

Joshua Williams Memorial Essay 1989

Sir Joshua Strange Williams was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have provided from that trust an annual prize for the essay written by a student enrolled in law at the University of Otago which is the opinion of the Council makes the more significant contribution to legal knowledge and meets the requirements of sound legal scholarship.

We publish below the winning entry for 1989.

THE LIABILITY OF BUILDERS IN NEGLIGENCE *D & F Estates Ltd v Church Commissioners for England*

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Suppose that a building firm has negligently put up a house. The builder's negligence may cause present or subsequent owners various kinds of loss. The owners may then claim from the builder different types of damages as compensation for these losses.

- 1 They would want compensation for any damage which the defective building may have done to property other than the building itself.
- 2 Usually the negligently created defect will have caused actual damage to the building itself. The owners would claim the cost of repairing that damage.
- 3 They would seek the cost of mending the defect if it threatened still more harm to the building or to other property. This would compensate them for the expense of forestalling damage which they expect to happen in the future.
- 4 Alternatively, the defect may not have caused any actual damage of the first or second kind but the owners may still want to claim the cost of repairing the defect to prevent such harm.
- 5 Yet again, the defect may not have caused or even *threatened* to cause any harm at all. Nevertheless its mere presence reduces the quality of the building and so the owners may claim the cost of mending it.
- 6 Assuming that everything has been repaired, the value of the building may still have fallen because of the defect. The owners then may claim

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the difference between the value of the building after repair and the value it would have had if it had not been defective.

- 7 Alternatively if it had been impossible to repair all the damage, then the owners would seek to recover the amount by which the remaining damage reduced the building's value.
- 8 The defect may have caused other consequential economic losses. The owners may for instance have lost rent which the building would have produced if it had not been damaged.
- 9 Lastly, the owners may claim general damages if, for example, the damage to the house has caused them anxiety or discomfort.

*D & F Estates Ltd v Church Commissioners for England*¹ aims to define which of these kinds of damages occupiers may recover from a negligent developer or contractor. *D & F* is the latest in a developing line of cases which have, until recently, widened the kinds of damages which the occupier may recover. On its face *D & F* curtails the types of damages recoverable and undermines the width of earlier cases. It does this by reaffirming the traditional rule of tort law that a plaintiff may not recover damages for purely economic losses. It also reaffirms the traditional understanding of what losses are, in law, purely economic.

Before I deal with *D & F* let me outline the developments in the cases which led up to it. I shall begin with *Bowen v Paramount Builders (Hamilton) Ltd.*²

In that case the negligent builder had laid inadequate foundations and the flats built on them were damaged by subsidence. There was no privity of contract between the builders and current owners. They therefore sued in tort.

The trial judge dismissed the claim.³ Adopting traditional common law reasoning, he held that damage to the defective building itself did not ground an action in negligence.⁴ It did not in law count as actual damage to property. Only damage to external property (ie type one, above) amounted to property damage for the purposes of the rule in *Donoghue v Stevenson*.⁵ Speight J reasoned as follows: the harm done to the flats only made them of inferior quality. The cost of repairing them (type two) and taking steps to avoid more subsidence only represented the amount by which the defect reduced their value. The loss was therefore purely economic and could not be claimed in tort.

Traditionally the law of contract has compensated people who suffer purely economic loss when the products that they buy do not fulfil their expectations of quality. Consumers may not claim in tort just because they have bought defective products that are worth less than they cost. Tradi-

1 [1989] AC 177 (HL).

2 [1977] 1 NZLR 394 (CA).

3 [1975] 2 NZLR 546 (SC).

4 Ibid at 553.

5 [1932] AC 562 (HL).

tionally tort has been concerned with safety, with harm done outside the defective product itself. Therefore placing a tortious duty on a builder to take care to prevent actual or expected damage to the building itself would extend the law of negligence so that it enforced an occupier's expectations of quality.

The Court of Appeal disagreed. It effectively reclassified the damage to the flats to make it recoverable. It held that actual damage to a defective building (type two) was physical damage to property for the purposes of the rule in *Donoghue v Stevenson*.⁶ Although the damages sought may have corresponded to the diminution in the flats' value, they represented the measure of the physical damage to the building and not purely economic loss as Speight J thought.⁷ The Court of Appeal also held that an occupier should be allowed to recover the cost of repairing a defect which threatened more physical harm to the building (type three) or which threatened such harm without yet having caused any (type four).⁸ A risk of damage and not just actual damage now grounded a negligence action.

Cooke J said obiter⁹ that he would have gone further. He would have allowed occupiers to recover purely economic loss where the defect neither caused nor threatened physical damage. A tort action should arise where the building was simply not up to standard and the plaintiffs had been misled by its appearance into paying too much for it (type five). This would erode the distinction between contract and tort by using a negligence action to enforce the occupiers' expectations of quality. The duty would even be owed to people with whom the builder was not a contracting party. However he would need only to take reasonable care to fulfil the tortious duty while contractual standards would be absolute.

Once the Court had classified the harm to the house as physical damage it allowed, in accordance with normal principle, the recovery of consequential losses caused by the damage. The occupiers recovered rent lost during the alterations (type eight), and amount by which any irreparable damage reduced the value of the flats (type seven).

The next important New Zealand case was *Mount Albert Borough Council v Johnson*.¹⁰ It extended the duty of care in *Bowen* to a developer who had not built the house himself but had only employed a builder. It also widened their potential liability by holding that a cause of action in negligence does not necessarily arise when the defect first causes damage but only when the defect becomes apparent.¹¹ This may not be until much later. Therefore the limitation period cannot lapse before the occupiers should realise that they have the elements of a negligence action. Moreover *Johnson* confirmed Cooke J's suggestions in *Bowen*¹² that a builder may

6 Supra n 2 at 410 per Richmond P; at 422-23 per Cooke J.

7 Ibid at 423, 1-5 per Cooke J.

8 Ibid at 417 per Woodhouse J.

9 Ibid at 423.

10 [1979] 2 NZLR 234 (CA).

11 Ibid at 239.

12 Supra n 2 at 424.

be liable in successive negligence actions if, over time, the original defect causes fresh and distinct instances of damage. A new six year limitation period would run from every fresh accrual of damage.¹³ Theoretically then a builder could be open indefinitely to several negligence actions arising from his original negligent act.

In *Anns v Merton London Borough Council*¹⁴ the main issue was to graft a common law duty of care on to the local authority's power under the Public Health Act 1936 (UK) to oversee building construction. The power's aim was said to be to protect the health and safety of occupiers.¹⁵ The House of Lords must have meant to impose a similar common law duty on the builder¹⁶ because it was chiefly to blame. Unfortunately *Anns* did not spell out the exact terms of the duty. Perhaps it was to be like that in *Bowen*, making the builder liable for actual damage to the defective building (type two) and for repairs needed to prevent future damage (type three and possibly type four).¹⁷ Alternatively the builder's duty was to be narrower and more specifically matched to that of the local authority. Thus the builder would be liable for repairing any defect which had caused or threatened damage that imminently endangered the occupier's health and safety.¹⁸ On this interpretation damage of types two, three and four would be actionable provided that in each case it satisfied the extra test of endangering health and safety. The House did not directly consider whether it was allowing purely economic loss to be recovered. As had *Bowen*, it classified the damage to the defective flats as physical.¹⁹ Perhaps it thought that the cost of mending the defect was not purely economic because repairs were needed to avert physical damage or that in any event the protective purpose of the statute justified recovery.

*Junior Books Ltd v Veitchi Co Ltd*²⁰ was the next step in the line of English authority. A majority of the House of Lords put aside the need for the negligently created defect to have caused or threatened actual damage to property. Nor did it try to bring the cost of replacing the defective floor within *Donoghue v Stevenson* by classifying the loss as physical. Instead the House openly admitted that the loss was purely economic.²¹ It held that in laying the floor the negligent sub-contractor was under a tortious duty to take reasonable care to produce work which was simply not defective, regardless of whether it caused or threatened damage²² (loss of type five). The result therefore enforced the plaintiff's expectations of quality by awarding damages to give them the benefit which they would have enjoyed if the work had been properly done.

13 *Supra* n 10 at 243.

14 [1978] AC 728 (HL).

15 *Ibid* at 753, D-E.

16 *Ibid* at 758, G; 759, E.

17 The English Court of Appeal implied this in *Dennis v Charnwood Borough Council* [1983] QB 409 at 420-421 per Templeman LJ.

18 *Batty v Metropolitan Realisations Ltd* [1978] QB 554 (CA) adopted this interpretation.

19 *Supra* n 14 at 759, H.

20 [1983] 1 AC 520 (HL).

21 *Ibid* at 546, F-H per Lord Roskill.

22 *Ibid* at 545, C.

The duty to take care not to create a defect which caused purely economic loss did not rest on *Donoghue v Stevenson*. Unlike the duty which Cooke J suggested in *Bowen v Paramount Builders (Hamilton) Ltd*, it resulted from the plaintiff's reliance on the defendant's experience and skill. It was like the duty not to cause purely economic loss by negligent mis-statements.²³ Effectively the defendants had assumed responsibility for the quality of their work just as professional people may assume responsibility for the soundness of their advice.

After *Junior Books Ltd v Veitchi Co Ltd* the New Zealand and English cases diverge. *Junior Books* was easily assimilated into New Zealand law. English decisions however have retreated from the liability for purely economic loss which the case would have imposed. They now regard it as an anomaly which resulted from its own special facts.²⁴

*Ware v Johnson*²⁵ shows the New Zealand approach. The defendant developed a kiwifruit orchard but he applied an unsuitable herbicide. The plaintiff bought the orchard. Soon after, the residue of the herbicide killed off the kiwifruit vines.

Prichard J found the defendant negligent. The judge drew an analogy between the facts before him and the situation where a builder negligently constructs a defective building.²⁶ The presence of the herbicide in the land was equivalent to a defect in a building. Treating the vines as fixtures to the land, no damage was done to property outside the "defective" soil just as a defective building may only damage itself. Prichard J held that the developer owed a general duty to take reasonable care that nothing be done or left undone which might cause loss to the plaintiff.²⁷ This involved a duty to prevent damage to the defective property (type two) so the plaintiff recovered the cost of replacing the dead vines. Prichard J followed *Junior Books* and impliedly placed a duty on the developer to avoid creating any sort of defect (type five). Hence the plaintiff recovered the economic loss involved in replacing the "defective" soil.

Continuing the New Zealand approach is *Stieller v Porirua City Council*.²⁸ The Council was held to have breached a common law duty of care to ensure that new houses complied with bylaws made under the Local Government Act 1974. It was liable, among other things, for the cost of replacing some defective timber cladding on the house. The fault simply reduced the quality of the building and may not have caused or threatened any actual harm. The Court's justification was this: the bylaws' purpose was to ensure that houses were soundly constructed from good materials.²⁹ Therefore the Council's responsibility extended beyond defects which endangered the occupiers' health and safety.³⁰

23 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

24 See eg *D & F* supra n 1 at 202, A-C per Lord Bridge.

25 [1984] 2 NZLR 518 (HC).

26 *Ibid* at 540.

27 *Idem*.

28 [1986] 1 NZLR 84 (CA).

29 *Ibid* at 94.

30 The approach in *Anns* supra n 14.

We may infer that the Court would have imposed a similar duty on the builders because they were primarily at fault. They would need to have taken reasonable care in choosing materials and in doing their work so as not to create defects which made the house substandard or unsound.

Therefore builders not only owe duties as regards actual damage (types one and two) and dangerous defects (types three and four). They may be liable if their negligence produces a defect of sheer quality (type five) and the occupiers incur economic loss to repair it. This comes close to using a duty of care in tort to impose a fault-based warranty of fitness. Finally, the Court awarded the Stieglers general damages for their discomfort and inconvenience (type nine). Presumably builders would be similarly liable.

By contrast, the products liability case of *Muirhead v Industrial Tank Specialities Ltd*³¹ shows how the English courts are unwilling to apply *Junior Books* to compensate plaintiffs for repairing mere defects, as opposed to damage caused by defects. The defendant had manufactured a faulty oxygenating pump. It broke down, causing Mr Muirhead's stock of lobsters to die. Mr Muirhead sued the manufacturer in negligence and recovered the value of the lobsters. That was damage to property outside the pump (type one). However his claim failed for the cost of repairing the fault in the pump (type five). The manufacturer's duty was that it not cause *damage* through a defect. There was no separate duty not to produce goods containing a defect that needed repair since the cost of mending the *defect* was purely economic loss. *Junior Books* which had imposed such a duty, was distinguished. The defendant there had voluntarily assumed responsibility for the quality of its work. Mr Muirhead was an ultimate consumer three links down the contractual chain from the manufacturer so there was no direct reliance as *Junior Books* and *Hedley Byrne & Co Ltd v Heller & Partners Ltd* required. There was not enough proximity between the parties for an assumption of responsibility to have arisen.

Hence the English cases expect consumers to rely on a builder's skill before a duty arises to take care to avoid causing purely economic loss. Probably only the first occupiers of a new building (as opposed to later occupiers) would ever be in a position to be owed such a duty. They would need to have selected the builder, relying on his particular skills so that he in turn could be held to have assumed responsibility for the quality of his work. Most remote buyers would never deal with the builder so it could not be said that there was reliance and a corresponding assumption of responsibility.

D & F Estates Ltd v Church Commissioners for England

D & F Estates sued in negligence the builders of the flats of which they were lessees. The builders, Wates, had engaged sub-contractors, Hitchens, to plaster the interior of the flats. The work was done negligently. The finished plaster was defective and threatened the safety of the occupiers of the flats. It needed to be replaced.

31 [1986] QB 507 (CA).

The plaintiffs therefore claimed the replacement cost from Wates. The falling plaster had also dirtied some carpets and furniture so the plaintiffs sought the cost of cleaning them. Some paint and wallpaper were lost when the plaster was removed.

The House of Lords dismissed the claim. Wates in any event were not vicariously liable for the acts of their independent sub-contractors. Nor did they owe a personal duty making them responsible for Hitchens' negligence.³²

However, even if the builders themselves had negligently applied the plaster they would not have been liable. They would have owed no duty of care in relation to the cost of replacing the plaster, although they would have owed a duty not to apply it in such a way that it damaged separate property like the carpets and furniture.

The House returned to reasoning like the trial judge's in *Bowen's* case. It affirmed that in a negligence action based on *Donoghue v Stevenson* a builder only owes a duty not to cause personal injury or actual damage to the plaintiff's property. He does not owe a duty to avoid causing them purely economic loss. However *D & F* differs from the cases that I have described by reasserting a traditional, wide definition of purely economic loss and a correspondingly narrow definition of physical damage. Hence it held that a builder's only duty is to take care not to put up a defective structure which *does* injure the plaintiffs or which *does* damage property separate from itself.³³ In other words, the builder only has a duty to avoid causing damage of type one and of course foreseeable economic loss consequential on this damage. Apart from general damages (type nine) the other sorts of loss on the list are purely economic. By definition therefore they fall outside the builder's duty.

The crux of the case is that only damage to property separate from the defective building counts as physical harm for the purposes of *Donoghue v Stevenson*. Therefore the relevant damage here was the harm done to the carpets and furniture. Simply that the loss has *in fact* a physical connection does not in *law* make it physical damage. Hence *D & F* impliedly rejected the fiction in *Bowen's* case that damage to the defective building (type two) may in law be physical loss. Likewise the cost of mending a defect is always purely economic loss, not only where the repair is needed to bring the building up to a decent standard (type five) but also to forestall future damage (types three and four). Diminution in value of type six has always been counted as purely economic loss. Moreover, losses of types seven and eight could no longer be recovered as consequential economic loss if they resulted from harm which, under the *D & F* definition, was not physical damage: eg rent lost owing to damage in the defective building. They would be classified under *D & F* as one form of purely economic loss consequential upon another form of purely economic loss.

32 Supra n 1 at 208-210. This differs from the non-delegable duty imposed on the developer in *Mount Albert Borough Council v Johnson* supra n 10.

33 Supra n 1 at 206, B-G; 214, A-B.

By rearranging the legal categories into which kinds of loss should be put, the House of Lords has narrowed the heads of damages which an occupier may recover from a negligent builder. How did its reasoning proceed? Lord Bridge took the traditional line that the law of products liability is concerned with dangerous defects.³⁴ Yet the only sort of danger that is legally relevant is that which materialises as actual harm outside the defective thing. Whether loss is recoverable does not depend on the seriousness of danger which the defect threatens but on whether the risk just *materialises* as a particular form of actual damage, namely type one. Lord Bridge implied that as a matter of law a defective thing which causes loss other than external physical damage only fails in *quality*³⁵ and so the loss is not physical but purely economic. Only contracts fix standards of quality. Therefore loss which in law represents a failing in quality may only be recovered using the law of contract. If occupiers could sue in tort to recover purely economic loss they would be benefitting from the equivalent of a contractual warranty of quality even if there were no contract between them.³⁶ In principle that would be wrong.

This "other property" rule is the core of the ratio decidendi but their Lordships made exceptions that whittle it down. It cannot therefore be considered the final principle to be taken from the case.

(i) The complex structure exception

If a defective building which damaged itself were treated as an integrated unit then, according to the other property rule, the occupier could not recover the cost of repairing the damage. Alternatively, a building may be treated as a "complex structure" some sections of which are units of property distinct from other sections. Therefore "damage to one part . . . caused by a hidden defect in another part may qualify to be treated as damage to 'other property.'" ³⁷ Their Lordships probably made this exception to try to rationalise *Anns v Merton London Borough Council* in terms of the other property rule. *Anns* had classified the harm to the flats caused by their defective foundations as property damage.³⁸ Lord Oliver therefore did not apply the exception to chattels,³⁹ although surely some chattels are as much a collection of distinct parts as buildings are.⁴⁰ Lord Bridge thought complex chattels exist but the exception only *may* apply to them.⁴¹

34 Ibid at 206, B-F.

35 Ibid at 206, C per Lord Bridge.

36 Ibid at 207, G per Lord Bridge; 211, H-212, B per Lord Oliver.

37 Ibid at 207, A-C per Lord Bridge.

38 Supra n 14 at 759, H.

39 Supra n 1 at 214, B.

40 American decisions have treated some products as complex chattels, eg *Walker Truck Contractors Inc v Crane Carrier Co* 405 F Supp 911 (US Dist C 1975) (rear axles of truck distinct from other drive train components).

41 Supra n 1 at 207, A.

Anyway there are many parts in a building so judges sympathetic to plaintiffs could easily find damage to "other property" within a single structure. It depends on how willing they are to distinguish defective from damaged parts. If the exception is given its logical effect and parts of a house genuinely treated as distinct property, it might also mean that some consequential economic losses could be recovered. They would need however to have resulted from damage to a particular section which was distinct from the defective part of the building. It would not do that the consequential losses arose from damage to the defective part since, according to *D & F*, this sort of damage is not done to other property.

D & F does not explain why some structures are complex or how they should be divided into parts. American products liability cases offer possible tests. When various suppliers provide different parts for the building the parts that each provides may be considered as distinct items of property.⁴² Therefore if a section of the house which the negligent builder has constructed harms a part provided by other suppliers or contractors, he will be liable for the cost of repairing the damaged part.⁴³ Lord Bridge may have had this test in mind because he implied that a chattel "supplied complete by a single manufacturer"⁴⁴ would not be complex. *King v Hilton-Davis*⁴⁵ applied a different test: what did the buyers expect when they bought the product? Did they mean to buy a single integrated product or a complex collection of parts? On this test, structures would seldom be complex. People usually see a building as an integrated whole not as an assembly of foundations, walls and ceilings. These quibbling distinctions show that the exception will cause many subtle but wasteful factual arguments. The House of Lords should have ruled outright that the cost of repairing damage to the defective building either could or could not be recovered.

(ii) The exception allowing the cost of repairing the defect to be recovered

Lord Bridge held that the cost of repairing a defect was always purely economic loss.⁴⁶ Lord Oliver however conceded that with complex structures an award of damages may include the cost of repairing a defective part if it *has* damaged another section and *will* do so again.⁴⁷ This seems a return to allowing preventative damages of type three without the qualification which *Anns* may have imposed that the damage which the defect threatens must endanger the occupiers' safety.

Arguably this exception can be reconciled with the other property rule. The cost of repairing the defective section may be deemed part of measure of the physical damage rather than purely economic loss. Lord Oliver meant

42 *Northern Power Engineering Corp v Caterpillar Tractor Co* 623 P 2d 324 (SC of Alaska 1981).

43 *Mike Bajalia Inc v Amos Construction Co, Inc* 235 SE 2d 664 (CA of Georgia 1977).

44 *Supra* n 1 at 206, B.

45 855 F 2d 1047 (US CA 1988).

46 *Supra* n 1 at 206, E.

47 *Ibid* at 212, C-D.

his exception to apply only where the defective section has first damaged another part.⁴⁸ If the defect will *continue* to injure the other part then, practically speaking, that damaged part is not genuinely repaired while the underlying cause of the harm remains active. Repairing the defective section is essential to the proper repair of the damaged section. Therefore the expense of mending the defect may be included in the cost of mending the damaged section.

As Lord Oliver seemingly expected, the same reasoning does not hold when the complex structure threatens to damage property separate from itself. For the building and the external property will be more clearly distinct while sections of a complex structure will somehow be physically joined. It is therefore less realistic to say that properly repairing the external property necessarily entails repairing the defective building. Genuinely repairing a damaged floor may entail mending the crumbling ceiling that keeps harming it. However it may be less realistic to say that genuinely repairing household furniture necessarily involves mending the defective ceiling that damages it.

(iii) The exception making builders liable for breaching their statutory duty under bylaws

Lord Oliver interpreted *Anns v Merton London Borough Council* as follows: builders are liable if they create a defect which imminently threatens personal safety. Occupiers may recover the cost of repairing the defect and any resulting damage only to the extent needed to avert that particular threat.⁴⁹ This result differs from traditional negligence law which required actual damage to occur and awarded the plaintiff the cost of fully repairing it.

To rationalise this anomaly Lord Oliver suggested that *Anns* intended to make the builder liable to the occupier not for common law negligence but for having breached his statutory duties under the building bylaws. He implied that this action would be available to occupiers even if common law negligence, as *D & F* defines it, were not. Actual damage would not be needed. Mere danger to people's safety would suffice because the bylaws were intended to prevent such danger.⁵⁰

Lord Oliver did not make clear whether a builder's liability should be absolute or dependent on fault. Is the builder necessarily liable whenever he has breached a bylaw and so endangered the occupiers' safety, or must he first have failed to take reasonable care to do what the relevant bylaw requires? Either way this exception makes the builder's liability far wider than it would be under common law negligence as *D & F* defines it. Building bylaws are very detailed and cover nearly all aspects of construction. The

48 He says at 212, D, "such remedial work would be essential to the repair of the property which had been *damaged* by it" (my emphasis).

49 Supra n 1 at 212, D-213, D.

50 *Anns* supra n 14 at 753, D-E.

action would usually cover damage of types two, three and four although economic loss consequential on damage could not be recovered.

New Zealand courts would probably not adopt the exception for breach of statutory duty. In *Askin v Knox*⁵¹ our Court of Appeal held that not complying with building bylaws would not of itself make the builder liable to the occupier in a separate strict liability action. It would only amount to evidence from which it might be inferred in a negligence action that the defendant had not met the proper standard of care.⁵² Moreover, the statute under which bylaws were made, the Local Government Act 1974, imposed penalties on builders who breached the bylaws. Parliament therefore would not have meant to give occupiers a separate civil right to claim damages from builders.

However if such actions were allowed in New Zealand, builders' liability would be wider here than in England. The purpose of our bylaws is not just to protect health and safety but to ensure that houses are soundly built from good materials.⁵³ Occupiers could recover the cost of remedying any breach of the bylaws without first having to prove that the breach endangered their safety. It would be enough that the breach made the building substandard. The action therefore would effectively impose a non-contractual warranty of quality.

(iv) What is left of *Junior Books* and *Anns*?

Putting aside the exceptions, plaintiffs could still recover the purely economic loss involved in repairing a defect if the courts applied *Junior Books Ltd v Veitchi Co Ltd* and held that the builder had assumed responsibility for the quality of his work. *D & F* would make this difficult. It confined *Junior Books* to its facts, holding that it did not lay down any generally relevant principle.⁵⁴ The English courts at least would not apply it unless identical facts arose.⁵⁵

What then of *Anns v Merton London Borough Council*? As an authority that a builder may be liable in common law negligence for repairing damage to the defective building — unless it comes within the complex structure exception — or for repairing a defect to avoid future damage — unless it comes within Lord Oliver's special exception — *Anns* conflicts with the core of *D & F* that only damage to separate property is actionable. As concerns builders therefore their Lordships thought *Anns* was not binding.⁵⁶

However this may not mean that *D & F* has constructively overruled *Anns*. Lord Oliver implied that *Anns* may have created a new branch of common law negligence separate from "classical" *Donoghue v Stevenson*

51 [1989] 1 NZLR 248.

52 See also *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 at 106.

53 *Stieller v Porirua City Council* supra n 28.

54 Supra n 1 at 202, A; 216, E-F.

55 Eg *Greater Co-operative Society Ltd v Cementation Piling & Foundations Ltd* [1989] QB 71 (CA).

56 Supra n 1 at 201, B-C; 213, F.

liability. Thus damage to the defective property and a mere *threat* of harm to personal safety — or possibly to separate property — would all ground an action in the new kind of negligence.⁵⁷ Although he rationalised the possibility in terms of his complex structure and breach of bylaws exceptions he did not openly rule it out. Yet the plaster in *D & F* was dangerous. Hence if he meant preventive damages based on *Anns* to survive, Lord Oliver should logically have awarded the plaintiffs the cost of *removing* the plaster to avert the danger. He did not, so exactly how he meant to explain *Anns* remains a puzzle.

*Department of Environment v Thomas Bates & Son Ltd*⁵⁸ has tentatively held that Lord Oliver thought *Anns* may have created a new branch of negligence which was to survive *D & F*. The Court of Appeal left the question open because on the facts the faulty pillars had not damaged anything and did not imminently endanger anyone's safety.

(v) What exactly is the result in *D & F*?

Although the leading opinions of Lord Bridge and Lord Oliver differ, the other Law Lords agreed with both. I take the result to be the widest set of propositions which may be extracted from the whole case.

Damages may undoubtedly be recovered to repair injury to external property (type one). Plaintiffs may only claim the cost of mending damage to a faulty building (type two) if that damage is in a part distinct from the defective part. This possibly applies to chattels too. Occupiers may be awarded the cost of repairing the defect in *negligence* (type three) if the faulty part of the building has *already* damaged a separate part and will *continue* to damage it unless mended. They may recover some consequential economic loss (type eight). It must result from damage to separate property. It may perhaps be recovered if it results from damage to a complex structure provided that it can be traced to a part which is distinct from the defective part. In England plaintiffs may also bring an action for breach of statutory duty. They may recover the cost of averting danger to their personal safety if the danger exists because the builder has breached the bylaws.

(vi) What effect would *D & F* have in New Zealand?

Already the New Zealand High Court in *Sloper v W H Murray Ltd*⁵⁹ has refused to follow *D & F* because *Bowen v Paramount Builders (Hamilton) Ltd* was binding on it. Following *Bowen* the Court awarded the Slopers the costs of repairing damage to their house (type two) and preventive damages of type three. Despite *D & F*, it did not recognise a separate action for breach of the building bylaws.

The doctrine of precedent would bind other High Court judges to the same result. As happened in *Sloper's* case they could still justify their

57 Ibid at 212, F-G; 213, C-D; 216, G-H. See also Lord Bridge at 206, F-G.

58 [1989] 1 All ER 1075 (CA).

59 Unreported, High Court, Dunedin, 22 November 1988, A31/85, Hardie Boys J.

decisions in terms of the complex structure exception if the building itself were physically damaged. They could also rely on Lord Oliver's second exception to allow the plaintiff the cost of repairing the defect. They could therefore pay lip service to *D & F* but still reach a result like *Bowen*. Only when a plaintiff claimed consequential losses (types seven and eight) or the cost of mending a pure quality defect (type five) would the High Court have to depart from *D & F*.

The Court of Appeal clearly would not think that precedent alone bound it to follow *D & F*. It has said that it is not bound to follow House of Lords' decisions though it is reluctant to differ from them.⁶⁰ Its decision may depend on whether it thinks that good policy requires it to curtail the potential liability of builders and whether following *D & F* is the soundest way to do this.

That liability is certainly wide. Cases such as *Stieller v Porirua City Council* and *Ware v Johnson* may make builders responsible not only for actual damage or dangerous defects but also for mere faults in quality. There may also be general damages and consequential economic loss to be paid. Moreover builders are open to possible claims for a long time. An action in negligence does not accrue till the occupiers do or should discover the damage.⁶¹ This may happen well after the builders' initial carelessness. Also, builders may be liable more than once if the defect causes fresh instances of damage.⁶² At any one time then, builders may be open to many potential claims, the amount of which would be hard to gauge when they were self-insuring or fixing cover for third party insurance.

The rule in *McLaren Maycroft & Co v Fletcher Development Co Ltd*⁶³ may disadvantage builders. Although builders may be concurrently liable in contract and tort to the original building owners, negligent professional people whom those owners engage would only be liable in contract.⁶⁴ Therefore the limitation period for the original owners' contractual actions against engineers or architects would run from when they were negligent, while actions in tort against builders would not accrue till damage was discovered. If this happened years afterwards, builders would perhaps be the only defendants available for the original owners to sue. Alternatively if the builder were sued in tort even before the limitation period against an architect and engineer had lapsed, he would not recover a contribution from them because they were not tortfeasors.⁶⁵

Is *D & F* the soundest way to right this imbalance? The answer depends partly on how much of the case our Court of Appeal would apply. Adopting only the "other property" rule would not be a just or sensible way to curb builders' liability. Innocent occupiers would have to bear most

60 *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 41 per Cooke J.

61 *Mount Albert Borough Council v Johnson* supra n 10.

62 *Bowen v Paramount Builders (Hamilton) Ltd* supra n 2.

63 [1973] 2 NZLR 100 (CA).

64 *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178 (CA).

65 The Law Reform Act 1936, s 17(1)(c) only provides for contributions between one tortfeasor and another and not between a tortfeasor and a party to a contract.

of the loss from the builders' negligence. Damage done or threatened to a faulty building is usually the most serious part of their loss. First party insurance for defective buildings is not available. Moreover private home owners here, unlike those in England, have no statutory right to sue builders who do their work in such a way that the house is unfit for living in. Compare the Defective Premises Act 1972 (UK).

If the Court of Appeal adopted and liberally applied all the exceptions to the "other property" rule, then the result would not differ much from *Bowen* although damages of types four, five and six would be barred, as would most consequential losses resulting from damage to the building (types seven and eight). Perhaps removing the builders' liability for pure defects of quality and consequential losses would put a fair ceiling on claims. Builders could more easily assess their potential liability and insure against it. Home owners would recover the most serious parts of their loss. Occupiers of commercial buildings could insure against consequential losses and pass on the cost of premiums in the price of their goods. However *D & F* would still bar damages for repairing a defect which threatens harm without yet having caused any (type four). In practice this would be arbitrary.

D & F manages a rough balance of the interests of builders and occupiers. It is not however a sensible means to this end. With its draconian central ratio and subtle exceptions it is not straightforward to apply. We need a neater rule. Moreover even with the exceptions included, a local authority which negligently inspected a building would be left liable for pure quality faults and for all consequential losses⁶⁶ but the careless builder would not.

Given an opportunity the Privy Council would probably bring our law into line with *D & F* because the leading New Zealand cases are so different in principle. Once English law was accepted as relevant, the Privy Council could consider that it was bound to follow a House of Lords' decision on the point⁶⁷ unless there were special conditions peculiar to New Zealand which justified our differing from other common law jurisdictions.⁶⁸ However in *Takaro Properties Ltd v Rowling*⁶⁹ the Privy Council said that when formulating a duty of care "no sensible distinction can be drawn . . . between the various [common law] countries and the social conditions existing in them."

There is one important difference. New Zealand has no statute equivalent to the Defective Premises Act 1972 (UK). Home owners here rely largely on the common law for compensation if builders are negligent. They would therefore fare worse than English home owners if builders' liability in negligence were curtailed. The Privy Council however may put aside these reasons. It may hold that it is bound to apply what it considers are the

66 *Stieller v Porirua City Council* supra n 28.

67 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 108 per Lord Scarman.

68 *O'Connor v Hart* [1985] 1 NZLR 159 at 165 per Lord Brightman.

69 [1987] 2 NZLR 700 at 709 per Lord Keith.

true principles of negligence and that only Parliament has the power to extend the law so as to balance fairly the interests of builders and home owners.

Probably legislation would be the tidiest way to achieve a balance. New Zealand at least needs a statute which settles when the cause of action arises in defective building cases. The discoverability test from *Mt Albert Borough Council v Johnson* could be codified but a long-stop provision added to prevent the possibility that builders would be indefinitely open to liability.⁷⁰

We could go further. I would suggest a statutory rule that does not hinge on a precise distinction between physical damage and purely economic loss. It should look instead to practical needs. Builders who are negligent should be liable for occupiers' costs in repairing actual damage to property both within and separate from the defective building. Occupiers should also recover the cost of repairing a defect which threatens property damage to the defective building. The same statutory rule would also replace the tort liability of all other people involved in the construction of the building, including negligent developers, architects and inspectors from local authorities. They might continue to be liable in contract according to normal principles and so be free to assume wider responsibilities than those which the statute required. The rule might provide that contracts could not exclude liability under the statute, at least for claims by the occupiers of private houses.

All sides of tort liability for faulty buildings need to be tidily brought together. It is time for Parliament to end the confusion.

⁷⁰ This is the rule in England: Latent Damage Act 1986 (UK). Cooke P in *Askin v Knox*, supra n 51, favoured this solution.