

THE DUTY OF CARE OWED BY PUBLIC AUTHORITIES: THREE RECENT COURT OF APPEAL CASES

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On 19 June 1986 the Court of Appeal delivered three decisions in which it considered the liability of public authorities for negligence in varying circumstances in the building control and town planning area: *Brown v Heathcote County Council* [1986] 1 N.Z.L.R. 76 (*Brown*); *Craig v East Coast Bays City Council*, [1986] 1 N.Z.L.R. 99 (*Craig*); and *Stieller v Porirua City Council*, [1986] 1 N.Z.L.R. 84 (*Stieller*). As an expression of the Court's approach to the liability of public authorities, the decisions are of considerable interest, for in all three the public authority was held liable, albeit for a modest sum, in contrast to the more conservative approach to their liability taken by the House of Lords and the High Court of Australia in recent cases. (See respectively *Governors of The Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd.* [1985] 1 A.C. 210 (C.A. and H.L.) followed in *Investors in Industry v South Bedfordshire District Council* [1986] 1 All E.R. 787 (C.A.) and *Sutherland Shire Council v Heyman* (1985) 60 A.L.R. 1 (H.C.A.).) Underlying *Peabody* and *Heyman* is the policy viewpoint that the person primarily responsible for the loss, whether engineer, architect, builder or developer, ought to be liable and that the owner or developer cannot look to the general body of ratepayers in an area to underwrite his loss. (*Peabody, supra*, at 241; *Heyman, supra*, at 53 per Brennan J and at 65 per Deane J). The importance of the New Zealand trilogy does, however, transcend this immediate context, for they contain the Court's first real reaction to efforts in *Peabody* and *Heyman* to restrict the broad *Anns* test for duty of care in circumstances not covered by authority, a test which had won wide acceptance and had been enthusiastically embraced by our Court of Appeal in a now developed line of decisions commencing with *Scott Group Ltd v McFarlane* [1978] 1 N.Z.L.R. 553 (C.A.). While the Court appears to express itself still loyal at a general level to the test in *Anns v Merton London Borough Council* [1978] A.C. 728, despite its declining fortunes, further clarification of this confused (and confusing) area and guidance to lower courts and legal advisers is not provided.

Immediately striking about all three decisions is the Court's decisive and pragmatic approach to the issues, in stark contrast to the almost agonising prolixity of the High Court of Australia in cases such as *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 C.L.R. 529, *Jaensch v Coffey* (1983-84) 155 C.L.R. 549 and *Sutherland Shire Council v Heyman, supra*. Indeed Cooke J (as he then was) comments in *Brown* that, while there is a considerable amount of valuable discussion in *Caltex* and *Heyman*, "the variations between the ten individual judgments limit the guidance that can be derived". The Court is clearly concerned to speak with one voice, so as not to be similarly dismissed, and to maintain a now characteristic "essentially pragmatic approach [which] is currently appropriate in the field of negligence and related subjects". (See *Mt Albert Borough v Johnson*

[1979] 2 N.Z.L.R. 234, 238). Thus the separate section of Cooke J's judgment in *Brown* entitled "An approach to Negligence" is carefully incorporated by McMullin J writing for the Court into *Stieller* and by Cooke J himself into *Craig*. While the Court delivered three separate decisions, they are really a single "round robin" decision and should be read together as a deliberate expression of a unified approach.

Having said that, rather paradoxically this note will confine itself primarily to *Brown* and will refer only incidentally to *Craig* and *Stieller*. Cooke J seized the opportunity to re-state the Court's approach to the duty of care issue in the negligence field generally in the light of the criticisms of the *Anns* test in *Peabody* and *Heyman*. Even before outlining the facts and issues on appeal in *Brown* he delivered something of a general credo entitled "The Approach to Negligence Cases". Before discussing it in detail, I shall digress briefly to describe the two main judicial views which emerged after *Anns* as to the appropriate test for the duty of care:

1. The first is that Lord Wilberforce intended his first inquiry, "whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood", to be completely satisfied if it is reasonably foreseeable that carelessness on the defendant's part will cause damage. That inquiry will generally be short and easy to satisfy. The real contest between the parties will be at the second stage of the *Anns* test viz. whether this *prima facie* duty should be cut down or negated by policy considerations. This approach has been generally favoured in New Zealand. For its highwater mark, see Woodhouse J in *Scott Group Ltd v McFarlane*, *supra*, at 574. In the U.K. it has been adopted by Sir Robert Megarry V.C. in *Ross v Caunters* [1980] 1 Ch.297, 310 and most recently by Robert Goff L.J. in his dissenting speech in *Leigh and Silavan v Aliakmon Shipping Co. Ltd, The Aliakmon* [1985] Q.B. 350, 391 (C.A.).
2. The second view is that the notions of proximity and reasonable foreseeability, derived from Lord Atkin's neighbour speech, are distinct. "Proximity" remains the "touchstone" of the existence of a duty of care, in that only if there is the requisite element of proximity or neighbourhood in the relationship between the parties does a duty arise and liability exist. Reasonable foreseeability is a prerequisite to proximity. Indeed in settled areas of the law, such as liability in negligence for physical damage or damage directly caused by positive action, it will ordinarily be sufficient. But in new or developing categories of case, reasonable foreseeability will not of itself suffice to give rise to a *prima facie* duty of care. Additional factors worked out through the cases are likely to be required to satisfy the proximity requirement. This approach shifts the real contest to the first of Lord Wilberforce's two inquiries for duty, and would circumscribe the second policy inquiry. Among those who adopt this approach, there is some difference of opinion over whether it can be reconciled with Lord Wilberforce's statement in *Anns*. Lord Keith of Kinkel in *Peabody* and Gibbs CJ in *Heyman* consider it merely an explanation of what Lord Wilberforce said, while Deane J in *Heyman* rejects *Anns* altogether as inconsistent with it. It is submitted that there is little doubt on a literal reading of Lord Wilberforce's dictum and the way in which his judgment proceeds from that point that Deane J is indeed correct. Lord Wilberforce did in fact equate proximity with reasonable contemplation of likely harm. A third variant of this approach, which finds its origin in an influential article published in 1983 by Professors Smith and Burns is that cases of nonfeasance fall outside Lord Atkin's neighbour test altogether, and that some foundation other than reasonable foreseeability is required before a duty to act arises. (See "*Donoghue v Stevenson* - The Not So Golden Anniversary" (1983) 46 M.L.R. 147.) Brennan J espouses this view in *Heyman*, although it is expressly rejected by Gibbs CJ and Deane J.

In the last round of *Takaro Properties Ltd v Rowling* in judgments delivered by the Court of Appeal on 1 May 1986 [1986] 1 N.Z.L.R. 22, the Court stated that it preferred to leave final consideration of the appropriate test for duty until the issue was squarely presented in the context of the liability of a local authority. Interestingly, however, Woodhouse J

gave a strong indication that he adhered to the view that “the well understood concept of foreseeability of loss [is] the objective test of proximity” and in so far as *Peabody* restricted *Anns*, he rejected it. Somers J on the other hand, while preferring not to reach a concluded view, perceived a difference between proximity and foreseeability and felt that “...at least in more complicated cases proximity ... seems likely to continue to be necessary.”

These three cases offered the Court the opportunity to be more explicit, an opportunity which was not really taken up. In *Brown* Cooke J commenced by noting *Peabody* and *Heyman*, together with other recent major decisions in this “difficult and developing field of law”. Then he recited a now considerable series of New Zealand decisions commencing with the seminal *Bowen v Paramount Builders* [1977] 1 N.Z.L.R. 394 (C.A.). He considered that a “generally consistent approach and philosophy” runs through this line of cases. Accordingly, he said, although New Zealand courts can learn and have learned from judicial developments overseas, a New Zealand court should weigh the duty issues in a novel factual situation “against a background and in the spirit of what is now a not inconsiderable body of indigenous New Zealand case law”. He concluded the section with the statement:

In the end I cannot avoid the conclusion that in the negligence field we in New Zealand will have to continue mainly to hew our own way.

Richardson J and Sir Clifford Richmond wrote a very short separate judgment solely to reiterate the point:

These questions [of liability in negligence] have come before this Court on many occasions over the last 10 years and we share [Cooke P.'s] view that while we will always benefit from decisions in other jurisdictions, in this evolving area of our law New Zealand judges have developed a considerable body of law in this field. Ultimately, and building on that jurisprudence, we shall we think have to follow the course which in our judgment best meets the needs of this society.

This claim that the contemporary New Zealand law of negligence is indigenous and has developed in response to local conditions is extremely significant. It is a strong assertion of the Court's independence and will enable it to act with comparative freedom in a field in which the *Anns* test already gives it wide scope to decline to follow inconvenient and otherwise binding or highly persuasive precedents without appearing to be disobedient. For instance it would provide the mechanism by which the Court could reject the House of Lords' damage test in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 A.C. 1 (H.L.) in the limitation field, should the Court, as expected, favour a discoverability test.

What, then, is this so-called indigenous New Zealand approach? It is completely clear that it is Lord Wilberforce's *Anns* test. As Professor Smillie has perceptively concluded in his article “Principle, Policy and Negligence”:

The *Anns* approach provides courts with latitude to adapt the law of negligence to meet the changing needs of modern society and changing perceptions of the predominant goals of the law of the torts without any need actually to overrule or refuse to follow established precedents At the same time, adoption of the *Anns* approach enables a court to downplay its active lawmaking role and conceal its full extent. (See (1984) 11 N.Z.U.L.R. 111, 142-143.)

The *Anns* test offers a liberal court considerable flexibility. It is suggested that this is the reason for our Court of Appeal's continued allegiance to it. For instance Cooke J noted that the Court has not regarded the fact that the loss is purely economic as automatically fatal to duty, a view he considered consistent with *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] A.C.1 and *The Aliakmon* [1986] A.C. 785 (H.L.) although he did not refer to the restrictive ratios in each case. One certainly gains the impression that our Court of Appeal is far less troubled by the spectre of indeterminate liability where the loss is purely economic than was the House of Lords even in *Junior Books v Veitchi* [1983] 1 A.C.520 (H.L.), a decision which must now be read as confined to its specific facts.

Thus the combination of the Court's continued commitment to the *Anns* test for duty together with the assertion of its independence in the negligence area generally leaves it free, to a hitherto unprecedented extent, to do what strikes it as just in individual cases. The disadvantage is, however, that the *Anns* test is so broad and vague as to transcend any specific fact situation. It gives virtually no guidance to lower courts and legal advisers in later cases. On occasions the Court has in fact identified, in the relationship between the parties, factors more specific than mere foreseeability. In what circumstances will something more than mere foreseeability, such as reliance or actual knowledge of the plaintiff's identity, be required in the relationship between the parties? What will be the content of the policy inquiry at the second stage of *Anns* in any given case?

No clear conclusion can be drawn on the question of which of the two approaches to duty outlined above Cooke J favours. On the one hand His Honour grafted the "justice and reasonableness" requirement from *Peabody* onto the *Anns* test, but did not refer to Lord Keith of Kinkel's rejection earlier in his judgment of mere foreseeability as the sole criterion for duty. His Honour also noted that a feature of "this indigeneous approach to duty" is "perhaps a certain simplicity", an advantage claimed for the view which equates proximity and foreseeability. The following passage from his judgment appears to suggest that reasonable foreseeability is an adequate and sufficient criterion for proximity:

...[the special features in this case] identify the plaintiffs as among a comparatively small number of property owners in the Board's district a special risk of loss to whom was reasonably foreseeable if ... the Board failed to consider the question of likely flood levels. There was marked and distinctive proximity.

On the other hand this passage could almost be taken to suggest that His Honour perceives a distinction between proximity and foreseeability:

We have considered first the degree of proximity and foreseeability of harm between the parties. I would put it whether these factors are strong enough to point *prima facie* to a duty of care.

And elsewhere His Honour indicated that he finds parts of Gibbs CJ's judgment in *Heyman* attractive. It is suggested that while he seems sympathetic to the view espoused by Woodhouse J in *Scott Group*, Cooke J does not prescribe either approach as obligatory for New Zealand. While the broad approach will remain Lord Wilberforce's *Anns* test, it seems that individual judges will be left to elect between the two views according to the needs of the case or to judicial taste. Interestingly in one of the

other cases decided with *Brown, Craig v East Coast Bays City Council*, Tompkins J in his judgment for the Court perceived a clear difference between proximity and foreseeability, thereby aligning himself on that point with the House of Lords in *Peabody*, the High Court in *Heyman* and the rather tentative view already referred to of Somers J in *Takaro Properties*. His Honour does, however, modify that position, since he refers to foreseeability as “the primary consideration”:

In determining whether the required degree of proximity exists, the primary consideration is whether the consequence of the carelessness can be in the alleged wrongdoer's reasonable contemplation - that is, whether the damage is foreseeable. Further factors relevant to proximity are whether the person suffering the damage can demonstrate a degree of reliance or dependence and, in the case of a public body, the nature of the relevant statutory duty.

Tompkins J's reference to reliance or dependence is a nod in the direction of some of the judgments in *Heyman*, particularly that of Mason J, who considered that the duty of a public authority to take positive action for the protection of others is based upon “a general reliance or dependence” upon it to perform its functions with due care (*supra*, at 31).

Craig concerned the question of whether a local authority dealing with an application for planning consent owes a duty to neighbouring owners, whose amenities should reasonably be foreseen as closely and adversely affected by the building proposal, to take reasonable care that it acts within its powers. The respondent council granted the appellant's neighbour a dispensation from a requirement of its district scheme which prohibited more than one residential unit on the property. As a result the roof of the second unit substantially obstructed Mr Craig's view. Tompkins J found that the dispensation was wrongly granted. The application to erect the second unit on the adjoining land should have been treated as a notified application for specified departure, to which the appellant would have had an opportunity to object. His Honour referred to three considerations pointing to a duty of care: foreseeability (“the primary consideration”); reliance or dependence by the plaintiff; and the nature of the council's statutory duty. The first was clearly satisfied on the facts. Furthermore the appellant had not merely indirectly relied on the council to ensure compliance with the scheme, but had actually telephoned its offices to check its requirements. Thirdly, after summarising the well-known distinction drawn by Lord Wilberforce in *Anns* between a public body's policy decisions and operational functions, he placed the council's functions in considering the application for a building permit and the dispensation clearly in the operational sphere. These were administrative acts, not policy choices, so there was no impediment to superimposing a common law duty of care on the council's statutory functions.

While McMullin J, who delivered the judgment of the Court in *Stieller*, referred to the change in approach to duty in *Peabody* and *Heyman*, he considered it unnecessary on the facts to indicate his own preference. Leaving the issue to individual judges to resolve, as Cooke J appears to do in *Brown*, is to recognise that the difference is probably one of emphasis and is unlikely to lead to different results in individual cases. (See *Heyman* per Gibbs CJ at 14.) There is no doubt, however, that the first view, which equates proximity with reasonable foreseeability, is potentially more expansive of liability in negligence and is likely to find favour with judges with that outlook.

Brown concerned an application to the second respondent, the Heathcote County, by one of the first respondents, Mr Brown, to build a house for himself and his wife on a sloping, low-lying, flood-prone section recently purchased from Mrs Brown's father. Mr Brown planned to build the house himself. Mrs Brown was aware of the flooding risk before the purchase of the section and told her husband of this, indicating the highest point to which water had reached in the past of which she was aware. Mr Brown pegged out an area on which the proposed house would be built, locating it back from the point indicated by Mrs Brown. The council's officer and the Christchurch Drainage Board's inspector both indicated on separate visits that the pegged site appeared to be in order. Every application for a building permit in the County was referred to the appellant Board to enable it to incorporate its plumbing and drainage requirements and, as was its practice, to advise the council on various topics, including any flooding risk. Thus the Brown's application was referred to the Board, which granted its approval. In September 1973 the council issued the permit and thereafter Mr Brown constructed the house.

During construction the Board's inspector returned to the site twice, both times to inspect arrangements to dispose of sewerage. On neither occasion, nor on the earlier site visit, did he warn the Browns of the flood risk, although, as Cooke J in the lead judgment noted, he was never expressly consulted on this point. In mid-1974 the Browns went into occupation. During the next three consecutive winters the Heathcote overflowed its banks to such a height as to extensively flood the Brown's house making it necessary for them later to raise the house and the whole section some six feet above its previous level to remove the risk. Hardie Boys J dismissed their later claim against the County, but awarded the Browns \$32,900.00 for the cost of the work against the Board.

Relying on the fact that it had never been specifically asked to advise about the extent of possible flooding, the Board argued on appeal that it had no duty to offer unsolicited advice on this question when consulted by the council on a building permit application. Thus on one view the Court was confronted with the issue of whether and in what circumstances a statutory authority could be liable for a failure to take positive action when to do so would or might have prevented the damage suffered by the plaintiffs, viz. liability for nonfeasance. It was this very issue which had so troubled the High Court of Australia in *Heyman*.

The distinction between nonfeasance and misfeasance is far from easy to draw. Almost every case of nonfeasance can be characterised as one of misfeasance. Thus the Board's activity in *Brown* can be seen alternately as nonfeasance, in that it failed to warn the Browns of the flooding risk, or as misfeasance in the sense of an omission during a course of conduct, in that it negligently granted its approval to the permit or its inspector negligently inspected the site. It is notoriously difficult to separate pure omission (nonfeasance) from omission as part of an action (misfeasance). Clarity has not been assisted by references to "nonfeasance amounting to misfeasance" (*Schacht v The Queen in right of the Province of Ontario* (1972) 30 D.L.R. (3d) 641, 651) and "pseudo-nonfeasance" (Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247, 254). The courts have not emerged with a uniform test. For instance the following definition employed by Sachs L.J. in *Dutton v Bognor Regis U.D.C.*, [1972] 1 Q.B.

373, 403 leaves the category of nonfeasance almost non-existent:

The moment [the Council] exercised its power under section 60 of the Act of 1936 to make bylaws it assumed control over all such building operations within its area as were the subject of those bylaws. That assumption of control was a positive act and therefore in my opinion any negligence in its exercise fell within the ambit of the decision in the *Geddis* case, 3 App. Cas. 430.

At the opposite end of the pole is the approach taken by the members of the Court in *Heyman*. In that case the council officer did conduct an inspection of the building during erection, but by reason of an inadequate inspection system, did not look at the foundations and discover their inadequacy. This could be seen as a failure during a course of conduct and hence misfeasance, but all members of the Court saw it as nonfeasance, a failure to act to avert loss having its origin in an earlier and positive act of negligence by another. It mattered not that the council had taken some positive action, for instance an inspection or the issue of a permit, so long as the operative cause of the loss in so far as the council is concerned is a failure or omission to protect, warn or rescue. (See *Heyman, supra* per Deane J at 60.) Until the courts apply a standard test for the misfeasance/nonfeasance dichotomy, misfeasance and nonfeasance will remain labels expressing a conclusion already drawn about liability. (See Benditt, "*Liability for Failing to Rescue*" (1982) 1 Law & Philosophy 391, 402.

While Cooke J does not expressly state whether he regards this as a nonfeasance or misfeasance case, it seems clear that he views the Board's activity in *Heyman* terms as a failure to warn or protect, rather than as a case of misfeasance arising out of negligent inspection:

I am far from saying that the Board was under any general duty to offer unsolicited advice [about the extent of possible flooding] ...

... there is not normally any duty to volunteer advice and, but for the special factors about to be mentioned, it would be difficult to see any sound basis for making the Board liable in the present case.

The "special factors" His Honour identified as justifying liability were:

1. The Board was the sole authority in the city with comprehensive and accurate information about the flood levels of rivers in its jurisdiction and was looked to by property owners and councils to provide such information. It had adopted a practice of providing information and advice about possible flood risks to councils and applicants for permits, even without specific requests.
2. The Board knew or should have known of the flooding risk to this property. The fact that the Board's inspector had visited the site on three occasions, together with the information in the Board's records about previous floods in the area satisfied the Court that a reasonably competent inspector, acting reasonably, would have appreciated the very real risk of flooding to that section.
3. There was a marked and distinctive proximity, since the plaintiffs could be identified by the Board as among a small number of riparian sites to which there was a foreseeable and special risk of flooding.
4. The Board's obligations were not onerous; a warning was all that was required.

On its facts the decision relies upon traditional factors in the duty inquiry. The emphasis His Honour places on the "special features" of the case justifying an unusual duty to volunteer advice is reminiscent of the *Hedley Byrne* "special relationship". A practice adopted by a public authority of

offering advice or information in an area of special expertise was crucial to liability in *Shaddock and Associates Pty Ltd v Parramatta City Council* (1981) 150 C.L.R. 225 and echoes the *Hedley Byrne* principle of “assumption of responsibility”. And while there may not have been evidence of actual, specific reliance by the Browns on the Board to warn them of the flooding risk, His Honour noted that the Board was looked to by local authorities and property owners as having special knowledge about the rivers in its area and their flood levels. For instance Cooke J noted that the case had some resemblance to *Dennis v Charnwood Borough Council* [1983] Q.B. 409 in that in both cases the plaintiffs had no professional advisers, such as consulting engineers. The importance of the lack of professional advice is that the plaintiffs have no alternative source of technical information and it is reasonable for them to rely on the public authority. (See *Dennis*, *supra* at 415). On this basis the decision can be reconciled with the judgment of Mason J in *Heyman*, in that there was a general dependence or expectation on behalf of the plaintiffs and others similarly placed on the Board to perform its function with due care, and perhaps also with those of Deane and Brennan JJ in *Heyman* in so far as they stress reliance as essential to duty in nonfeasance cases. Thus, despite suggestions that reasonable foreseeability alone is sufficient upon which to ground duty, traditional factors, including reliance, were in the end identified. The question is whether these factors and, in particular, reliance will be required in the next nonfeasance case. Unfortunately, by not discussing nonfeasance at a theoretical level and *Heyman* in any detail, the Court did not answer this question and thereby provide guidance in this difficult area.

As hinted by Cooke J in *Mt Albert Borough v Johnson* [1979] 2 N.Z.L.R. 234, 239 and predicted by Todd in his note on *Peabody* (see (1985) 11 N.Z.U.L.R. 392, 397), the Court emphatically laid to rest the notion that in New Zealand, unlike Britain, the duty of care in building cases is confined to danger to health and personal safety. In this respect the law in New Zealand is different from that in Britain as expressed in *Peabody*. While the issue was directly presented in *Stieller*, Cooke J was at pains to resolve it in *Brown*, although on its facts it may not have been necessary to do so. The broader duty of care arises in New Zealand because the background legislation assigns to local authorities functions of wider scope than did the Public Health Act 1936 considered in *Anns* and the Local Government Act 1963 at issue in *Peabody*, both of which emphasise the health and safety of occupiers. Cooke J followed the judgment of Wilson J in *City of Kamloops v Nielsen* (1984) 10 D.L.R.(4th) 641, in which the Supreme Court of Canada similarly declined to confine a city’s duty of care to avoiding injury to occupants or damage to the building. Similarly “under New Zealand law”, Cooke J stated, “the exercise is unnecessary”.

In *Stieller* Greig J at first instance had awarded the Stiellers \$10,098.50 against the respondent council, representing the cost of replacing deformed weatherboards. The weatherboards had warped due to the use of defective materials by and the poor workmanship of the builder, which the council had failed to detect on issue of the building permit or during several inspections during construction. The principal issue of the appeal was the council’s argument that its duty was confined to safeguarding purchasers from injury to safety or health, and thus there was no duty in respect of the weatherboards, which concerned the appearance of the house. It

met the same fate as the submission in *Brown*, McMullin J holding that councils can be liable for superficial or aesthetic defects or those falling below an acceptable standard or quality, even though questions of health and safety do not arise.

While it is undoubtedly correct that the various statutes prescribing the functions of local authorities in New Zealand indicate the wider duty, underlying the discussion are deeper issues concerning the nature of recoverable loss. Historically the health and safety limitation on duty served a purpose not adverted to by the Court in *Brown* or *Stieller*. It enabled a line to be drawn between claims for physical damage, which were clearly recoverable, and claims for pure economic loss, which the courts were more reluctant to countenance. Where defects in the building were likely to cause imminent danger to the safety or health of occupiers, there was recoverable physical damage, whereas claims for the defective condition of the property itself were economic loss recoverable only in contract. Eradication of this distinction is welcome in that it treats alike, as is logical, the plaintiff who discovers the defect and repairs it in time to prevent danger or actual physical damage and the plaintiff who does not. Does this mean, however, that by stealth the Court has now unanimously recognised “a duty not to put out carelessly a defective thing”? (See *Bowen*, *supra*, at 423 per Cooke J.) Certainly His Honour is careful in *Brown* to preserve the Court’s freedom to decline liability where the loss is purely economic: “... if the loss in question is merely economic, that may tell against duty.”

But because the “health and safety” limit on duty is not discussed in the context of recovery of economic loss, it seems likely that, at least where the property concerned is a building, the fact that the negligence has resulted in a mere defect which has not progressed to the stage of physical damage, will not itself “tell against duty”. In the building area the prospect of successive purchasers bringing a series of claims can be controlled in other ways (see *Bowen*, *supra*, at 418 and 424). The problem of indeterminate liability will arise in the area of claims by ultimate purchasers against manufacturers in respect of defective chattels purchased in ordinary everyday transactions (see *Muirhead v Industrial Tank Specialists Ltd* [1986] Q.B. 507 (CA)). In this area there will be enormous pressure on the courts to cut down the ambit of the duty not to put out carelessly a defective chattel by using a narrower definition of proximity than reasonable foreseeability.