PURE ECONOMIC LOSS: WHO SHOULD PAY, WHEN AND HOW?*

Bruce Feldthusen and Craig Brown
Professors of Law, University of Western Ontario

1. Introduction

The ruling by the House of Lords in *Murphy v Brentwood District Council*[1] excludes liability in common law negligence for pure economic loss attributable to defects in buildings and, by extension, in chattels as well. By economic loss we mean the cost of repairing the defect or the diminution in value when repair is impractical plus consequential loss.[2] It is "pure" economic loss because it results from a defect in the product (a term we use to include buildings and chattels) itself and not from damage to the product caused by some external source like fire or a falling object.[3]

Previously, in *Anns v Merton London Borough Council*[4] the House of Lords had endorsed recovery for product defect economic loss provided the defect posed an imminent risk to health and safety or danger to other property. Subsequent decisions in England and elsewhere, including New Zealand, suggested that recovery be allowed even for non-dangerous defects.[5]

In this article we examine some issues raised by *Murphy*. In general, we ask, as the House of Lords did, whether negligence law should have any role in redressing this type of pure economic loss. Our intuition is that the strength of the case for recovery in negligence might vary depending on whether we are dealing with a defective chattel or a defective building. It is assumed in most cases, including *Murphy*, that the rule ought to be the same in either case. Therefore we first evaluate in detail the case for negligence liability for defective chattels. Then we consider whether there are any differences with defective buildings which might justify different conclusions. We also deal separately with the (at least theoretical) distinction between dangerous and non-dangerous defects asking whether it is a valid and viable one. That distinction was rejected preemptorily in *Murphy*.

Our criteria of analysis to this point is largely functional. Specifically, we ask whether negligence liability for product defect economic loss is likely in theory or practice to generate any net deterrence of social waste or injury, or to provide a practical mode of injury compensation.[6] We conclude that the case for direct negligence liability for dangerous building defects caused by builder's negligence, although not overwhelming, finds some support on both deterrence and compensation grounds. The case is weaker for a similar action for dangerously defective chattels, and for non-dangerous defects generally.

But, regardless of the strengths and weaknesses of these arguments, we then consider whether the policy goals which might justify tort liability (for builders, manufacturers

and/or public authorities) might be better pursued through other means. In New Zealand the common law action for damages for personal injury has been deemed deficient and replaced by a scheme philosophically based on the notion of community responsibility. We discuss the case for a similar approach to building defect economic loss and find it attractive.

2. Chattel Defect Economic Loss

A. Non-Dangerous Chattel Defects[7]

At the heart of commerce in chattels lies the contract of sale. The manufacturer sells under contract to the seller who in turn sells under contract to the buyer.[8] The case for allowing the buyer to sue the non-privy manufacturer in negligence depends on two determinations. First, the contractual regime must be judged inadequate in some significant respect. Second, the negligence suit must be responsive to the perceived shortcomings of the contractual regime.

There are two significantly different ways in which the negligence duty could be integrated into existing commercial law. Negligence law can supplement valid contractual rights which the buyer has against the seller either by providing additional tort rights against the seller subject, in both instances, to their being limited by the terms of the contract.[9] Alternatively negligence law can supersede the contractual rights and impose duties on the manufacturer regardless of the terms of the contract of final sale.

If the buyer has a valid claim in contract against the seller, is there any reason to recognise an additional action against the manufacturer in negligence? No doubt, the manufacturer's negligence may be the reason a product fails to meet standards established in the final contract of sale. It may seem more just to hold the negligent manufacturer liable than the innocent seller. We might also hope that negligence liability would deter negligence in manufacture. Assuming that these are desirable goals is one thing. Believing that they can be achieved by the direct action in negligence is another.

Manufacturers and sellers will allocate the risk of liability to purchasers in their own contracts.[10] The manufacturer may agree to indemnify the retailer if the law holds the retailer liable to the purchaser. The direct negligence suit would merely replicate the outcome which the parties had pre-determined in their own contract. It is sometimes thought that the direct negligence suit is more efficient than chain contract suits. But there is no reason to suppose that actual litigation between the manufacturer and seller will be common, or inappropriate when it does occur.

In other cases, the seller and manufacturer may agree that the seller will bear ultimate liability for product defect claims. Assuming we found this objectionable, negligence liability alone would not insure that liability would be brought home ultimately to the manufacturer. Once the negligence rule was established, the manufacturer could simply shift that liability back to the seller by contract. To ensure that the loss rested ultimately on the manufacturer the law would have to couple the negligence rule with a prohibition on contractual loss shifting back to the seller. This would be as inefficient as it would be

extraordinary. Presumably the decision to allocate the loss to the seller was a mutually beneficial decision made by experienced commercial parties. There is no *a priori* reason to believe that the legitimate goal of deterring negligence in manufacture will be sacrificed if the retailer bears the loss.[11] Contractual loss shifting is no more objectionable than, say, allowing potential defendants to carry liability insurance for personal injury negligence claims.

Therefore, assuming solvent retail sellers, allowing a buyer to sue the manufacturer directly in negligence as an alternative to suing the seller in contract will not determine who ultimately bears the loss. The negligence suit is superfluous in deterrence terms.[12] It may create the illusion of justice by appearing to place liability on the party responsible. Symbolic justice may be important, but the social problem of shoddy products does not seem to be the most pressing area in which to pursue it.

However, the direct action in negligence might make a significant difference to a plaintiff unable to realise judgment against a retail seller. Perhaps the seller has become solvent or left the jurisdiction or there are other purely practical reasons preventing the buyer from following an otherwise valid claim against the manufacturer through to actual damage recovery. The negligence action could serve as a form of compulsory insurance against such judgment-proof sellers. This clearly has a compensation rationale although, if buyer-compensation is the primary goal, strict liability or warranties probably make better sense.[13]

Altogether different issues arise if the action in negligence is completely independent from the terms of the contract of final sale. From the plaintiff's point of view, the negligence action may be useful whenever the action on the contract is likely to fail. Perhaps the contractual limitation period has expired. Perhaps the goods, although shoddy, were sold as such and met the contractual description. Perhaps the risk of defect was allocated to the buyer in the contract. Nevertheless, the plaintiff might hope that the court will hold the manufacturer liable for negligently circulating "defective" goods. In effect, to grant a remedy in negligence in such a case is to allow the buyer to improve upon the terms of the contract by suing in tort. One would only wish to do this if one believed that contract and sales law (including legislation) was unsatisfactory.

In the commercial sales market it is generally assumed that the parties themselves are in the best position to specify quality terms and price, and to allocate risk of breach between them. Naturally, not every commercial contract is the outcome of fair negotiation between equally empowered parties. However, there is no reason to assume that commercial buyers, as opposed to sellers or manufacturers, tend to be the generally vulnerable parties. In general the law ought to take care, as it usually does, to guard against actions in tort intended to circumvent contractual bargains.[14]

In contrast, it is commonly believed that inequality of bargaining power in the household consumer market supports special legal protection for the consumer purchaser. Many jurisdictions have accepted this rationale and enacted statutory consumer protection provisions which modify basic sales law.[15] So, if there is a case for allowing the buyer to succeed in negligence when she would fail in contract, it is more cogent in the consumer

market, but only in jurisdictions whose consumer protection legislation is deficient. Isolating particular markets, such as the household consumer market, is not a typical common law approach, but it could be done.

While defining the elements of the common law action seems straight forward enough – negligence by the manufacturer (or seller) and a defect in the product purchased by the plaintiff – determining when they were satisfied could be problematic. True, in some cases defects are self-evident. If a consumer buys a new toaster for the purpose of making toast and it does not do that, it is defective. If that occurs because of careless assembly of the particular toaster, or indeed by a design defect, there is negligence. But other circumstances would prove more difficult to assess. What if the toaster worked well but only for 18 months? Is that a defect or merely inferior quality being the trade off for a lower price? What is a lower price? Perhaps in the process of free bargaining, the buyer has simply bargained poorly.

If the courts are to allow consumers to sue on the wider notion of defect in negligence in cases in which the consumer cannot succeed in contract, they must be prepared to review the substance of consumer contracts. In a given case, the court must know the price at which the product was sold, and then determine that the consumer got less than his or her money's worth[16]. There will be a great many cases where it will be far from clear that a judge is in a better position than the consumer to make that determination.[17]

To the extent that a defect is merely a poor bargain, fault-based manufacturer liability ought to be premised on the manufacturer's responsibility for the poor bargain. Dangerous defects and defects such as the toaster that wouldn't work aside, it is not negligence *per se* to manufacture low quality goods. Indeed, lower quality goods sold to a reasonably informed public at a sufficiently low price play an important role in modern industralised societies. Surely it is for the legislators to decide that shoddy goods may not be marketed on any terms at any price, and then to establish the minimum quality standards.

In some cases, the cause of so-called product defect economic loss is not the manufacturer's negligence, but the selling price. The manufacturer quite deliberately manufactures and sells a lower grade product to a fully informed retailer. The retailer, without breaking applicable sales law, then markets the product to consumers at a substantially higher price. In the negligence suit, the consumer would be arguing that the product was defective in that the price was excessive relative to the quality. But often the manufacturer will have had no control over the price at which the product was sold by the retailer.[18] In such a case, it would make no sense to impose fault-based liability on the manufacturer. It might make sense to hold liable manufacturers who had determined, or at least been aware of, the excessive retail price. But then, the fault in issue would be more akin to fraud than to negligent manufacture of "defective" goods.

Perhaps the best reason to reject the negligence suit as a tool of consumer protection is that private law suits are of limited use to individual consumers. Few consumers who believe that they have unfairly purchased shoddy goods are going to invest their own time, let alone legal fees and costs, in a negligence suit. The inadequacy of private litigation has

been demonstrated even in the case of defective automobiles where the damages may be relatively high.[19] In fact, recognising the negligence suit as a tool of consumer protection could be dysfunctional in so far as it diverted attention from solutions which promised real change.

In summary, the case for allowing a buyer to use the courts to improve upon (rather than merely enforce) a contract depends on: (1) the belief that consumers will use private litigation; and (2) the belief that courts are better able to assess bargains than typical consumers. Even if these premises are sound, and we are sceptical that they are, they do not support the recognition of a direct suit in negligence which would override the terms of the contract of sale. First, the logical starting point to deal with unfair consumer contracts is the law of consumer sales itself.[20] But, if one wished to develop rules to sanction manufacturers who are responsible for unfair consumer contracts, these would often have nothing to do with allegations of negligence in the manufacturing process itself. It follows that if an action in negligence for shoddy product economic loss were recognised, it ought only to be allowed to supplement a valid claim in contract. And then, its only impact should be to designate manufacturers as compulsory insurers against judgment-proof sellers.

B. Dangerous Chattel Defects

The next question is whether and how the analysis might change if the defect posed a significant risk of danger to health and safety or to other property. A defect may be regarded as dangerous in this sense if the reasonable person would have incurred the economic loss (repair or replacement) at that time in order to eliminate the danger. This test emphasises the probability and severity of harm rather than the imminence of harm *per se*[21] and a court should be able to apply it with as much certainty as most other legal tests if it were of a mind to impose liability.

The rationale, if any, for treating dangerous defects differently from others does not lie to any great extent in the owner's claim for compensation.[22] As emphasised in *Murphy*, from the owner's point of view it matters little whether the defect is dangerous is not. Once the dangerous defect becomes manifest, it has, like any other defect, the effect of rendering the chattel less valuable than it would have been without known defects.[23] So, the direct negligence suit against the manufacturer must be rationalised otherwise, probably by a concern for accident deterrence.

Ordinarily, when a dangerous defect becomes manifest within a reasonable time after sale, the buyer will have a remedy in contract against the seller. Thus, in the typical case of a negligence suit against the manufacturer of a dangerously defective product the buyer will not be seeking to improve upon the terms of the contract of sale. That the defect is dangerous will not change the analysis of this situation from what it was in the case of merely shoddy products. The seller and manufacturer will have allocated this risk by contract, and negligence liability can not prevent this, even if we wished it to. The only impact the negligence rule would have is in the case of judgment-proof sellers. And, since this is a compensatory rationale, there is no reason to distinguish dangerous from non-dangerous defects.

Next, consider the case in which damages relating to the dangerous defect cannot be obtained in an action on the contract of sale. There is no common law prohibition against commerce in dangerous or potentially dangerous goods, so there may be occasional cases in which the defect constitutes neither a breach of the contract nor a breach of relevant safety legislation. There may also be an occasional case in which a court concludes that the risk of defect has been allocated to the buyer in the contract.[24] In this case, a negligence action for economic loss pertaining to dangerous defects is not subject to the same objections as the action pertaining to merely shoddy goods. In the case of merely shoddy products, it was suggested that the concept of "defect" is elusive in the absence of a contractual reference point but it is easier to define a dangerous defect objectively. In addition the deterrence arguments are stronger.

In effect, such an action would amount to a transmissible manufacturer's warranty against dangerous defects caused by the manufacturer's negligence. Implicitly, at least, this would have to be a warranty for a reasonable period of time. Manufacturers cannot be responsible for deterioration in perpetuity. The question of reasonable time could pose a difficult, but not impossible, task for the courts. This would be a compulsory warranty in that the action would lie regardless of the terms of the contract of sale (except express acceptance, in full knowledge, of the defect). The purpose of such an action would be to deter carelessness in manufacturing which leads to dangerously defective products. Once adopted, the negligence rule would increase the potential liability cost of the manufacturer, and would be expected to induce whatever additional quality control measures became cost-effective in light of the new exposure. In the event that the manufacturer shifted his liability risk back to the seller, a marginal increase in deterrence would still be predicted.[25]

There may be another deterrent effect. The ultimate point of deterring dangerous defects is to prevent the injuries or property damage that such defects may cause. The speeches in *Murphy* assume that once a defect becomes manifest, the danger disappears because the user will immediately repair or remove the defective chattel.[26] But, as *Murphy* itself shows, this is not necessarily so.[27] Users may choose to expose themselves and others to the risk that the defect may cause physical harm to themselves or to others. True, in so doing they are running a risk of being held liable themselves in negligence to others, but often the risk will be discounted by the victim's probable difficulty in proving that the user was aware of the defect. It is possible that the user would be more likely to repair or replace knowing that she would be indemnified. So, in the rare case when the user would not be indemnified by the seller, a right of indemnification from the manufacturer may encourage repair or replacement.

In addition, the negligence duty if borne by the manufacturer, may also have a small compensatory impact in favour of injured third parties. Although the victim may have a cause of action against the user, that person may not carry insurance or be otherwise able to satisfy a large personal injury judgment.

The negligence action for dangerously defective product economic loss seems to be a natural derivation of established tort principles. If damages for physical harm are

recoverable, why not damages to prevent defects from actually causing physical injury? According to standard[28] functional analysis, the negligence action for dangerously defective goods is both coherent and plausibly useful. Where a contractual remedy already exists, the negligence rule will have virtually no impact. Where there is no contractual liability, its impact is difficult to predict without detailed empirical study. Our guess, and it is only a guess, is that the negligence action will neither generate significant costs nor induce major safety incentives.

3. Structural Defects in Building

A. Non-Dangerous Structural Defects

Our analysis and conclusions differ significantly when we move to structural defects in buildings. The main reason is that commerce in real property is conducted differently from commerce in goods. There is an active resale market in which the buyer typically gets little or no contractual protection.[29] Another reason is that the stakes are higher. Individuals are far more likely to find litigation worthwhile when their homes become uninhabitable than when their dishwashers break down.

Consider first the possibility of allowing the action in negligence when the buyer does have a valid case in contract. For all practical purposes, this analysis is relevant only to the market for new buildings. In the typical resale transaction between two parties with no particular knowledge or expertise about building, the risk of latent defect will be allocated by contract to the buyer. To be of any use here the negligence action would have to override the contract, a possibility described later.

In the case of new buildings, usually the builder is also the seller. Obviously, the negligence action accomplishes nothing here. When the seller is not the builder, as in the chattels analysis, the negligence actions makes a difference only when the seller is judgment-proof and the builder is not. The case for judgment-proof seller insurance is somewhat stronger for buildings than chattels, at least in the residential home market. With buildings, the amount at risk is typically much larger, and residential home buyers are in a relatively poor position to take their own precautions. This makes some extra precaution such as insurance more attractive. And, with larger amounts at risk, it becomes more likely that owners would invoke their legal rights to obtain compensation. Potential liability might induce the builders to take more care in building, or in selecting sellers.

Of more practical significance is whether the law ought to recognise an action in negligence to recover damage associated with latent building defects in cases in which the buyer would not be entitled to recover in an action in contract against the seller. In effect, ought the law to recognise a mandatory warranty against latent defects caused by builder's negligence, which passes with title to successive owners? The case is somewhat different with buildings than chattels because of the relative importance of the resale market. The typical resale transaction between two parties with no special expertise in construction will allocate the risk of latent defect to the buyer. Although a buyer might well find it practical to turn to the courts to remedy serious structural defects, it is unlikely that the resale residential home buyer will have any contractual rights to exercise. In

contrast, the ordinary chattel consumer who will seldom find legal rights of any use will have a broad range of contractual rights against the seller, and often additional rights against the manufacturer.[30] For this reason it is tempting to allow the courts to develop mandatory quality standards for buildings, especially for residential housing. The residential home buyer makes the single largest purchase of a lifetime with virtually no common law legal rights against the seller or builder.

But, here too, we face the difficulty that the notion of defect entails that the building falls short of some quality standards. If the court is going to go outside the standards established in the contract, as it must, it must develop a common law definition of "suitable" housing. While this is an appealing idea for residential housing, (even thought it would presumably have only prospective effect), it is an option better left to the legislature. The case for providing decent affordable housing for citizens is a political one, and it is already on the political agenda in most jurisdictions today. The economic ramifications of such a "suitability" warranty are too complex and potentially enormous to be instituted by judicial guesswork (or left to the fortuity of the evidence available in particular cases). The practical problems of refining the suitability standard are daunting. Are buyers better off in homes with crooked floors and peeling paint than in lower cost rental accommodation? At what price and at what opportunity cost?[31]

B. Dangerous Defects

As with chattels, a stronger case exists for the negligence action in respect of building defects which can be identified as posing a risk to health or safety or other property. Essentially, we are considering a mandatory[32] warranty against dangerous building defects caused by builder negligence which would pass with title to successive owners. The main rationale for such an action would be deterrence of builder negligence. We would also expect that owners who become aware of dangerous defects would be less inclined to pass them along to unsuspecting resale buyers if they were able to have them remedied by the builder.

The negligence action might also be justified on compensatory grounds. For one thing, the loss may be large enough to justify litigation. These defects tend to be very expensive, ordinarily they must be attended to, and they are not easily discovered by the typical buyer.[33] In contrast we cannot say with the same confidence that the risk of product defects, even dangerous defects, is not rationally assumed by product consumers.[34]

With due respect to the contrary views expressed in *Murphy*, negligence liability for dangerously defective structural economic loss seems to be a natural derivation from established tort principles. If damages for physical harm are recoverable, why not damages to prevent defects from actually causing that harm? The negligence action for dangerously defective buildings is coherent and possibly useful both as a deterrent and as a vehicle whereby a wronged consumer may obtain compensation. And, in contrast to the situation with defective products, residential home owners will frequently find themselves without a contractual remedy against the seller. Moreover, we might expect that the negligence action may be of some practical use to owners of the dangerously defective premises in that the cost involved will be worth incurring.

Some may object that the distinction between dangerous and non-dangerous defect cannot be made with certainty. For example, is it dangerous to "health" to cause a property's value to drop or to reduce the owner's pride of ownership so that anxiety or diminished "well being" results? We are less troubled by this. In the first place the *Anns* test for danger could be revised to drop the imminence requirements and to utilise a familiar reasonable person standard.[35] In the second place the distinctions called for resemble those that have been developed in related areas of the law.[36]

As to the distinction between buildings and chattels, we can invoke the traditions of the common law. Although perhaps more for historical than functional reasons, it has long distinguished the law governing real property from that governing chattels. It would be quite feasible to recognise a common law rule which applied to buildings alone.[37]

The actual deterrence impact of potential negligence liability for dangerous defects is difficult to predict.[38] If, for example, the typical negligent builder is likely to go bankrupt, say within five years of commencing business, liability rules of any sort are futile in deterrence terms (and in compensation terms unless they are coupled with a legislative scheme to insure solvency or otherwise provide insurance cover).

The impact of potential liability even on firms likely to stay in business is also difficult to predict. If we move from a situation in which builders have no incentive to build safely to one where they will be held liable in negligence for dangerous defects, it is reasonable to expect significant improvement in quality control. However, it would be rare to find a jurisdiction where there were no builder safely incentives. One might find, for example, that in any jurisdiction with significant legislative health and safety standards and enforcement, the reputable builder would already be taking all feasible quality control measures. Potential liability might have no marginal deterrent impact whatsoever. If not, the increased costs associated with the liability rule will have to be justified otherwise.[39]

4. Is Tort the Answer at All?

So far we have concluded that the strongest arguments for negligence liability for product defect pure economic loss relate to dangerous defects in buildings. Contractual remedies fall short of providing reasonable certainly of compensation for the most likely victims of loss (resale buyers) so something more seems necessary to meet that goal. Negligence liability promises something in that regard as well as some deterrence.

But this does not mean that tort is necessarily the preferable solution. Commentators have called for legislative intervention in respect of compensation for building defects, both before[40] and after[41] *Murphy*. The common law has proved incapable of dealing consistently with the policy issues involved. Even people with different views about what the policy objectives should be seem dissatisfied.

Perhaps this is because a court's institutional competence to deal with these questions depends largely on whether the necessary information is available and whether counsel

have been willing and able to put it before the court. Clearly the legislature is in a better position to commission such research from scratch and to bring a range of legal options to bear on the subject (if it is so inclined).[42]

There are other reasons for questioning the value of tort as the most appropriate response to the problem of defective buildings. In 1974 New Zealand scrapped tort as the means for dealing with the consequences of personal injury. The Woodhouse report, which inspired that revolutionary change, cited several reasons.[43] It found the moral notion of "fault" to be an inadequate justification for common law negligence in that (a) the latter applied an objective standard regardless of the individual defendant's ability to meet that standard, (b) the obligation assumed by a defendant was disproportionate to the conduct deemed to be faulty (ie damages are "not measured by the quality of the defendant's conduct, but by its results") and (c) the defendant is not usually held personally accountable, damages being paid by a liability insurer. The Report also referred to the uncertainties of litigation which make outcomes (both in terms of liability and quantum of damage) dependent upon availability of evidence, financial and other pressures on the plaintiff to settle, the essential subjectivity of fact-finding and the application of the reasonable person standard and the possibility of contributory negligence. Another criticism was the "delay and suspense" necessitated by the procedures involved in a negligence claim; yet another the expense of the process. On top of all this, the Report seriously questioned the deterrent value of the negligence action. At least in the realm of personal injury it was thought to offer little if any marginal increase in deterrence over those incentives already existing (criminal sanctions, the instinct for self-preservation, conscience, etc) especially when the "sanction" would usually be paid by a liability insurer.[44] Although criticisms such as these have not been uniformly accepted as valid,[45] they do have wide currency and have led to reform of personal injury law, especially in respect of motor vehicle accidents, in many jurisdictions.[46]

But perhaps even most important to the Woodhouse thesis than the itemised shortcomings of the negligence system as a response to the problem of personal injury was the view that the tort approach was fundamentally inappropriate. Tort provided remedies in some individual cases to individual victims who could find individual defendants. The compensation of injured victims (as distinct, perhaps, from the prevention of injury) was not so much a matter of individual responsibility as a community concern. The Report stated:[47]

> This first principle [of community responsibility] is fundamental. It rests on a double argument. Just as a modern society benefits from the productive work of its citizens, so should society accept responsibility for those willing to work but prevented from doing so by physical incapacity. And, since we all persist in following community activities, which year by year exact a predictable and inevitable price in bodily injury, so should we all share in sustaining those who become the random but statistically necessary victims. The inherent cost of these community purposes should be borne on the basis of equity by the Community.

If all these considerations justify a radical departure from (or at least modification of) the common law approach to personal injury, and we believe they do, should similar

arguments be applied to other types of loss; specifically, for present purposes, financial loss attributable to building defects?

The litigation process seems to be no less time consuming and no less costly in building defect cases them in personal injury cases. In one Dunedin High Court case,[48] Mr Justice Hardie Boys, in reference to the fact that the proceedings had been commenced more than five years before the eventual High Court hearing, observed:[49]

> It is most regrettable that it has not been dealt with earlier, for costs have continued to escalate; and as well the builder has gone out of business, although it is not in liquidation.

Delay is inherent in the system. While crowded trial lists no doubt contribute to the problem, a process which requires attribution of cause and, in particular, blame is necessarily a lengthy one because of the need to collect the appropriate evidence. In addition uncertainties about the law may militate against quick settlement.[50] The problems caused by delay are, as Mr Justice Hardie Boys pointed out, continued cost escalation and, because something as fundamentally necessary as accommodation is concerned, personal anxiety. By itself, the delay problem should be enough to provoke serious thoughts of reform.

Associated with delay is the problem of the cost of the process. The complicated nature of the factual and legal questions typically involved requires the allocation of significant legal and related resources. While estimates vary, it seems that nearly half of the money that changes hands in the sorting out of latent defect cases goes to legal costs and experts' fees.[51]

The uncertainties of litigation makes claims relating to building defects something of a lottery, if not quite to the same extent as the Woodhouse Commission observed with respect to personal injury. The skill of counsel, availability and reliability of witnesses and other evidence, the financial pressures on the plaintiff to settle early and the availability of insurance or other resources to meet a judgment or settlement[52] are all variables which might affect the outcome of otherwise meritorious claims. The underlying concern is that similarly deserving cases might be treated differently. Of course, this requires a value judgment about what are similarly deserving cases. Advocates of the traditional tort approach hold that victims who have suffered at the hands of a wrongdoer are more deserving of a legal remedy. Others, like us, take the view that victims of equal loss who are equally innocent (in the sense that contributory fault is not involved) deserve equal access to compensatory remedies. The negligence approach discriminates against victims, first on the the legal criterion of fault by a defendant and second, by setting up practical hoops for the plaintiff to jump through to satisfy that legal criterion.[53]

The deterrent value of tort in building defect cases may be overestimated by its advocates just as it was with personal injury. This is not to say that some incentives are not at work; rather that they are, at best, uncertain (as we discussed above), haphazard in their operation, perhaps counter productive, and can be achieved in other ways.

To the extent defendants can insure against liability for building defects,[54] incentives to take care are severely diluted. There may be an indirect impact of adverse claims experience on defendants in the form of premium increases or policy cancellation. But insurers' actions in this regard depend largely on conditions in the insurance market which usually relate to general interest rates. When interest rates are high insurers, seeking funds to invest, try to attract customers by lowering premiums and by being less particular about risks betting that increased exposure will be more than offset by increased returns on investment. On the other hand, when interest rates are low, insurers become much more concerned about "underwriting losses" and tend to increase premiums and pay closer attention to the nature of the risks they accept. They may even reject entire classes of risk. Any deterrent effect in this amounts to overkill. Firms may go out of business rather than face exposure to risk without insurance or some may continue without cover.[55] The consumer loses in two ways. The number of suppliers is severely reduced. The likelihood of obtaining compensation in the event of loss caused by a firm remaining in business is significantly reduced.[56] Even if premium adjustments are useful incentives they can be implemented through first-party insurance. There are also other regimes of control under building codes and regulations requiring approval of plans and inspection by public authorities.[57]

As the Woodhouse Report did in dealing with personal injury, it is possible to build a case for a response to building defects which is based on community responsibility. The Woodhouse Report referred to a concern for the "predictable and inevitable price" of community activities.[58] In reviewing the accident compensation scheme in 1988, the Law Commission reiterated this point, referring to the "inevitable and regrettably random consequences of essential or accepted social activity".[59] The Law Commission characterised the scheme as "citizen-wide social insurance . . . concerned with income maintenance and fair support for living standards".[60] If supporting living standards is the goal, it seems reasonable to consider housing along with income maintenance. Moreover the concern is not just with providing housing but also with its quality. In a paper written for the Royal Commission on Social Policy, D H Thorns wrote:[61]

> The key issue in the New Zealand debate about homelessness is *adequacy* of housing rather than a dramatic increase in those with no shelter at all. The increasing costs of shelter have produced more people living in poorly maintained housing. . . .

We recognise that there will never be political consensus as to which is appropriately a matter of community responsibility. However we believe a respectable argument can be made that the generally recognised public obligation for ensuring the safety of buildings (given form in public health legislation and building bylaws) should also include responsibility for arranging for the compensation of those whose buildings (dwellings at least) suffer from latent defects.

5. Alternative Approaches

Policy makers who have sought to remedy perceived deficiencies in personal injury law

dominated by negligence theory, have often turned to some form of no-fault regime. By this we mean a scheme whereby the victims of loss obtain compensation, perhaps subject to limitation by amount and category of loss, without having to show that someone was to blame.[62]

For present purposes, no-fault schemes can be divided into two types; those funded by potential victims (first party schemes) and those funded by third parties. Examples of the first type are motor vehicle no-fault plans such as those in place in many North American jurisdictions[63] and indeed the motor vehicle component of the Accident Compensation Schemes in New Zealand. Typical of the second type are workers' compensation schemes (including the earners' scheme under the ACC), where levies are paid by employers in respect of claims by employees, and some medical accident plans like that in Sweden where health care providers pay into a fund for the compensation of medical accident victims.[64]

A building defect compensation scheme could be of either type (or, indeed, a combination). Professor Smillie has described arrangements in place in Britain which amount to a first-party scheme.[65] The National House-Building Council, a building industry organisation, makes available to buyers of new homes from builders or developers registered with the Council a 10 year warranty against defects in workmanship and materials (including major structural defects). It is transferable to successive owners and is backed by insurance. It is available at low cost (about 0.3% of the construction cost). It also provides incentives to avoid defects. Builders with bad claims experiences are subject to penalties including, ultimately, deregistration by the Council, no small measure in that most lending institutions require borrowers to obtain the warranty meaning that most buyers will only do business with a registered builder.

Another British example cited by Smillie[66] is a specialised first-party insurance policy covering latent defects. One insurer offers cover for 10 years at a cost of about 1% of the value of the building. This policy is aimed at the commercial market but other insurers are starting to compete with the NHBC scheme in the housing market.

Purpose-designed cover, in the form of warranties or insurance policies, is necessary. Most ordinary homeowners' insurance does not cover latent defects, either because that is not within the perils insured against or because perils such as "faulty workmanship" are specifically excluded.[67] Care must be taken in defining the terms of cover, particularly the time period during which defects must manifest themselves. Here a balance must be struck between cost and reasonable protection.[68]

Other policy choices would have to be made in terms of the administration of a first-party scheme. Smillie is content to leave it to the private insurance market.[69] If the building industry is sufficiently well organised, as apparently it is in Britain, the scheme can be handled by a body representing its members.[70] Alternatively, the job can be given to an existing or newly created government organisation.[71]

Then there is the question of whether the scheme is compulsory. This will depend on how attractive[72] the scheme is to buyers of homes (or commercial buildings) or the existence of other, informal, incentives such as conditions attached to housing loans. It may also depend on whether tort rights are formally abolished. If they are it may seem necessary to fill the gap completely. On the other hand an attractive scheme combined with the abolition of subrogation (perhaps less controversial than the formal abolition of tort rights) would have the effect of slowly killing off tort as a significant factor.[73]

If the scheme is not funded by buyers (at least directly), there are three other possibilities; builders, local authorities, or central government.[74] If builders were charged with payment they would, if market conditions allowed (determined by supply and demand), simply pass the cost onto buyers. To the extent builders bore the cost themselves, some deterrent effect might be achieved although it would be diluted by the loss-spreading nature of the scheme. In any event, other factors such as pressure from lenders (as in Britain) and building inspectors would be operating. Putting the burden on central government has the effect of spreading the loss further but this may been seen as unfair, especially if some localities are known to have more problems with building defects than others. Having local authorities bear the burden avoids this while giving effect to the idea that protection is a matter of community responsibility.[75] Of course the cost would fall ultimately on ratepayers but this is roughly the same group (if ratepayers include tenants who pay rates indirectly) as that which realises the benefits of safe buildings.[76] The costs are therefore spread among the class of occupiers rather than owners. Responsibility for costs may also provide local bodies with an incentive to exercise care in inspecting and approving construction, if this is thought necessary.[77] However, in an era of government spending restraint, political action to assume more costs rather than "privatising" them is unlikely.[78]

If there is a legislative solution, as most commentators propose, it will most likely involve a first party scheme with strong incentives for owners to participate, if not outright compulsion. It could well be administered by the private sector - possibly in conjunction with an existing public body like the Earthquake and War Damage Commission.[79] Legislation will most likely arise in New Zealand if courts here follow *Murphy* leaving homeowners largely protected. But if New Zealand caselaw remains firmly on its present course exposing both builders and local authorities to liability in negligence, the principal players might well take the economically rational step of introducing a scheme themselves which would eliminate the inefficiencies of tort litigation without legislation. This has happened in Britain and is likely that that development was not unconnected with the trend in liability reflected in *Anns* and *Junior Books*. As Professor Smillie has indicated, the building industry in New Zealand has already taken the first steps in this direction.[80]

A scheme of the type we envisage need not be confined to dangerous defects. There may be objection to dealing only with dangerous defects, either because the distinction is believed to be often too hard to make or because public policy calls for a broader focus. These objections can easily be accommodated in the definition of risk covered.[81]

5. Conclusion

In the circumstances that prevail in Britain, the result, if not all the reasoning, in *Murphy* turns out to have been sound. Compensation for losses attributable to building defects is available through other, more efficient means which effectively spread those losses. Other incentives to take care (at least for builders) are in place. In New Zealand compensation through loss spreading has been a primary rationale for imposing negligence liability.[82] It has been thought that this can be achieved through liability insurance, especially that held by builders. As Smillie has shown, this is largely an unfounded assumption insofar as it relates to builders.[83] Accordingly actual liability has tended to fall back on local bodies' ratepayers. While this can still be defended on compensation (through loss spreading) grounds and, to some extent, deterrence grounds, our view is that these goals can be achieved without the costs, delays and inequities inherent in the negligence system.

* We are grateful to Professor John Smillie, University of Otago, for comment and criticism which we found invaluable. We are of course entirely responsible for the views expressed herein.

1. [1990] 3 WLR 414 (HL).
2. The House of Lords held that it makes no difference whether the defect is dangerous or not. While we accept that in either case the claim may be characterised as economic loss, that does not in itself resolve whether we might wish to recognise a tort duty for dangerous defects alone. More on that below.
3. As the Court observed the distinction between pure economic loss and that attributable to externally caused damage is sometimes not easy to draw in that some "internal" defects may be characterised as "external" in relation to other parts of the property. See *D. & F. Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL).
4. [1978] AC 728 (HL), approving the decision of the English Court of Appeal in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373.
5. *Junior Books Ltd v Veitch Co Ltd* [1983] 1 AC 520 (HL); *Morton v Douglas Holmes Ltd* [1984] 2 NZLR 548 (HC); *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163 (HC); *Steiller v Porirua City Council* [1986] 1 NZLR 84 (CA).
6. We do not ignore the notion of "justice". Rather we incorporate it into our analysis. However we treat it with care, realising that arguments for or against a tort action are inevitably value-based with a subjective element. Our analysis is no freer of this than any other. We regard the issues under review as giving rise to two justice questions, not one. The just way to treat the victim does not always coincide with the just way to treat the causer of the harm.
7. The term "dangerous defect" is used as a short form for a defect which poses a significant risk to health or safety. This is explained more fully below. For the time being, assume that the analysis applies to goods which are merely shoddy, but in no way dangerous.
8. There may be a series of intermediate sellers selling to one another under contratct. The analysis derived from the basic three-party commercial chain is easily extended to that variation. It is also possible that the user or owner may have obtained the product otherwise than by contract, by gift perhaps. While it is desirable that the law protect those people in the case of actual personal injury, the case for protecting the purely economic interests of donees is a weak one, especially, as will be demonstrated below, when there is no compelling reason to protect the interest of the buyer.
9. Cf comments by Lord Roskill in *Junior Books*, supra, n 5 at p. 546.
10. Sometimes, the manufacturer will take steps, such as by making express warranty claims, to bear the loss directly.
11. Manufacturers will have to "pay" retailers to bear this risk by selling at lower cost than they would otherwise. There is an obvious incentive to reduce this "cost" by reducing the risk. Presumably, the parties find it more efficient to have the seller bear the costs in the first instance. Perhaps transaction costs are much lower if the seller compensates the buyer. Sellers assess the risk of manufacturer negligence in setting the contract price, and in this way the consequences of negligence are brought home to the manufacturer. Consumers benefit from these efficient arrangements. True, market imperfections may allow poor or unscrupulous manufacturers to shift excessive defect cost to vulnerable sellers and thus distort ideal deterrence. However, in the world of commerce there is no reason to expect generally that sellers will be the vulnerable parties systematically victimised by manufacturers.
12. Adding negligence liability in this area may in fact undermine the compensation goal by adding too much deterrence. George Priest has suggested that increased categories of tort liability in the U.S. caused such a burden on insurers that they withdrew from some commercial markets entirely. See Priest, "The Current Insurance Crisis and Modern Tort Law" (1987) 96 Yale LJ 1521.
13. Note too a possible logical inconsistency. The proposition is that the manufacturer should be liable to guard against a collapse of chain obligations. But the manufacturer and seller may have allocated responsibilities between themselves so that the seller had no claim over against the manufacturer in respect of suits against it (the seller) for defects in the product.
14. See, eg, *Central Trust Co v Rafuse* [1986] 2 SCR 147.
15. Perhaps most common are the "merchantable quality" and "fitness for purpose" provisions of the Sale of Goods Act 1908, s16. Note too the Fair Trading Act 1986 which is not confined to consumer transactions.
16. We are not dealing here with fraud or misleading advertising. We are assuming here reasonably well informed parties. Impediments to full information can be addressed through consumer protection legislation or through intentional torts.
17. See the comments of Lord Brandon (dissenting) in *Junior Books*, supra, n 5 at p.552. Admittedly determinations like this have been reasonably common in merchantability cases under Sale of Goods legislation. See supra, n15. There, however, these determinations are usually not coupled with the notion of fault as would be necessary under negligence. But see *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163 (HC).

18. Indeed in some jurisdictions it is illegal for the manufacturer to try to influence retail price.
19. Forty American States have enacted so-called "lemon laws" to govern liability for defective new automobiles. Although the schemes differ, the common characteristic is manufacturer-financed arbitration as a viable alternative to litigation for consumer relief. For a comprehensive summary see Nowicki, *Regulating and Resolving New Car Warranty Problems and Disputes* (1987, unpublished doctoral thesis, Syracuse University).
20. Prima facie, the logical way to improve the law of contract would be to change the law of contract directly. This, however, the courts may be reluctant to do because contracts of commercial and consumer sales are so heavily regulated by legisation.
21. Suppose the defect is not imminently dangerous, but will inevitably become so over time. Ideally, from an efficiency and deterrence point of view, we would wish to encourage a small repair immediately than to risk a major repair later. Indeed, if the repair is delayed too long, a serious accident may occur. However, if the test is for *imminent* danger, the user might prefer to wait until confident that the risk would be regarded as imminent and thereby throw the cost onto the manufacturer, than to incur the cost herself. (This assures that buyers will be confident that they will be better off with a negligence claim than making repairs themselves. And it ignores that manufacturers might prefer to make the small early repair if the defect were brought to its attention than to risk the greater liability later). Our formulation avoids this and responds to the concerns expressed by Lord Bridge in *Murphy*, supra, n 1 at p. 440.
22. Although tort law has traditionally been more solicitous of personal injury than, eg, property damage. Perhaps a similar "ranking" might justify tort's intervention in dangerous rather than non-dangerous cases.
23. One cannot say that dangerous defects are always or are even generally more financially burdensome than others. Non-dangerous defects may be slightly less onerous in one sense. One can choose to drive an automobile with a defective coating of paint in preference to paying a substantial sum to repaint. This simply means that the owner values the loss at less than the cost of repair. However, if a product is truly dangerous, it ought to be repaired immediately or scraped, whatever the owner's preference.
24. Courts would be strict about this in a commercial context. However, this may also happen in consumer resale markets, such as the market for used automobiles. There an analogy to the residential home market (see below) may be appropriate.
25. It seems odd that the courts would pursue this goal indirectly through the negligence regime rather than directly by imposing such a warranty in sales law. Possibly, the courts feel that sales law is so heavily regulated by legislation that the role of common law is more restricted there than in negligence.
26. Supra, n 1 at pp. 426 and 432 (Lord Keith), pp. 435 and 437 (Lord Bridge) but cf p. 448 where Lord Oliver seems to envisage the situation in which the owner of a chattel, knowing it to be defective, courts the danger that represents.
27. The purchaser of the building (from the plaintiff) continued to live in it without making repairs.
28. That is, without empirical evidence.
29. Even for new homes contractual protection is usually minimal; there being no implied terms as to quality in the contract of sale for completed buildings, and contracts typically provide for a short maintenance period (insufficient for discovering latent defects).
30. See Brown "*Murphy*: Out of the Frying Pan into the Fire" (1990) 6 Prof Neg 150, 153.
31. See Lord Brandon's comment in *Junior Books*, supra, n 17. According to traditional economic theory, 'value' is essentially a subjective matter. Each consumer allocated his/her resources according to individual choice. Tort litigation would necessarily second-guess this process.
32. By mandatory warranty we mean one that would override the terms of the contract, even those that purported to contract out of the warranty. If the buyer has a contractual or statutory remedy, the only thing the common law can do is to offer judgment-proof seller insurance. Since the contract or statutory remedy was likely to lie against the builder already it is not of much use.
33. See Brown, supra, n 30. See also Olowosoyeku, "*Murphy, Anns* and Pure Economic Loss" (1990) 6 Prof Neg 158.
34. At least consumer expectations about remedies are different. The buyer of a chattel that turns out to be defective tends to expect the seller to put it right. That is less so when a building is concerned.
35. See supra, n 21 and accompanying text.
36. For example, in respect of liability for nervous shock and indeed other types of economic loss. Note, however, that while these arguments support the feasibility of tort liability in a narrow category, it does not follow that tort is necessarily the answer. Later we argue for a non-tort, non-sales contract solution under which definition problems, such as they are, can be reduced to relative insignificance.
37. Some structures, such as stationary cranes, might be difficult to classify but that is unlikely to be a common problem. (See *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189.)
38. In *Murphy* only Lord Keith mentions deterrence and he seems skeptical about its effect; supra, n 1 at pp. 432-3.

39. We have so far only dealt with the liability of builders or other sellers. We have not dealt with the liability of public authorities for failing to comply with duties or exercise powers to inspect buildings to ensure compliance with relevant statutory standards. We have chosen to regard this as outside the scope of the present paper although we return to the theme of public responsibility below in the context of alternative approaches.
40. Withnall, "Negligence and the House that Jack Built" (1990) 7 Otago L R 189; Fox; "The Liability of Builders in Negligence: *D. & F. Estates v Church Commissioners of England*" (1990) 7 Otago L R 347; Duncan Wallace, "Negligence and Defective Buildings: Confusion Confounded?" (1989) 105 LQR 46.
41. Brown, supra, n 30; Smillie, "Compensation for Latent Building Defects" [1990] NZLJ 310.
42. This is not to say that legislative and common law regimes cannot co-exist. But if the legislature has studied and acted upon the problem of dangerous (or, for that matter, shoddy) buildings courts should pause before acting independently of the statutory regime.
43. *Compensation for Personal Injury in New Zealand* (1967) pp.47-62 (Woodhouse Report).
44. Other criticisms mentioned such as the problem of lump-sum awards and difficulties with regard to rehabilitation relate specifically to personal injury and are not applicable here.
45. This is especially true of the deterrence argument which has been the subject of considerable discussion in the law and economics literature. See, eg, Posner, *Economic Analysis of Law* (2nd ed, 1977).
46. For a review of the literature relating to this reform in Canada, see Brown, *No Fault Automobile Insurance in Canada* (1988) ch 1.
47. Supra, n 43 at p. 40.
48. *Sloper v Murray Ltd*, High Court, Dunedin, A 31/85, 22 November 1988, Hardie Boys J.
49. Ibid., at p.2. The action had originally been commenced in the District Court but, because the damage was found to exceed that court's jurisdiction (due in part to escalation of costs over time), it was removed to the High Court in April 1985, some three and a half years before the hearing.
Other reported cases show that delays of three to five years between commencent and hearing are not uncommon for cases that go to trial. Two or three years can be added for those cases that go on to the Court of Appeal. See, eg, *Stieller v Porirua County Council* [1986] 1 NZLR 84 (CA), writ issued 1979, High Court hearing 1983, Court of Appeal, 1986; *Brown v Paramount Builders* [1977] 1 NZLR 394 (CA), writ issued 1970, High Court 1975, Court of Appeal 1976; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 23 (CA), writ issued 1973, Court of Appeal hearing 1978.
50. Even in *Murphy*, which supposedly settled the law in England, there were musings about possible exceptions to the no-liability approach. See, eg, Lord Bridge's discussion (supra, n 1 at p.436) about possible liability for the cost of rectifying defects which pose a danger to neighbouring property.
51. Smillie says "approximately 40% of liability insurance premium revenue is absorbed by legal costs and experts' fees": supra, n 41 at p. 313. This figure may not cover all plaintiff's costs nor all the public expense involved in providing the facilities of the court. Another aspect, seldom mentioned in tort discussions, is the added burden of possible insurance litigation. For example, the Mount Albert Borough Council, after being successfully sued for negligence in connection with a building defect (a matter being finally resolved in the Court of Appeal: see *Mt Albert Borough Council v Johnson*, supra, n 49) then commenced proceedings against its insurer which had denied it an indemnity. That case itself went to the Court of Appeal (see *Mt Albert Borough Council v NZMCI Co Ltd* [1983] NZLR 200 (CA)).
52. This factor accounts for the prevalence of cases involving "deep pocket" local authorities as defendants. Surely an inefficient way to provide insurance.
53. One such restriction might be a "long stop" limitation period. Discovery of loss after the period would disqualify the claimant. The problem is that tort tries to balance the interests of both plaintiffs and defendants. In accommodating (legitimate) concerns of defendants, the system can short change plaintiffs.
54. In New Zealand builders are in fact unlikely to have insurance protecting against liability for latent defects. See Smillie, supra, n 41 at p.312. If indeed they cannot insure, they may be judgment-proof in which case the threat of tort liability is academic.
55. In the U.S. this occurred during the "insurance crisis" of the mid-1980s. See Priest, supra, n 12. Perhaps the most dramatic consequence was the withdrawal of entire fields of medicine, such as obstetrics, from some communities.
56. Priest, ibid., at p. 1225.
57. Of course the public authorities themselves may require incentives to carry out their functions properly. Tort law may arguably have a role to play here. We think other arrangements would do a better job. More on this below (see infra, nn 75-78 and accompanying text).
58. Supra, n 43.
59. Law Commission, *Personal Injury: Prevention and Recover* (1988, Report no 4), para 45.
60. Ibid., paras 44-5.

61. Thorns, "Housing Issues" in *Report of the Royal Commission on Social Policy* (1988) vol III p. 11 (emphasis added).
62. Although it may be necessary to show the loss was caused in a particular way, eg, by accident rather than disease.
63. See Brown, supra, n 46.
64. See Oldertz, "Social Insurance, Patient Insurance and Pharmaceutical Insurance in Sweden" (1986) 34 Am J Comp L 635.
65. Supra, n 41 at p. 313.
66. Ibid., at p. 314.
67. For Canadian examples of judicial ingenuity in getting around this, see *Cominco Ltd v Commonwealth Insurance Co* (1985) 13 CCLI 51 (BCSC); *Todd's Men & Boys Wear Ltd v Diamond Masonary Ltd* (1985) 12 CCLI 301 (Alta QB); But cf *Bird Construction Ltd v US Fire Insurance Co* (1985) 18 CCLI 92 (Sask CA).
68. Somewhere between 10-15 years seems to have achieved a reasonable balance in Britain. Differences in construction methods and other conditions in New Zealand (see Withnall, supra, n 40 at p.200) may support a different period.
69. Smillie, supra, n 41 at p. 317.
70. Apparently the NZ Master Builders' Federation is soon to implement a scheme. See Smillie, ibid.
71. This idea is not new in New Zealand. See the Building Performance Guarantee Corporation act 1977. The scheme had several shortcomings which meant it was not greatly used. It was repealed in 1987. The Housing Corporation now provides an indemnity under its Buildguard scheme. See Smillie, ibid., at p. 313. In addition, the Building Industry Commission has floated the idea of a statutory authority. See Smillie, ibid., at p. 316.
    A further possibility is a combined public-private venture like the Earthquake and War Damage Commission. Premiums are collected with fire insurance premiums by private insurers but administered by a public body with responsibility for compensating specific kinds of loss not covered by the typical private insurance policy.
72. In New Zealand the scheme established by the Building Performance Guarantee Act 1977 had a short life because it did not attract sufficient support: see ibid.
73. See Smillie, supra, n 41 at p. 317. This has essentially been the case with Sweden's medical accident scheme. See Oldertz, supra, n 64.
74. There could be of course several contributors. The Building Industry Commission floated the idea of a scheme jointly funded by home buyers and builders. See Smillie, supra, n 41 at p.316.
75. An idea that is bound to have its detractors. See Fleming, "Requiem for *Anns*" (1990) 106 LQR 525 at p. 528.
76. Note this argument among others might support the view that local authorities be liable in tort in these types of cases. For reasons expressed above, however, we prefer other means.
77. But this may have adverse effects such as undue delays in the processing of permits. See Building Industry Commission, *Reform of Building Controls* (1990) vol 1 p. 24.
78. Even if owners pay, however, that cost could be expected to be passed onto tenants in rents.
79. See supra, n 71.
80. Smillie, supra, n 41 at p.317.
81. The other principal distinction we have drawn is that between buildings and chattels. Again that was mainly for the purpose of assessing the value of tort liability. While it would be possible in theory to create a no-fault scheme for chattel defects our perception is that the need does not exist; that contractual or other consumer law remedies are sufficient.
82. See *Bowen v Paramount Builders* [1977] 1 NZLR 394 at p. 419 per Woodhouse J.
83. Smillie, supra, n 41 at p. 311.