AN IMPOSSIBLE DISTINCTION*

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In a famous passage in *Dutton* v. *Bognor Regis Urban District Council*[1] Lord Denning M.R. said:

> "Mr. Tapp submitted that the liability of the Council would, in any case, be limited to those who suffered bodily harm: and did not extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of *S.C.M. (United Kingdom) Ltd. v W. J. Whittall & Son Ltd.*[2]
> I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr. Tapp's submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defect in time to repair it—and he does repair it—the council are not liable. That is an impossible distinction. They are liable in either case.
> I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for repair."

It is to be noted that nowhere in the passage do the words *contract* or *tort* appear. Whether or not their omission was deliberate or merely a result of the natural sweep of Lord Denning's language, it is significant that he was able to state the law (as he held it to be) without invoking those technical, yet ill-defined, concepts. Although they have become major rubrics in modern expositions of the common law, they do not always stand for clearly differentiated compartments. There may be overlapping. For that proposition, so far as English authority is concerned, one need do no more than cite the scarcely less famous judgment of Oliver J. in *Midland Bank Trust Co. Ltd.* v. *Hett Stubbs & Kemp,*[3] holding that a solicitor's duty of care to a client arises in both contract and tort. Nor did Lord Denning use in the passage quoted the word *warranty,* a term which historically is consistent with liability in either tort or contract.[4]

The main theme of the present article will be that in relation to (for instance) the liability in negligence of builders, manufacturers and local authorities, the true issues are becoming obscured by the use of the labels *contract* and *tort.* The policy choices confronting the courts are certainly not easy. But the choice can be unconsciously evaded, rather than made, if we begin by affixing to the suggested liability one of these labels and then go on to deduce the consequences by a process of *a priori* reasoning.

For a serving judge who has had some part in trying to decide a controversial legal issue, and who may have to return to the task, whether to write on it extra-judicially can be a rather delicate question. On this occasion I am impelled to do so by several considerations.

First, there are the best of precedents. The case against *Anns v Merton London Borough Council*[5] has been cogently presented at the highest legal level in the United Kingdom extra-judicially as well as judicially, an illustration being Lord Oliver of Aylmerton's 1988 Sultan Azlan Shah Law Lecture, "Judicial Legislation: Retreat from Anns,"[6] which put forward much of the reasoning contained in his Lordship's speech a little earlier in *D. & F. Estates Ltd.* v. *Church Commissioners for England*[7] and now more fully developed by him in *Murphy* v. *Brentwood District Council.*[8]

Secondly, there are some linked considerations stemming ultimately, I believe, from the same root cause, namely the sheer volume of case law and legal writing in the English-speaking world. The responsibility of the House of Lords is to pronounce on the law of the United Kingdom. To a slightly increasing extent their Lordships are referred by counsel to decisions in other countries, but the practice is still limited and rather haphazard. Moreover, even when cases decided in another jurisdiction are cited, the constraints on judicial time and associated factors are such that, entirely understandably, they may not receive attention in depth.

To illustrate those points it may be mentioned, albeit in no querulous spirit, that the latest New Zealand Court of Appeal case in the line that began in 1976 with *Bowen* v. *Paramount Builders Ltd.*[9] was not cited by counsel in *Murphy*, according to the list appearing in the *Weekly Law Reports,*[10] and is not cited in any of the speeches there. Since 64 cases were cited to them their Lordships might well not have been much assisted by one more, and it is true that *Askin* v. *Knox*[11] did not embody any significant change from our earlier thinking; but possibly it might have been of some small help on an aspect which troubled Lord Mackay of Clashfern L.C., who spoke[12] of:

> "difficulty in reconciling a common law duty to take reasonable care that plans should conform with byelaws or regulations with the statute which has imposed on the local authority the duty not to pass plans unless they comply with the byelaws or regulations and to pass them if they do."

In *Askin* that did not seem to the court a practical difficulty. An argument for strict or absolute liability based on building byelaws made under statutory powers was rejected as going too far, though it was accepted that whether due care had been taken to comply with the byelaws was relevant in considering negligence.[13] In New Zealand liability has been firmly anchored to negligence, which was found in *Askin* not to be made out on the facts of a rather stale claim (20 years; allegedly negligent persons dead). Ironically, in commenting on an unsatisfactory disharmony between New Zealand and English law, the judgment mentioned[14] that relevant cases had fallen to be decided in New Zealand before the House of Lords had settled the corresponding English law and that then the New Zealand cases had not been cited in the House of Lords.

By the way of only one further illustration, the prevailing trend of opinion in New Zealand[15] has been that, if a case be approached in terms of Lord Wilberforce's two-stage test in *Anns* (which has been seen as a convenient basis for organising thinking, with ample inbuilt flexibility at both stages), the first stage entails much more than foreseeability. Many contingencies, even quite unlikely ones, are reasonably foresee-

able. The degree of foreseeability and the nature and magnitude of the risk are always relevant in deciding whether prima facie there should be a duty of care. I tried to say this in *Scott Group Ltd.* v. *McFarlane,*[16] a case about auditor's negligence and the take-over of a public company, but obviously failed culpably to do so, as my judgment was misunderstood in the House of Lords in *Caparo Industries Plc.* v. *Dickman.*[17] The result is that it may be necessary to resort to the pages of the *Law Quarterly Review* to escape condemnation for heresy.

Thirdly, and this is by far the most important reason for writing something, we are concerned here with basic questions of common law principle and approach. The inevitable separate development of the common law continues apace, but this subject is one of those described by Lord Keith of Kinkel in the judgment of the Privy Council in *Rowling* v. *Takaro Properties Ltd.*[18]

> "upon which all common law jurisdictions can learn much from each other; not: because, apart from exceptional cases, no sensible distinction can be drawn in this respect between the various countries and the social conditions existing in them. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions; but what they are all searching for in others, and each of them striving to achieve, is a careful analysis and weighing of the relevant competing considerations."

As has been recognised,[19] that is exactly the approach that has been attempted in New Zealand for many years.

It may be doubted whether there is any overseas jurisdiction where the work of the United Kingdom courts is more deeply respected and influential than it is in New Zealand; and we do what we can to be sensitive. It is trite to say, however, that within any jurisdiction there are judges with different outlooks and that prevailing national judicial moods change from time to time. Few tort lawyers would dispute that the spirit which animated the unanimous decision in *Anns* and the majority decisions in *Dorset Yacht Co. Ltd.* v. *Home Office*[20] and *Donoghue* v *Stevenson*[21] is different from that which now prevails in the House of Lords and Privy Council. It cannot be a difference in carefulness or logic or powers of analysis. As is to be expected from judges of such eminence, the one approach is as well-reasoned as the other. In the end it is a difference in value judgments. And when there is a swing in ruling value judgments in one jurisdiction the problem for another jurisdiction can be whether to imitate it in the interests of uniformity.

Without qualifying in the least what has just been said about deep respect, the observation may be respectfully offered that, while English and Scottish appellate judges naturally differ *inter se,* perhaps equally naturally their general approach seems quite noticeably distinguishable from those followed in, say, Canada, the United States of America and Australia. There is an impressive and distinctive homogeneity about the House of Lords and the Privy Council (disturbed only by an occasional incursion). Currently its main characteristic is perhaps legal conservatism. At all events, what follows is an attempt to show that the structure which is *D. & F. Estates, Murphy,* and *Department of the Environment* v. *Thomas Bates & Son Ltd,*[22] may be all the better for

a little fresh air and is not incapable of admitting it. Building partly on some of the thinking in their Lordships' speeches and adding some materials quarried from the rich, if daunting, mines of North American jurisprudence, it may be possible to fashion something that accommodates justice and the needs of developed society without violating any doctrinal proprieties.

Distractions and diversions

Some of the debate in this field has a scholastic or arid character, appearing to do little to get to the heart of the real issues. For example, if a house subsides and parts crack because of the defective foundations, is there much profit in arguing about whether this should be classified as physical damage or purely economic loss? No one seems to doubt any longer that, if a builder negligently constructs a house with a hidden dangerous defect, he will be liable for personal injuries suffered by the occupants in consequence before the defect is reasonably discoverable. All the Law Lords who delivered full speeches in *Murphy* evidently so accept[23]; and it also seems entirely clear that the mere fact that the builder was the owner makes no difference,[24] so Lord Denning was right at least when he said[25] *Bottomley* v. *Bannister*[26] is no longer authority. But their Lordships in *Murphy* repeatedly state likewise that the same applies to damage to property other than the house itself. If the householder's books or furniture suffer water damage as a result of negligently-created latent structural defect, he can presumably recover from the a negligent builder.

Exemplary and nominal damages aside, a plaintiff awarded monetary redress for damage to his property is essentially being compensated for economic loss. It is in his pocket, not in his person, that he has suffered. The distinction between "pure" economic loss and economic loss flowing from deprivation of the *use* of property is especially thin, as in the example of damage to a householder's car.

Perhaps even more metaphysical is the debate about the complex structure concept — whether a house is one whole item of property or an assembly of integrated parts.[27] That anything should turn on this, that it should be a subject of grave discussion in the highest court of a land, gives it curiosity value and the charm going with fine points of law. As a touchstone for answering practical questions, it may not turn out to be reliable. A result suggested, though possibly not actually decided, by opinions in *Murphy* is that if a contractor supplies only part of a house, such as the electrical system or boilers or steel framing, he owes a duty of reasonable care to successive owners to safeguard them from economic loss caused by damage to other parts of the building; yet not if he supplies the whole house.[28] The smaller the role, the greater the responsibility. It must be respectfully questioned whether such a distinction can survive.

Another difficulty in seeking to dispose of the issues by the proposition that "pure" economic loss is not recoverable in tort, although caused carelessly, is that major exceptions have to be made. It is enough to murmur *Hedley Byrne*.[29] The conventional rationale for the negligent advice exception is that the duty stems from reliance and a special relationship of proximity.[30] Yet the liability of a local authority for a building

inspector's negligence has been based, by courts which uphold it, on control.[31] There seems nothing false or contrary to common sense in saying that purchasers of houses rely on the local authority that controls building in the district to exercise its powers responsibly and with reasonable care.[32] If the argument then becomes that the relationship is nevertheless not sufficiently proximate, this is to introduce another term eluding definition, as pointed out by Lord Oliver[33] — who adds that there are other cases, such as *Ross* v. *Caunters*,[34] not explained by the reliance theory.

A further shortcoming of the "pure" economic loss criterion is brought out by Lord Bridge of Harwich in *Murphy* when he expresses the opinion[35] that a building owner ought to be entitled to recover in tort from a negligent builder expenditure necessarily incurred in obviating damage so as to protect himself from liability to third parties outside the property. His Lordship states that this is so "in principle," and it would not seem easy to devise a principle that would distinguish convincingly between the owner's liabilities to his neighbours and to his tenants or visitors. Indeed it may not be nonsensical to say that, if the owner is entitled to recoup the cost of saving from harm people on adjoining properties and in the street, the same should apply to the cost of protecting himself and his family.[36] Lawyers nervous of the potential reach of Lord Atkin's *Donoghue* v. *Stevenson* principle based on the Christian ethic often argue on the lines that the common law must stop short of enforcing love of one's neighbour or altruism as a legal duty; making the point that the right to pursue self-interest underlies many rules of law. It would be paradoxical if the rules in this field were to treat solicitude for one's neighbour as more deserving of encouragement than preservation of the safety of one's own household.

Other labels which in the end may be more semantic than practically useful are *proximity* and *incrementalism*. Something has already been said about the first; I shall return to it shortly. In the High Court of Australia there are broadly two different schools of thought, epitomised by the two terms. Much will be found on the subject in *Essays on Torts*,[37] produced for the 1989 seminar in Professor P. D. Finn's series at the Australian National University, Canberra. A valuable essay reviewing from this point of view English as well as Australian authorities is contributed by Justice McHugh, who declares himself an incrementalist but emphasises that questions of policy must come in. He adopts[38] as the proper approach to the duty question a passage in the speech of Lord Diplock in the *Dorset Yacht* case[39] including the following:

> "But since ex hypothesi the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations, imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as *Lickbarrow* v.

> *Mason,*[40] *Rylands* v. *Fletcher,*[41] *Indermaur* v *Dames,*[42] *Donoghue* v. *Stevenson,*[43] to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability."

On that approach a judge who leans against extending a duty of care to a situation not hitherto ruled upon can say that the addition would not be incremental, or not sufficiently so. Brennan J. is the leading exponent of the approach in Australia, and his views have commended themselves in the House of Lords.[44] A problem is that, if a judge prefers to hold — fundamentally for policy reasons — against the addition, he is likely to describe it in quite emotive language which a judge otherwise disposed would not employ. Thus in *Sutherland Shire Council* v. *Heyman*[45] Brennan J. stigmatised the first stage of Lord Wilberforce's *Anns* test as involving a "massive" extension of a prima facie duty of care (on an interpretation which, as already explained, has not prevailed in New Zealand) and in *Murphy* Lord Keith has spoken[46] of the passage in Lord Denning's *Dutton* judgement set out at the beginning of the present article as involving an unacceptable "jump".

Such epithets are undoubtedly justified in the light of the views held by those distinguished judges. It has to be remembered, though, that what is a jump to one person may be quite a small and necessary step to another. The *fons et origo* of this chapter of the law in England was the 1971 judgment of Cusack J. in the Queen's Bench Division in *Dutton.*[47] The judge's discussion of the law takes only three pages of the report, although he records, not "too seriously," that at one stage of the argument he felt that no book would be left unopened. He relied on *Donoghue* v. *Stevenson* and other personal injuries cases[48]; and, noting Lord Macmillan's declaration that the categories of negligence are never closed, added the following conclusion[49]:

> "The purpose of the building byelaws, including the inspection of the site of the building in the course of erection, is the protection of the public. There is ample authority for saying that if a local authority exercises its statutory powers to the injury of a member of the public, the injured person may be entitled to sue: see for example *McClelland* v. *Manchester Corpn.*[50] In my view it must be in the contemplation of those who gave approval to building works that such approval will affect subsequent owners of the house. The council, through its building inspector, owed a duty to the plaintiff. The inspector was negligent. The council should therefore, on the facts as I find and the law as I believe it is, be found liable."

Evidently Cusack J. saw his decision as a natural incremental application of principle.

So, too, as to *proximity*. The leading Australian exponent of that requirement is Deane J., who has said[51] that identification of it should not be either ostensibly or actually divorced from notions of what is "fair and reasonable". When held to exist, the term *proximity* announces a result rather than articulates a concept.

One last point about labels. References to *judicial legislation*, in what Lord Diplock would have called a dyslogistic sense, are of course helpful in emphasising forcefully that a particular solution is not approved.[52] As well, however, it may conduce to perspective to remember that when a truly new point arises *any* solution of it is truly judicial legislation.

Dutton's case was no doubt in that class. Counsel for the appellant council is reported[53] to have opened in the Court of Appeal by saying:

> "The case raises for the first time in this country the question whether where someone like a local authority, exercising a right to inspect during manufacture or construction of buildings or goods, negligently approves the construction or manufacture so that the property or the goods turn out to be less valuable to the ultimate purchaser than they would have been if there had been no negligence, the ultimate purchaser will have a right of action in tort against the inspecting body."

No matter how *Dutton* was decided, the case was destined to make new law.

Murphy is in one sense a more striking instance of judicial legislation than *Anns*, indeed one of the most striking instances in the history of English law, for, as the Lord Chancellor said,[54] it was the overruling of a decision taken after full consideration by a committee consisting of the most eminent members of the House of Lords; whereas *Anns* did not overrule any previous decision of any court.[55] The decision in *Murphy* could not justly be criticised on that account, however, as the Law Lords were undoubtedly entitled to change the existing common law if satisfied that it was unsatisfactory.

A straighter path

Parts of the speeches in *Murphy* accord closely with the thinking of the leading writer on construction law, Mr. I. N. Duncan Wallace Q.C., and in particular his contributions to this *Review*.[56] For a knowledgeable account of the factual background to the basic problem, one cannot do better than quote a passage in his 1989 article[57]:

> "Until the *D. & F.* case, and in particular Lord Oliver's speech in that case, there seems to have been little or no understanding or discussion in the English appellate or other courts of the fact that the presence of physical damage may be technically as well as legally entirely irrelevant to the existence of even the most serious physical defects in a building, or indeed of non-compliance with bye-laws. Many defects are of such a kind that a building may be totally unsafe, but as yet not even microscopic chemical or other damage may have occurred. Bad workmanship, such as carelessly placing steel reinforcement in the wrong position, or a poor design specifying inadequate reinforcement, may mean that a beam will be mechanically incapable of carrying its full designed working load, though as yet it may not have failed (for example where an occupier later wishes to install furniture or equipment in a previously lightly loaded building and carries out a survey which discloses the error). Again, defects such as the absence of adequate surcharge drainage arrangements or the omission of a damp proof course, whether due to failure of design or of contract compliance or to simple bad workmanship, may produce no damage if discovered before seasonal or other, perhaps quite exceptional, flooding occurs, which if it does occur may do serious damage to render the house unsuitable. Very often, of course, some superficial cracking may be an early indication of movement and potential future structural failure, and this is particularly true of the differential settlement which is the usual result of inadequate foundations. This cracking and settlement may often cease and present little or no further problem beyond a need for superficial redecoration; on the other hand it may continue progressively to a point which requires radical solutions, including new foundations, to prevent structural failure. Other structural failures may be sudden and catastrophic, and not conveniently progressive with earlier symptomatic

'damage' before the moment of failure. By contrast some defects may develop very slowly and inperceptibly as a result of chemical action, such as inadequate concrete cover leading to rusting and swelling of reinforcement, and later to cracking of concrete, or the presence of sulphides in bricks or calcium chloride additives or high alumina cement in concrete, leading to progressive decay analogous to a human disease of a *Cartledge* v. *Jopling*[58] character."

When one contemplates such facts, it is easy to see the force of Lord Denning's observation that a distinction between liability for remedial expenditure and liability for injury is impossible. Further powerful support for that view was furnished in *Anns* by Lord Wilberforce and Lord Salmon, with the concurrence of Lord Diplock, Lord Simon of Glaisdale and Lord Russell of Killowen. The only qualification of it in *Anns* is that Lord Wilberforce held[59] that *a* cause of action arises when the state of the building is such that there is present an imminent danger to the health or safety of persons occupying it. But beyond that Lord Wilberforce expressly left any issue of remedial action open.[60] Then again no less a lawyer than Laskin J. thought[61] that "Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure."

Yet in *Murphy* judges of the eminence of Lord Mackay of Clashfern L.C., Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle all unite in treating the distinction which Lord Denning called impossible as, on the contrary, a fundamentally sound distinction which should be restored and preserved. And they use quite strong language in rejecting the opinion of the Denning-Wilberforce-Laskin school. Words such as "capricious," "somewhat superficial," "a state of confusion defying rational analysis," "wholly unconvincing," "fallacy," "impossible" itself, appear in the *Murphy* speeches. Lord Brandon of Oakbrook and Lord Ackner concur without delivering separate speeches.

With such strong voices on each side, there is a very strong temptation to say that both must be right. In an analytical sense, that can indeed be said. The thought permeating the speeches in *Murphy*, repeated again and again in varying language to the same effect, is encapsulated in the following words of Lord Bridge in *D. & F. Estates*[62]:

"But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue* v. *Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel."

That is in contestable if the starting premise is that the only relevant head of negligence liability in tort requires injury to the person or actual damage to other property. Once those limits are taken as absolute save for exceptions which do not apply, there is of course no problem at all in rejecting tort liability. The permeating theme of *Murphy* and other recent House of Lords cases is only another way of saying the same; and it could be said no more authoritatively and forcefully than in the speeches of their Lordships. Moreover, as the speeches underline, the limits are perfectly consistent with *Donoghue* v. *Stevenson*,

a case of alleged illness where no issue arose about economic loss. On the other hand, the majority speeches in *Donoghue* v. *Stevenson* were patently not meant to close the categories of liability in negligence, so the decision in that great case could certainly not be said actually to require the decisions now reached in *D. & F. Estates, Murphy* and *Thomas Bates*. Analytically it was open to the House of Lords in those recent cases to decline to take further the ideas which won the day in *Donoghue* v. *Stevenson.* But, analytically, it was just as open to the House as constituted in the *Anns* and *Dorset Yacht* cases to take the more expansive approach. (I avoid the adjective "liberal" in this context as being emotive.) The choice was a policy one.

In making the more restrictive choice the present-day House of Lords have placed weight on the opinion of the Supreme Court of the United States of America, delivered by Blackmun J., in *East River Steamship Corporation* v. *Transamerica Delaval Inc.*,[63] a case decided in the Admiralty jurisdiction of that court in which a products liability claim relating to the manufacture of turbines was held not to lie where the product malfunctioned and injured only itself. There Blackmun J. expressed concern[64] that "contract law would drown in a sea of tort." The theme of the opinion is that damage to a product itself is most naturally understood as a warranty claim. One policy reason given is that the increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified. Warranty liability was treated as excluded by the particular agreements entered into between the several parties in that case.[65] It was accepted that where a warranty claim lies repair costs (*inter alia*) are recoverable. Realism would seem to suggest, therefore, that the route to a more direct solution to the issues in *Murphy* and the associated cases may begin with examination of the proper scope of warranty law.

Warranty law in America

In the United States of America, products liability claims appear to be governed mainly by state law and within the jurisdiction of state courts without rights to appeal to or review by the federal Supreme Court. Nevertheless it may be supposed that the *East River Steamship* case will be influential. It will have pleased, to some extent, those commentators who have argued that strict products liability has been carried too far in state courts, inhibiting entrepreneurial and manufacturing initiatives of public benefit.[66] But note the following passage in the *East River Steamship* opinion[67]:

> "Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies . . . In exchange the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, *cf. Henningsen* v. *Bloomfield Motors, Inc.*,[68] we see no reason to intrude into the parties' allocation of the risk."

To that passage Blackmun J. for the court appended a footnote:

> "8. We recognise, of course that warranty and products liability are not static bodies of law and may overlap. In certain situations, for example, the privity requirement of warranty has been discarded. *E.g., Henningsen* v. *Bloomfield Motors, Inc.* . . .

> In other circumstances, a manufacturer may be able to disclaim strict tort liability . . . Nonetheless, the main currents of tort law run in different directions from those of contract and warranty, and the latter seem to us far more appropriate for commercial disputes of the kind involved here."

Henningsen v. *Bloomfield Motors, Inc.*, referred to in both the body of the judgment and the footnote with apparent approval or at least without disapproval, is a leading case in which it was held in New Jersey, after a survey of the gradual erosion of the doctrine of privity in other state jurisdictions, that:

> ". . . an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of a car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an automobile for ordinary highway operation. Those persons must be considered within the distributive chain."[68A]

Modern English lawyers tend to assume, as did Blackmun J., that a warranty is necessarily contractual. In *Finnegan* v. *Allen*,[69] where Mr A. T. Denning K. C. persuaded Lord Greene M.R. that it was "quite fantastic" to suggest that a valuer's letter was a warranty that he had valued in accordance with his instructions, the Master of the Rolls said "Warranty is one of the most ill-used expressions in the legal dictionary, but its essence is contractual in nature and must be pleaded in terms sufficient to assert that contractual relationship." Legal historians tell us, however, that until the time of Lord Holt an action for breach of warranty was grounded in tort, being treated as a species of deceit.[70] Again *warranty* is a label and the substance of the obligation is more important than the way in which it is classified, though classification will be relevant for some purposes, such as (arguably) applying some limitation statutes. In *Williston on Contracts*[71] it is said that one of the great developments of the law of warranty in the twentieth century is the gradual erosion of privity of contract; and that a new form of action not necessarily grounded in either contract or tort has evolved: an action for breach of constructive warranty.[72]

Whatever may be the most appropriate classification of implied warranty liability, the Supreme Court's *East River Steamship* opinion was deliberately qualified by leaving room for such liability extending to third parties.[73] This serves to underline the relevance of looking at the way in which American courts have applied the concept in cases about housebuilding. No American cases on that subject or on the subject of local authority liability are mentioned in the speeches in *D. & F. Estates, Murphy* and *Thomas Bates.* Professor Fleming has spoken[74] of "one-sided and misleading" references to American case law. I suggest that this may be seen as an example of the problems created by the volume of available materials and other factors mentioned earlier in the present article.

In turning to the American housebuilding cases, I must make it clear both that I have been unable to undertake any comprehensive search and also that there are undoubtedly a number of states that, so far, continue to adhere to the privity requirement. I am not sure

how many, if any, states remain in which there is no redress whatever for remedial expenditure necessarily incurred by a "downstream" purchaser, even though negligence on the part of the builder or a controlling local authority be proved.[75] But it has been stated judicially[76] that by 1980 at least 35 state courts had afforded some measure of protection for purchasers of new homes by implying some form of warranty of habitability. And in this particular field there seems to be a growing tendency to dispense with the privity requirement, in line with what Williston applauds as a general achievement and the United States Supreme Court apparently accepts as legitimate in some fields at least.

For clear and scholarly judgments illustrating the trend, mention may be made of the opinions of Clark J. in the Supreme Court of California in *Pollard* v. *Saxe & Yolles Development Co.*[77]; Lewis C.J. in the Supreme Court of South Carolina in *Terlinde* v. *Neely*[78]; Clark J. in the Supreme Court of Illinois in *Redarowicz* v. *Ohlendorf*[79], Prather J. in the Supreme Court of Mississippi in *Keyes* v. *Guy Bailey Homes, Inc.*[80]; Locher J. in the Supreme Court of Ohio in *McMillan* v. *Brune-Harpenau-Torbeck Builders, Inc.*[81]; Gordon V.C.J. in the Supreme Court of Arizona in *Richards* v. *Powercraft Homes, Inc.*[82]; and Thayer J. in the Supreme Court of New Hampshire in *Lempke* v. *Dagenais.*[83] Some extracts from the judgment last cited, when the New Hampshire court changed its law (just as the House of Lords did in a different direction in *Murphy*), convey many of the reasons found in this line of cases. The following quotations omit references to the cases and writings cited. Although of some length, they are given because American reports are not always readily available:

> "We have previously denied aggrieved subsequent purchasers recovery in tort for economic loss and denied them recovery under an implied warranty theory for economic loss . . . The policy arguments relied upon in *Ellis* for precluding tort recovery for economic loss, in these circumstances, accurately reflect New Hampshire law and present judicial scholarship. . . and, as such, remain controlling on the negligence claim. However, the denial of relief to subsequent purchasers on an implied warranty theory was predicated on the court's adherence to the requirement of privity in a contract action and on the fear that to allow recovery without privity would impose unlimited liability on builders and contractors. Thus we need only discuss the implied warranty issue.
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> There has been much judicial debate on the basis of implied warranty. Some courts find that it is premised on tort concepts.
>
> . . .
>
> Other courts find that implied warranty is based in contract.
>
> . . .
>
> Other authorities find implied warranty neither a tort nor a contract concept, but 'a freak hybrid born of the illicit intercourse of tort and contract . . . Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract.'
>
> . . .
>
> Regardless of whether courts have found the implied warranty to be based in contract or tort, many have found that it exists independently, imposed by operation of law, the imposition of which is a matter of public policy.
>
> . . .

We continue to agree with our statement in *Elliott* that '[implied] warranties are not created by an agreement . . . between the parties but are said to be imposed by law on the basis of public policy. They arise by operation of law because of the relationship between the parties, the nature of the transaction, and the surrounding circumstances.'

. . .

. . . numerous jurisdictions have now found privity of contract unnecessary for implied warranty.

. . .

In keeping with judicial trends and the spirit of the law in New Hampshire, we now hold that the privity requirement should be abandoned in suits by subsequent purchasers against a builder or contractor for breach of an implied warranty of good workmanship for latent defects.

. . .

Numerous practical and policy reasons justify our holding. The essence of implied warranty is to protect innocent buyers. As such, this principle, which protects first purchasers . . . is equally applicable to subsequent purchasers . . . The mitigation of *caveat emptor* should not be frustrated by the intervening ownership of the prior purchasers. As a general principle, '[t]he contractor should not be relieved of liability for unworkmanlike construction simply because of the fortuity that the property on which he did the construction has changed hands.'

. . .

First, '[c]ommon experience teaches that latent defects in a house will not manifest themselves for a considerable period of time . . . after the original purchaser has sold the property to a subsequent unsuspecting buyer.'

. . .

Second, our society is rapidly changing. 'We are an increasingly mobile people; a builder-vendor should know that a house he builds might be resold within a relatively short period of time and should not expect that the warranty will be limited by the number of days that the original owner holds onto the property.'. . . 'the ordinary buyer is not in a position to discover hidden defects . . .'

. . .

Third, like an initial buyer, the subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction.

. . .

Fourth, the builder/contractor will not be unduly taken unaware by the extension of the warranty to a subsequent purchaser. 'The builder already owes a duty to construct the home in a workmanlike manner . . .' And extension to a subsequent purchaser, within a reasonable time, will not change this basic obligation.

. . .

Fifth, arbitrarily interposing a first purchaser as a bar to recovery 'might encourage sham first sales to insulate builders from liability.'

. . .

Economic policies influence our decision as well. '[B]y virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to . . . evaluate and guard against the financial risk posed by a [latent defect] . . .'

. . .

It is clear that the majority of courts do not allow economic loss recovery in tort, but that economic loss is recoverable in contract.

. . .

We agree with courts that allow economic recovery in implied warranty for subsequent purchasers, finding as they have that 'the contention that a distinction should be drawn between mere "economic loss" and personal injury is without merit'."

The court stressed that the implied warranty does not go beyond the use of the customary standard of skill and care. It is not strict liability. The builder is not an insurer. Further, it was said that the warranty is limited to a reasonable period of time. In England and Wales, the Latent Damage Act 1986 may sufficiently meet this point. The New Zealand Law Commission has recommended the same longstop limitation period, 15 years.

Negligence by inspectors

It is possible to deal here more briefly with the American law as to local authority liability in this field, for the position is conveniently summarised in Speiser, Kraus and Gans, *The American Law of Torts.*[84]

> "The authorities are apparently split on the subjection to liability of a municipality for the negligence, etc., of its safety inspectors—building inspectors and the like. The divergence seemingly stems from the 'general duty'—'special duty' dichotomy. If, in a jurisdiction, the duty owed by the municipality is deemed only a 'general' one owed to the public at large, then that municipality is not liable. But where this 'general duty' doctrine has been repudiated and rejected, the municipality (and/or its inspectors) may be held liable for inspectors' negligence.
> A leading case holding a municipality and its municipal building inspector liable, and reiterating a [*sic*] repudiating the 'general' or 'public' duty role, is *Wood* v. *Milin.*[85] This case holds that when plaintiffs' house partially collapsed due to serious structural and plumbing defects, the municipal building inspector is liable to plaintiffs for causing their losses by his negligence. Moreover, since plaintiffs, husband and wife, were owners of the house in joint tenancy, each of them could recover $25,000, the statutory ceiling on municipal liability. Evidence showed that when the wood frame of the house was completed, the inspector observed that the rafters and floor joists had not been constructed to building code requirements. Moreover, when the house was completed he failed to conduct a final inspection as required by the building code. He also knowledged he did not issue an occupancy permit for the house certifying that no code violations existed, as required by law. (At trial, experts testified that the construction and location of the joists supporting the main floor were defective and violated the building code, and that these defects existed at the time of original construction and caused the house's partial collapse. Additional testimony stated that the plumbing problems resulting from code violations which also existed at construction).
> Some other cases have reached a similar result of liability.
> On the other hand, in jurisdictions that cling to, and still espouse, the 'general' or 'public' duty principle, that concept has been held to bar recovery against a municipality or its inspector(s) for the latter's negligence."

As the Wisconsin Supreme Court crisply put it in *Wood* v. *Milin* "a duty to all is a duty to none." There is as much logic in holding the employing authority liable when an inspector carelessly allows a house to be built on unstable soil as there is when a pointsman carelessly signals a driver into an inevitable collision. As already mentioned and has been demonstrated by the Privy Council in *Brown* v. *Heathcote County Council,*[86] where inspections are habitually carried out before the issue of a permit the duty of care may be rationalised on the grounds of reliance or assumption of duty—if those concepts are regarded as helpful. Like much else in the broad field now under discussion, it is a question more of label or classification than of substance.

Where the local authority has been directly responsible for allowing a substandard house

on the market, so that it is not merely a case of vicarious liability, the grounds for imposing liability are even stronger. In *City of Kamloops* v. *Nielsen*,[87] the leading decision in this field in the Supreme Court of Canada, the evidence gave rise, as Wilson J. said in her judgment,[88] to a strong inference that the city, with full knowledge that the work was progressing in violation of the byelaw and that the house was being occupied without a permit, dropped the matter because one of its aldermen was involved. In those circumstances it seems altogether unsurprising that a remedy in negligence was allowed to the purchasers from the alderman. The case was touched on with a hint of disapproval in *Murphy*,[89] but without allusion to the facts just mentioned.

The merits

It is not easy to pinpoint in the speeches in the *Murphy* group of cases reasons why, as a matter of substantial justice, the United States courts which favour a housebuilder's liability to third parties for negligence, or a local authority's liability for carelessness on the part of inspectors, are wrong. Obviously this is partly explained by the fact that the House of Lords were not referred to any of the relevant decisions. But that is not the sole explanation. Their Lordships do not purport to approach the issues from the point of view of substantial justice—"the merits" as practising lawyers say. They are concerned rather with doctrinal difficulties or assumptions, and the floodgates argument. There is also an important point about legislation covering the field, to which I must return shortly.

With regard to doctrine, the difficulties would seem largely to disappear if the enlarged and commonsense conception of warranty is admitted. A number of observations by present members of the House of Lords tend to confirm this and can be seen as sowing the seeds for future growth of the law in a rational way, should the merits be thought to point in the direction of development. Lord Bridge's reference in *D. & F. Estates* to the benefit of a relevant warranty of quality has already been quoted. Lord Keith in *Murphy* combines both the doctrinal and the floodgates arguments by speaking[90] of the opening of "an exceedingly wide field of claims, involving something in the nature of a transmissible warranty of quality." In *D. & F. Estates* Lord Oliver has said[91] that to hold the manufacturer liable in tort for making good the defect would be to attach to goods a non-contractual warranty of fitness which would follow the goods into whosoever's hands they came. His Lordship regarded this as unsupported by authority (with of course the major exception of Lord Denning) and contrary to principle. With respect, there is much force in that analysis if one has not been given the opportunity of taking into account the relevant American expositions of principle.

The warranty approach would not naturally be apt as a basis for holding a local authority liable for negligence in inspection, but there seems to be no doctrinal difficulty here. If it be accepted that the authority's duty of care stems from control (and consequent reliance by home owners), there is nothing irrational in holding that the duty extends to taking reasonable care not to cause, or contribute to causing, economic loss to home owners. The risk of economic loss from being misled into the purchase of a home which deceptively looks stable is one of the very kinds of risk which the duty would be imposed to guard against. Remedial expense is precisely the kind of loss which due care would be likely to avert. In effect this is confirmed by the judgment of the Privy Council in *Brown*

v. *Heathcote County Council*[92] upholding a judgment for the cost of remedial works against a drainage board whose inspector had been negligent in granting an approval without checking flood levels. More generally, in *D. & F. Estates* Lord Oliver accepted[93] that the recovery of damages in negligence for pure economic loss is "now firmly established in New Zealand," referring to a case[94] in which the Court of Appeal had been concerned with the local authority's liability as well as that of the builder.

Notwithstanding the *Brown* case and what was said by Lord Oliver in *D. & F. Estates,* it is reasonably foreseeable that we in New Zealand may be faced with an argument that, as to the the liabilities of both builders and local authorities, New Zealand common law should now change course in the light of the recent House of Lords decisions. It would be inappropriate for me to comment on that issue. The point to be made here is that, for the foregoing reasons, purity of doctrine does not inexorably compel the denial of remedies in this field; the question is one of the merits or policy. The issues becomes, in Lord Keith's phrase in *Peabody Trust* v. *Sir Lindsay Parkinson Ltd.,*[95] whether it is just and reasonable that a duty of care of particular scope be incumbent on a defendant; and, as Lord Fraser of Tullybelton said for the Privy Council in *The Mineral Transporter,*[96] some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence. undoubtedly this requires, as Lord Keith has emphasised,[97] a careful analysis and weighing of all the competing considerations. Several elementary considerations stand out here.

First, it would be feasible, though not obligatory, to draw a distinction between realty and personalty, as is traditionally done in many branches of the law. The liability of a manufacturer of goods *need* not be the same as that of a housebuilder. Quite apart from the fairly basic distinction between land and chattels, generally speaking a house is expected to last longer than a product, though that is not invariably so. Products liability questions can be considered separately and in the light of any legislative background. Secondly, the floodgates argument is entitled to some weight, but not necessarily decisive weight, otherwise *Donoghue* v. *Stevenson*[98] itself would never have been decided as it was. Thirdly—and this is surely particularly significant—it is very widely recognised that home owners should have some remedy against negligent builders. Opinion is probably much more divided in relation to commercial buildings. It can be said that purchasers of such buildings should be able to look after themselves. The American cases on the warranty of habitability do not extend to them. In the New Zealand Court of Appeal all the relevant cases that we have had to consider so far have been about dwellings.

As to dwellings, the policy considerations which moved the English courts in *Dutton* and *Anns*, and United States courts in cases already cited, are so powerful that they have inspired independently the Defective Premises Act 1972, reflecting the finding of the Law Commission that considerable disquiet had been expressed in recent years about the operation of *caveat emptor* in the purchase of dwellings.[99] In the light of the American cases it is especially interesting that the Commission recommended and the legislature enacted what is in effect a transmissible warranty of habitability ("a duty to see that the work which he takes on is done in a workmanlike, or as the case may be, professional

manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed"). It might be no exaggeration to say that the reasons pointing towards such a duty as just and reasonable are overwhelmingly strong. Nor is there anything in the recent House of Lords cases to suggest that their Lordships think that home owners should be totally without remedy for negligently-caused economic loss.

Some changes can only be achieved by statute, and the desirability or otherwise of making them must be left to the legislature. An obvious example is a longstop limitation period, as was recognised in *Askin* v. *Knox.*[100] Another possible example is an upper limit or cap on damages awards against local authorities, on the ground that the community should not bear the whole burden of one citizen's loss, even though the community's representatives or officers have been at fault. As has been seen in the case of Wisconsin, some American states have enacted general provisions of this type. The initiative as regards protective legislation seems best left, however, to potential defendants, since they are usually represented by organisations or comprise pressure groups much better equipped to advance a case at the general level than the unorganised multitude of plaintiffs. In any event the onus should be on those who ask for protection to show that it is needed. The advice of law reform bodies is of course also valuable.

Nor would the courts wish to intrude by development of the common law if legislation already covers the field. It is at this point that one of the most difficult questions in the recent House of Lords cases arises. In *Murphy* the Lord Chancellor gave decisive weight[101] and the other Law Lords considerable weight[102] to the existence of the Defective Premises Act. It was thought that it would not be a proper exercise of judicial power to uphold *Dutton* and *Anns* in so far as those decisions accepted duties of care wider or other than the duties imposed by the Act. There may be some doubt whether this accords with the true intention of the Act. Section 6(2) expressly provides that any duty imposed by or enforceable by virtue of any provision of the Act is in addition to any duty a person may owe apart from that provision. Even in relation to the obligations imposed by their draft Bill, the Law Commission expressly left any future development of the common law free to take effect.[103]

In New Zealand we are disposed in matters of public policy to try to develop the common law, so far as necessary and with due caution, on a course parallel with that chosen by Parliament. We have been influenced by such approaches as that of Lord Diplock in *Erven Warnink* v. *J. Townend & Sons (Hull) Ltd.*[104] where, in a passing-off case, weight was given to the increasing recognition by Parliament of the need for more rigorous standards of commercial honesty. The consumer-protection policy of our Fair Trading Act 1986, an Act which has some application to land as well as goods, might be relevant when some of the questions discussed in this article arise for further judicial consideration.

In England and Wales, it may be argued, the need for common law development does not arise in the building negligence field, because Parliament has enacted the duties specified in the Defective Premises Act and at the same time has excepted from the Act approved schemes, an exception covering the National House-Building Council's 10-year warranty scheme. It has in fact been argued[105] by a New Zealand commentator, Professor J. A.

Smillie, that in their jurisdiction the House of Lords are correct in the belief that the imposition of a general common law duty is not necessary in order to provide house owners with adequate protection against loss for latent defects. He suggests that altogether the warranty scheme, plus the Act, plus the valuers' duty of care to house purchasers now established in such circumstances as are illustrated by *Smith* v. *Eric S. Bush*,[106] sufficiently meet the needs of justice. As to New Zealand on the other hand he argues that, in the absence of any scheme with the wide application of the N.H.B.C. one, the existing New Zealand common law as to housebuilding negligence should be maintained unless and until compulsory insurance by new residential building owners is introduced by legislation (which he advocates).

It is certainly striking that in *Murphy* Lord Keith was able to say[107] that most litigation involving *Anns* consists of contests between insurance companies. There has been no suggestion that such is the position in New Zealand. Therein lies one of the background differences. It may be as well to add that in New Zealand liability in damages for personal injury caused by accident is abolished in favour of statutory compensation.[108] Nevertheless accident prevention is an important statutory objective, and remedial measures to that end would tend to save community costs. But those are local considerations. For present purposes it may be more useful to note that, as to England, Mr. Duncan Wallace, taking a view radically different from that of Professor Smillie, argues[109] that the "approved scheme" section of the Defective Premises Act should be removed, as serving "no useful purpose save to provide a producer-oriented escape route for invested interests"; and that there should be a range of other legislative reforms. He suggests *inter alia* "more considered legislation regulating tortious liability for defective buildings as a whole."

I am not sufficiently well-informed to venture a view about the overall adequacy of the present English system for protecting home owners. Perhaps the following suggestion may appertain more to the outlook of a judge. The likely incidence of insurance ("cost-spreading") is a factor in working out negligence liability,[110] but need not be the dominant one. From the point of view of evolving common law principle, the dominant policy factors should be the straightforward canons of conduct generally accepted in the community, however imperfectly observed by most of us. After all, it is from ethical considerations rather than any theory of loss-spreading that *Donoghue* v. *Stevenson* derives.

Fifteen years ago, as a junior appellate judge in *Bowen* v. *Paramount Builders Ltd.*,[111] I would have preferred to await the then pending decision of the House of Lords in *Anns* before the court tried to decide the law of New Zealand, but did not see why the law of tort should necessarily stop short of recognising a duty not to put out carelessly a defective thing, nor any reason compelling the courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it.[112] The *Anns* decision came later and was broadly to the same effect as ours, though the reasoning was rather different. In the subsequent New Zealand cases it was easy to harmonise with *Anns*. No one has betrayed the slightest inclination to pick up and run with the slightly older ball dropped in *Bowen*. The more recent turn of events in England leaves me with nothing for

it but to do so myself. In the intervening years I have at least learnt that there is nothing magic in the word *tort*.

The point is simply that, prima facie, 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. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. 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

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1. [1972] 1 Q.B. 373 at p. 396.
2. [1971] 1 Q.B. 337.
3. [1979] Ch. 384.
4. *Coggs* v. *Bernard* (1703) 2 Ld. Rym. 909 at p. 911; 93 E.R. 107 at p. 108; Holdsworth, *History of English Law*, Vol. VIII, p. 68; *Williston on Sales* (4th ed.), Vol. 2., at pp. 322-331.
5. [1978] A.C. 728.
6. (1988) 1 S.C.J. 249 (the Malaysian Supreme Court Journal).
7. [1989] A.C. 177.
8. [1990] 3 W.L.R. 414.
9. [1977] 1 N.Z.L.R. 394.
10. [1990] 3 W.L.R. at p. 417.
11. [1989] 1 N.Z.L.R. 252.
12. [1990] 3 W.L.R. at p. 419.
13. [1989] 1 N.Z.L.R. at p. 253.
14. *Ibid.*, p. 254.
15. See, for instance, *Williams* v. *Att.-Gen.* [1990] 1 N.Z.L.R. 646 at p. 687 *per* Casey J.
16. [1978] 1 N.Z.L.R. 553 at pp. 580-585.
17. [1990] 2 W.L.R. 358 at pp. 391-392.
18. [1988] A.C. 473 at p. 501.
19. *Williams* v. *Att.-Gen.* [1990] 1 N.Z.L.R. 646 at p. 656 *per* Tipping J.
20. [1970] A.C. 1004.
21. [1932] A.C. 562.
22. [1990] 3 W.L.R. 457.
23. [1990] 3 W.L.R. at p. 424 (Lord Keith), p. 436 (Lord Bridge), p. 447 (Lord Oliver), p.452 (Lord Jauncey).
24. *D. & F. Estates* [1989] 1 A.C. at p. 213, *per* Lord Oliver.
25. *Dutton* [1972] 1 Q.B. at p. 394.
26. [1932] 1 K.B. 458.
27. [1990] 3 W.L.R. at pp. 436-439, 444, 455-456.
28. *Ibid.*, at pp. 438-439, 456.
29. *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.
30. See for example [1990] 3 W.L.R. at pp. 427 and 441.
31. *Mount Albert City Council* v. *New Zealand Municipalities Co-operative Insurance Co. Ltd.* [1983] N.Z.L.R. 190 at p. 196.
32. *Pace* Lord Salmon in *Anns* [1978] A.C. at p. 769.
33. [1990] 3 W.L.R. at pp. 446-447.
34. [1980] Ch. 297. For a variant, see *Gartside* v. *Sheffield Young and Ellis* [1983] N.Z.L.R. 37 (disappointed beneficiary owed duty of care by allegedly dilatory solicitor).
35. [1990] 3 W.L.R. at p. 436. Lord Oliver expresses reservations at p. 448.
36. Professor J. G. Fleming makes the same point in (1990) 106 L.Q.R. at p. 527.
37. The Law Book Co. Ltd., Sydney, 1989.
38. *Ibid.*, at pp. 41-42.
39. [1970] A.C. at pp. 1058-1059.
40. (1787) 2 Term Rep. 63; 100 E.R. 35.
41. (1868) L.R. 3 H.L. 330.
42. (1866) L.R. 1 C.P. 274.
43. [1932] A.C. 562.
44. *Caparo Industries Plc.* v. *Dickman* [1990] 3 W.L.R. 358 at p. 365 *per* Lord Bridge; *Murphy* [1990] 3 W.L.R. at p. 442 *per* Lord Keith; *Curran* v. *Northern Ireland Housing Association* [1987] A.C. 718 at p. 726 *per* Lord Bridge.
45. (1985) 157 C.L.R. 424 at p. 481.
46. [1990] 3 W.L.R. at p. 426.
47. *Dutton* v. *Bognor Regis Urban District Council* [1971] 2 All E.R. 1003.
48. *Grote* v. *Chester and Holyhead Ry. Co.* (1848) 2 Ex. 251; 154 E.R. 485 (railway bridge); *Brown* v. *T. &*

E.C. Cotterill (1934) 51 T.L.R. 21 (tombstone); *Sharpe* v. *E.T. Sweeting & Son Ltd.* [1963] 1 W.L.R. 665 (concrete canopy); *Gallagher* v. *N. McDowell Ltd.* [1961] N.I. 26 (hole in floor); *Clay* v. *A.J. Crump & Sons Ltd.* [1964] 1 Q.B. 533 (wall).

49. [1971] 2 All E.R. at p. 1009.
50. [1912] 1 K.B. 118.
51. *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424 at p. 498.
52. A leading example of this usage is in the speech of Lord Bridge in *Murphy* [1990] 3 W.L.R. at p. 434.
53. [1972] 1 Q.B. at p. 380.
54. [1990] 3 W.L.R. at p. 418.
55. Except possibly *Bottomley* v. *Bannister* [1932] 1 K.B. 458. See [1978] A.C. at p. 768 *per* Lord Salmon. But it now appears to be agreed on all sides that *Bottomley* v. *Bannister* is not good law.
56. (1989) 105 L.Q.R. 46; (1978) 94 L.Q.R. 60; (1977) 93 L.Q.R. 16.
57. 105 L.Q.R. at pp. 57-58.
58. [1963] A.C. 758.
59. [1978] A.C. at pp. 759-760.
60. Lord Wilberforce needs no defenders, but it does seem perhaps a little hard to reject the option of building on his work in *Anns*, which he manifestly did not intend to be the last word on the subject, because he did not go on to discuss the recoverability of remedial expenditure incurred at an earlier stage: see [1990] 3 W.L.R. at p. 418.
61. *Rivtow Marine Ltd.* v. *Washington Iron Works* (1973) 40 D.L.R. (3d) 530 at p. 552.
62. [1989] A.C. at p. 206.
63. 476 U.S. 858, 90 L.Ed. 2d 865, 106 S.Ct. 2295 (1986).
64. 476 U.S. at p. 866.
65. *Ibid.*, at p. 875.
66. A vigorous and sustained example of this criticism is *Liability, The Legal Revolution and its Consequences* by Peter W. Huber (Basic Books Inc., New York, 1988). The author assails as impractical idealists "the Founders"—Dean Prosser, Professor John Wade, Traynor C.J. of California—and argues that consumers should arrange their own insurance.
67. 476 U.S. at pp. 872-873.
68. 32 N.J. 358, 161 A.2d 69 (1960).

68A. 161 A.2d at p. 100.

69. [1943] K.B. 425 at p. 430.
70. A few of the many references that could be given appear in n. 4, *supra*.
71. 3rd ed., Vol. 8, at pp. 734, 744.
72. Some of the reasons for the American development are forcefully put in *Inglis* v. *American Motors Corporation* (Oh.App.) 197 N.E. 2d 921 (1964) in a passage adopted in Williston. "Courts today have taken cognizance of the evolution of merchandising whereby today's retailer, as contrasted to one in bygone days, is in most instances the conduit through which sales are made. Through this change in relationship the purchaser has relied solely on the reputation of the manufacturer and its advertising which is disseminated through various media such as television, radio, newspapers and the like, extolling the virtues of the product and is primarily directed at the ultimate consumer. From the cumulative efforts of this advertising and upon its reliance, the sale is made before the purchaser ventures to the retailer's place of business."
73. If the liability be regarded as purely contractual, the recognition of third party rights is in harmony with the majority judgments in the High Court of Australia in *Trident General Insurance Co. Ltd.* v. *McNiece* (1988) 165 C.L.R. 107.
74. (1990) 106 L.Q.R. 525 at p. 530.
75. As to the builder, authority appears to have been fairly evenly divided in 1981, according to an annotation in 10 A.L.R. 4th 385. See further the cases collected by Mr. Duncan Wallace in (1978) 94 L.Q.R. at pp. 70-72.
76. *Redarowicz* v. *Ohlendorf* 441 N.E.2d 324 at p.329 (1982), a decision of the Supreme Court of Illinois.
77. 525 P.2d 88 (1974).
78. 271 S.E.2d 768 (1980).
79. *Supra*, n. 76.
80. 439 So.2d 670 (1983).
81. 455 N.E.2d 1276 (1983).
82. 678 P.2d 427 (1984).
83. 547 A.2d 290 (1988).
84. (1988) Vol. 5, pp.414-415.
85. 134 Wis.2d 279 (1986).
86. [1987] 1 N.Z.L.R. 720.

87. (1984) 10 D.L.R. (4th) 641.
88. *Ibid.*, at p. 673.
89. [1990] 3 W.L.R. at p. 434.
90. [1990] 3 W.L.R. at p. 430.
91. [1989] A.C. at p. 212.
92. *Supra*, n. 86. The board of the Judicial Committee was Lord Templeman (who delivered the judgment), Lord Keith, Lord Brandon and Lord Griffiths and Sir Robert Megarry. The judgment puts it at p. 726. ". . . authorities such as the Drainage Board exist to protect the ignorant and those whose little knowledge is dangerous."
93. [1989] A.C. at p. 216.
94. *Mount Albert Borough Council* v. *Johnson* [1979] 2 N.Z.L.R. 234.
95. [1985] A.C. 210 at p. 241.
96. *Candlewood Navigation Corporation Ltd.* v. *Mitsui O.S.K. Lines Ltd.* [1986] A.C. 1 at p. 25.
97. *Supra*, text to n. 18.
98. [1932] A.C. 562.
99. *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com. No. 40, 1970).
100. *Supra*, n. 11
101. [1990] 3 W.L.R. at p. 419.
102. *Ibid.* at pp. 433, 441, 451, 457.
103. Para. 73 of their report, *supra*, n. 99.
104. [1979] A.C. 731 at p. 743. See for example *Dominion Rent a Car Ltd.* v. *Budget Rent a Car Systems (1970) Ltd.* [1987] 2 N.Z.L.R. 395, 407. See further P. S. Atiyah, "Common Law and Statute Law," (1985) 48 M.L.R. 1.
105. [1990] N.Z.L.J. 310 at p. 314.
106. [1989] 2 W.L.R. 790.
107. [1990] 3 W.L.R. at p. 432.
108. Accident Compensation Act 1982.
109. (1989) 105 L.Q.R. at pp. 77-78.
110. See *Mayfair Ltd.* v. *Pears* [1987] 1 N.Z.L.R. 459 (car parked without authority catching fire for unknown reasons; owner held not liable for fire damage to parking building).
111. [1977] 1 N.Z.L.R. 394.
112. *Ibid.*, at pp. 423-424.