THE LAW OF NEGLIGENCE IN NEW ZEALAND AFTER *MURPHY*

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Introduction

Everyone interested in the development of the law of torts in New Zealand is well aware that in recent years there has been a widening divergence between the attitude of the courts in England on the one hand and in New Zealand on the other regarding the approach to be taken towards the resolution of the duty issue in negligence cases. Faced with a situation not precisely covered by existing authority the English courts have tended towards caution and to deny recognition of any novel duty of care. The New Zealand courts, by contrast, have been readier to allow the law of negligence to expand into new fields. They have not been deflected from their path by the plea that there is no precedent for imposing a duty in the particular circumstances. A clear example of this divergence, although not by any means the only one,[1] is found in the cases concerning the ambit of liability of a builder or local authority for negligence in putting up or inspecting a defective building. It has been apparent for some time that the House of Lords had come to regret its decisions in *Anns v London Borough of Merton*[2] and *Junior Books Ltd v Veitchi Co Ltd*,[3] imposing duties on the local authority and builder respectively to take care to protect subsequent owners of the building from incurring loss through buying or paying for work on the building. In a series of decisions, to be examined in more detail shortly, the ambit of *Anns* was progressively cut back and *Junior Books* was marginalised as a case decided on its own very special facts. Now, in *Murphy v Brentwood District Council*,[4] *Anns* has been overruled. In New Zealand, on the other hand, the Court of Appeal, after showing the way in *Bowen v Paramount Builders (Hamilton) Ltd*,[5] has since embraced the result, if not all of the reasoning, in *Anns*.[6] The Supreme Court of Canada has been no less enthusiastic.[7] *Anns* has indeed been recognised as a pivotal case. In these interesting circumstances our task today is to examine *Murphy's* case and to assess its likely impact upon the development of the law in this country.

The decision in *Anns* was difficult and complex. In deciding whether, or the extent to which, it may retain importance we need to look carefully at what *Murphy* says about the various strands to its reasoning. In particular, we need to disentangle and consider separately four issues.

1. How, in principle, should we analyse duty issues in negligence? Might Lord Wilberforce's two-stage test in *Anns* still be used as an aid in the duty enquiry?

2. What does *Murphy* decide about the recovery in negligence of pure financial loss? The answer to this question will lie at the heart of our discussion.

3. What are the implications of *Murphy* as regards a claim that a local authority is liable for *failing to act* - for a mere omission to help another?

4. How does *Murphy* leave the law as regards other issues bearing upon the negligence liability of public bodies?

These are all fundamental questions about the nature and scope of liability in negligence at common law.

Of course, *Murphy* being a decision of the House of Lords, it does not bind the New Zealand courts.[8] While there remains the right of appeal to the Judicial Committee of the Privy Council, however, probably the Court of Appeal will not have the final say on the matter.[9] As for the attitude of the Privy Council itself, the principle laid down in *de Lasala v de Lasala*,[10] a case on appeal from the Court of Appeal of Hong Kong, presumably would be applied. In that case Lord Diplock, after observing that the Judicial Committee shares with the Appellate Committee of the House of Lords a common membership, said that the Judicial Committee is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England. Whether there might be differing local circumstances in New Zealand will be considered below.[11]

The Nature of the Duty Enquiry[12]

In *Anns* Lord Wilberforce sought to explain how Lord Atkin's neighbour principle in *Donoghue v Stevenson*[13] can be understood as being of general application. Lord Wilberforce said, in words so familiar that they hardly bear repeating, that the question has to be approached in two stages.[14]

> First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

At first it seemed that the *Anns* two-stage test would become the commonly accepted means for analysing all questions of duty. It was quickly accepted on a number of occasions in the New Zealand Court of Appeal,[15] and later by the Supreme Court of Canada.[16] It was regularly invoked by courts of first instance in common law countries. It was not long, however, before the House of Lords itself began to signal its doubts. The retreat started in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson &*

Co Ltd[17] where Lord Keith cautioned against treating Lord Wilberforce's words as being of a definitive character and instead thought it appropriate to ask simply whether it was "just and reasonable" to impose a duty. Since then, in a series of decisions[18] culminating in *Caparo Industries Plc v Dickman*,[19] both the House of Lords and the Privy Council have levelled a sustained barrage of criticism at the *Anns* approach. In *Caparo* Lord Bridge reviewed these decisions, observing that they emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope. His Lordship said that whether the courts will recognise a duty of care in any particular case depends on the foreseeability of the harm, the proximity of the relationship between the parties and, generally, considerations of fairness and reasonableness. These concepts of fairness and reasonableness are not, he noted, susceptible of such precise definition as would be necessary to give them utility as practical tests but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of given scope. His Lordship proceeded to quote with approval the words of Brennan J in *Sutherland Shire Council v Heyman*,[20] that the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by a massive extension of a prima facie duty of care restrained only by indefinable stage two considerations.

Caparo perhaps marks the final rejection in England of the *Anns* approach to duty questions. *Murphy* does not say anything different about it. Lord Keith[21] and Lord Oliver[22] similarly reviewed the earlier decisions, several of them containing Lord Keith's own judgments, and expressed a like conclusion.

Despite the criticism in England and Australia, the New Zealand courts so far, in cases prior to *Murphy*, have seen *Anns* as having a role to play in the development of New Zealand law. In *Brown v Heathcote County Council*[23] Cooke P, delivering the judgment of the court, said that without necessarily subscribing to everything said by Lord Wilberforce in his well-known opinion in *Anns*, they had found it helpful to think in a broad way along the lines of his two-fold approach. His Honour expressed the question at the first stage as being whether the degree of proximity and foreseeability of harm was strong enough to point prima facie to a duty of care and at the second as whether there were other particular factors pointing against a duty. This kind of analysis was helpful in determining whether, in terms of Lord Keith's analysis in *Peabody*, it is just and reasonable that a duty of care of a particular scope was incumbent upon the defendant. More recently, in *Williams v Attorney-General*,[24] three of the five members of the court - Richardson, Casey and Bisson JJ - once more applied *Anns*, or Cooke P's restatement of it in *Brown*. Cooke P himself asked simply whether it was "just and reasonable" to recognise a duty. The question for consideration now is whether it would be sensible for the courts here to continue to use the two-stage approach, notwithstanding that *Anns* itself has been overruled. Certainly the analysis of the duty question in *Anns* can stand independently of the actual decision in the case.

How far the criticisms of the *Anns* approach are justified depends to some extent on how

Lord Wilberforce's words should be understood. One interpretation is that at stage one of the enquiry the sufficiency of proximity should be tested simply by the reasonable foreseeability of harm. This view has support from Woodhouse J in *Takaro Properties Ltd v Rowling*[25] and possibly it is implicit in the earlier decisions of the Court of Appeal. As a matter of history, however, a duty has never been presumed in this way. There are, of course, various categories of case where loss is foreseeable yet no duty at all or only a very limited duty has ever been seen to arise. In addition, to presume a duty wherever harm is foreseeable and thereby to put the onus on the defendant to adduce good reasons in rebuttal can be seen as unjustifiably burdensome for the defendant and as productive of much uncertainty. However, the picture changes if the stage one issue is recognised as being concerned not only with questions of foreseeability but also with wider issues. In *Yuen Kun Yeu v Attorney-General of Hong Kong*[26] Lord Keith said the expression "proximity or neighbourhood" was intended to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant which gives rise to the duty. His Lordship reiterated the point in *Murphy*. The same view has been taken in the recent New Zealand cases. Somers J in *Takaro Properties*[27] took this as the true meaning of *Anns* and Cooke P's judgment in *Brown* also is consistent with this approach. Any doubt about the matter has been removed by the decision of the Court of Appeal in *Downsview Nominees Ltd v First City Corporation Ltd.*[28] Richardson J, delivering the judgment of the court, said that the degree of proximity or neighbourhood between the alleged wrongdoer and the person who has suffered damage is not a simple question of foreseeability of harm as between the parties, and involves the degree of analogy with cases in which duties are already established.

On this analysis it is difficult to understand what the House of Lords and the Privy Council see as being wrong with the *Anns* approach. Far from leading, in Brennan J's words, to a "massive extension of a prima facie duty of care", it is entirely consistent with Lord Bridge's re-affirmation in *Caparo* of the importance of the traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. Before any prima facie duty arises the relationship between the parties must be sufficiently proximate in accordance with the needs of the particular case, including considerations of certainty and the avoidance of indeterminate liability, and in the light of previous authority. Indeed the test in *Anns* in its terms is phrased more restrictively than the approach propounded by its detractors, for even after stage one has been satisfied the further limiting considerations contemplated in stage two must then be brought into account. Admittedly a stage two issue will not, it seems, arise very often. In *Yuen Kun Yeu's* case Lord Keith said that the enquiry can arise only in a limited category of case where, notwithstanding that a case of negligence is made out on a proximity basis, public policy requires that there should be no liability. His Lordship identified the immunity of a barrister for negligence in the conduct of proceedings in court as one of these "rare" cases.

The stage two question does seem to fulfill a useful function. Normally it is, of course, incumbent upon the plaintiff to prove the existence of a relationship with the defendant such that a duty of care in law is seen to arise. The stage two issue is reserved for the case where the plaintiff proves the existence of a prima facie duty and the defendant, the onus

being on him, then seeks to establish a limiting or negativing factor. It operates like a *defence* to a tort liability. Thus, to take Lord Keith's example, in a claim against a barrister the plaintiff must establish the existence of a proximate relationship such that a duty can, in principle, arise, in which case the defendant must show that the alleged negligence occurred in the conduct of proceedings in court or, applying McCarthy P's test in *Rees v Sinclair*,[29] was closely and intimately connected with the conduct of the proceedings. Again, in cases concerning local authorities, our primary concern today, it is up to the defendant to prove, if he can, that the conduct of the authority did not involve merely "operational" negligence but was founded upon considerations of policy or discretion such as to negate an otherwise existing duty. We shall return to this point later on.

I think the real objection to the *Anns* approach is that it is expressed in a potentially misleading way. It does not recognise explicitly that policy considerations may be highly relevant at the first stage of the enquiry, but on the contrary might suggest to the uninitiated that they are only brought into account at stage two. Richardson J in *Downsview* has drawn attention to this misconception, but the language used in *Anns* nonetheless remains a potential source of misunderstanding. Certainly if the New Zealand courts are to continue to make use of a two-stage approach - and as already indicated there is merit in so doing - it might be best no longer to refer to *Anns* but explicitly to reformulate the test (as opposed simply to interpreting it), so as to affirm (i) that foreseeability, proximity, fairness and reasonableness are all relevant at the first stage, and (ii) that the second stage is reserved for the case where the defendant can point to a consideration of policy which limits or negates a duty which would otherwise arise out of the particular relationship between the parties. The judgments in *Brown* and *Downsview* have already gone most of the way, but a further word perhaps would be desirable in the light of *Anns*' demise.

Possibly this whole question has been given more attention than it really merits. There is a danger that undue concentration on matters of abstract analysis will obscure the essential truth, that in deciding whether a duty will be recognised in novel circumstances a judge is guided ultimately by his or her perception of the governing considerations of policy. In the light of the debate which it has engendered, however, a discussion of this aspect of the *Anns* decision seemed to be worthwhile.

Financial Loss

At this stage of our discussion we are not concerned with the liability of a local authority or builder for physical injury or physical damage to separate property caused by faulty work of construction or repair. Our interest is in the negligence, or any other, liability of the authority or builder in respect of the economic cost of repairing or replacing the property actually containing the defect. It must immediately be recognised that the courts have not always found it easy to make the distinction. On the one hand the owner has acquired already defective property and has suffered an economic loss in having paid too much for it. On the other hand the defect may have caused or threatened physical harm to the person or to the property itself and for this reason the claim for repair might be treated as, or as analogous to, one for physical damage. As will be explained, the former is now recognised as being the correct analysis, irrespective of whether physical harm is

caused or threatened. As for whether the loss is recoverable, we need to look at the divergent approaches to this issue in England and New Zealand prior to *Murphy*, to examine the actual decision in *Murphy* and to evaluate that decision. After that we shall consider briefly some options for reform.

Background to Murphy

The decision that initiated the whole recent line of authority is that of the English Court of Appeal in *Dutton v Bognor Regis U.D.C.*[30] Here a local authority was held liable to the owner of a house which had subsided after being built on a filled-in rubbish dump. The damage was treated simply as being physical. Five years later the decision, although not the reasoning, was affirmed by the House of Lords in *Anns'* case. It was held that a local authority owed a duty to owners or occupiers who might suffer injury to health caused by defective foundations. Lord Wilberforce thought that the damage sustained by the plaintiff was "material, physical damage". What was recoverable was the amount of expenditure necessary to restore the dwelling to a condition in which there was no longer a present or imminent danger to the health or safety of persons occupying and possibly expenses arising from necessary displacement.[31] Then in the *Junior Books* case the House of Lords seemingly went further, allowing recovery against a builder where there was no risk of injury to health or to other property. The plaintiff owners had engaged contractors to build a factory. The flooring work was sub-contracted by the main contractors to Veitchi Ltd. The work allegedly was done badly, so that the floor cracked and needed to be replaced. The owners sued Veitchi in negligence[32] and succeeded. Although the defect had caused physical harm to the floor itself the claim was recognised as being for a financial loss. It was recoverable because of the close proximity between the parties. The relevant factors were summarised by Lord Roskill.[33] He thought it was of crucial importance that Veitchi Ltd were nominated sub-contractors, specialists in flooring, who were alone responsible for the composition and construction of the floor. Junior Books had relied on Veitchi's skills and experience and Veitchi must have known this. The relationship between them was as close as it could be short of actual privity of contract.

The New Zealand courts were also showing that they were ready to embrace the head of liability first introduced in *Dutton*. In *Bowen's* case, decided just before, and cited in, *Anns*, the Court of Appeal held that a builder who put up a house on inadequate foundations owed a duty of care to a subsequent purchaser of the building. Liability was founded on the builder having negligently created a hidden defect which was a source of danger to persons whom he could reasonably foresee were likely to suffer damage in the form of personal injuries or damage to property. The claim was seen simply as being for physical damage to the structure of the house. Richmond P thought that the cost of repairs actually incurred to prevent threatened damage was recoverable, whereas Woodhouse and Cooke JJ both thought the cost was recoverable whether or not the work had actually been carried out.[34] It was also made clear, by Richmond P and Woodhouse J, that the nature of the builder's contractual obligations could not set a limit to the duty of care owed to third parties, although they could be relevant in determining whether the builder had been negligent.[35]

In subsequent decisions the Court of Appeal moved away from the *Bowen* analysis. In

Mount Albert Borough Council v Johnson[36] a building developer erecting a block of flats on land known to have been filled was held liable to a subsequent purchaser of one of the flats for failing to take the foundations down to solid bottom. The court regarded *Bowen* as having decided that an owner of defective property can recover in tort for financial loss caused by negligence, at least where the loss was associated with physical damage. Furthermore, the developer owed a "non-delegable duty" to ensure that the building work was properly performed and could not avoid liability by engaging apparently competent independent contractors. Next, in *Brown v Heathcote County Council*[37] the court held that the Christchurch Drainage Board, having failed to warn a local authority considering an application for a building permit that the land the subject of the application was susceptible to flooding, was liable to the applicants who went ahead and built a house on the land. In the Court of Appeal the Board's duty was founded on the "marked and distinctive proximity" between the parties. Proof of a danger to health was not required. In the Privy Council the Board was held to have assumed a duty, because it had in the past habitually given the information without having been asked. Liability was, therefore, founded on an implied representation that there was no danger of flooding. Thirdly, in *Stieller v Porirua City Council*[38] the defendant council had exercised its statutory power to inspect the plaintiff's house during construction, before the plaintiff bought it, and had failed to notice that the stormwater drains were not connected to any outlet or that the weatherboards were of inferior quality. Once more the court imposed a duty, maintaining that the construction of houses with good materials and in a workmanlike manner was a matter within the council's control. As in *Brown*, the council's obligations were not confined to defects affecting public health and safety (although it was thought that in an extreme case the defects could in any event qualify on that basis), nor to defects damaging or threatening to damage other parts of the structure. It was enough that they reduced the value of the premises. The court awarded in addition substantial damages for the distress and inconvenience caused to the owners by their problems with the house. Lastly there is *Askin v Knox*,[39] where a houseowner's claim against a builder and local authority failed on the grounds that negligence on the part of either defendant had not been proved. Cooke P, in the course of delivering the judgment of the court, observed that negligence liability had been a difficult and in some respects a controversial development in the building control field, but in the view of the court a necessary one.

While all this was happening in New Zealand the English courts were having second thoughts. *Junior Books* marks the outer limits of liability which they were ever prepared to countenance. Since then there has been a total retreat. The first step back came in the judgment of Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd.*[40] His Lordship had difficulty in seeing how, having regard to the scope of the duty recognised in *Anns*, a non-resident owner could fall within it, as he would not be subject to any possible injury to health. *Anns* should, he thought, be restricted solely to claims by owner/occupiers. Then in *Muirhead v Industrial Tank Specialities Ltd*[41] the Court of Appeal refused to apply the proximity principle in the case of a defective chattel. The relationship between manufacturer and owner was, it was thought, far less proximate than that between builder and owner. In two subsequent cases the Court of Appeal went further. In *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*[42] glass panels supplied by the manufacturer to a building sub-contractor proved

not to be in accordance with the specifications, as a consequence of which the owner withheld payment to the main contractors until the panels were replaced. The court decided that the main contractors could not bring a tort action against the suppliers, for two main reasons. First, the defendants had not voluntarily assumed direct responsibility to the plaintiffs for the quality of the glass. Secondly, a remedy could be pursued down the contractual chain, ending up with a contractual claim against the suppliers. To allow a direct claim would, it was thought, give rise to formidable difficulties. The claim would need somehow to be reconciled with other quite separate claims which might also be made, both by the owner in tort and by the sub-contractor in contract. It would also have to be determined how far the terms and conditions in the supplier's contract should affect non-parties. If the terms circumscribed the duty otherwise owed it would be unfair to the non-party, but if the duty was unaffected by them it would be unfair to the suppliers and would make a mockery of contractual negotiation. In *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd*[43] the Court of Appeal held that any duty of care owed by sub-contractors to the owners of a building was negated by the existence of a collateral contract between the parties, notwithstanding that the contract rendered their relationship in a sense *more* proximate than in *Junior Books*. The parties had, and took, the opportunity to define their relationship by means of a contract: and the silence of the contract as to the question of liability for the manner in which the work was executed was adverse to the establishment of a close relationship for the purpose of the law of tort in regard to economic loss.

In *D. & F. Estates Ltd v Church Commissioners for England*[44] the House of Lords reviewed the existing cases and confirmed the retreat from *Anns*. The issue in this case was whether builders could be liable to the lessees of a flat in respect of the financial loss incurred by the lessees in renewing plaster work incorrectly applied by sub-contractors. It was held that they could not. *Junior Books* was a "unique" case and could not be regarded as laying down any principle of general application. Rather, to recognise a duty would be to impose on the builders for the benefit of those with whom they had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose. Their Lordships regarded Lord Wilberforce's "danger to health" argument with suspicion, Lord Oliver observing that this was quite a novel form of duty, being actionable by owner-occupiers in respect not of actual damage as normally understood but of damage consisting of the perception of personal injury. However they expressed no concluded view about it as on the facts there was no such danger. They also left open the possibility that one element of a structure could be regarded as distinct from another element, so that damage to one part caused by a hidden defect in another part might qualify as physical damage to "other property". The recoverable damages might then include the cost of making good the defect, as essential to the repair of the property which had been damaged by it. Where, however, no physical damage had been inflicted, or where such damage was not to "other property", the owner's financial loss was not recoverable in an action in negligence. Their Lordships also thought that the builders could not in any event be liable for negligence by their independent contractors and rejected the notion of a non-delegable duty as applied by the Court of Appeal in the *Mount Albert Borough Council* case. Lord Bridge[45] recognised that as a matter of social policy the Court of Appeal's views might be entirely admirable,

but he could discover no basis upon which it was open to the court to embody this policy in the law without the assistance of the legislature.

The position in Canada and Australia needs brief mention. The Supreme Court of Canada has treated the owner's loss as financial and imposed liability on a local council on an approach similar to that taken by the New Zealand courts.[46] The High Court of Australia, by contrast, has declined to impose liability on a council on the grounds it was under no positive obligation to act,[47] but has not made clear its views as to the liability of the builder.[48]

The Decision in Murphy

D. & F. Estates appeared fatally to undermine *Anns* but did not actually overrule it. A direct challenge came with *Murphy's* case. The defendant council, acting on the advice of consulting engineers, had approved a faulty design for the foundations of a house, with the result that the house was built with defective foundations. It later cracked and subsided and the owner, instead of repairing it, sold it for less than half its market value in an undamaged state. The owner sought to recover from the council the amount of the diminution in value and other losses and expenses. In the Court of Appeal[49] the claim succeeded, on the ground that the condition of the house was such as to pose an imminent danger to the health or safety of the plaintiff while occupying it. In the House of Lords, however, a bench of seven Lords of Appeal[50] held unanimously that the council owed the owner no duty to take care and that *Anns* should be overruled.[51]

Those of their Lordships who delivered substantive judgments all found it necessary to devote close attention to the true nature of the plaintiff's loss. They agreed that the loss in question was purely financial, that the "danger to health" argument was illogical and lacking in all principle and that no sensible distinction could be drawn between a mere defect of quality and a supposedly dangerous defect. Lord Keith,[52] quoting with approval from the judgment of Deane J in *Sutherland Shire Council v Heyman*,[53] thought that a claim for remedying a structural defect in property which already existed at the time when the owner acquired it could not be classified, as in *Anns*, as "material, physical damage", for the building never existed otherwise than with its foundations in that state. The owner's loss being purely economic, there was no logic in confining recovery to cases where a danger to health exists, or confining it to where some damage (perhaps comparatively slight) has been caused to the building but refusing it where the existence of the danger has come to light in some other way, such as through a structural survey. Lord Bridge[54] made a similar analysis of *Anns* and pointed out that to require as part of the cause of action that a defect should pose a danger could lead to quite irrational and capricious consequences. He asked what the position would be where a defect does not constitute a present or imminent danger but will in due course become one, when the costs of repair will be much greater, or where a defect causes a sudden collapse of an unoccupied building. Lord Oliver,[55] in perhaps the most illuminating judgment, said that if one asked "What were the damages to be awarded *for*?" clearly they were not to be awarded for injury to health of the plaintiffs, for they had suffered none. Equally clearly the description of the damage as physical or material did not withstand analysis. The manifestations of the defective nature of the structure by some physical symptoms were

merely the outward signs of a deterioration resulting from the inherently defective condition with which the building had been brought into being from its inception and could not properly be described as damage caused to the building in any accepted use of the word "damage". The categorisation of the damage in *Anns* had, he thought, served to obscure not only the true nature of the claim but, as a result, the nature and scope of the duty upon the breach of which the plaintiffs in that case were compelled to rely.

Their Lordships all agreed that the "complex structure" theory could provide no escape from this conclusion. Lord Keith[56] thought that it would be unrealistic to regard one part of a structure as being damaged by a hidden defect in another part as regards a building the whole of which had been erected and equipped by the same contractor. Where, however, electrical work had been done by a sub-contractor and a defect caused a fire which destroyed the building, it might not be stretching ordinary principles too far to hold the sub-contractor liable for the damage. Furthermore, even if the theory applied, it would not cover a local authority acting pursuant to an Act concerned with averting danger to health, not damage to property, nor a situation where a defect was discovered before it did any damage. Lord Bridge[57] said that a critical distinction should be drawn between some part of a complex structure which does not perform its proper function in sustaining the other parts and some distinct item which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. His Lordship gave an example similar to that of Lord Keith, maintaining that the manufacturer of a boiler which exploded and damaged a house might be liable in tort on *Donoghue v Stevenson* principles. But where inadequate foundations lead to differential settlement and cracking, the structure as a whole is seen to be defective and as it deteriorates will only damage itself. Lord Jauncey[28] considered that the only context for the complex structure theory in the case of a building would be where one integral component of a structure built by a separate contractor caused damage to other parts of the structure, for example a steel frame erected by a specialist contractor which failed to give adequate support to floors or walls. Liability for defects in ancillary equipment would be determined in like fashion.

The owner's claim thus being for pure economic loss, their Lordships concluded that the local authority could not be liable in negligence to the owner, essentially for the same reasons as led them to their earlier decision in *D. & F. Estates*. First, if a duty were incumbent upon a local authority it would also be incumbent upon the builder. Lord Bridge[59] affirmed that negligence by a local authority in securing compliance with building regulations could attract no greater liability than that attaching to the negligence of the builder whose fault was the primary tort giving rise to any relevant damage. Lord Oliver[60] observed that their respective liabilities were not logically separable. (In *D. & F. Estates*, of course, their Lordships had already held that the builder was not liable where there was no danger to health.) Second, if the builder was to be liable, there could be no grounds in logic or principle for not extending a like liability to the manufacturer of a chattel. This would open the door to a mass of product liability claims which the law had not previously entertained.[61] Third, all these claims for financial loss would involve the introduction of something in the nature of an indefinitely transmissible warranty of quality, and it was not desirable as a matter of policy that the courts should do this.[62] Lord Keith[63] recognised that *Anns* was capable of being regarded as affording a measure of

justice, but as against that the impossibility of finding any coherent and logically based doctrine behind it was calculated to put the law of negligence into a state of confusion defying rational analysis. It was also material that *Anns* imposed a liability far beyond that which Parliament had imposed upon builders alone by the Defective Premises Act 1972, a statute not adverted to in that decision. He considered that in what is essentially a consumer protection field, there is much to be said for the view that the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature. Lord Bridge[64] observed that the shoulders of a public authority are only "broad enough to bear the loss", quoting Lord Denning MR from *Dutton's* case, because they are financed by the public at large. It was pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient for imposing on the public the burden of providing compensation for private financial losses. Lord Oliver[65] acknowledged that there may be very sound social and political reasons for imposing upon local authorities the burden of acting, in effect, as insurers that buildings erected in their areas have been properly constructed. Statute might so provide. It had not done so and it was not right for the courts not simply to expand existing principles but to create at large new principles in order to fulfil a social need of this kind.

In *Department of the Environment v Thomas Bates & Son*,[66] a case decided at the same time as *Murphy*, the House of Lords held, inevitably, that a builder was not liable to the lessees of a building for the cost of remedial work which was necessary only for the purpose of rendering the building fit to support its design load. The claim was in respect of a mere defect in quality, making the plaintiff's lease less valuable than it would otherwise have been, and loss of this kind was not recoverable in tort.

Evaluation

In Britain the decision in *Murphy* probably will not seriously prejudice the interests of private homeowners, because alternative forms of protection are readily available. Almost all owners of new residential buildings are covered by the National House Building Council's warranty scheme[67] and the remainder may have a right of action under the Defective Premises Act 1972.[68] In New Zealand there is only the Housing Corporation's Build Guard scheme, which provides only limited coverage[69] and, it seems, is not widely held.[70] It is, therefore, far more likely that, absent a common law action, a property owner in New Zealand will be without a remedy. It is this difference in background which lends urgency to the question as to the likely impact of *Murphy* in New Zealand.

The judgments in *D. & F. Estates* and *Murphy* expose the serious difficulties raised by the line of reasoning taken in *Anns*. They have confirmed what has long been apparent, that to base recovery in negligence for the cost of repair of a faulty building on the supposed existence of a danger to health to the occupants of the building or on the fact that the defects have damaged the structure camouflages and obscures the true nature of the plaintiff's claim. In any negligence action the plaintiff must show that he personally has suffered actual damage. He cannot sue on the basis that he *might* suffer damage, let alone that someone else might. Damages are awarded in respect of the cost of repair or replacement of the property, not in respect of any anticipated injury. Furthermore, no test

was ever formulated for determining exactly when a defect can qualify as a danger, this perhaps because the question is incapable of resolution in any satisfactory manner. It might seem more plausible to base recovery on the defect having damaged the property containing it, but this also does not withstand analysis. That the plaintiff's loss is financial is manifest from decisions involving defective buildings where no physical damage has happened and, perhaps, it is not certain that it ever will,[71] or where, as in *Murphy*, the plaintiff has sold the house and is in no danger. A claim in respect of the defectiveness of property cannot mysteriously change in character because physical harm in addition is caused or threatened. After a false start in *Bowen* the New Zealand courts latterly have not relied upon the *Anns* reasoning in this respect. According to Lord Bridge in *Murphy*,[72] they have carried the *Anns* doctrine to its logical conclusion in holding that the scope of the duty of care imposed by the law on builders and local authorities for the negligent performance of their functions embraces all economic loss sustained by the owner of a building by reason of defects in it arising from construction in breach of building bylaws or regulations.

This observation by Lord Bridge is not, I think, entirely correct. The obligation imposed on local authorities cannot be to comply with building bylaws or regulations as such, for in that case the authority would be setting its own standard of quality. The standard must be judicially imposed. In *Stieller*[73] the court referred to the construction of houses "with good materials and in a workmanlike manner", which gives the clue to the character of these claims. As has already been noted, their Lordships in *Murphy* recognised that they are not in the nature of actions in tort as normally understood but constitute, or are analogous to, actions for breach of a warranty of quality. The plaintiff's loss is of an expected financial advantage, traditionally the concern of contract, rather than for damage to or loss of something the plaintiff already owned or possessed, the core concern of torts. In these circumstances their Lordships were persuaded that the owner's claim had to lie in contract or not at all. This brings us to the crucial question, which is whether the New Zealand courts ought to do what the House of Lords has refused to countenance and decide, as a matter of policy, to support and develop a warranty of this nature, notwithstanding the lack of any privity of contract between the parties.

Sir Robin Cooke has argued extra-judicially, in a persuasive article, in favour of just this development.[74] Sir Robin notes that modern English lawyers tend to assume that a warranty is necessarily contractual, but points out that the action for breach of warranty historically was treated as an action for deceit and that "warranty" is in any event only a label and the substance of the obligation is more important than the way it is classified. Sir Robin then turns to a host of American housebuilding cases to illustrate a growing tendency to give relief to purchasers of new houses by implying some form of warranty of habitability, and in so doing to dispense with the requirement of privity of contract. He suggests that purity of doctrine does not, therefore, inexorably compel the denial of remedies in this field and that the question is one as to merits and policy. In deciding whether they favour such a development Sir Robin points to a number of considerations to be brought into account. First, it would be feasible, although not obligatory, to draw a distinction between realty and personalty. Secondly, the floodgates argument is entitled to some, but not necessarily decisive, weight. Thirdly, and most importantly, it is very

widely recognised that homeowners should have some remedy against negligent builders, although opinion is probably much more divided in relation to commercial buildings. As regards dwellings it might be no exaggeration to say that the reasons pointing towards such a warranty as just and reasonable are overwhelmingly strong. Sir Robin concludes that he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.

In *Murphy* their Lordships did not think it desirable to expand upon existing law in the direction suggested by Sir Robin, primarily because they saw the implications as too far reaching. This was, they thought, a matter for the legislature, not the courts. They were bolstered in this view by the fact that United Kingdom legislature had intervened in the field only to a limited extent, by enacting the Defective Premises Act 1972. If we look first at the possible implications, clearly we must consider what the ambit of any proposed warranty would be. The Lords were particularly impressed by a perceived impossibility of drawing a distinction between defective buildings and defective chattels. In terms of ordinary negligence reasoning this view is indeed difficult to refute. However, once we move from the language of negligence to the language of warranty the difficulty may be seen to disappear, or at least to lessen, for a warranty of habitability in its nature can apply only to buildings. In the case of chattels the need for a remedy would seem to be less pressing.

Secondly, a question mentioned by Sir Robin and not adverted to in *Murphy*, is whether the courts might distinguish between commercial buildings and private dwellings. Professor J. A. Smillie has argued that they should.[75] He points out that there are alternative forms of redress open to homeowners in Britain (as has already been noted), and that owners of commercial buildings can protect themselves by making use of assignable collateral warranties and "duty of care" agreements from contractors and consultants, by employing independent surveyors and valuers prior to purchase and by purchasing property protection insurance. In New Zealand owners of residential premises have only the limited coverage provided by the BuildGuard scheme, so it would be unfair to abolish the common law duty before an adequate alternative system for compensating for latent defects is made available. Owners of commercial buildings, however, have the same opportunities to allocate and spread the risk of loss from latent defects as their British counterparts. Smillie concludes that when the opportunity arises the Court of Appeal should, therefore, apply the *Murphy* decision to commercial buildings.

Smillie's general thesis is an attractive one. Certainly in the context of commercial property the reasoning in *Simaan*, preventing a tort (or warranty) action from undermining the contractual negotiation of risks and liabilities and limiting recovery to actions down the contractual chain, is especially compelling. The question is whether it is feasible for the New Zealand courts to draw the suggested distinction. Once again it helps to recognise that the action is one for breach of warranty, for Sir Robin Cooke has pointed out that the warranty of habitability as developed in American law does not apply to

commercial buildings. While difficult cases can be envisaged, assistance could, no doubt, be derived from the American cases. Whether the courts could or should do something similar with chattels, so as to distinguish between "consumer" and "business" sales, seems to me much more doubtful.

This may constitute a satisfactory solution as regards builders, but the somewhat invidious position of local authorities gives ground for some disquiet. Builders frequently are not available or able to satisfy any judgment against them, leaving the authority, and ultimately the local ratepayers, to bear the burden of the houseowner's loss. In principle, however, local authorities can be held liable in respect of the exercise or non-exercise of their supervisory responsibilities without too much trouble, for reasons which are considered later on.[76] The real problem here perhaps lies in the doctrine of the concurrent liability of several tortfeasors, the merits of which are outside the scope of this paper.

We come finally to consider whether the introduction of a warranty of habitability is properly a matter for the legislature. There is, of course, no "right" or "wrong" answer. Certainly Parliament is better equipped to provide a comprehensive scheme identifying who can claim, setting appropriate limits on coverage and ensuring sufficient funding. Some proposals will be discussed below.[77] While, however, there would probably be general agreement that a statutory solution is highly desirable, no adequate scheme exists in New Zealand at present, and if one were to be introduced it is most unlikely that existing houses would be covered. When the courts are next faced with a new construction claim they will, then, have to decide whether the common law can still give a remedy. It does seem that it can.

The recognition of non-contractual warranties in New Zealand law can be supported in terms of legal principle and well justified in terms of legal policy. As regards principle, the perceived difficulties arise from the rigid categorisation of claims as "tort" and "contract". A strict theory of privity of contract never took root in the United States in the same way as in the United Kingdom or New Zealand, rendering the development of the idea of non-contractual warranties correspondingly easier. Even so, the contract/tort dichotomy cannot be regarded as set in stone so far as New Zealand is concerned. Although a radical step, it would be in accordance with common law tradition for the courts now to recognise and enforce a private obligation not classifiable under either head but falling into a grey area between the two. It should be noted also that the courts are prepared to set standards for contracting parties which are not founded upon the parties' presumed intentions but which are imposed as a matter of law.[78] They are not obviously barred from doing something similar in the absence of a contractual relationship. As regards policy, the risk in any particular case is limited to the cost of repair or replacement of the property in question and, perhaps, consequential loss. Only one person can suffer the loss, albeit that his or her precise identity may not be known or foreseeable, and thus there is no fear of liability in limitless amounts to an uncertain number of plaintiffs. Recognition of the obligation would, moreover, largely resolve the difficulties and anomalies created by the need to decide whether a defendant's negligence had caused damage to separate property, well exemplified by the discussion in *Murphy* of the circumstances in which a contractor might be liable for damaging part of an integrated

structure. While different reasoning is needed, for nowhere do the existing cases refer to "warranties of habitability", the way forward ought to be along this path.

If indeed the Court of Appeal, when the matter comes before it, were to take this view, the question arises as to the fate of any appeal to the Privy Council. The following points might be borne in mind. First, their Lordships in *Murphy* were concerned to show that the reasoning in *Anns* was unsound and that the owner's claim could not be accommodated by ordinary principles of negligence. They were not asked to address the line of argument advanced by Sir Robin Cooke and the relevant American authorities. Secondly, the United Kingdom legislature was presumed to have intended to cover the field by enacting the limited reform contained in the Defective Premises Act 1972. There is no New Zealand equivalent to this Act. The reform achieved here by the Contracts (Privity) Act 1982, giving certain designated third parties the right to sue on a contract made between others, is not in point, because the proposed warranty is not aimed at enforcing the builder's original contract as such. Thirdly, as has already been noted, the policy considerations favouring the warranty would seem to be considerably stronger in New Zealand than in England. My initial belief after *Murphy* was decided was that the Privy Council would settle the law similarly for New Zealand. This may prove to be too hasty a forecast.

Before turning to the proposals for reform, some attention should be given to what *Murphy* does *not* decide. It does not purport to bar negligence claims for pure financial loss other than those by an owner for the diminished value of defective property. As Lord Oliver observed,[79] it does not at all follow as a matter of necessity from the mere fact that the only damage suffered by a plaintiff in an action for the tort of negligence is pecuniary or "economic" that his claim is bound to fail. The critical question, his Lordship said, is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have suffered. Lord Bridge[80] also recognised that economic loss may be recoverable where there is a "special relationship of proximity" between the parties. Lord Keith and Lord Jauncey[81] only mentioned recovery for negligently inflicted economic loss under *Hedley Byrne*, saying there was at the time of *Anns* no right to recover on any other basis. They did not positively rule out other cases for today: and their judgments would be far too narrow if they did suggest any such thing.

The difficulties associated with negligence claims for financial loss caused by acquiring already defective property do not apply in *Hedley Byrne* cases. These fall within mainstream principles, for the defendant does not seek the benefit of a non-contractual undertaking but interferes with the plaintiff's existing financial prosperity. Certainly this head of claim is available where an owner purchases defective property in reliance upon a negligent representation as to its quality or soundness, perhaps by a surveyor[82] or, it may be, a local authority inspector. In non-*Hedley Byrne* cases, whether financial loss is recoverable naturally enough turns on the policy factors applicable to the instant case. It is odd that there have been few such claims in the United Kingdom. One example is the well known decision of Megarry VC in *Ross v Caunters*, [83] where a disappointed legatee successfully sued her solicitor for negligence in the execution of the will under which she

had hoped to benefit. *Gartside v Sheffield, Young & Ellis* [84] is the New Zealand equivalent of *Ross*. Claims for financial loss have succeeded in two recent cases before the Court of Appeal, both being novel in character. In *Williams v Attorney-General*,[85] a particularly interesting case, the Customs Department forfeited a yacht being used for drug smuggling and then neglected to look after it. The plaintiff was the unpaid vendor of the yacht, innocent of any criminal conduct, who the Minister of Customs allowed in his discretion, after a considerable delay, to repossess the yacht. The plaintiff's claim was, therefore, for financial loss in getting his yacht back in a damaged state. A duty of care was recognised because there was a close relationship between the parties, the plaintiff being the former legal owner of the yacht applying, to the defendant's knowledge, for its recovery, to require the Department to take reasonable precautions was not onerous, and the plaintiff's contingent interest in the yacht could not be dismissed as a mere spes. In *Downsview Nominees Ltd v First City Corporation*[86] the receiver of a car dealership appointed by first debenture holders (Downsview Nominees), instead of simply discharging his duty to enforce the security and discharge the indebtedness, elected to carry on the business with a view to trading the company out of its difficulties. The company's financial position thereafter declined disastrously, with the result that the second debenture holders (First City Corporation) suffered very substantial losses. The Court of Appeal once again imposed a duty. There was an immediate risk of harm to the interests of F.C.C. from continued trading by the receiver, a duty would not erode the responsibility which the receiver owed to the first debenture holders, the framework of the duty was defined and limited and there was thus no risk that receivers would be exposed to an indeterminate liability.

It is easy to point to many other cases where the question of recovery for negligently inflicted financial loss has been in issue. Sometimes policy has favoured a duty,[87] sometimes it has not.[88] No doubt the courts will continue to decide such cases on their particular merits. Factors like the danger of indeterminate liability, deterrence and the need to encourage the taking of care are familiar to us. Considerations of economic efficiency, loss spreading and the insurability of the risk may increasingly have a part to play.

Reform

On any view, legislative reform so far as defective buildings are concerned would be welcome. One might hope (piously, perhaps,) that the *Murphy* decision will provide the spur. One possible solution would be to introduce a statutory warranty of habitability along the lines of the Defective Premises Act 1972 in England. It will be recalled that under the Act the builder of a dwelling owes a duty to subsequent owners to see that the dwelling is properly constructed so that it is fit for habitation when completed. This alone would be an inadequate response, for there would be no guarantee that claims would actually be satisfied. It is essential that any remedy be properly funded. Another solution is that contained in the Building Bill 1990,[89] which is based upon certain recommendations of the Building Industry Commission.[90] The Bill provides in Part VII for the making of regulations to constitute a national building code and in Part VIII for certification by approved professional persons that a building complies with the requirements of the code.

Clause 49(2) provides that a building certificate shall signify that the certifier has used all reasonable skill and care, and clause 49(3) provides that a certifier shall not issue a certificate unless an approved scheme of insurance applies in respect of any civil liability of the certifier that might arise out of the issuing of the certificate. The purpose of the scheme apparently is to shift the burden of legal responsibility for non-compliance with building regulations away from local authorities, yet success in this respect seems unlikely while it is left up to the building owner to decide whether to employ a certifier or simply to rely on the council. Thirdly, the Building Industry Commission has recommended that further consideration be given to establishing a compulsory house guarantee scheme after the proposed national code is in place.[91] The scheme would provide successive owners of a house with an assurance in the form of a guarantee that in the event of non-compliance with code requirements any necessary work would be done to bring the house up to the code standard. It would be funded by annual payments by builders and by one-off payments by owners on the issue of a building permit. The extent of the guarantee would depend upon an actuarial assessment, although for the purposes of reference the Commission pointed to a limit of $A.40,000 in a somewhat similar scheme in Victoria. An equivalent figure in New Zealand would seem not to provide adequate protection to the homeowner, but in broad outline the scheme certainly deserves to be supported and developed. An alternative would be to revamp the Housing Corporation's BuildGuard scheme,[92] by raising its financial limits, extending the time for making a claim and making it compulsory that builders of new houses should enter it. Finally, a solution favoured by Professor Smillie[93] is to require building owners of new residential accommodation to take out first party insurance cover against building defects as a condition of the grant of a building permit. Smillie suggests that this would provide adequate compensation to homeowners at reasonable cost, relieve local authorities of the burden of liability and, through their insurers, impose effective controls on builders.

Possible reform of the law concerning the liability of manufacturers for their defective products also needs to be considered. We must, of course, distinguish between claims for loss suffered in buying a sub-standard product and claims for damage done by the product. Our present concern is only with the former type of claim.[94] Arguably the privity rule preventing a non-contracting purchaser from suing the manufacturer on any warranty of quality is too restrictive, at least in relation to consumer transactions.[95] In Australia the rule has been modified and federal and some state legislation extend the benefit of the manufacturer's warranties to the ultimate consumer acquiring title to the goods.[96] Contracting out generally is forbidden. Under this kind of scheme the consumer can recover "loss of bargain" where the goods are not fit for their purpose, and also consequential loss. Reform in New Zealand along somewhat similar lines was proposed by the Contracts and Commercial Law Reform Committee in a Working Paper on Warranties in the Sale of Goods[97] and, more recently, in the Vernon Report on Post-Sale Consumer Legislation in New Zealand.[98] The latter report envisages that consumers of household goods and services should have a direct remedy against the supplier and other persons in the chain of distribution if the goods and services have failed to meet prescribed standards of quality. Although the action is described as sounding in tort, only the purchaser could sue and his remedies would be confined to repair, replacement, refund

of the purchase price and "out of pocket expenses". Consequential loss would not be recoverable. The proposals have been criticised in a number of respects[99] and whether any legislation eventuates remains to be seen.

Any reform imposing a liability on a builder, certifier, manufacturer or anyone else would need to take account of the limitation problem.[100] It may be that particular provision would not be needed, for the Law Commission has recently put forward some proposals which would cater for these, and other, cases of potential difficulty. The proposals can be summarised briefly as follows: (i) there should be a common limitation period of three years, which would apply to all civil proceedings, the period commencing on the date of the act or omission which is the subject of the claim; (ii) the period should be subject to extension so that time would not run until the plaintiff knew or should have known of the following facts (a) the occurrence of the act or omission (b) the identity of the person responsible (c) the act or omission has caused harm, and (d) that the harm is significant; (iii) there should be a long stop period of 15 years which would override the extension provisions except where, inter alia, the absence of knowledge was caused by deliberate concealment by the defendant. So far Parliament has shown no sign of acting on these recommendations.

Omissions

Another major question of principle which arose in *Anns* and was mentioned in passing in *Murphy* concerns liability for omissions. As Lord Oliver observed in *Murphy*,[101] the plaintiff's complaint was not of what the defendant had done but what it had not done. It had failed to prevent the builder from erecting a sub-standard structure. Is there, then, in these cases any ground for saying that the defendant is under a duty to take positive action to prevent harm being suffered by a subsequent owner of the building? The question remains important in New Zealand at least for the time being: and even in England an authority's liability for a negligent inspection resulting in physical loss awaits determination.

In *Anns* Lord Wilberforce found the true explanation of the duty in the requirement that the defendant as a statutory body should give proper consideration to the question whether to act or not.[102] This does not seem right. Failure to give proper consideration to any particular matter is a ground for *invalidity*. For a court to impose *liability* on this basis confuses matters of public and private law. It also assumes that had proper consideration been given the council would have acted and thus the court makes the council's decision for it. The plaintiff's real ground of complaint is not a failure to *consider* but a failure to *act* in circumstances giving rise to an obligation to act.[103]

One well established basis for a duty of positive action is where the defendant has in some way taken upon himself or herself a responsibility for acting. Reliance is not necessary, although it may sometimes constitute an alternative basis for a duty. The defendant may have assumed responsibility for a particular task[104] or over a particular person. In the latter case the defendant may be required to look after that person[105] or to prevent him or her from inflicting damage on another.[106] These principles can be seen in operation in a

number of cases involving public bodies. A duty can arise possibly from the assumption of a public office, where the plaintiff is very closely and directly affected by the defendant's failure to act, or from the assumption of control over the person who caused the harm. A clear example is *Home Office v Dorset Yacht Co Ltd*,[107] where Lord Morris and Lord Pearson based the Home Office's liability for the damage done by escaping borstal trainees squarely on the defendant's obligation to control the trainees. The decision can be compared with *Yuen Kun Yeu v Attorney-General of Hong Kong*,[108] where the Hong Kong Commissioner of Deposit-Taking Companies was not liable for failing to de-register a company being conducted fraudulently. The court relied particularly on the fact that the Commissioner had no power to control the day-to-day management of the company. His power was limited to putting it out of business or allowing it to continue. Recent actions against the police are also illustrative. In *Hill v West Yorkshire Police*[109] the House of Lords held that the police could not be expected to protect all young women in the West Yorkshire area of England from the attacks of a murderer, but recognised that a person at a special, distinctive, risk might be able to sue. A possible example of a "special risk" case is the decision of the Supreme Court of Canada in *O'Rourke v Schacht*.[110] Here a traffic officer attending the scene of an accident in which a car had knocked over a safety barrier was obliged to warn road users of the danger.

It seems to me that a duty in the "inspection" cases can be founded on the council having assumed a responsibility to safeguard the owner or having assumed control over the work of the builder. The decision of the High Court of Australia in *Sutherland Shire Council v Heyman*[111] admittedly is not easily reconciled with this view. The claim against the authority failed, not because of the nature of the loss, but because a majority of the court considered that there was no sound basis for the imposition of a duty of positive action. There should, it was thought, always be reliance on the authority having performed its statutory functions properly. In this case, of course, the claim could succeed on the basis of the *Hedley Byrne* principle. The court did not discuss the possibility that the council had assumed responsibility by instituting planning and building control regulations and requiring builders to adhere to them. The significance of this idea of control was emphasised early on by Lord Denning MR in *Dutton* [112] but was rejected in *Anns* in favour of the "proper consideration" argument. However clear support for it is found in *Curran v Northern Ireland Housing Association Ltd.*[113] In this case the House of Lords held that a Housing Association which had exercised its statutory power to pay an improvement grant for the building of an extension to a house owed no duty of care to future owners to see that the extension was properly constructed, precisely because the Association possessed no powers to control the building operations analogous to those on which the decision in *Anns* depended. The Association could withhold payment of the grant if the works had not been executed to its satisfaction, but to hold that its power in this respect could support the duty contended for would be an "almost bizarre" conclusion.[114]

The judgments in *Murphy* are somewhat equivocal about the basis for a duty to act. Lord Oliver[115] said that Lord Denning's notion of control in *Dutton*, while going no way towards resolving many of the difficulties arising from the decision, might perhaps provide an acceptable basis for liability, but pointed out that this was specifically rejected in *Anns*.

He later observed that *Dorset Yacht* could support the view that the relationship which existed between the authority and the plaintiff was such as to give rise to a positive duty to prevent the builder from inflicting injury, but that in subsequent cases, notably *Curran, Hill* and *Yuen Kun Yeu*, the House of Lords had been unable to find a like relationship in the case of other regulatory agencies with similarly wide powers. Lord Bridge[116] said that he agreed with the principle laid down in the *Sutherland Shire Council* case, that any duty of the local authority to act must be based on the notion of reliance. He considered that there is nothing in the ordinary relationship of local authority, as statutory supervisor of building operations, and the purchaser of a defective building capable of giving rise to such a duty. The other members of the court preferred to leave the question open.[117]

Lord Bridge's view seems far too narrow. As for Lord Oliver's references to *Yuen Kun Yeu* and other cases where no duty was owed, the control exercised by a public body regulating the construction of new buildings is far more detailed and specific than that found in these cases. This strict control does seem to constitute a persuasive reason for imposing on the body a duty to act. It does not seem desirable or in accordance with principle that a public body charged with supervisory or regulatory responsibilities should be able to turn a blind eye. Certainly private persons assuming control over others in analogous circumstances cannot do so.

The Discretionary Function Immunity

A further aspect of *Anns'* case, which bears upon the liability of public bodies as such and which deserves brief mention mainly for the sake of completeness, concerns the immunity of these bodies in respect of their exercise of discretionary functions. This immunity is founded upon the courts recognising that they should not usurp the functions of a public body, by questioning decisions or conduct founded upon broad economic, social or political considerations. In *Anns*[118] Lord Wilberforce accordingly drew a distinction between decisions making or implementing policy on the one hand, in respect of which a public body may not be liable, and "operational" matters on the other, where policy is not challenged and in respect of which the body may be liable in the ordinary way. The distinction was accepted as part of New Zealand law in the interlocutory and final decisions of the Court of Appeal in *Takaro Properties Ltd v Rowling*.[119] On appeal to the Privy Council[120] it was affirmed that the policy/operational distinction does not provide a touchstone of liability but is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that the question whether it has been made negligently is unsuitable for judicial resolution.

A good example of policy negating a duty is the decision of the House of Lords in *Hill v Chief Constable of West Yorkshire*.[121] Lord Keith thought that to impose liability on the police for failing to catch a criminal might require the court to enquire into various matters of policy and discretion, for example as to which particular line of enquiry was most advantageously to be pursued and what was the most advantageous way to deploy the available resources. Many decisions about such matters would not be regarded by the courts as appropriate to be called in question yet elaborate investigation of the facts and significant diversion of police manpower might be necessary to ascertain whether or not

this was so.[122] The building cases, on the other hand, have involved mere operational matters. The question has been about not, say, the allocation of resources as between the different functions of local government but whether, having made the decision to set up an inspection system, there has been negligence in its implementation.

Murphy says nothing about the policy/operational dichotomy: and *Anns* accordingly remains a relevant source of common law principle. It has in fact been argued that the justifications for the concept may be catered for perfectly adequately by traditional private law principles of negligence: that an extra dimension of confusion is created by the need to determine what are policy and what are operational matters.[123] The argument has force. It is true, for example, that private defendants equally may raise arguments concerning manpower and resources in deciding whether a duty has been broken. Again, the courts have not always clearly explained the nature of the distinction at issue.[124] Even so, there is nothing unusual in the courts making use of more than one technique to achieve a desired result. The concept, properly understood, can be of value in focusing attention on the preliminary question whether ordinary principles of negligence ought to apply at all rather than on the later question whether in all the circumstances an appropriate standard of care has been attained. So understood, probably it should be treated as a "stage two" issue, as was suggested earlier, so that the burden rests on the defendant to negate a duty of care which would otherwise arise. The plaintiff is unlikely to have, and may well find it difficult to acquire, direct knowledge of any relevant policy considerations. It should be for the defendant authority to show a policy reason, if there is one.

Summary

1. Even though *Anns* has now been overruled in England, the case may remain influential with the New Zealand courts when deciding whether a duty of care ought to be recognised in novel circumstances. It needs to be clearly understood that policy factors are relevant at stage one as well as at stage two of the two-fold enquiry.

2. In *Murphy* the House of Lords decided that it was not desirable for English law to recognise a warranty on the part of a builder, actionable at the suit of subsequent purchasers not in contractual privity, that care has been taken to build a reasonably sound and habitable dwelling. Circumstances in New Zealand do, however, support the recognition of such a warranty.

3. A local authority exercising supervisory powers can be liable for failing to prevent loss being inflicted on another on the application of ordinary principles of negligence.

4. Whether a common law remedy against builders and local authorities will survive in New Zealand is uncertain How best to afford protection to the owners of badly built houses deserves the immediate attention of Parliament.

1. See, for example, *Caparo Industries Plc v Dickman* [1990] 2 WLR 358 (HL), holding that the auditor of company accounts owes no duty of care to potential investors in the company and preferring the minority view of Richmond P in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 663; *Meates v Westpac Banking Corporation Ltd* (unreported, 5 June 1990, PC 43/89), criticising the decision of the Court of Appeal in *Meates v Attorney-General* [1983] NZLR 308 that a government minister had a duty to take care to carry out a promise.
2. [1978] AC 728.
3. [1983] 1 AC 520.
4. [1990] 3 WLR 414.
5. [1977] 1 NZLR 394.
6. *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Stieller v Porirua City Council* [1986] 1 NZLR 84; *Askin* v *Knox* [1989] 1 NZLR 248.
7. *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; *Rothfield v Manolakos* (1990) 63 DLR (4th) 499.
8. For cases where the Court of Appeal has asserted its freedom to develop the law in New Zealand as it thinks appropriate, see *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741; *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176; *Busby v Thorn E.M.I. Video Programmes Ltd* [1984] 1 NZLR 461.
9. The Minister of Justice has recently stated his view that the Privy Council plays a valuable role as New Zealand's ultimate appeal court and that the right of appeal to it is unlikely to be abolished in the short term: see *Christchurch Press*, 7 January 1991, p. 4.
10. [1980] AC 546 at pp.557-8, discussing *Australian Consolidated Press v Uren* [1969] 1 AC 590.
11. See infra at pp.14-5.
12. Quinlan and Gardner, (1988) 62 ALJ 347; Smillie, (1989) 15 Mon LR 302.
13. [1932] AC 562.
14. [1978] AC 728 at pp.751-2.
15. *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 at pp.565, 573-4, 583; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 at pp.323, 332-3; *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 at pp.29, 33-4; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at pp.46, 52; *Meates v Attorney-General* [1983] NZLR 308 at pp.334.
16. *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 at 662-663; and see *B.D.C. Ltd v. Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1; *Rothfield v Manolakos* (1990) 63 DLR (4th) 449.
17. [1985] AC 210.
18. *Leigh and Sillivan Ltd v Aliakmon Shipping Co. Ltd* [1986] AC 785 (HL); *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC); *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC); *C.B.S. Songs v. Amstrad Plc* [1988] AC 1013 at 1059 (HL); *Curran v Northern Ireland Co-Ownership Housing Association Ltd* [1987] AC 718 (HL); *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *Davis v Radcliffe* [1990] 1 WLR 821 (PC).
19. [1990] 2 WLR 358 at pp.364-5.
20. (1985) 157 CLR 424 at p.481.
21. [1990] 3 WLR 414 at pp.422-423.
22. Ibid., at p.447.
23. [1986] 1 NZLR 76 at p.79 (appeal dismissed [1987] 1 NZLR 720).
24. [1990] 1 NZLR 646.
25. [1986] 1 NZLR 22 at p.57.
26. [1988] AC 175 at p.191.
27. [1986] 1 NZLR 22 at p.73.
28. (1990) 5 NZCLC 66,303.
29. [1974] 1 NZLR 180 at p.187; adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 and by the High Court of Australia in *Giannarelli v Wraith* (1988) 165 CLR 543.
30. [1972] 1 QB 373.
31. [1978] AC 728 at p.759.
32. No explanation was forthcoming as to why Junior Books did not sue the main contractors in contract.
33. [1983] 1 AC 520 at p.546.
34. [1977] 1 NZLR 397 at pp.414, 418, 425. The court also made an award for loss of rental and diminution in the value of the house even after repairs had been carried out.
35. Ibid., at pp.407, 419.
36. [1979] 2 NZLR 234.
37. [1986] 1 NZLR 76 (CA), [1987] 1 NZLR 720 (PC).
38. [1986] 1 NZLR 84.
39. [1989] 1 NZLR 248.
40. [1985] AC 210 at p.242.

41. [1986] QB 507.
42. [1988] QB 758.
43. [1989] QB 71.
44. [1989] AC 177.
45. Ibid., at p.210.
46. *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641; In *Rothfield v Manolakos* (1990) 63 DLR (4th) 499 the court was concerned with a dictum of Lord Wilberforce in *Anns*, that no duty was owed to a negligent building owner who was the source of his own loss. In *Peabody* [1985] AC 210 the claim of an owner who failed to comply with building regulations because of the negligence of his architect was dismissed partly for this reason. La Forest J in *Rothfield*, taking a narrower interpretation of Lord Wilberforce's words, thought that a negligent owner would be treated as the source of his own loss only where, for example, he knowingly flouted the regulations or directives or was completely indifferent to the responsibilities put on him by the bylaws. Certainly *Peabody* must be open to criticism, for it is not clear that an owner ought to be identified with the negligence of his independent contractor, or that an owner in breach of regulation is necessarily to be treated as negligent.
47. As to which, see infra at pp.18-20.
48. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.
49. [1990] 2 WLR 944.
50. Lords Mackay, Keith, Bridge, Brandon, Ackner, Oliver and Jauncey.
51. Their Lordships did not find it necessary to rule on whether the council would have discharged any duty by relying on competent independent contractors. *D. & F. Estates* would clearly suggest that the council had done enough.
52. [1990] 3 WLR 414 at pp.428-9, 431.
53. (1985) 157 CLR 424 at pp.503-5.
54. [1990] 3 WLR 414 at pp.436, 440.
55. Ibid., at pp.443-444, 448.
56. Ibid., at p.431.
57. Ibid., at pp.438-9.
58. Ibid., at p.456.
59. Ibid., at p.439.
60. Ibid., at p.443.
61. Ibid., at pp.430, 435, 447-8, 457.
62. Lord Bridge (ibid., at p.436) thought there might be an exception where a building poses a danger to persons or property on neighbouring land or on the highway, where the owner ought to be able to recover from the builder the cost of protecting himself from potential liability to third parties. It is not clear why his Lordship thought that this situation ought to be treated differently. Lord Oliver (ibid., at p.448) expressed doubt about the suggestion.
63. Ibid., at p.433.
64. Ibid., at p.442.
65. Ibid., at pp.450-1.
66. [1990] 3 WLR 457.
67. The warranty protects successive owners against defects in materials and workmanship for a 2 year period and against structural defects for another 8 years. The builder is obliged to insure against liabilities arising under the scheme.
68. The Act imposes upon persons who undertake work for or in connection with the provision of a private dwelling a statutory duty, owed to subsequent owners, to see that the work taken on is done in a workmanlike manner and with proper materials, so that the dwelling will be fit for habitation when completed. It does not apply to buildings covered by the N.H.B.C. scheme.
69. The scheme was set up under the Building Performance Guarantee Corporation Act 1977 but in 1987 it was taken over by the Housing Corporation. Where the original builder of a residential building has entered into the scheme, the Corporation will indemnify a subsequent owner for the cost of remedying defects in materials and construction and any resulting damage to the structure. The term of the indemnity is limited to 3 years from commencement in the case of defects in materials and 6 years in the case of all other claims. Claims must be made in writing within 90 days from the date from which the owner became aware or should have become aware of the defect or damage. The Corporation in its discretion limits its liability in respect of all claims to $200,000, restricts the bringing of claims for "minor construction defects" to an 18 month period and excludes recovery for consequential loss. It also excludes its liability for loss resulting from a failure to comply with the terms of any permit required by a local authority.
70. Builders are not obliged to enter the scheme. Smillie reports ([1990] NZLJ 310 at p.317, n 8) that up to 1987 the Guarantee Corporation issued indemnities in respect of only 24 per cent of new dwellings.
71. See, eg, *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554 (CA) (house built on unstable land

predicted to collapse within 10 years); *Williams v Mt Eden Borough Council* (1986) 1 NZBLC 103,771; Todd, [1986] NZLJ 186 (house contained a "catalogue of defects" resulting in a weakened structure at risk in an earthquake but in no immediate danger of collapse).

72. [1990] 3 WLR 414 at p.435.
73 [1986] 1 NZLR 84 at p.94.
74. "An Impossible Distinction" (1991) 107 LQR 46. This article is republished infra, at p.59
75. "Compensation for Latent Building Defects" [1990] NZLJ 310 at pp.314-5.
76. Infra at pp.18–20.
77. Infra at pp.17-18.
78. *Liverpool City Council v Irwin* [1977] AC 239.
79. [1990] 3 WLR 414 at p.445.
80. Ibid., at p.435.
81. Ibid., at pp.429, 452.
82. *Smith v Bush* [1989] 2 WLR 790 (HL); *Yianni v Edwin Evans Sons* [1982] QB 438; *Roberts v J Hampson & Co* [1990] 1 WLR 94.
83. [1980] Ch 297.
84. [1983] NZLR 37.
85. [1990] 1 NZLR 646.
86. (1990) 5 NZCLC 66,303.
87. See, eg, *New Zealand Forest Products Ltd v Attorney-General* [1986] 1 NZLR 14, *Mainguard Packaging Ltd v Hilton Haulage Ltd* [1990] 1 NZLR 360 (loss of business profits caused by interruption in power supply recoverable); *Lawton v B.O.C. Transhield* [1987] ICR 7 (employer owed duty to former employee when writing him a reference); *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* (1990) 65 DLR (4th) 321 (tug owner liable for damaging a railway bridge, preventing plaintiff from using it); *National Westminster Finance New Zealand Ltd v United Finance & Securities Ltd* [1988] 1 NZLR 226 (mortgagee selling land owed duty to holder of subsequent encumbrance over the land); cf *Parker-Tweedale v Dunbar Bank Plc* [1990] 3 WLR 767.
88. See, eg, *Van Oppen v Clerk to the Bedford Charity Trustees* [1990] 1 WLR 235 (school under no duty to insure pupil against personal injury or to advise about insurance); *Reid v Rush & Tompkins Group Plc* [1990] 1 WLR 212 (employer not obliged to insure employee); *B.D.C. Ltd v Hofstrand Farms Ltd* (1986) 26 DLR (4th) 1 (courier not liable to recipient of envelope for loss caused by late delivery); *Business Computers International Ltd v Registrar of Companies* [1988] Ch 229 (creditor not liable to debtor for serving winding up petition at wrong address); *South Pacific Manufacturing Co Ltd v NZ Security Consultants Ltd* (1990) 3 NZBLC 101,605 (investigator reporting to insurance company about a company's insurance claim owed no duty to creditors and shareholders of latter company). Note also *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (no negligence liability in field already covered by defamation).
89. On 6 September 1990 Parliament voted to carry forward this Bill, together with a great many others, to the next Parliamentary session.
90. *Report of the Building Industry on the Reform of Building Controls* (January 1990), vol. 1, Part 4, paras 4.78 - 4.95.
91. Ibid., para 2.50, appendix 7.
92. Smillie points out (supra, n75 at p.316) that this scheme already provides better protection to the homeowner in a number of respects than that proposed by the Building Industry Commission.
93. Ibid., at p.317.
94. So far as the latter is concerned, debate has centred on the merits of a rule of strict liability. Such a rule has recently been enacted in the United Kingdom (Consumer Protection Act 1987) and proposed for Australia (Australian Law Reform Commission, *Product Liability* (1989, Report no 51)). The majority view in the Report of the Torts and General Law Reform Committee on *Products Liability* in 1974 was that the imminent introduction of the accident compensation scheme made a move towards strict liability unnecessary.
95. The Contracts (Privity) Act 1982 would seem not to apply, the ultimate consumer being neither sufficiently designated nor intended to be able to sue.
96. Trade Practices Act 1974, Part V, div.2 A (ss 74A-74L) (C'th); Sale of Goods Act 1923, s.64 (NSW); Manufacturers Warranties Act 1974 (SA); Law Reform (Manufacturers Warranties) Act 1977 (ACT).
97. Wellington, July 1977.
98. A Report to the Minister of Justice, December 1987.
99. Harland, "Post-Sale Consumer Legislation for New Zealand - A Discussion of the Report to the Minister of Justice by Professor David H Vernon" (1988) 3 Canta LR 410.
100. As regards the existing law, in *Askin v Knox* [1989] 1 NZLR 248 the Court of Appeal left open the question whether time runs from the date when the defect becomes discoverable, as favoured by a majority of the

court in *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 at p.239, or whether, following the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, it runs from the date of the physical damage to the property. Now that *Murphy* has made it clear that *Anns, Bowen* and similar cases involve *economic* losses, it is apparent, and Lord Keith seemed to recognise (at p. 427), that the decision in *Pirelli* cannot be supported. The plaintiff in that case equally was suing in respect of a financial loss, which would have been suffered only when the defect was discovered.

101. [1990] 3 WLR 414 at p.443.
102. [1978] AC 728 at p.755. This also was the explanation given by Wilson J delivering the majority judgment of the Supreme Court of Canada in the *Kamloops* case (1984) 10 DLR (4th) 641 at p.673.
103. The question as to the recovery of damages by the victims of invalid administrative action is discussed by Barton, "Damages in Administrative Law" in Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986) pp.123-152.
104. See, eg., *Barnett v Chelsea Hospital* [1969] 1 QB 428 (doctor obliged to treat patient); *Teno v Arnold* (1974) 55 DLR (3d) 57 (vendor of ice-creams under duty to safeguard children); *Hawkins v Clayton* (1988) 164 CLR 539 (solicitor who had assumed custody of a will required to take reasonable steps to locate executor).
105. The Supreme Court of Canada has dealt with a number of such cases: see *Horsley v McLaren* (1971) 22 DLR (3d) 545 (boat owner under duty to rescue guest who had fallen overboard); *Jordan House Ltd v Menow* (1978) 38 DLR (3d) 105 (publican obliged to protect an inebriated customer); *Crocker v Sundance Northwest Resorts Ltd* (1989) 51 DLR (4th) 321 (competition organiser had to safeguard competitor).
106. See,eg, *Kenealy v Karaka* (1906) 27 NZLR 1118, *Smith v Leurs* (1945) 70 CLR 256 (parents obliged to control children); *Commonwealth v Introvigne* (1982) 150 CLR 258 (school liable for not controlling pupil).
107. [1970] AC 1004.
108. [1988] AC 175; *Minories Finance Ltd v. Arthur Young* [1989] 2 All ER 105; *Birchard v Alberta Securities Commission* (1987) 42 DLR (4th) 300; *Davis v Radcliffe* [1990] 1 WLR 821.
109. [1989] AC 53; *Clough v Bussan* [1990] 1 All ER 431; *Alexandrou v Oxford, The Times*, 19 February 1990.
110. (1975) 55 DLR (3d) 96.
111. (1985) 157 CLR 424.
112. [1972] 1 QB 373 at p.392.
113. [1987] AC 718.
114. Ibid., at p.728.
115. [1990] 3 WLR 414 at pp.443, 449.
116. Ibid., at p.441.
117. Ibid., at p.419 per Lord Mackay, at p.425 per Lord Keith, at p.451 per Lord Jauncey. Lord Brandon agreed with Lord Keith and Lord Ackner agreed with Lords Keith, Bridge, Oliver and Jauncey.
118. [1978] AC 728 at p.754.
119. [1978] 2 NZLR 314; [1986] 1 NZLR 22.
120. [1987] 2 NZLR 700 at p.709.
121. [1989] AC 53.
122. Ibid., at p.63.
123. Bailey and Bowman "The Policy/Operational Dichotomy" [1986] CLJ 430.
124. Some clarification is found in the recent decision of the Supreme Court of Canada in *Just v British Columbia* (1990) 64 DLR (4th) 689.