

Breaking new ground for recognition of non-physical injuries in the employment context

Introduction

1. Whitfield Braun acted for the successful parties in a recent Employment Court decision (*Cronin-Lampe & Anor v The Board of Trustees of Melville High School* [2017] NZEmpC 41 (“*Cronin-Lampe v Board*”). The case, among other things, involved a limitation issue, and is an important decision for future claimants suffering from enduring health problems arising out of their work environment.
2. The traditional position regarding limitation is that a cause of action becomes available to a claimant once all of the elements which are necessary to establish that cause of action are in existence. The Limitation Act 1950¹ then provided limitation periods for particular claims. Generally, there is a six year limitation period for civil claims, a ten year “long stop” limitation period alongside that for building claims, and a two year limitation period for claims relating to physical injury, with the limitation period running from the date the act which caused the damage occurred. This became a problem in certain areas involving personal injury, and building defects, because in both cases the damage suffered by the claimant could remain hidden for years. That caused a change in the law in these areas through the introduction of the doctrine of reasonable discoverability.
3. The problem which arose as a result of the traditional position on limitation periods, was that claimants were prevented from bringing a claim in negligence in circumstances where the act of negligence occurred long before the harmful effects were felt, and before the injured party was reasonably able to discover that the cause of the harm was another party’s actions. Therefore the cause of action had effectively arisen and expired without the injured party ever having knowledge of the harm, or having any reasonable opportunity to discover that the cause of action existed.
4. In building litigation this could occur, for example, where defective foundation works were only able to be discovered years after the original building work had been carried out, when cracks started to appear. In personal injury litigation, this situation could occur where symptoms only became apparent long after the incident which caused the harm.
5. To address these problems, the Courts introduced a doctrine of ‘reasonable discoverability’ which enabled innocent plaintiffs access to justice for latent defects in both building litigation and personal injury claims. The doctrine of reasonable discoverability provides that a cause of action arises once a claimant has discovered (or should have reasonably discovered) the existence of all of the elements necessary to establish the claim (judged on the basis of an objective reasonable person).

¹ Note that the Limitation Act 2010 codifies the reasonable discoverability test for claims about acts or omissions occurring on or after 1 January 2011 by providing for an initial limitation period (“the primary period”) which may be extended if the claimant only discovers the issue later (“the late knowledge period”).

Doctrine of reasonable discoverability in personal injury litigation

6. The *Cronin-Lampe* case involved argument on the application of the doctrine of reasonable discovery in personal injury litigation, namely in respect of post-traumatic stress disorder ("PTSD").
7. The two leading cases on the doctrine of reasonable discovery in personal injury litigation are *G D Searle & Co v Gunn* [1996] 2 NZLR 129, and *S v G* [1995] 3 NZLR 681. In *G D Searle & Co v Gunn*, the plaintiff discovered that her stomach pain and infertility was caused by a Family Planning clinic negligently installing an IUD ten years earlier. The court applied the doctrine of reasonable discoverability, to delay the commencement of the limitation period on the following grounds:

To hold that a plaintiff who has not discovered that a bodily injury is attributable to the wrongful action of another, and who could not reasonably have discovered that fact, is barred from suit if the injury in fact occurred outside the statutory period is effectively to deny a person the right of action. We do not see that consequence as being required by the legislation. We should therefore hold that for the purposes of s 4(7) of the Limitation Act 1950, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonable discoverable as having been caused by the acts or omissions of the defendant.

8. In *S v G*, the plaintiff, as an adult, discovered that serious psychological issues had been caused by child abuse during a time when the plaintiff was in foster care. The Court of Appeal held the cause of action was available, and not barred by the Limitation Act, because of the doctrine of reasonable discovery:

... By analogy it can be said that the sexual abuse victim who reasonably has not linked serious psychological damage to the abuse does not have the limitation period run merely because of awareness of the symptoms of that damage. It is only when the psychological damage is or reasonably should have been identified and linked to the abuse that it can be said that the elements of the negligence cause of action are known and thus the cause of action has accrued.

The *Cronin-Lampe* case

9. The recent decision in *Cronin-Lampe v Board*, was a strike out application brought by the Board of Trustees seeking to strike out our client's claim on limitation grounds. We successfully defended the application through arguing that the doctrine of reasonable discoverability applied in the particular circumstances of this case, which involved the delayed onset of chronic PTSD.
10. By way of factual summary, in 2012, our clients were diagnosed with chronic PTSD as a result of their experiences while they were employed as guidance counsellors at a High School during a particularly distressing period in the School's history, where a series of traumatic events occurred. The events included twenty two suicides by students and former students, and deaths by other causes, including murder. Over this period, the Cronin-Lampes were expected to be on call 24 hours a day and seven days a week for students, and were closely involved with supporting family and friends.
11. Upon discovering the cause of their PTSD, our clients raised a personal grievance against the Board of Trustees and commenced proceedings broadly for a failure of the

Board of Trustees to provide a safe working environment, with adequate support to the Cronin-Lampes for their own health and wellbeing, during this traumatic time.

12. The defences raised were that the claims were time barred due to the limitation periods that applied under the Employment Relations Act 2000 and the Limitation Act 1950.
13. In particular, the Board argued that the recent Supreme Court decision in *Trustees Executors Ltd v Murray* reversed the doctrine of reasonable discoverability so that it could no longer apply to cases of personal injury in tort or in relation to a claim for breach of an employment contract. Such an argument could have wide ranging impact on access to justice.

Decision of the Employment Court

14. The Employment Court ultimately held that the decision of the Supreme Court in *Murray* did not reverse the law as applied in *S v G*, *GD Searle & Co v Gunn*, and in other Employment Court decisions which have held the doctrine of reasonable discoverability applies in claims for breaches in an employment context.
15. The comments of the Employment Court were as follows:

[29] While [counsel for the Board] has submitted that the Supreme Court's decision in *Murray* means that the Employment Court's decisions on this point can no longer be relied upon, nor for that matter the findings in *S v G* and *Searle*, I do not necessarily accept that the decisions have been discredited in the way that he submitted. The authors of *Law of Contract in New Zealand*, state as follows regarding this conflict:

In recent cases in tort there has been debate as to whether the general rule that time runs from the date of damage should be replaced by a rule that says that time runs from the date that the damage was reasonably discoverable. A discoverability rule has been held to apply in three kinds of cases – those involving latent defects in buildings, personal injury, and sexual assault – and there is something to be said for applying it generally to all causes of action including claims in contract. However, in *Murray v Morel & Co Ltd* the Supreme Court declined to extend the law any further. And possible limitation problems in contract actions caused by lack of knowledge of relevant matters are now addressed in the Limitation Act 2010.

[30] The authors clearly do not regard the rule in personal injury cases, whether based on tort or breach of contract, as being necessarily abrogated by *Murray*. In the present case, the conflict has wider ramifications than just those parts of the potential causes of action covered by the s 4(7) application. For this reason it is preferable to defer a final consideration of those wider limitation issues until all matters have been canvassed at the substantive hearing of all proceedings.

Implications of the decision

16. This decision clarified two important points of law relating to the doctrine of reasonable discoverability:
 - 16.1 That the decisions of *G D Searle & Co v Gunn*, and *S v G* are still good law; and

- 16.2 That the doctrine of reasonable discoverability applies in the context of employment contracts as well as in actions in tort.
17. The decision of the Employment Court in *Cronin-Lampe v Board* represents a development in the law towards greater appreciation of the causes of mental illness, and responsibilities of employers to provide a safe work environment. This is an important decision for access to justice and limitation principles generally, as well as the ability of potential personal injury litigants who have suffered a delayed onset of symptoms from an unsafe work environment or otherwise.

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