NEGLIGENCE AND THE RIGHT TO SUPPORT: Bognuda v. Upton & Shearer

I. THE NATURE OF THE RIGHT TO SUPPORT

The right to support of land by a neighbour's land is said to exist de jure, springing from the moment of severance of the two properties[1] and is an incident to the land itself.[2]

There is, however, no natural right to support for a building on that land, for such building is artificially imposed and therefore does not exist *de jure naturae.* The right to support for buildings is acquired by law either in the form of an easement or grant,[3] or by some means equivalent to a grant. The classic case illustrating this second alternative is that of *Dalton v. Angus,*[4] where after lengthy deliberation, the House of Lords held that a right to support could be acquired by twenty years' uninterrupted enjoyment. This did not detract from the right of the neighbour to attempt to defeat this enjoyment at any time within the twenty year period by whatever means he saw fit. The concept of such a right springing into existence merely by effluxion of time was abhorred both by Fry J. and Lord Penzance, but both were forced to concede that such a notion was founded on high authority and was the law of England.[5]

The right to support recognised by *Dalton v. Angus* has been followed since, though the position could only be described as unsatisfactory with the law upholding two extreme positions; in the first place, a landowner could deal with his land in any manner he saw fit (lawful or unlawful) and could excavate so as to undermine his neighbour's property without fear of retribution.[6] However, once his neighbour earned the right to support (at the end of twenty years), the rights of the landowner were restricted so that he could not deal with his own land (either lawfully or unlawfully) so as to damage his neighbour's buildings in any way. Of this, Fry J. remarked,[7]

> ". . . by the mere act of his neighbour and the lapse of time, a man may be deprived of the lawful use of his own land, a proposition which shocks my notions of justice . . ."

The unsatisfactory inflexibility of this position became even more obvious when, fifty years later, Lord Atkin put forward his model of neighbourly behaviour, but there was no doubt that the nineteenth century English law permitted no half-way house for the hapless excavator.

---

1. Per Field and Fry JJ. in *Dalton v. Angus* (1881) 6 App. Cas. 740, 752, 772.
2. Ibid., per Lord Selborne at 791.
3. Ibid., per Lord Selborne at 792.
4. (1881) 6 App. Cas. 740.
5. Ibid., 779, 803.
6. See *Wilde v. Minsterley* (15 Charles I) 2 Roll. Abr. 564 and recently, *Ray v. Fairway Motors (Barnstaple) Ltd* (1968) 20 P. & C.R. 261, 269.
7. (1881) 6 App. Cas. 740, 779.

When cast into the twentieth century, obvious problems arise. What of landowner A, who carefully constructs his twelve storeyed office block to the extremities of his small city holding, only to watch helpless, five years later, as his neighbour in preparing to construct his fifteen storeyed office block, undermines his foundations in the course of excavation and causes severe structural damage to the existing building.

II. BOGNUDA'S CASE — THE FACTS

On a minor scale this position arose recently. In the case of *Bognuda v. Upton & Shearer Ltd*,[8] the plaintiff (appellant) owned a property in Riddiford Street, Wellington, upon which was situated a service station and a workshop. The defendant was engaged in excavating and building operations on the land adjacent to the service station. In the course of these operations, the defendant excavated a trench about four feet deep and running the entire length of a brick wall which formed the northern wall of the plaintiff's service station premises. This trench was for providing foundations for a new building the defendant was in the process of constructing, but in September 1969 the plaintiff's brick wall collapsed into the trench, resulting in serious structural damage to the service station. The wall itself was over forty years old, though it was accepted that at the time, it was quite sound and its collapse was occasioned by a failure on the part of the defendant to shore up its excavated trench to prevent the soil on which the plaintiff's brick wall rested from crumbling. Expert evidence left no doubt that even though it was of poor quality, the soil itself would not have eroded had it not been for the weight of the wall on top of it.

Here then, we have the situation where a landowner's building is damaged through the (negligent) excavation of his neighbour, there being no evidence of any easement for support of the wall favouring the landowner.

The plaintiff sued for damages under two main heads:[9] firstly, that the defendant had breached the plaintiff's right of lateral support to his land and wall, and secondly, that the defendant had acted negligently in its excavations by failing to underpin or provide temporary support to counteract the removal of the soil, and excavating in close proximity to the plaintiff's brick wall, when it knew or ought to have known that such activity could cause the subsidence of the plaintiff's land and wall.

III. IN THE SUPREME COURT

At first instance, Quilliam J., in following *Dalton v. Angus*, found that no right to lateral support arose, for on the expert evidence it

8. [1971] N.Z.L.R. 618; [1972] N.Z.L.R. 741 (C.A.).
9. A third head of trespass was abandoned.

was clear that it was not the excavation which caused the plaintiff's soil to subside, but the weight of the wall on the soil.

The claim in negligence also failed, for as Quilliam J. observed,[10]

> "A right of action in negligence can only lie for the breach of a duty. If the plaintiff had no right to the support of the adjoining owner's land for the building on his own land, then the adjoining owner was free to remove that support with impunity."

His conclusions might also be expressed in the following form:

(a) Here there was no right to support for the building,
(b) As there was no right, there could be no duty on the defendant not to withdraw that support,
(c) As there was no such duty, there could be no claim in negligence.

This, with respect, appears to follow the English law as recently affirmed by the Court of Appeal in *Ray v. Fairway Motors (Barnstaple) Ltd*,[11] although that case was not cited in the judgment. There, the plaintiff sought damages in circumstances similar to those in the present case, and although the Court found for the plaintiff on other grounds,[12] it was held on the question of negligence that no duty of care was owed to a neighbour by an excavator of adjoining premises in the absence of a right to support. Willmer L.J. said,[13]

> ". . . if it is right . . . that, in the absence of an easement to support, the owner of land has a legal right to do what he likes with his own land, even if that results in the collapse of his neighbour's building, it seems difficult to find room for a duty to exercise reasonable care to avoid that result."

Neither he nor Russell L.J. was prepared to find this room. Fenton Atkinson L.J., on the other hand held a slightly different view, saying,[14]

> "If the plaintiff could have shown something beyond the mere removal or omission to take active steps to prevent its effect, for example, the adoption of an unnecessarily dangerous method of removal causing collapse, the position could well have been different."

Both Quilliam J. and the majority of the Court in the *Fairway Motors* case confirmed, however, that as far as the excavation cases go, in the absence of a duty to support, there could be no duty in negligence; the principle of *sic utere tuo ut alienum non laedas*[15] propounded by Cockburn C.J. in *Bower v .Peate*[16] did not apply.

---

10. [1971] N.Z.L.R. 618, 620-621.
11. (1968) 20 P. & C.R. 261.
12. It recognised the plaintiff's easement acquired by long use.
13. (1968) 20 P. & C.R. 261, 269.
14. Ibid., 275.
15. "So use your property so as not to injure another's".
16. (1876) 1 Q.B.D. 321.

IV. IN THE COURT OF APPEAL

Happily, the plaintiff's advisors saw fit to appeal against this view of the law; one which Quilliam J. himself reached with some reluctance.[17] In a bold decision, which should have lasting implications, the Court of Appeal reversed his finding on the question of negligence.

North P. in delivering the first and longest of the judgments, apportioned what he had to say under six headings. He began by referring to the House of Lords decision in *Dalton v. Angus*, though more at this stage to note Lord Penzance's reluctant agreement as to the legal position of the "lost grant" as a means of acquiring a right to support. After noting isolated dicta supporting the plaintiff's position,[18] including the observations of Fenton Atkinson L.J. in the *Fairway Motors* case, he passed on to Commonwealth authority, focusing his attention on the Canadian case of *Wilton v. Hansen*.[19] There, in a similar excavation case, the Manitoba Court of Appeal found no difficulty in holding a careless excavator liable in negligence. American authority was of a like view and he briefly discussed the principles lucidly derived by the Supreme Court of Appeals of West Virginia in *Walker v. Strosnider*.[20]

The President then moved to the central feature of his judgment in discussing the effect on the law of *Donoghue v. Stevenson*,[21] prefacing his remarks by repeating Lord Atkin's famous words,

> "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong."[22]

He then continues by referring to Lord Atkin's well known formulation of the "neighbour" principle, tracing its acceptance in *Grant v. Australian Knitting Mills Ltd*,[23] its development in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*,[24] and its latest application by the House of Lords in *Home Office v. Dorset Yacht Co. Ltd*.[25] Each of these cases applied the principle to a new "duty" situation, Lord Reid saying of it in the *Dorset Yacht* case,[26]

> ". . . It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that

17. [1971] N.Z.L.R. 618, 621.
18. [1972] N.Z.L.R. 741, 747-748.
19. (1969) 4 D.L.R. (3d) 167.
20. (1910) 67 S.E. Rep. 1087.
21. [1932] A.C. 562.
22. Ibid., 583.
23. [1936] A.C. 85.
24. [1964] A.C. 465.
25. [1970] A.C. 1004.
26. Ibid., 1027.

> it ought to apply unless there is some justification or valid explanation for its exclusion."

and Lord Morris saying,[27]

> "But precedents do not fix the limits of what may be called duty situations; they illustrate them. If there are no clear-cut precedents, the Court may have to reach a decision whether, once the facts and circumstances of a situation are ascertained, it can be said that it was a 'duty situation'."

With this foundation laid, North P. turns to the last section of his judgment entitled "conclusions", beginning with a fairly lengthy consideration of *Dalton v. Angus* and noting that in England it would be difficult to place the owner of land under the restriction of having to exercise reasonable care in excavating his own land immediately adjacent to his neighbour's building within the twenty-year prescription period. Likewise, when the prescriptive right is acquired, the question of negligence is immaterial, for an absolute right to support has arisen.

This difficulty did not present itself to the American Courts who had refused to recognise any prescriptive right, leaving ample room for the development of the tort of negligence in the field of negligence cases. Quite unequivocally then, he continues,[28]

> "In principle, I agree with the way this question was approached by the Judges in the American case of *Walker v. Strosnider* . . . ."

The President then, as if to justify this course, asserts the merely persuasive nature of the House of Lords' decision in *Dalton v. Angus* even though such judgments are "entitled to the greatest respect". Nevertheless, he concludes with an acceptance of the American position by extending the *Donoghue v. Stevenson* principle to apply in excavation cases.

Turner J. starts immediately with an examination of the *Donoghue v. Stevenson* principle, recognising its dynamic qualities. As Lord Reid did in the *Dorset Yacht* case, he would apply the "neighbour" concept to the present case, unless there was any justification or valid explanation for its exclusion, or unless this could be regarded as within the class of exceptions to that rule. He briefly discusses the nature of the right to support, then notes the difference between the English law, where the landowner can obtain a prescriptive right, and the New Zealand law where he could not by virtue of a statutory provision.

Turner J. then examines *Dalton v. Angus,* concentrating mainly, as did North P., on the reluctant conclusion of Fry J. and Lord Penzance, that the existence of the prescriptive right was a feature of English law. He comes to the conclusion that "there is no reason why it should be applied"[29] in New Zealand, and opts for the *sic*

---

27. Ibid., 1038.
28. [1972] N.Z.L.R. 741, 756.
29. Ibid., 763.

utere tuo principle. This result, which he finds supported by legal principle, is checked with the policy considerations derived from what "the man on the Island Bay bus . . . the one who before boarding it has peered, fascinated, through the hole in a builder's hoarding" — would think.[30]

Finding that policy also supports the principle enunciated in *Walker v. Strosnider,* he turns to compare this view of the law with the evolution of the "neighbour" concept in the field of negligent mis-statement, concluding,[31]

> "It seems to me that the present case is an exactly parallel case . . ."

and then,[32]

> "I think that the same conditions and the same kind of legal development require the same kind of extension in the law of negligence to [the] field of excavation of neighbouring properties."

Woodhouse J. in the last and shortest of the three judgments briefly discusses the facts, then directs his attention to the central issue,[33]

> "Can there be no duty of care in negligence as the Judge thought, simply because a building enjoys no right of support? Or has he allowed a relevant rule concerning conduct to be overborne by an unrelated aspect of property law?"

In an equally succinct manner he deals with the question posed,[34]

> ". . . I am clearly of the opinion that irrespective of any right to support an excavator does owe a legal duty to a neighbouring owner to exercise reasonable care not to cause needless damage to the latter's buildings; and it is a mistake to assume that the existence of the duty depends upon entirely independent concepts which historically have surrounded the development of property rights."

In considering *Dalton v. Angus,* he notes that the decision was based on property law principles and at a time when the formulation of negligence as an independent cause of action was still far distant. He finds that the property law principle inherent in *Dalton v. Angus* had been treated as an absolute answer to the claim that care must be exercised in making excavations and disagreed with Russell L.J. who doubted that the impact of *Donoghue v. Stevenson* had changed the law in this regard.[35] In New Zealand, Woodhouse J. finds a "cogent" answer to this doubt on two grounds: firstly, the absence

30. Ibid., 764.
31. Ibid., 765.
32. Ibid., 766.
33. Ibid., 767.
34. Ibid., 767.
35. (1968) 20 P. & C.R. 261, 272.

of the acquisition of an easement by prescription, and secondly, the evolution of the tort of negligence had left the remedy with ample vitality to extend to excavators. Returning to the question he first asked,[36] he notes a confusion in distinguishing the two separate principles; one a property right and the other, a regulation of activity.

He too, recognises the evolution of the *Donoghue v. Stevenson* principle as expressed by Lord Reid in the *Dorset Yacht* case, but in no way sees the *Dalton v. Angus* prescriptive right as a justification for not applying the principle.

Woodhouse J. too, finds ample support for his conclusions in policy considerations and also refers to the "high persuasive influence" of House of Lords decisions in New Zealand, observing, however, that the Court of Appeal would not follow them where it was "quite inappropriate to do so".

Extension of the Neighbour Principle

The approach of the Court of Appeal in *Bognuda's* case is interesting in many respects, though perhaps the most important is the extension of the *Donoghue v. Stevenson* principle to the negligent excavator. The three Judges were as one in their views on this point, all choosing to follow the approach of Lord Reid and Lord Morris in the *Home Office v. Dorset Yacht Co. Ltd*,[37] in applying the principle to the facts before them.

In doing this, the Court of Appeal avoided dealing with the negligent acts of an excavator in terms of property rights, the approach, which it is submitted, found favour with Quilliam J. in the Court below, and which was followed by the English Court of Appeal in the *Fairway Motors* case. There Russell L.J. had said,[38]

> ". . . it has for many years been the law that a landowner is under no obligation to provide support for, or not to remove support from, his neighbour's property unless the neighbour has acquired an easement, subject only to the natural right to support of soil, and I doubt whether the impact of *Donoghue v. Stevenson* is sufficient to have reversed the law in that regard."

This view, it is submitted, is based on an unnecessarily narrow interpretation of the ratio of *Dalton v. Angus,* which, when regard is had to the questions put,[39] goes no further than expressing the

---

36. See supra, note 33.
37. [1970] A.C. 1004, 1027 and 1038 — see notes 26 and 27 supra.
38. (1968) 20 P. & C.R. 261, 272.
39. See (1881) 6 App. Cas. 740, 741 : (1) Has the owner of an ancient building a right of action against the owner of lands adjoining if he disturbs his land so as to take away the lateral support previously afforded by that land? (2) Is the period during which the plaintiffs' house has stood under the circumstances stated in the case, sufficient to give them the same right as if the house was ancient?

existence of a property right. Indeed, at that time there was no general category of negligence and their Lordships could not be said to be dealing with a rule of conduct — that came fifty years later.

In *Bognuda,* the Court of Appeal, in upholding the rule of conduct over the property right, applied the maxim, *"sic utere tuo ut alienum non laedas"*. As this recognition of the supremacy of the neighbour principle over the property right is at variance with high English authority, some analysis of the approach taken by the Court is called for.

To achieve the extension of the neighbour principle, the Court of Appeal mounted what might loosely be described as a "three pronged attack" by way of policy considerations, legal principle and strict notions of precedent. Each of these will be discussed in turn.

POLICY

Negligence cases seem to be a prime class for the exercise of judicial policy.[40] It could even be said that policy considerations were not far from the mind of Lord Atkin when he formulated his "neighbour" principle,[41] whilst Lord MacMillan in the same case thought that,

> "The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."[42]

Similar sentiments can be noted in the cases that followed.[43]

In recent leading negligence cases, the Court of Appeal has seldom articulated questions of policy, preferring to phrase judgments in terms of legal principle.[44] It may be that policy considerations become more relevant when the Court is called on to extend the scope of the law of negligence in a particular area, such as the duty of care in the present case.

However, *Bognuda's* case marks an unusual willingness on the part of the Court to express clear policy reasons for accepting the *Dorset Yacht Co.* doctrine of examining a new "duty situation" to see if the "neighbour" principle applies.

---

40. See Symons, *The Duty of Care in Negligence; Recently Expressed Policy Elements* (1971) 34 M.L.R. 394 and 528; Mathieson, *The Detonator Case* (1966) N.Z.L.J. 261 and 297.
41. [1932] A.C. 562, 583 cited at note 22 supra.
42. [1932] A.C. 562, 619.
43. See esp. Lord Pearce in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465, 536; "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the Courts' assessment of the demands of society for protection from the carelessness of others." and also Lord Morris in the *Dorset Yacht* case, note 27 supra.
44. See *Smith v. Auckland Hospital Board* [1965] N.Z.L.R. 191, *McCarthy v. Wellington City* [1966] N.Z.L.R. 481 (though policy considerations were clearly in the mind of McCarthy J.: see 519-520), and *Ross v. McCarthy* [1970] N.Z.L.R. 449.

Turner J. in particular, supports his argument on "principle" with clear reference to policy. His alluding to the "man on the Island Bay bus" hints unmistakably at the social factors he directly points to. Expressions such as,

> ". . . Lord Penzance obviously did not live in the world of building contracting; . . . that in his day there were not buildings twenty or thirty storeys high being built in every street as a matter of course."[45]

and,

> ". . . I think that those responsible for the conduct of modern building construction must recognise some duty of care."

and,

> "The burden cast upon them by such a duty may not be great. It must depend upon the current needs of the community."

ending with an all-embracing,

> "The law must not be allowed to atrophy with the times."

point to such considerations as present patterns of thought and modern conditions, whilst in the background the safeguard of what he considers are the socially accepted limits.

Woodhouse J. does not as readily identify the policy factors which influenced his judgment,[46] but he does indicate some of the broader issues involved. In dealing with Lord Penzance's discussion of the *sic utere tuo* principle in *Dalton v. Angus,* he says,

> "The remarks were made in a case dealing with contemporary attitudes to rights of property; but I think they may be regarded as an important pointer to one of the ways in which the Courts in New Zealand today can and should be prepared to adapt the tort of negligence to current needs."[47]

With reference to the notion of the prescriptive right, the factor which led to the English Court of Appeal's reluctance to apply the *Donoghue v. Stevenson* principle to the negligent excavator, he says that it,

> ". . . would be regarded by most people as entirely out of keeping with present needs and the sensible rights and responsibilities of adjoining landowners."[48]

In a concluding reference to policy, Woodhouse J. adopts the observations of Lord Morris in the *Dorset Yacht* case where he observed that,

> "in the situation stipulated in the present case, it would not only be fair and reasonable that a duty of care should exist, but that it would be contrary to the fitness of things were it not so."

---

45. [1972] N.Z.L.R. 741, 764.
46. But see his judgment in *Smith v. Auckland Hospital Board* [1964] N.Z.L.R. 241 esp. 250, where clearly expressed policy considerations are the basis for his decision.
47. [1972] N.Z.L.R. 741, 769.
48. Ibid., 770.

In his own words,

> "Sometimes the utility of the conduct under challenge needs to be evaluated against the risks associated with it in order to decide whether, as a matter of justice and commonsense, a duty situation in law should be recognised."[49]

In the present case, however, such a balancing of factors was not required, for

> "a choice can be made between a reasonably safe and a forseeably hazardous method of conducting such a deliberate and isolated operation as excavating in land."[50]

VI. PRINCIPLE

It is perhaps the second limb that is the most important feature of *Bognuda's* case, for this was the first occasion that the Court of Appeal has directly considered the *Donoghue v. Stevenson* principle in the light of its application by the House of Lords in *Home Office v. Dorset Yacht Co. Ltd.*[51] Each of the Judges adopts Lord Reid's approach in that case[52] by holding that the neighbour principle apply "unless there is some justification or valid explanation for its exclusion."

North P. in particular, spends some time laying the foundations[53] on which he concludes,[54]

> "Therefore, I can see no reason why the range of negligence which was greatly extended in *Donoghue v. Stevenson* "on the wide principle of the good neighbour; *sic utere tuo ut alienum non laedas*" should not be applied in this field. If I may be permitted to echo the words of Lord Reid in the *Dorset Yacht* case, it is no longer necessary to ask the question whether the present case is covered by authority, but only whether recognised principles apply to it."

Turner J. adopts the dicta of Lord Reid as the "foundation stone" of his judgment, using Lord Atkin's concept as a "statement of principle". He too forms the view that the circumstances of the case provide no real justification for excluding the *sic utere tuo* principle.

Woodhouse J. was

> "confident that the evolution of the tort of negligence and in particular the impact of the synthesis achieved by Lord Atkin . . . has left the remedy with ample vitality to extend to the activities of excavators . . ."[55]

He also applies Lord Reid's dicta to the present case, but cannot find

---

49. Ibid., 771.
50. Ibid., 771.
51. [1970] A.C. 1004.
52. Ibid., 1027, cited at note 26 supra.
53. [1972] N.Z.L.R. 741, 750-753.
54. Ibid., 757.
55. Ibid., 770.

the *Dalton v. Angus* principle as justification for excluding Lord Atkin's doctrine in New Zealand. As far as the present case is concerned,

> "Surely there could be no more graphic illustration of the neighbour Lord Atkin thought one ought "reasonably to have in contemplation" than an adjoining owner whose building is about to be affected by an excavation at the common boundary."[56]

VII. PRECEDENT

The third feature of the Court's approach in *Bognuda's* case, though more of incidental interest than the others, is the manner in which it dealt with precedent. It will not be often that the Court of Appeal will reject House of Lords authority of such long standing with so little ceremony in favour of American law. The almost cavalier treatment of the authority of *Dalton v. Angus* may be due to the disfavour with which the Court viewed the inflexible implications flowing from that decision. Each Judge in turn deprecates the case,[57] then invokes the strict doctrine of *stare decisis* to sweep away its authority in New Zealand. One might be excused for thinking that North P. was firing a valedictory broadside when he said,[58]

> "while judgments of the House of Lords, without question are entitled to the greatest respect, technically we are not bound by the judgments of that august body. Our master is the Judicial Committee of the Privy Council, not the House of Lords, and there is no decision of the Privy Council which stands in the way of this Court following the line which has found favour in America."

Woodhouse J. expressed a similar opinion, concluding,[59]

> "We are not bound to follow a decision of the House of Lords and it would be quite inappropriate to do so where the rule in question has been based (as in the present instance) upon a derivative application of principles that unquestionably are inapplicable in New Zealand."

This categorical approach to the effect of House of Lords authority gives a rare indication of the Court's attitude on the question of precedent when its way is unfettered by binding authority.

Ross v. McCarthy

It is interesting to compare the views of the Court in *Bognuda's* case, when dealing with the question of House of Lords precedent, with those in another of its recent decisions in *Ross v. McCarthy*.[60]

---

56. Ibid., 771.
57. [1972] N.Z.L.R. 741, 756 (North P.), 763 (Turner J.), 768 (Woodhouse J.).
58. Ibid., 757.
59. Ibid., 771.
60. [1970] N.Z.L.R. 449.

It is perhaps worthy of brief comparison, for two of the members of the Court in *Bognuda*, there rejected an attempt to apply the *Donoghue v. Stevenson* principle in what also appeared to be a "duty situation".

In *Ross v. McCarthy*, the appellant was seeking damages as the result of a collision involving his car and one of the respondent's cattle which had strayed onto the road. The task was by no means easy, for the law had clearly been laid down twenty years earlier by the House of Lords in *Searle v. Wallbank*,[61] when it held that there was no legal obligation on the owner of a field abutting a highway to fence his property so as to prevent his animals straying onto the road.

Counsel for the appellant used much the same arguments as those put forward for the plaintiff in *Bognuda's* case, for there was a Canadian Supreme Court decision[62] which rejected the House of Lords' approach and also the American Restatement which supported his argument that *Searle v. Wallbank* be not followed. In dealing with that authority, North P. said,

> "I agree with (counsel for the appellant) that technically we are not bound by judgments of the House of Lords, but it would be idle to suggest that they are not entitled, particularly on a matter of substantive law such as this, to be treated with the very greatest of respect and departed from on rare occasions where for some good reason or another the law in New Zealand has developed on other lines as was the position in *A.C. Press v. Uren.*"[63]

Turner J. also declined the invitation not to follow the House of Lords authority, noting that although the Courts were always ready to exert control over their own procedural matters, on questions of substantive law, such freedom did not exist when the New Zealand and English law had developed side by side. He was accordingly of the view,

> "that it would not be proper for this Court to embark upon the judicial legislation (for it would be no less) which would be necessary before we could allow this appeal."[64]

Although the remarks of both Judges in this earlier case appear to be inconsistent with reasoning in *Bognuda* (both cases sharing remarkably similar backgrounds), one factor was highly relevant in the later case, for in the words of North P., "furthermore, we are not embarrassed by any earlier New Zealand case." In *Ross v. McCarthy*, the New Zealand law had been soundly established in two earlier decisions[65] and had developed along the same lines as

---

61. [1947] A.C. 341.
62. *Fleming v. Atkinson* (1959) 18 D.L.R. (2d) 81.
63. [1970] N.Z.L.R. 449, 453-454.
64. Ibid., 455.
65. See *Millar v. O'Dowd* [1917] N.Z.L.R. 716, and *Simeon v. Avery* [1959] N.Z.L.R. 1345.

the English authority. A further clear distinction arises from *Bognuda's* case where the relevant English property law was different from that in New Zealand.

VIII. CONCLUSION

The decision in *Bognuda v. Upton & Shearer Ltd* is to be applauded as an example of what the Court of Appeal can do when unfettered by direct precedent. It would have been easy to have accepted Quilliam J.'s decision in the lower Court and recognise the recently stated English position, giving precedence to property law concepts and ignore the duty of care that each man owes his neighbour. However, it is submitted with respect that the Court of Appeal arrived at the correct decision and the bold approach in adapting the *Dorset Yacht* case application of the "neighbour" principle to a new duty situation will no doubt have important future implications in negligence cases.

The heralding of this approach may well have been inspired by the Court's notions of the justice of the plaintiff's plight when faced in the modern high-rise era with a straitjacketed nineteenth century formulation of the law. The decision might be described as a modern restatement of the law with respect to excavators, which, in the words of Turner J., was,

> "a judicial compromise between the need for protection for buildings and the claims of landowners to use their land without restriction."

N. TRENDLE.