F W Guest Memorial Lecture 1990

NEGLIGENCE AND THE HOUSE THAT JACK BUILT

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Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

It is a great honour to be asked to deliver the F W Guest Memorial Lecture. When I began my study of the law in this university in 1966, I was fortunate to have been one of Professor Guest's students. In the relatively short time I knew him I developed a profound and lasting admiration and respect for him. His was a rare combination of the attributes of a philosopher, scholar, teacher, and practitioner of the law. As a teacher he was quiet, incisive and compelling; his love of the law and philosophy was obvious and he had the ability to inspire his students to strive for the same qualities he possessed.

My own career in the law has been as tradesman rather than scholar, but many of the precepts of the philosophy of the law which he taught have remained with me. One of those was his teaching that the law had to strive to maintain a balance between the ideal of doing perfect justice, and the pragmatic need for certainty.

In a less than perfect world the former must often yield to the latter, but only to the minimum extent necessary to enable people to know the law and order their affairs in accordance with it. Those competing demands of justice and certainty are of particular relevance to the subject of this paper.

Despite the substantial social and economic changes which have occurred in our society in the last ten years, home ownership remains one of the prime goals of most New Zealand families, and the most important single investment they will ever make. It is not only an investment of hard-earned savings, but in many cases an investment of time, effort, imagination and personal involvement to the extent that the whole is much more than the sum of the constituent parts of wood, bricks and mortar. It becomes an integral part of the family unit itself – an extension of its personality.

Being such a central feature of family life, it is an investment deserving of legal protection. There are, I suggest, a number of aspects in respect of which the law ought to provide a remedy in the event of unlawful (and therefore tortious) interference. The first of these is so fundamental that it has long been recognised and protected by the courts, namely, the right

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of security from unwanted intrusions, whether by physical entry or by indirect means which interfere with the enjoyment of occupation. It is so fundamental that it extends beyond the proverbial home and castle of the Englishman to all kinds of property, and beyond full ownership to rights of lawful possession and occupation. This protection is enshrined in the law of trespass and nuisance.

The second is not so much an interest in the property itself but an interest in the health and safety of the occupants, which is to be protected by ensuring that the dwelling is safe for human occupation and providing a remedy where safety is endangered by the tortious acts of others. However, if the remedy necessarily involves the provision of the means of making good the physical defects in the structure itself or compensating the owner if the defects are irrepairable, then the financial interests of the owner are indirectly protected. It has been primarily in the twentieth century that this interest has been recognised as worthy of protection, both by legislatures and the common law.

The third and fourth are the financial or economic interests of the owner or owners independent of questions of physical health and safety, and the intangible but nonetheless real interests of freedom from the emotional stresses when the security of the financial and personal investment in a home are threatened. Those residents of Ocean View who have recently discovered that their homes have been built over a long abandoned mine, now threatened by collapse, will be acutely aware of this reality. It is the extent of the legal protection which is afforded to these latter interests that is the prime subject of this paper.

To a generation of lawyers taught that the foundation stone of the modern law of negligence is the Atkinian concept of proximity propounded in *Donoghue* v *Stevenson*[1] there is little difficulty in accepting as a general proposition that contract aside, a builder who negligently erects a dwelling should be liable to the owner when damage ensues as a consequence. The foreseeability of harm is so obvious and the causal relationship so direct that one has little difficulty with the proposition that in law the builder is the "neighbour" of the owner – whether original or a subsequent purchaser. I would venture to suggest that if one were to ask the hypothetical "officious bystander" or "person on the Clapham omnibus" whether that should be so, the reply would be akin to that of Mr Bumble's, that the law would be an ass were it not.

The role of local government in the control and development of land subdivision and housing is so broad and pervasive in modern times that when Lord Denning, in the seminal decision in *Dutton* v *Bognor Regis Urban District Council*[2] in December 1971, held that the Council was liable for damage caused by defective foundations which its building inspector had negligently approved, again there was little conceptual difficulty in accepting the decision as being an application in a then novel field of the established principles of the law of negligence. I leave aside for the moment

1 [1932] AC 562.
2 [1972] 1 QB 373.

the more controversial question of the heads of damage recoverable as a consequence of such negligence.

The development of the common law does not take place in a vacuum, but is a response, often slow and conservative, to changes in the economic and social environment of the populace it serves. It is helpful therefore to examine the context in which the developments about to be discussed took place.

The post-war baby boom and the buoyant and expanding economy of New Zealand in the 1950's and 1960's created an increasing demand for new housing stock to accommodate the rapidly growing population. Immigrants from war-ravaged Britain and Europe, quick to adopt the Kiwi ethic of home ownership as a normal incident of family life, contributed to the demand. The influx of Polynesian immigrants which came later maintained the momentum which had built up as the building industry mushroomed to meet the demand.

New legislation was enacted to regulate the burgeoning growth of urban development;[3] standard building by-laws were expanded and widely adopted by local authorities.[4] Additional staff was required to cope with the volume of supervision required.

Against that background it was perhaps inevitable that a percentage of houses should be built in a manner which left much to be desired. Whether this occurred through inadvertence, ignorance or design is unprofitable and unnecessary to debate. Suffice to say that although the majority of those in the industry, employers and employees, were competent and conscientious tradesmen, nonetheless there was a smattering of those whose motto was "she'll be right", as well as the out and out "cowboys" and "short-cut merchants". In this respect I speak from personal experience.

When these defects began to manifest themselves the New Zealand courts were able to follow the lead already established in the United Kingdom by Lord Denning. In the late 1970's, the Court of Appeal in such cases as *Mt Albert Borough Council* v *Johnson*[5] and *Bowen* v *Paramount Builders (Hamilton) Ltd,*[6] dealing with situations of houses built on filled ground where the foundations had not been carried down to solid, was faced with a fact situation with an uncanny resemblance to that in *Dutton* — and one which was to become all too familiar in the Courts of the Commonwealth.

These developments, I suggest, were the seeds from which was to grow a certain independence of approach in the Court of Appeal when courts in the United Kingdom and Australia began to develop the law in a different direction. The approach taken by the New Zealand courts was such as would in my view readily be approved by the "officious bystander" or "reasonable person".

3 Town and Country Planning Act 1953.
4 NZSS 1900.
5 [1979] 2 NZLR 234.
6 [1977] 1 NZLR 394.

In the United Kingdom similar problems had surfaced some years earlier as a result of similar pressures of different origin. I shall return later to the significance of the time differential. The decision in *Dutton* was given two days after the report of the Law Commission of the United Kingdom on civil liability for defective structures[7] was released, which recommended that a statutory right of action be given to owners of houses suffering damage as a result of faulty construction and inspection, but not to owners of commercial developments.

The report found legislative expression in the form of the Defective Premises Act 1972, which was enacted on the 29th of June 1972, and came into force on the 1st of January 1974. For present purposes, I have endeavoured to summarise its principal features as follows:

(a) It casts a duty on persons taking on work for or in connection with the provision of a dwelling (but not other forms of building) to see that the work carried out is done in a workmanlike or, where appropriate, professional manner and with proper materials so that as regards that work the dwelling will be fit for human habitation when completed.[8]

(b) The duty is owed to the person to whose order the dwelling is provided and to every person who acquires an interest, legal or equitable, in the dwelling.[9]

(c) Where a person takes on work on terms that he is to perform it in accordance with instructions given by or on behalf of another, he is deemed to have discharged the duty if the work has been performed in accordance with those instructions. However, a person is not to be treated as having given such instructions simply by having agreed to specified materials or design.[10]

(d) The duty does not apply in any case where rights in respect of defects in a dwelling are conferred under a scheme approved by the Secretary of State which itself confers contractual rights in respect of defects, and a certificate is issued to the effect that the requirements as to design or construction under the scheme have been substantially complied with.[11]

(e) For the purposes of the Limitation Acts, a cause of action in respect of a breach of the duty is deemed to have accrued at the time the dwelling was completed, or if further work is carried out to remedy defective work, at the completion of the remedial work.[12]

This legislation has no direct equivalent in New Zealand and its existence does not appear to have been noticed in the indigenous jurisprudence on the subject. Its nearest equivalent was the now repealed Building Guarantee

7 *Civil Liability of Vendors and Lessors for Defective Premises* Law Com No 40 (15 December 1970).
8 Section 1.
9 Section 1(a) and (b).
10 Section 1(2) and (3).
11 Section 2.
12 Section 1(5).

Corporation Act 1977, a masterpiece of quango creation in the idiom of the time. Running to 44 sections, it contained three which enpowered the Corporation to enter into contracts indemnifying homeowners from losses arising from defective workmanship – in the Corporation's discretion and subject to such conditions as it chose – for a period not exceeding three years from the completion of the dwelling. The remaining 41 sections were devoted to such weighty matters as the constitution, powers, and remuneration of this latest addition to the bureaucratic establishment.

The direction in which the New Zealand courts were developing the law in this field were given further impetus by the speeches in the House of Lords in *Home Office* v *Dorset Yacht Club,*[13] *Anns* v *Merton London Borough Council*[14] and *Junior Books Ltd* v *Veitchi Co Ltd.*[15] The first two in conjunction with *Donoghue* v *Stevenson,* became a trilogy which was widely regarded as settling the modern principles for determining whether a duty of care should be held to exist in a given fact situation. In particular, the two stage approach propounded by Lord Wilberforce in *Anns,* namely, first, to consider whether the relationship between the parties was of such proximity that in the reasonable contemplation of one that carelessness on his part was likely to cause harm to the other, and secondly, whether there were any policy reasons to outweigh the desirability of liability arising out of the first, became the touchstone.

The third, read in conjunction with *Anns,* was seen as heralding the demise of the doctrine that liability in negligence would not extend to enable recovery of "pure economic loss" – economic loss not accompanied by any form of physical damage. The conventional view had been that damages in tort were available only in respect of injury to the person or to property other than to the defective article itself. In *Anns,* Lord Wilberforce, deriving support from the New Zealand Court of Appeal in *Bowen,* and the Canadian Supreme Court in *Rivtow Marine Ltd* v *Washington Iron Works & Walkem Machinery & Equipment Ltd*[16] held that the recoverable damages included the cost of repairing the dwelling (ie the defective article itself) to render it no longer a danger to health and safety. Further, his Lordship was of the view that the damages might possibly include the expenses arising from temporary relocation of the occupants whilst the work was carried out.

In *Junior Books,* a majority concluded that the manufacturer of a defective floor, who was not in a contractual relationship with the factory owner (although the relationship was said to be so close as to be all but contractual), was liable in negligence to the factory owner for the cost of replacing the floor and associated expenses such as costs arising out of disruption of business, notwithstanding that there was no suggestion that there was danger to personal safety or to other property. This was consistent with the position already adopted in New Zealand.

13 [1970] AC 1004.
14 [1978] AC 728.
15 [1983] 1 AC 520.
16 [1973] 6 WWR 692.

Subsequently, however, the appellate courts of the United Kingdom, and the House of Lords in particular, began to develop the law in the building field in a way which reflects the differing matrix of statutory social and economic considerations from those which exist in New Zealand. Of particular significance is the fact that homeowners in the United Kingdom have the statutory right of action under the Defective Premises Act 1972; I suggest that it is no coincidence that a significant number of cases in which the English courts have adopted an approach which diverges from that in New Zealand (soon to be discussed) have been concerned with building developments of a commercial or industrial nature. (In that category I include residential developments intended for commercial investment as opposed to individual ownership.) In those cases the courts have been concerned to protect the personal safety of occupiers rather than the economic interests of owners. That emphasis I submit is conditioned by the statutory, economic and social environment in which those courts function.

The New Zealand courts were faced with a situation in which, in the absence of a remedy against builders and local authorities whose negligence had in some degree facilitated the shoddy workmanship of the former, innocent families would be faced with financial and emotional distress or disaster. In at least one instance the social desirability of the risk being spread through the wider community via the medium of insurance was expressly acknowledged – see the judgment of Woodhouse J in *Bowen.*[17] I suggest that premise may well be implicit in the reasoning of other decisions.

THE RETREAT FROM *ANNS* AND THE DIVERGENCE BETWEEN ENGLISH AND NEW ZEALAND LAW

The speeches in *Anns* were delivered in May 1977. Since that time there has been a wealth – some would say a plethora – of cases in the United Kingdom and to a lesser extent in New Zealand and other Commonwealth jurisdictions arising out of defective construction. In a large number the main ground of complaint has been inadequate or defective foundations. The interpretation and application of the limitation consequences of the decision has occupied a very substantial portion of the Official Referee's lists, and a goodly portion of the Court of Appeal's business also. However, those building cases which reached the House of Lords after *Junior Books,* beginning with *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners*[18] in 1983 and progressing to *D & F Estates Ltd* v *Church Commissioners for England*[19] in 1989, have had the cumulative effect of substantially overruling both *Anns* and *Junior Books,* or at least severely restricting their respective applications.[19a] The decision of the High Court of Australia in

17 Supra n 6 at 419.

18 [1983] 2 AC 1.

19 [1989] AC 177 [Noted by D Fox in this issue of the Otago LR – Ed.]

19[a] On 26 July 1990, as this paper was going to the printers, the House of Lords in *Murphy* v *Brentwood District Council* pronounced that *Anns* was wrongly decided and that *Dutton* should be overruled: see *The Times* 27 July 1990.

The Council of the Shire of Sutherland v *Heymans*[20] in 1985 is an example of this trend which is much closer to home.

The first line of attack was in relation to the limitation aspects of the *Anns* decision. Lord Wilberforce had apparently endorsed the reasoning of the English Court of Appeal in *Sparham-Souter* v *Town and Country Developments (Essex) Ltd*[21] that the cause of action did not arise until the defect was discovered or ought with reasonable diligence to have been discovered – the same view which had commended itself to our Court of Appeal in *Johnson.* In *Pirelli,* the House of Lords took the opposite view and held that the cause of action accrues and time begins to run when the first physical damage occurs, regardless of whether it is then discoverable. It was said that Lord Wilberforce had not approved the decision in *Sparham-Souter* at all but had merely "narrated the conflict between the cases of *Dutton* and *Sparham-Souter* without expressing any preference".[22] The possible harshness and absurdity of the consequences of that ruling were recognised but said to be a matter for the legislature, not the courts, to remedy. The legislature in England responded appropriately by the enactment of the Latent Damage Act 1986, which in general terms provides that the cause of action accrues when damage becomes reasonably discoverable, and prescribes a limitation period of three years from that date, subject to a "longstop" provision that all claims are barred after 15 years from the completion of the defective work. However, the Act is applicable only to buildings erected after its enactment, leaving the *Pirelli* decision to operate to the full extent of its harshness and absurdity in other cases. This state of affairs has led to what one writer has described as a "highly suspect form of expert evidence, constituting a new kind of building 'archaeology' aimed at establishing the dates of first damage".[23]

The experience of the English courts and the Official Referee's division in particular, where such cases have been estimated to comprise almost half the list, has shown the impracticality of this ruling and its propensity to spawn litigation due to the inherent uncertainties in fixing the date of occurrence of the "first damage" perhaps years after the event. The case of *London Congregational Union Inc* v *Harriss & Harriss*[24] provides an example, where part of the exercise involved trying to ascertain when dampness first affected plaster which it had penetrated due to the absence of a damp-proof course between the foundation and brickwork. In *Pirelli,* Lord Fraser had suggested that in certain circumstances, namely where the defect was so serious that the building was "doomed from the start",[25] the limitation period could begin to run as soon as the building was erected. Not surprisingly, this suggestion was quickly seized upon by defendants who saw no moral objection to asserting in their own defence that as a result of their negligence the building, though it had lasted the length of

20 (1985) 157 CLR 424.
21 [1976] QB 858.
22 Supra n 18 at 71.
23 I N D Wallace, "Negligence and Defective Buildings: Confusion Confounded?" (1989) 105 LQR 46 at 58.
24 [1988] 1 All ER 15.
25 Supra n 18 at 72.

the limitation period, was so defective that damage was inevitable, therefore it was "doomed from the start" and that therefore they should escape liability! Fortunately, that particular line of defence was firmly discouraged by the English courts, the Court of Appeal holding that it could only be in exceptional cases that it could apply. It was given the coup de grace by Lord Keith in *Ketteman* v *Hansel Properties Ltd,*[26] when he said "whatever Lord Fraser may have had in mind in uttering the dicta in question it cannot . . . have been a building with a latent defect which must inevitably result in damage at some stage. That is precisely the kind of building that the *Pirelli* case was concerned with, and in relation to which it was held that the cause of action accrued when the damage occurred."[27]

The Supreme Court of Canada in *City of Kamloops* v *Nielsen*[28] has refused to follow *Pirelli.* The issue has not yet arisen squarely in the New Zealand Court of Appeal, although it has been the subject of extensive dicta by Cooke P in *Askin* v *Knox.*[29] In that case a ruling was not required, as the appellant plaintiffs had not proved negligence, although a bench of five judges had been assembled to deal with the issue if it became necessary. The President, delivering the judgment of the Court, observed:

> . . . an unsatisfactory disharmony exists at present between New Zealand law and English law. It may have developed partly, though certainly not wholly, because relevant cases have fallen to be decided in New Zealand before the House of Lords has settled the corresponding English law, and then the New Zealand cases have not been cited in argument in the House of Lords.[30]

Having discussed the case law and legislation he then continued:

> This Court is of course willing to deal with the problems if and when a case squarely raising the issue arises. But we venture to suggest that individual litigants should not be left to bring the issue to resolution and that there is a strong case for legislation. *Pirelli* produces results so obviously unjust that in England and Wales they have been remedied by the Latent Damage Act 1986. It is quite an elaborate act but apparently to substantially the same effect as *Bowen* and *Johnson,* with the important addition of a longstop period . . . It is true that by declining to follow *Pirelli* this Court might be able to avert most of the injustices caused by that decision, but to introduce a longstop would not be within our power. That could only be done by legislation. There is ground for treating negligence in building and building control as a special subject with its own problems and for enacting a longstop period, in the context of an Act similar to the English one or a more general Limitation Act . . . We express no opinion as to what period is fairest; that is a question of policy for Parliament and the advice of the Law Commission would be appropriate. We respectfully commend this matter to their attention.[31]

The judgment in *Askin* v *Knox* was delivered in July 1988. Despite the fact that in 1987 the New Zealand Law Commission had released a discussion paper on the Limitation Act 1950[32] containing a discussion on

26 [1988] 1 All ER 38.
27 Ibid at 51.
28 (1984) 10 DLR (4th) 641.
29 [1989] 1 NZLR 248.
30 Ibid at 254.
31 Ibid at 255.

the problems arising from *Pirelli* and a proposal for reform generally along the lines of the English Act, but of general application to all causes of action, no Bill has yet been introduced to the house. Given the record of legislative indifference to date, there appears to be little prospect of reform in the near or medium term.

The second major area of divergence has been in the scope of the duty of care and consequentially the recoverable heads of loss. In the *D & F Estates* case the House of Lords has effectively reversed the law as it has been conceived to be since *Dutton* and applied by the New Zealand and English Courts of Appeal for almost 20 years. Put briefly, the effect of the decision is that the duty of care now firmly established at common law on the part of builders is a duty to take reasonable care to see that the building will not be so defective as to cause physical injury to persons or physical damage to property *other than the building itself.* Thus the damages recoverable for breach of the duty of care do not include the cost of repairing the building itself. Since in virtually every case this will be the major head of loss, and most of the other losses will be incidental to it, eg engineering fees, temporary relocation expenses, and in New Zealand no action lies for personal injuries at common law, there will be effectively no remedy.

In the course of the speeches their Lordships confined *Junior Books* to its own facts, cited with approval the dissenting speech of Lord Brandon, and declined to follow *Bowen, Johnson* and *Anns.* The reasoning is simply that in the case of damage to the building itself or it being defective and requiring repair the loss is purely economic. The law of negligence had never provided a remedy in such cases in the absence of a contractual relationship between the parties, and the previous decisions had been in error in extending the law to cover such cases. Lord Bridge described the position thus:

> If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself then the manufacturer is liable. But if the hidden defect is discovered before any damage is caused then there is no longer any room for the application of the *Donoghue* v *Stevenson* principle. The chattel is now defective in quality, but it 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 it is not recoverable in tort by a remote buyer or hirer of the chattel. If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it, would seem to be purely economic.[33]

I confess to some difficulty in grasping the logic of the proposition that the bottle of unstable nitro-glycerine which I bought as some perfectly harmless substance ceases to be dangerous as soon as I discover its true

32 *The Limitation Act 1950* Law Com Preliminary Paper No 3 (1987).
33 Supra n 19 at 206.

nature and propensity to explode. Likewise I find difficulty in the proposition that my house, which is in imminent danger of collapse, ceased to be a threat to person or property the moment I became aware of its condition.

In the same vein, Lord Oliver, by way of example, discussed the case of a negligently manufactured tyre which bursts due to the defect in manufacture.[34] If it causes damage to other property, eg the car, or personal injury, then an action will lie against the manufacturer in tort; however there is no corresponding action in respect of the cost of replacing the tyre for in that case the loss is purely economic.

To this one might well be tempted to reply that the owner of the tyre whose other property is damaged as a result of the exploding tyre will also have to either repair or replace or dispose of his damaged property and his loss is therefore purely economic also. One might also postulate that the foreseeability of that loss is somewhat more remote than the foreseeability of the loss arising as a result of having to replace the defective article. However the former is recoverable, the latter not.

The question of what is "other property" for the purposes of this limitation on liability receives some attention in the speech of Lord Bridge, who suggests that in the case of a "complex structure" such as a building, different parts may be regarded as "other property" so that a defect in one which causes damage to another will not preclude recovery in respect of that other. Thus where as a result of defective foundations settlement occurs causing damage to a window the cost of repairing the window may be recoverable, whereas the cost of repairing the foundation which caused the damage will not.

Whilst that dictum may provide some measure of relief from the otherwise disastrous consequences of the decision, the damages are likely to be so minimal as to be undeserving of the effort. The only real benefit is likely to be to the Bar, as the dictum is likely to be the breeding ground of yet another species of dubious expert evidence supporting litigation having the object of deciding what parts of a building are separate from each other. With respect, I suggest that the dictum was as ill-considered as Lord Fraser's "doomed from the start" in *Pirelli,* and likely to suffer the same fate. The uncertainty of its scope is compounded by the speech of Lord Oliver, who treats it as extending to cover the cost of remedying the defective part so far as necessary to repair the "other property".

Although the *D & F Estates* case was only concerned with the liability of the builder, it is a necessary implication that it applies equally to architects, engineers and local authorities. In *Anns,* Lord Wilberforce had held that it would be unreasonable to impose liability on the local authority if the builder would not be liable, for the essence of the local authority's liability was its failure to ensure that the builder did his job properly. However, Lord Oliver in *D & F Estates* appears to consider that *Anns* remains authority for the proposition that both the builder and the local

34 Ibid at 211.

authority are liable for breach of statutory duty, independently of common law negligence, for failure to observe and enforce respectively the relevant by-laws. This liability has to date received scant attention in this field in New Zealand, but was considered to be unavailable in *Askin* v *Knox.*

THE WAY AHEAD

The disharmony to which Cooke P referred in *Askin* v *Knox* has now become more discordant, and more pointed, with the House of Lords expressly declining to follow the New Zealand decisions. In recent times the Court of Appeal has asserted a measure of independence from overseas authority, particularly in this field where it has been able to ascertain important differences in the statutory objectives and powers of local authorities in England under the housing and building legislation from those which apply in New Zealand. In *Brown* v *Heathcote County Council*[35] Cooke P observed that it is necessary to note the crucial weight attached in English cases in the field to matters affecting health or personal safety. He went on to point out that in New Zealand the functions of local authorities under the relevant legislation are of much wider scope, and more akin to the Canadian position as discussed in the *Kamloops* case. *Brown* was one of a trilogy of decisions in building cases delivered on 19 June 1986.[36] The President outlined what he described as a "not inconsiderable body of indigenous New Zealand case law" and concluded that part of his judgment dealing with the approach to negligence cases by stating:

> In the end I cannot avoid the conclusion that in the negligence field we in New Zealand will have to continue mainly to hew our own way.[37]

Despite various expressions of legislative intent the right of appeal to the Privy Council is still with us. In the present political climate it may well be with us for some time to come. Given the current philosophy in the House of Lords it is unlikely that those of their Lordships sitting in the Privy Council on appeal from New Zealand will be eager to uphold judgments which refuse to follow *Pirelli* or *D & F Estates,* or to find the claim of differing local conditions justifying a departure from those decisions persuasive. When *Brown* v *Heathcote County* was finally determined in the Privy Council[38] their Lordships did not find it necessary to determine whether a statutory duty imposed on a local authority other than for the preservation of health or safety creates a common law duty in negligence. The advice of the Judicial Committee contains the following hint of things to come:

> In determining that question there will inevitably fall for consideration, in the light of *Anns* v *Merton London Borough Council,* the desirability on the one hand of the

35 [1986] 1 NZLR 76.
36 The other two were *Craig* v *East Coast Bays City Council* [1986] 1 NZLR 99 and *Stieller* v *Porirua City Council* [1986] 1 NZLR 84.
37 Supra n 35 at 80.
38 [1987] 1 NZLR 720.

> Courts and not the legislature deciding to compensate any one who suffers damage which could have been avoided, and the desirability on the other hand of not making the ratepayer or taxpayer an insurer or indemnifier against loss."[39]

In the speech of Lord Bridge in *D & F Estates* there is a more direct portent. Of a passage in the joint judgment of Cooke and Somers JJ in *Mt Albert Borough Council* v *Johnson,* it was said:

> As a matter of social policy this conclusion may be entirely admirable . . . As a matter of legal principle, however, I can discover no basis on which it is open to the Court to embody this principle in the law without the assistance of the legislature and it is again, in my opinion, a dangerous course for the common law to embark on the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations.[40]

The only sure solution is appropriate legislation. But I suggest that it would be a mistake, particularly in the limitation field to simply copy that which has been considered appropriate elsewhere.

I mentioned earlier that the problems appeared to have surfaced earlier in Britain than they did here. The reason, I believe lies in the different building methods in the two countries.

In Britain, the majority of houses and many commercial buildings are built of solid brick or stone. They are inflexible structures, dependent for their integrity on the strength of the bond between mortar and brick.

New Zealand houses are, in the main, wooden framed. Long wooden structural elements possess the ability to absorb the bending, elongation and compression forces which result from differential settlement and other movements to an infinitely greater extent than 20 centimetre lengths of brick held together by a centimetre thickness of mortar. The structural strength of the various load-bearing elements is increased even further when modern sheet materials such as construction ply or particle board are fixed to them to form highly rigid diaphragms in which the stress is transmitted to all parts of the building element, and racking of the structure is virtually eliminated. Modern fixing systems such as nail plates further enhance this resistance and strength.

Our buildings, and especially commercial buildings, are designed to cope with the shock loads imposed by earthquakes – a phenomenon virtually unknown in Britain. A timber-framed building is very much lighter than a solid brick or stone one of similar size and will therefore take longer to compact the material underlying its foundations.

Little wonder therefore that it often takes a very considerable time before stresses accumulate in a New Zealand building to the point where significant discoverable damage occurs. Law which fails to take into account these local factors is unlikely to produce results which are just and workable.

39 Ibid at 725.
40 Supra n 19 at 210.

Far too little recognition has been given in the past to these peculiarities of our environment.

In the absence of legislative intervention in one form or another, it is highly probable that New Zealanders will be saddled with law which is basically unjust, of little relevance to our society and uncertain in its scope and application.

I return to Professor Guest's theme of the conflicting demands of justice and certainty. When, as in the case I have been discussing, the law is neither just nor certain, the case for reform is imperative.