered by the client?

Injustice follows whichever way the question is answered; if time runs from the date of the negligent act the client may lose the right to sue before it even realises there is a problem. If time runs from when the client should have discovered the problem, solicitors will remain exposed to liability and claims for an indefinite period; the purpose of the Limitation Act, namely to achieve certainty, would be defeated.

For many years decisions of the High Court have been divided on this question. In recent years it is fair to say that the trend has been towards time beginning to run from the date of the breach. But the continuing uncertainty on the state of the law has made giving advice on limitation very difficult. It is also often hard for underwriters to know how long to keep dormant claim files open.

Frustratingly, the Court of Appeal declined to take up several opportunities that came its way to clarify the law—until now.

In the decision of *Murray v Morel* (CA86/04 22 December 2005) the Court of Appeal (Anderson P, Hammond and Chambers JJ) had to consider whether any of the ten causes

of action against a number of defendants were time-barred. This commentary focuses on the negligence cause of action.

The plaintiffs had invested in a forestry partnership in 1994. They said that they did not discover the defendants had been negligent until 1999. If the limitation period was postponed to the date of discovery, the negligence cause of action would not be out of time.

The court had no hesitation in rejecting the plaintiffs' argument that there was a broad-based doctrine of reasonable discoverability applying to all causes of action. Instead, the court confined the doctrine of reasonable discoverability to certain limited exceptions: latent defects in buildings (as in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513) and personal injury claims (see *S v G* [1995] 3 NZLR 681).

The court's rationale for the building exception was said to be that loss does not occur until the market value of the house is affected. This generally will not occur until the defect is discovered. Therefore, in building cases, discovery and loss will generally coincide. But this argument does not apply to negligence claims generally.

In emphatic terms the court affirmed that it was the job of Parliament, not the courts, to legislate reasonable discoverability into the general law.

This decision is clearly correct. But even if one disagrees with its conclusions, we should all be pleased to have certainty, at long last.

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### Points of Interest

- *Time Limit in Negligence runs from the date of breach;*
- *Discovery by the Plaintiff is irrelevant*
- *Building Cases and Personal Injury are the exception, not the rule.*

## A new approach to reparation and fines in OSH cases

By Simon Penlington

The High Court has adopted a two stage approach to assessing reparation orders and fines in OSH cases. The decision also shows that voluntary payments made by the employer to the victim or victim's family can significantly reduce the amount of the reparation order or fine.

In *Department of Labour v Areva T& D New Zealand Limited* (unreported, High Court, Rotorua, CRI 2003-403-000042, 9/11/05) Justice Priestley adopted the approach articulated in *Department of Labour v Ferrier Woolscours (Canterbury) Limited* (unreported, Timaru District Court, CRN 30765100701072, 29/11/04, Judge Abbott).

The two stage approach consists of the Court firstly fixing the amount offenders must pay by way of reparation on a stand alone basis. The second stage involves determining whether any additional penalty by way of a fine should be imposed. At this stage, the Court must take into account the quantum of the reparation sentence when assessing the amount of the fine.

### *The Facts*

The *Areva* case involved a fatality arising from the electrocution of an employee while replacing high voltage power poles. At the time of the accident, Areva had in place accident insurance cover in respect of its employees and it paid the benefit of this policy (\$100,000) to the deceased's family. Areva also had statutory liability insurance providing indemnity in respect of defence costs and reparation orders. After the accident, Areva paid the deceased worker's spouse a further \$38,000 in payment of various expenses. It also participated in a Restorative Justice Conference with the deceased's family. Taking these factors into account Judge Ingram held that no reparation order or fine should be imposed on the company. He said "that the defendant company had done enough."

Perhaps not surprisingly the Department appealed Judge Ingram's decision on the basis it was manifestly inadequate. The appeal

succeeded in part as the High Court ordered the company to pay a fine of \$35,000. The nil reparation order remained unchanged.

### *The High Court's Approach*

In coming to this decision, Justice Priestley held that Judge Ingram had properly considered the insurance payment and the company's payment of \$38,000 under section 10(1) and (2) of the Sentencing Act 2002. These provisions require the court in sentencing to take into account any offer of amends or agreement as to how the offender may remedy the wrong, loss or damage caused by that offender. Justice Priestley said that these payments together with the defendant's participation in a restorative justice conference and treatment of the deceased family meant that Judge Ingram was "absolutely correct not to impose a sentence of reparation."

However, Priestley J did not consider that the insurance payment or payment of expenses was a sufficient reason for concluding that a conviction alone was a sufficient penalty. His Honour did not agree that because the defendant had "done enough" for the deceased's family that this was a valid basis not to impose the prescribed penalty, namely, a fine.

Having made these observations, Justice Priestley agreed with Judge Ingram that \$75,000 was an appropriate starting point to determine a fine in this case. His Honour allowed a discount of 30-35% for Areva's early guilty plea and co-operation with the Department. A further discount of 15% was allowed for Areva's financial provision to the deceased's family. And "extra softening of the penalty" was justified by Areva's excellent record. The end result was a fine of \$35,000.

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### Points of Interest

- *Reparation is fixed on a stand-alone basis then the fine is assessed;*
- *Any assistance to the victim or the victim's family is taken into account in assessing the fine and reparation order;*
- *In cases of serious harm heavy fines are likely even where assistance has been substantial*

## A new approach to fines and reparations (cont.)

### *The Significance of Areva's Decision*

The *Areva* decision is significant for a number of reasons.

Firstly, the two stage approach adopted by Priestley J provides an analytical framework which, if followed, should avoid the widely diverging results which have occurred recently in the District Court. For example, compare the *Areva* decision at first instance with the decision in *Maritime Safety Authority v Sealord Group Limited* (unreported, Nelson District Court, CRI 2005-042-732, 24/6/05, Judge Zohrab) where Sealord was ordered to pay reparation totaling \$195,000 and fined \$10,000 (albeit for two offences).

Further, given Priestley J's observations regarding the District Court's failure to impose a fine, it is likely that employers will face a reasonably significant fine in cases where there is serious injury. No longer is it likely that there will be results

such as *Department of Labour v Waimarino Limited* (unreported, Tauranga District Court, CRN04070501048, Judge Zohrab) where the defendant was only ordered to pay reparation of \$35,000 but no fine was imposed. Extremely low fines, as were ordered in *Sealord*, are also unlikely.

Finally, *Areva* shows that an employer and insurer may be able to significantly reduce their exposure to payment of reparation by assisting a victim's or victim's family both financially and otherwise after the accident, actively participating in Restorative Justice Conferences; and payment of employee accident insurance policies to the victim or his or her family. In *Areva* not only were these factors crucial to the nil reparation order, which was upheld in the High Court, they were also relevant to reducing the fine significantly. Therefore Insurers and employers have a common interest in the employer taking these steps both before and after workplace accidents



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BARRISTERS & SOLICITORS

### Points of Interest

- *The defendant received credit in sentencing for attending a Restorative Justice Conference;*
- *Employers can take steps after the accident to benefit themselves and their Insurers when it comes to sentencing*

PO Box 1801  
Auckland 1  
Ph: +64 9 373 0050  
Fax: +64 9 379 3679

Level 13  
Gosling Chapman Tower  
51-53 Shortland Street  
Auckland

JONES FEE  
BARRISTERS & SOLICITORS