We have the great benefit of Martin Canny's lucid and comprehensive textbook "Limitation of Actions" published by Round Hall in 2010 stating the law as at the end of May, 2010. I do not propose to trawl through the areas covered by him with great clarity, but rather to refer to some developments since the publication of that book, and to spend a little time on issues that have come to the fore again in the aftermath of the building boom.

The most interesting general development in the halting of proceedings is undoubtedly the use by the courts of their inherent power to dismiss claims that are stale or in which there has been inordinate or inexcusable delay with no countervailing circumstances to justify the delay. This is an area that has been dealt with by Neville Cox in his paper today and I do not propose to trespass unnecessarily on this. It should be said that the recent willingness of the courts to grant orders of this nature to defendants has provided significant additional weaponry to them, and has to some degree sidelined the necessity of relying exclusively on the Statute.

The effect of this can be seen in the decision of Hogan J in Donnellan v Westport Textiles Ltd. (in voluntary liquidation) and Minister for Defence, Ireland and the Attorney General [2011] IEHC 11, (unreported High Court 18th January, 2011) where the Plaintiff claimed he was exposed to excessive noise during two separate periods (as a former member of the Defence Forces for 10 months in 1974, as against the State defendants, and as a cone-worker in 1978 – 1979) as against the first defendant and subsequent hearing loss and tinnitus as a result. The proceedings commenced in 2000. The plaintiff’s counsel informed the Court at the commencement of the hearing of the Motion brought by the State defendants to strike out the proceedings on the grounds of inordinate and inexcusable delay that at the trial the plaintiff would contend that he had commenced proceedings against the defendant within the period of three years from his "date of knowledge" within the meaning of section 2 of the Statute of Limitations (Amendment) Act, 1991. For the purposes of the motion Hogan J. assumed that this was so and proceeded on the basis that the action is not, in fact statute barred.

Accordingly the delay became the crucial issue. On this the following statement from Hogan J. at paragraph 37 of the judgment illustrates the great additional strength given to the defendants in grounding the application on delay relying on the principles in O'Domhnaill v Merrick [1984] I.R. 151:

"while I am conscious that the plaintiff has, in fact, suffered some appreciable hearing loss, the post- commencement delays simply compounded a problem which was inherent from the start, namely, that the 26 years delay involved in commencing the litigation in the first place was
simply too long for the administration of justice to tolerate, even if the proceedings were technically within the Statute of Limitations.”

It is clear that this type of judicial discretion may be used to dismiss claims which are not statute-barred, and which are still within the limitation period, but where there has been such a delay or such a great lapse of time that the court considers that it would be unjust to allow the claim to proceed.

How this inherent jurisdiction overlaps and intersects with the Statute of Limitations code, and how the competing interests of the plaintiff, the defendant and the newly emphasized interest of the public are to be balanced can be seen in the following comment from Peart J. at page 586 of his judgment in Byrne v Minister for Defence and others [2005 ] 1 I.R. 577, an army deafness claim:-

"The court’s jurisdiction to dismiss such an old claim is an important power in the public interest, regardless of prejudice to the defendant, yet one which must be used sparingly lest a plaintiff might unreasonably be deprived of a remedy to which he is entitled. If the courts were never to invoke that power it would send the wrong message, namely that the courts will tolerate and indulge unreasonable delay in the bringing of claims where a defendant cannot show prejudice. That consideration must exist regardless of the existence of a defendant’s right to plead the Statute of Limitations by way of defence pleading. That statute has the capacity to protect the defendant’s rights which I have identified, but it serves no purpose in the protection of the public interest to which I have referred."

Without going over ground that has been covered already today, it is clear that the increase in the number of applications in the common law motion list and the non-jury list being made by the defendants on the basis of delay, on whichever of the two separate but overlapping strands of jurisprudence in this area, is a clear recognition of the power of this new tool, and indeed its flexibility.

Mr. Canny in his book thought this to be "a developing jurisdiction" and said that "further refinement of the principles involved should be anticipated".

Before turning to some of the recent developments in the area of tort it might be helpful to practitioners to point, in passing to some decisions in other areas of the limitations code.

In a judgment given on 20th December 2011, in Murphy v Gilligan and others [2011] IEHC 464, Feeny J. held that interlocutory orders made pursuant to section 3 of the Proceeds of Crime Act, 1996 prohibiting a respondent from disposing or otherwise dealing with property the proceeds of crime and orders pursuant to section 4 of the Act, directing the disposal of such property did not constitute a penalty or forfeiture pursuant to section 11(7)(b) of the Statute of Limitations, 1957.

In O’Hagan v Grogan [2012] IESC 8, a majority decision of a three judge Supreme Court given by Finnegan J. on 16th February 2012, the court found that the Chief State Solicitor, who was the plaintiff in the proceedings sought as personal representative to recover lands forming part of the estate of the deceased in respect of whom the State is the ultimate intestate successor, was not a "State Authority" within the meaning of the Statute of Limitations and, accordingly was subject to a twelve year limitation period in adverse possession rather than that of thirty years that applies to a State Authority.
In *Mahon v O'Reilly* [2010] IEHC 103,( unreported, High Court 26th March 2010), Dunne J decided that letters written by the owners of the paper title to a property, to an occupier, objecting to his presence are not sufficient to prevent the Statute running in the occupiers favour.


The old section 50 read:-

> "In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act, 1991, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation order, as appropriate, section 14,17,32 or 36, rules order sections 46(3) or section 49 shall be disregarded”.

Section 11 is the provision under which application is made to the Injuries Board.

The difficulty that arose from this section was that while all personal injury actions, except those alleging medical negligence were required to be submitted to what is now the Injuries Board for assessment, not all the limitation periods for personal injuries actions are contained in the 1957 and 1991 Acts.

From the general practitioners viewpoint the principal type of claim that did not benefit from the additional 6 months was one brought against the estate of a deceased defendant in respect of a cause of action, which was existing against them prior to his death. Section 9 of the Civil Liability Act, 1961 set out the time limit in respect of causes of action which survive against estates of deceased persons as follows:

1. In this section "the relevant period“ means the period of limitation prescribed by the Statute of Limitations or any other limitation enactment.

2. No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either:-

   a. proceedings against him in respect of that cause of action were commenced within the relevant period and were pending at the date of his death, or

   b. proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his death, whichever period first expires”.

Accordingly, actions against the estates of deceased defendants, not coming within the 1957 or 1991 Acts, did not get the benefit of the additional six months from the issue of the Boards Authorisation within which proceedings could be issued. Two other areas were affected, accidents on board sea vessels and accidents in the course of international air transport.

The new section 50 now provides:-
"In reckoning any period of time for the purpose of any applicable limitation period in relation to a relevant claim (including any limitation period order the Statute of Limitations 1957, section 9(2) of the Civil Liability Act 1961, the Statute of limitations (Amendment) Act 1991 and an international agreement or convention by which the state is bound, the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorization order, as appropriate, section 14, 17, 32 or 36, rules under Section 46(3) or section 49 shall be disregarded."

Section 34(1) (a) amends section 3 of the Personal Injuries Assessment Board Act, 2003 by stating that the Act does not apply to a civil action relating to any of the International Conventions governing Air and Sea travel, and Regulation made in relation to such travel by the European Parliament and Council. The net effect of this is that the P.I.A.B. Act shall not apply to a civil action involving personal injuries sustained by a passenger on board a vessel at sea, or on board an aircraft operated by or on behalf of an air carrier.

The new section 50 applies as regards applications made under section 11 after the coming into operation of the section, the 2nd August 2011.

Turning to the recent significant decisions, the first I should like to deal with is a judgment of McGovern J. in McCoy and Others v Keating and South Tipperary County Council [2011] IEHC 260 (unreported High Court 28th June, 2011). In that case the granddaughter of the first and second plaintiffs and in respect of whom the third named Plaintiff was in loco parentis was killed in a road traffic accident near Mullinahone, Co. Tipperary on 20th March 2006. Another unrelated child was also killed and a brother of the granddaughter was seriously injured. The plaintiffs claimed damages for psychiatric injuries and nervous shock caused by the shock or trauma of coming upon the aftermath of the accident. The circumstances as set out in the judgment were upsetting to put it mildly.

Liability was not in issue. Three personal injury summonses were issued, prima facie out of time by five months, 4 months and 22 days and 12 days respectively.

A plea was raised in each case that the actions were barred. As you know section 3(1) of the Statute of Limitations (Amendment) Act, 1991 provides that an action in respect of personal injuries caused by negligence or breach of duty shall not be brought after the expiration of two years from the date on which the cause of action accrued or the date of knowledge, if later, of the person injured.

Section 2(1) sets out the factors that are relevant to "date of knowledge", one of which is the date at which a plaintiff first had knowledge that the injury in question was significant.

Section 2(2) provides:

"For the purposes of this section, a person’s knowledge includes knowledge which he might reasonable, have been expected to acquire-

(a) from facts observable or ascertainable by him, or

(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek".
In *Bolger v O’Brien* [1999] 2 I.R. 421, the plaintiff claimed not to have realised that a back injury was “significant” until October 1992, at which time an x-ray confirmed the presence of an undisplaced fracture of his sacrum. The accident happened in March 1990, and the Plenary Summons issued in October 1993. The previous three year limitation period applied at the time. In the Supreme Court Hamilton C.J. giving the unanimous judgment of a five judge Court found that

"the fact that the Plaintiff did not realize the full significance of the effect of such injury is not of relevance once it is established that he knew the injury was significant".

In *McCoy* each of the plaintiffs gave evidence that they suffered significantly from shock and distress from the time they attended upon the immediate aftermath of the accident and saw the bodies of the children on the side of the road. None of the plaintiffs sought medical help for their mental state soon after the accident, and they were only referred to a psychiatrist by their Solicitor when they had consulted the solicitor with a view to commencing proceedings. They alleged that it was only when the psychiatrist told them that they were suffering from post traumatic stress disorder, that is when their condition was given a name, that they became aware of the significance of their injuries. This was not enough to convince McGovern J. that they could escape the limitation period and he found that their actions were barred.

In *O’Aonghusa v D.C.C. plc and others* [2011] IEHC 300, (unreported 19th February, 2011) concerned an accident that befell the Plaintiff in unusual circumstances. He alleged that in September, 2004 he was travelling in his motorized wheelchair on Milltown Bridge at Clonskeagh when the tubes in the front right tyre gave out, causing the wheelchair to topple over and the injuries of which he complained. The wheelchair had either been purchased from or supplied or manufactured by the relevant defendants. The Plaintiffs claim was pleaded primarily in negligence and breach of duty but also pleaded breach of statutory duty alleging that the defendants were “in breach of the Products Liability Act”.

The proceedings were commenced on 11th July, 2008, the application to PIAB, having been made in September 2007, and the authorisation issued on the 28th January 2008. In so far as the negligence claim was concerned. On the Plaintiff’s own pleadings he was statute barred by 30th March 2007, being two years from the date of commencement of Section 7 of the Civil Liability and Courts Act, 2004, and Hogan J. who heard an application by the Defendants to strike out the proceedings found that this was so.

The more interesting aspect of the case was the potential liability under the Liability for Defective Products Act, 1991 (the 1991 Act).

The limitation period governing claims of this kind is contained in section 7 of the Act as follows:-

"(1) An action for the recovery of damages under this Act, shall not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer."
(2)(a) A right of action under this Act shall be extinguished upon the expiration of the period of ten years from the date on which the producer put into circulation the actual product which caused the damage unless the injured person has in the meantime instituted proceedings against the producer.

(b) Paragraph (a) of this subsection shall have effect whether or not the right of action accrued or time began to run during the period referred to in subsection (1) of this section.

.........

(4) The Statutes of Limitation, 1957 and 1991, shall apply to an action under this Act subject to the provisions of this subsection.

(5) For the purposes of Subsection (4)-

(a) Subsection(1) of this section shall be deemed to be a provision of the Statute of Limitations (amendment) Act, 1991 of the kind referred to in section 2(1) of that Act,

(b) "injury" where it occurs in that Act except in Section (2)(1)(b) thereof includes damage to property, and "person injured" and, "injured" shall be construed accordingly, and

(c) the reference in subsection(1) of this section to the date when the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer shall be construed in accordance with section 2 of that Act but nothing in this paragraph shall prejudice the application of Section 1(3) of this Act”.

For the sake of completeness, and this is something to which I shall return later, in another context, Section 2 of the Statute of Limitations (Amendment) Act, 1991 reads as follows:-

"(1) For the purposes of any provision of this Act
For the purposes of any provision of this Act whereby the time within which an action in respect of an injury may be brought depends on a person's date of knowledge (whether he is the person injured or a personal representative or dependant of the person injured) references to that person's date of knowledge are references to the date on which he first had knowledge of the following facts:

(a) that the person alleged to have been injured had been injured,
(b) that the injury in question was significant,
(c) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty,
(d) the identity of the defendant, and
(e) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

(2) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire—

(a) from facts observable or ascertainable by him, or
(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.

(3) Notwithstanding subsection (2) of this section—
(a) a person shall not be fixed under this section with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice; and
(b) a person injured shall not be fixed under this section with knowledge of a fact relevant to the injury which he has failed to acquire as a result of that injury.

In their application the defendants argued that the effects of Section 7(5)(a) was to deem section 7(1) to be a provision of the Statutes of Limitation, so that the effect was that the principle limitation period for actions under the 1991 Act was reduced to two years.

Hogan J. found that Section 7(5)(a) does not deem Section 7(1) to be a provision of the Statute of Limitations for all purposes, but only "of a kind" referred to in Section 2(1) of the Statute of Limitation (Amendment) Act, 1991, that is to say that it is the specialized rules as to the date of knowledge and running of time contained in the Statutes of Limitation that are deemed to apply to the 1991 Act.

He found that any other conclusion would mean that:

"the limitation period contained in one statute (i.e., the 1991 Act) might be taken to have been obliquely and indirectly amended by the amendments effected in respect of another statute (i.e., the Statutes of Limitation Acts), in the absence of a general collective interpretation clause such that deemed the 1991 Act to be part of the Statute of Limitations for all purposes. There is, of course, a presumption against unclear changes in the law (see, e.g., the comments of Henchy J. in Minister for Industry and Commerce and Hales [1967] I.R. 65) and it would indeed be surprising if the Oireachtas could have intended that a legal rule as fundamental as a primary limitation period rule could have been amended in this quite oblique fashion".

The special "date of knowledge rules" set out in the Statute of Limitations (Amendment) Act, 1991 only apply to personal injury actions an area where this limitation has given rise to frequent concern for practitioners is that of damage to property caused by the negligence of builders, architects and engineers.

While the cases are not of the most recent vintage a short summary of the current position is probably helpful.

The comment of Geoghegan J. as a High Court Judge in Irish Equine Foundation Limited -v- Robinson and others [1999] 2 I.R. 442 at page 447, is a good starting point, where he states that:

"Prior to the Act of 1991, the cause of action for personal injury did not arise until the injury was manifest but it did then arise irrespective of whether it ever occurred to the party injured or could ever have reasonably occurred to the party injured that it resulted from the negligence of somebody else. Personal injury cases, of course, are now governed by the Act of 1991 and the views of the Supreme Court in Hegarty -v- O'Loughran are only
relevant insofar as they can and should be adapted to actions for personal damage.

In my view, it is at least arguable that the nature of personal injury damage is so different from the nature of damage resulting from defects in a building as a concept of an injury becoming manifest as being relevant to the commencement of the limitation period may only be applicable to personal injury cases but I accept that the opposite can also be argued. I find it quite unnecessary to decide this point and that being so, I do not think that I should decide it."

I will return to this. In that case, in December 1979, the plaintiff retained the first to sixth defendants to act as Architects and the seventh defendant to act as an Engineer for the purposes of designing and supervising the construction of an equine centre. A Certificate of Practical Completion was issued in March, 1986, and a final certificate was issued in November, 1987. However, water started leaking through the ceiling in 1991 and the plaintiff issued proceedings in January, 1996. The Architects and the Engineers argued that the plaintiff’s claim was statute barred in contract and in tort as more than six years had passed since the cause of action had accrued. The plaintiff defended this claim saying that as there had been no manifestation of the damage until the leak had occurred, the limitation period only ran from that time. Geoghegan J. found that the action was statute barred, finding that the defects in the building could have been detected by experts at any stage after the construction of the building. The defects that manifested themselves from the time the building had been erected and the statutory period had commenced running from then.

The judge said at page 448 of the Report that:

"It would seem to me that if the roof, the subject matter of this action, was defectively designed for the reasons suggested by the plaintiff, this would have been manifest at any time to any expert who examined it. I agree with the submission in this regard made by Counsel for R.K. and D. [the Architects], that if experts with the same qualifications as these defendants had been retained just after the roof was constructed to inspect and report and, assuming that the plaintiff’s allegations are correct, they could and would have reported that the roof was defectively designed. I am satisfied, therefore, that insofar as this action is founded on negligence in the design of the roof, it is clearly statute barred."

In O’Donnell and Anor v Kilsaran Concrete Limited and Anor [2001] 4 I.R. 183, the plaintiff entered into a contract with the second named defendant, a builder, to build a dwelling house in May, 1987. An Architect’s Certificate of Practical Completion was issued in March, 1988. In 1991, cracks appeared in the outside walls. The area was re-plastered and no further difficulties arose until 1997, when a Civil Engineer was consulted by the Architect after cracking in the plaster in the same area was discovered. This cracking was due to the presence of a certain mineral in the concrete blocks. The Engineer was satisfied that these cracks were of "recent origin" but was unable to express any opinion on
the 1991 cracking. He also accepted that the concrete blocks were unsuitable and defective from the outset.

On the issue of the applicability of the Statute of Limitations, Herbert J. in the High Court found that the action in contract was barred but not that in tort, specifically negligence and that in that case time began to run once the damage occurred and continued thereafter.

At page 190 of the Report, the Judge said:

"In my judgement, the decision of Geoghegan J. in the High Court in Irish Equine Foundation Limited -v- Robinson and others [1999] 2 I.R.442 at page 443 does not assist the defendants. In that case, the learned Judge accepted that if experts with the same qualifications of the Defendant's experts had been retained by the plaintiffs to inspect the roof in question just after it had been constructed they would, if the plaintiffs' allegations were correct, have reported that the roof was not defectively designed. The learned Judge says at page 448:

'It would seem to me that if the roof the subject matter of this action, was defectively designed for the reasons suggested by the plaintiff, this would have been manifest at any time to any expert who examined it'. Earlier in his judgement at page 447 the learned Judge said:

'I think, therefore, that Hegarty - v- O'Ioughran... must be taken as authority for the view that prior to the [Statute of Limitations (Amendment) Act. 1991], a cause of action for personal injury did not arise until the injury was manifest...’

He then concluded that these principles now applied only to cases of damaged property though he appears to express some hesitation in this regard.

In that case, the learned Judge found on the evidence and the pleadings that it was manifest that the roof was incorrectly designed immediately after construction was completed or even before it was completed and that pure economic loss would inevitably be involved in making it good. In the present case, I am satisfied on the evidence that the damage only came into existence not long prior to October, 1998, or in the terminology used by Geoghegan J. was not manifest until then. It is not necessary for the Court to express an opinion on the vexed question of 'discoverability' because in this case the damage, having come into existence not long prior to October, 1998, it was drawn to the attention of Mr. Lawlor in May, 1998 and by Mr. McLoughlin, in October, 1998, and the Plenary Summons was issued on 4th June, 1999, well within the limitation period."

In fact, as is clear from the next case to which I will refer, the question of "discoverability" is settled in Irish Law insofar as property claims are concerned, this position being that it has no applicability.

This case, which is the most recent case, is an unreported judgment in the High Court of Dunne J. in Murphy and Anor -v- McInerney Construction Ltd., and Others [2008] IEHC 323, given on 22nd October 2008. This was a decision in the trial of a preliminary issue on the
Statute of Limitations where the following facts were agreed for the purposes of the application:

1. That the first named defendant constructed Muckross Close, Powerscourt, Co. Waterford in 1987 and that in 1996 the first named defendant acknowledged defects in the structure of the property to its then owner, and agreed with him to carry out repairs and remedial work to the property.
2. That in or about the month of September 1997, the plaintiffs were interested in purchasing the property.
3. That in September 1997, the plaintiffs retained the second named defendant to inspect the property and to advise on its structural condition prior to the completion of negotiations for the purchase of the property.
4. That on 25th September 1997 the second named defendant furnished a report to the plaintiffs’ Solicitors and concluded that the principal structural elements of the property were in good structural order with no apparent defects.

There were then a number of paragraphs not relevant to this paper.

7. That the first named defendant was negligent and in breach of duty in constructing the property and in affecting the repair and remedial work.
8. That the proceedings were commenced on 30th September 2004.

Prior to the hearing the plaintiffs accepted that their claim against the second named Defendant was, in fact statute barred, and the case proceeded in relation to the builder alone.

Having dealt with her view that the discoverability test has no applicability in cases of property damage, which I think is undoubtedly correct in law, the learned trial Judge went on at page 16 of the judgment to say:

"Having regard to the pleadings in this case on the facts agreed before me, I cannot come to the conclusion that the cause of action against the first and second named defendants accrued within the 6 years prior to the issue of these proceedings. There is nothing whatsoever to suggest that the damage complained of occurred within that time frame. What is contended is that 'the latent defects became manifest' within the time frame. That is nothing short of a discoverability test. Contrary to the position as set out and found by Herbert J. in the case of O'Donnell v Kilsaran Concrete Ltd. this is not a case where one could say that the damage was of recent origin.

The words of McCarthy J. in the case of Hegarty v O'Loughran at page 164 are apposite: 'The fundamental principle is that words in a Statute must be given their ordinary meaning and, for myself, I am unable to conclude that a cause of action accrues at the date of discovery of its existence rather than the date on which, it had been discovered,
the proceedings could lawfully have been instituted. I recognise the unfairness, the harshness, the obscurantism that underlies this rule, but it is there and will remain unless qualified by the legislature or invalidated root and branch by this Court.”

At paragraph 7-17 of his book Mr. Canny makes the point that these cases “were all pleaded as ‘property damage’ although somewhat confusingly, several could be described in the taxonomy of tort law as being ‘pure economic loss’ cases” where liability is based on the principles set out in *Hedley Byrne Ltd v Heller & Partners Ltd.* [1964] A.C. 465.


A word of caution first. While the decisions on property damage discussed above are capable of being characterized as ones involving “pure economic loss” giving rise to the potential for a longer limitation period, the issue was touched on in two of the decisions and the comments of the judges emphasize the need for caution.

In the Irish Equine Foundation Case, Geoghegan J said at page 448 of the report:

"This action is for the recovery of £208,500 being the alleged cost of removing existing slating, retaining existing roof structure and sheeting with metal decking with counter batons, and slating over (estimated). That, in my view, is the primary claim. Admittedly, in para.8 of the statement of claim, there is a vague hint of a general claim for damages also. But it would seem to me that if such a claim was sustainable at all, it would be for a nominal sum. For all practicable purposes, this is a claim for what is known in the English authorities as “pure economic loss”. It would seem clear from the House of Lords’ decisions in D & F Estates Ltd. v Church Commissioners [1989] A.C. 177 and Murphy v Brentwood D.C. [1990] 3 W.L.R. 414, that there is no duty of care in law to prevent pure economic loss arising from careless conduct of omission. An exception to this is where the case can be brought within the principles of *Hedley Byrne Ltd v Heller & Partners Ltd.* [1964] A.C. 465. And possibly one or two other situations. Counsel for the plaintiff argues that *Hedley Byrne*, can be invoked in this case as it is a claim against two firms of professionals and not against the builder. But at any rate the law relating to the recovery of pure economic loss in a negligence action would appear to be different in Ireland having regard to *Ward v McMaster* [1988] I.R.337.”

The Privy Council in *Invercargill City Council v Hamlin* [1996] A.C. 624, a New Zealand appeal which broke new ground in that it decided not to follow the English position on property damage caused by negligence expressed in *Pirelli v Oscar Faber & Partners* [1983] 2 A.C. 1 which Geoghegan J. stated in *Irish Equine Foundation* was in accordance with Irish law.
The distinction and the points made on the applicability on the “economic loss” argument made in *Invercargill City Council* can be seen from the following analysis of that decision by Dunne J. in *Murphy v McInerney Construction Ltd.* at page 14:

"As mentioned above, counsel on behalf of the plaintiffs also placed reliance on the decision in the case of *Invercargill City Council v. Hamlin* [1996] A.C. 624. In that case a firm of builders in New Zealand built a house for the plaintiffs in 1972. During the course of its construction a building inspector employed by the City Council carried out a number of inspections as required by the city bye laws and approved the foundations. In 1974 cracks began to appear in the building and in 1989 the plaintiff called in another builder who told him that the foundations were defective. In 1990 the plaintiff commenced proceedings against the builders and the Council seeking a sum as the cost of repairs. It was held, inter alia, that in the particular context of latent damage to a building that the plaintiffs' claim was for economic loss rather than for physical damage to the house or foundations; that such loss occurred only when the market value of the house had been depreciated by reason of the defective foundations having been discovered, the measure of the loss being the cost of repairs if it was reasonable to repair or that depreciation in the market value if it was not; and that, accordingly, the judge had applied the correct test under the law of New Zealand in holding that the plaintiffs' cause of action had accrued when the defects would have become apparent to any reasonable home owner and, since there were no grounds for disturbing the findings of fact, the plaintiff's action had been brought in time and the Council were liable for damages in negligence. The Privy Council declined to follow the decision in *Pirelli*. Particular emphasis was laid on the fact that the loss in the case was economic loss which occurred only when the market value of the house concerned had been depreciated by reason of the defective foundations having been discovered. In the course of the judgment of the Privy Council in that case, Lord Lloyd of Berwick commented at p. 648 as follows:-

"In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable home owner would call in an expert. Since the defects would then be obvious to a potential buyer or his expert, that marks the moment when the market value of the building is depreciated and therefore when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss would then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not. . . .

This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of the *Pirelli decision* [1983] 2 A.C. 1, by the Supreme Court of Canada in the *Kamloops case*, 10 D.L.R. (4) 641. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff’s claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action."

He went on to comment:-

"It is regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle. Whether
the Pirrelli case, [1983] 2 A.C. 1, should still be regarded as good law in England is not for their Lordships to say. What is clear is that it is not good law in New Zealand.”

It is my view that the decision does not assist this Court in reaching a decision. The law in this jurisdiction is clear as to the interpretation of the Statute of Limitations. In any event, the plaintiffs have not sought to make out a case for damages for economic loss in their pleadings”.

With all these caveats the recent decision of Charleton J. is of great interest, whether it can be adapted for use in property damage cases, or at least some of them, or not; a difficult point, in that it is a decision primarily in negligent misrepresentation that sets the Irish law as being similar to that in England and Australia.

Mr O’Hara and Mr. Gallagher invested substantial sums of borrowed money in a financial product marketed by the ACC Bank called the “Solid World Bond”. The Bank lent the necessary funds. The bonds were to mature over a period of five years and eleven months. Both plaintiffs purchased a bond for €500,000 in October, 2003. This was “Solid World Bond 4”. In March, 2004 Mr. O’Hara invested a further €250,000 in another ACC Bond “Solid World Bond 5”. The plaintiffs’ interest payment liability far outstripped any return on the bond as the learned Judge said at paragraph 2 of the Judgment:

"While the name on the bonds might imply that monies were being placed into securities or share funds which were unshakeable, the intervening years have proved that the world financial system is far from solid”.

The plaintiffs claim was that the investments did not perform as the Bank represented they would. The defendant bank brought motions to dismiss the proceedings on the grounds that the claims were out of time. There was an additional ground as to an estoppel relied on as against Mr. O’Hara, which is not relevant here.

Both sets of proceedings were issued in 2010, Mr. O’Hara’s on 24th February and Mr. Gallaghers on 10th June. The bank contended that every investor who bought “Solid World Bond 4” or “5” suffered damage immediately upon and by reason of the misrepresentation inducing them to make that purchase, leaving the plaintiffs out of time.

The problem was set out by the learned judge at paragraph 29 of the Judgment as follows:

"Where wrongs lead to a physical manifestation of damage, as with cracking in a building, the scope for argument as to the date on which this occurred will be limited. Where, as in this case, the loss resulting from the tortious action is economic, the scope for debate as to when this was manifest is considerably widened. The resolution of when an action in tort accrues on the manifestation of damage, as between an immediate and a contingent loss, is often difficult, as can be seen in the case law from the neighbouring kingdom. Reading that case law the principles are illuminated, but a universally applicable set of tests remains elusive. Each case is to be judged on the facts as to when the tort occurred, and whether damage resulted at that time or whether the wrong initiated a course of action that later resulted in a loss. The keenest problems in analysis arise when what the plaintiff obtains as a result of a tort such as misrepresentation is a financial
product that may involve greater risk than was sought but which may turn out for better or worse; or where a tort opens the door to a potential liability which may or may not be later called up by a third party. In such cases, damage may readily be argued to have occurred when the plaintiff failed to obtain that which was sought, or was saddled with that which negligent advice delivered but, on the other hand, it may also be attractive to argue that the assessment of damages as of the date of the wrong is impossible because it cannot be ascertained how matters will probably turn out and that therefore accrual of a cause of action only can occur when that damage comes to pass. It may be that the wait and see approach may be more apposite when the potential for damage is contingent on the making of a third party claim or on market forces, whereas the actual occurrence of real loss as of the date of the transaction brings the date of accrual back to the date of the wrong alleged. Whatever the approach, debate will remain as to what is or is not, in terms of damage, a manifestation of damage and as to when that occurred.”


At paragraphs 37 and 38 of the judgment Charleton J said as follows:-

Wardley Australia Limited v. State of Western Australia ’ (1992) 175 C.L.R. 514 is a case where the High Court of Australia adopted a clear distinction between an immediate and a contingent liability. The State of Western Australia had been induced by misrepresentation by Wardley Australia Limited about a bank called Rothwells Limited to grant to that bank an indemnity. But for the misrepresentation, the contention was that the indemnity would not otherwise have been granted. When the bank suffered loss and made a claim on the indemnity, the State of Western Australia had to make a substantial settlement. The issue in the case was whether the State of Western Australia’s cause of action accrued when the indemnity was granted or when that indemnity was activated. The reasoning of the High Court was that the indemnity had generated a contingent liability and that the State, therefore, did not suffer any loss until that contingency was fulfilled. Time therefore began to run only from the occurrence of that event. It could be argued, and indeed was argued in that case, that the damage had occurred once the indemnity was granted because the State of Western Australia had then been locked into a damaging situation. That situation, however, only resulted in loss upon a contingency. Some might urge that an assessment of the loss resulting from being locked into that situation should be approached as of that event in the same way as a risk of arthritis resulting from an injury is quantified by a judge in personal injury cases. I am not attracted by that approach: how can it be ascertained when the loss will happen, if ever, and what it will be? That kind of analysis must be done on a probability basis in some personal injury cases, but that is because the damage is already suffered and further consequences of it may arise in the future. I see that as entirely different to a plaintiff being caught up in an unbargained for or unwanted situation which may or may not result in a loss. The analysis of the High Court of Australia was that the contingency of loss was fulfilled when the bank’s loss was ascertained and
quantified, subject to the making of a claim for payment by the bank. Mason C.J. for the majority stated at paras. 24-26:-

24. "It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date ((36) Forster v. Outred and Co. and D.W. Moore and Co. v. Ferrier illustrate the point.).

25. In Islander Trucking Ltd. v. Hogg Robinson Ltd., Evans J. observed ((37) (1990) 1 All ER, at p 831), with reference to the cases in which solicitors have brought into existence defective documents:

"The decision that damages are suffered at the time when the defective document is executed may, it appears, be put on one or both of two bases. The first is because the chose in action which the client acquires, or parts with, as a result of executing the document is regarded as a form of property which is held or acquired by the plaintiff and which is found to be devalued, that is to say worth either nothing or less then it would be worth if it was free from the defect which has resulted from the solicitor's negligence. The second possible basis is perhaps this: in the case of a claim against a solicitor, unlike a claim for damages in the building cases, the plaintiff is entitled to recover for economic loss, as distinct from any injury to person or property...The law is clear in relation to solicitors and has been authoritatively stated in these (cases). Where, in my respectful view, it might be said to depart from earlier common law rules is by reason of the fact that it apparently contemplates, as a common law rule, that a cause of action may arise at a time when its existence is unknown and could not reasonably be known by the injured plaintiff."

His Lordship went on to say ((38) ibid., at p 832) that, in D.W. Moore and Co., the contractual chose in action could be equated to an interest in property. In that case, the defendant solicitors negligently prepared and advised the execution of an agreement containing an unenforceable covenant against competition. Notwithstanding that the damage actually complained of was not suffered until much later and was dependent on two contingencies, the Court of Appeal held that there was a cause of action for some measurable loss which occurred when the defective contract containing the unenforceable covenant was executed.

26. If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred. A deferred liability may stand in a different position but there is no occasion here to discuss that matter."
In the House of Lords decision in *Law Society v Sephton and Co. and others* [2006] 2 A.C. 543, Lord Hoffman expressed himself in “complete agreement” with the Australian decision and his approach was adopted by Charleton J., describing it as drawing a clear distinction between an actual and a contingent financial liability, and he quotes the following passages from Lord Hoffman’s speech as follows:

"30. In my opinion, therefore, the question must be decided on principle. A contingent liability is not as such damage until the contingency occurs. The existence of a contingent liability may depress the value of other property, as in *Forster v Outred & Co* [1982] 1 W.L.R. 86, or it may mean that a party to a bilateral transaction has received less than he should have done, or is worse off than if he had not entered into the transaction (according to which is the appropriate measure of damages in the circumstances). But, standing alone as in this case, the contingency is not damage.

31. The majority of the Court of Appeal appear to have decided the case on the basis that the Law Society did not enter into any transaction giving rise to the contingent liability. It did nothing and the contingent liability was created by the misappropriations and the previous existence of the compensation fund and the rules which governed its administration. No doubt in most cases in which a party incurs a contingent liability as a result of entering into a transaction, that liability will result in damage for the reasons already discussed in relation to bilateral transactions. But I would prefer to put my decision on the simple basis that the possibility of an obligation to pay money in the future is not in itself damage."

Charleton J. concluded at paragraph 42 of his judgment:

"Manifestly, the transaction in purchasing the bonds entered the holders of the investment into a situation of market return that during the currency of the plaintiff holding the bond could turn out for better or for worse. On the purchase of the bond, therefore, the holders did not suffer an immediate loss but were left facing a contingent loss. The quantification of damages in such a case was not simply difficult, but it was impossible because no loss had then occurred and a buoyant performance over the lifetime of the bonds was possible. After all, it should be remembered that such an attractive prospect is why the plaintiff purchased the bonds and it is the basis, as well, on which the bank claims to have sold this ultimately disappointing financial product. Thus, if there was misrepresentation, the tort only became complete when a financial loss crystallized."

**Law Reform Commission**

The most potentially significant development in recent times has been the Report of the Law Reform Commission on Limitation of Actions, which was published in December 2011, (LRC 104 – 2011). A draft Bill was appended to the Report.

The focus of the report was on what would generally be called “common law” actions that is those concerning contracts (including debt-related claims); quasi-contracts; torts,(that is, non-contractual obligations), but not defamation claims; personal
injuries actions claiming damages for negligence, nuisance or breach of duty, and wrongful detention or conversion of an item or chattel.

For these actions the Commission recommends the introduction of a limitations law based on the model of a “core limitation regime”, comprising three limbs, a uniform basic limitation period; a uniform commencement date, and a uniform ultimate or “long stop” limitation period.

The Commission recommends that the uniform basic limitation period should be two years running from the date of knowledge of the plaintiff and that it should be calculated by reference to the date on which the plaintiff first knew, or ought reasonably to have known the following facts:

(a) That the injury, loss or damage had occurred;
(b) That the injury, loss or damage in question warrants the bringing of proceedings against the defendant;
(c) That the injury, loss or damage, was attributable in whole or in part to the act or omission by the defendant which is alleged to constitute negligence, nuisance, or breach of duty, or otherwise give rise to a claim;
(d) Is the identity of the defendant, and
(e) If it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant,

and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.

While this is broadly based on section 2 of the Statute of Limitations (Amendment) Act, 1991, it is simpler in structure and hopefully easier to interpret as a result. Importantly it removes the involvement of knowledge on the plaintiffs part that the injury was significant, the current position on which I referred to earlier.

The Commission was greatly influenced by the research and work carried out by the Alberta Law Reform Institute in Canada, which explained the text now being proposed as follows:-

"The discovery rule incorporates a constructive knowledge test which charges the claimant with knowledge of facts which, in his circumstances he ought to have known. This is the reasonable man standard."

Knowledge should include active and constructive knowledge, the latter being knowledge that a person might reasonably have been expected to acquire from facts observable or ascertainable by him or her, or from facts ascertainable by him or her with the help of professional expert advice.

Insofar as constructive knowledge is concerned, the recommendation made is subject to a proviso that a person will not be fixed with knowledge of a fact (i) ascertainable only with the help of expert advice so long as he or she has taken all reasonable steps to obtain (and where appropriate, to act on) that advice; or (ii) relevant to the injury which he or she has failed to acquire as a result of that injury.

A “long stop” or uniform ultimate limitation period of fifteen years running from the date of the act or omission giving rise to the cause of action, with a narrow statutory discretion to either extend or dis-apply that period related to exceptional
circumstances with a non-exhaustive statutory list of factors to which a court must have regard in exercising the discretion, the list being set out in the Recommendations and the draft Bill, was also recommended.

On the concept of "disability", the Commission recommended that this should be removed and replaced by the term "person whose legal capacity may be limited or absent".

The Commission is anxious that there be as few exceptions to the core principles and that issues of infancy or mental incapacity be dealt with in the courts discretion to extend or dis-apply the ultimate limitation period.

The non-exhaustive criteria take account of this and in the case of infancy include a statutory provision that in respect of a person, who was under eighteen years of age at the date of the act or omission giving rise to the cause of action, and who was in the custody of a parent or guardian, the parent or guardian shall be presumed competent and to be conscious of his or her responsibilities and therefore capable of commencing proceedings on behalf of such a person.

The narrow statutory discretion includes a reference to a person whose mental capacity may be limited, including by reference to child sexual or physical abuse.

Insofar as the other old bases that allowed the postponement of the limitation period apply to these types of common law actions, those being, acknowledgment; part payment; fraud or mistake, the Commission takes the view that having regard to the date of knowledge test; to the inclusion of a discoverability test of general application, and the limited discretion to dis-apply the ultimate limitation period, as suggested by the Commission, these factors were either illogical or unnecessary.

Coming full circle to where I started this paper, the Commission’s Report also recommends a general extension of the provisions in the 1991 Act to the effect that the law on limitation periods is without prejudice to the existing jurisdiction of the courts to dismiss a claim. This provision is intended to include cases that are dismissed on the grounds of there being such a delay between the accrual of the cause of action and the bringing of the action as in the interest of justice, would warrant its dismissal, and also cases that are dismissed because of such inordinate inexcusable and prejudicial delay that a hearing of the claim would not be consistent with the administration of justice or fair procedures ad also those that are an abuse of the process or frivolous or vexatious.

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END