The duty of care owed by builders and local authorities: Mount Albert Borough Council v. Johnson

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In this article Victoria Stace discusses developments in the area of local body liability for negligence in the context of the recent Court of Appeal decision of Mount Albert Borough Council *v.* Johnson, *which dealt in particular with the problem which arises when damage occurs more than once to the same building, the accrual of causes of actions, and contribution among defendants.*

I. MOUNT ALBERT BOROUGH COUNCIL v. JOHNSON[1]

In 1965 a development company, Sydney, was granted a building permit by the Mount Albert Borough Council to erect a block of flats. The actual building was carried out by independent contractors, Fry and Hayter, who were employed by Sydney. The land on which the building took place was "filled", meaning the ground was not solid, natural earth, but consisted of uneven basalt rock, the hollows having been filled with imported materials, including clay and rubbish such as old motorcar parts. The fact that the land was filled was known both to the council and Sydney. Building proceeded, and the council inspected the foundations before the concrete was poured.

In 1966 Flat 3 was sold. In 1967 cracks appeared in the front concrete steps, the outside roughcast plaster and also in the ceiling of the lounge. Remedial work was done by Fry and Hayter at the request of Sydney. At this stage it was not suspected that there was any major defect in the foundations, and the trial judge found that Sydney did not anticipate any further settlement after the completion of this work. What was actually done was that six extra piles were put in, by way of underpinning and the cracks were filled. These piles were not taken down to solid base. The council was not notified of the extra work and no building permit was applied for in respect of it.

* This article is an edited version of a paper presented as part of the LLB(Hons) programme.

1 [1979] 2 N.Z.L.R. 234.

In 1968 the purchasers sold to Mr and Mrs Harris, and there was no evidence of any damage to the structure occurring during their ownership. Mr and Mrs Harris sold to Miss Johnson in 1970. She knew nothing of the 1967 work and on inspecting the flat before purchase she found it to be in immaculate condition. Towards the end of 1970 slight cracks began to appear, becoming worse in the following years. These were similar to the 1967 cracks but significantly worse. An engineer consulted by Miss Johnson gave evidence that a progressive subsidence of the flat was occurring because the foundations were not adequate for the construction of the block on filled ground. Miss Johnson sued both the Mount Albert Borough Council and Sydney in negligence.

The case came before the High Court in 1976. Mahon J. found that Sydney was negligent in failing to ensure that the foundations were adequate or that the building was founded on secure ground. In regard to the council Mahon J. found it must have been apparent to the inspector that the foundations were inadequate in respect of land that had been filled and the inspector was therefore negligent in passing them. He also found that the council had been negligent in its issue of a building permit as in the application for a permit Sydney had left blank the space for description of the soil. Mahon J. found authority for the builders' duty of care in *Bowen* v. *Paramount Builders Ltd.*,[2] and for the council's duty of care in *Dutton* v. *Bognor Regis Urban District Council.*[3] The defendants were held equally liable. Both had pleaded section 4(1) of the Limitation Act 1950, which bars actions in tort more than six years from the date on which the cause of action accrued. Mahon J. said that in his view the damage in an action for negligence arose when the faulty foundations were constructed. He said he was, however, bound to follow the English Court of Appeal in *Sparham-Souter* v. *Town and Country Developments (Essex) Ltd.*[4] which establshed that a cause of action does not accrue until the damage manifests itself or when a person who has an interest in the property first discovers the damage or should with reasonable diligence have discovered it. On this test the action before Mahon J. was not statute-barred.

Both defendants appealed. The council's grounds were that the action was statute barred, the cause of action having accrued either in 1965 or 1967, or, alternatively, that the apportionment between the defendants was wrong. Sydney's grounds were firstly the same limitation point, secondly that it could not be held liable for the negligence of independent contractors, and thirdly that the events in 1967 constituted settlement or "accord and satisfaction", barring any further claims in respect of the property.

The appeals were dismissed. The court found:

— that the damage that occurred in 1970 was caused by the 1965 negligence and was significantly distinct from that occurring in 1967 to result in a separate cause of action accruing to Miss Johnson;

2 [1977] 1 N.Z.L.R. 394.
3 [1972] 1 Q.B. 373.
4 [1976] Q.B. 858.

— that Sydney had a duty of care to see that proper care and skill was exercised in the building of the flats and that duty could not be avoided by delegation to an independent contractor;

— that it was the builder's responsibility under the by-law to go down to a solid bottom. The council's initial failure to check adequately what the builder did, or to insist on something more, made the council liable to the plaintiff. The builder's omission in 1967 did not constitute a novus actus interveniens, but the builder was the party primarily liable.

Responsibility was apportioned between the defendants at four-fifths to Sydney and one-fifth to the council.

Four issues raised by the decision will be discussed in this paper —

1. accrual of causes of actions against builders as compared with councils;
2. a developing approach to questions of economic loss;
3. the problem of successive causes of action;
4. the contribution issue.

II. ACCRUAL OF CAUSES OF ACTION AGAINST BUILDERS AS COMPARED WITH COUNCILS

A. Introduction

The *Johnson* case involved both a council and builders. There was no assignment of any right of action from the previous owners, so Miss Johnson could only sue for damage which arose during her period of ownership.[5] Her ownership started in 1970 and as she commenced legal action in 1973 no question of limitation arose. Nonetheless, the court took the opportunity to discuss the issue of accrual and more specifically whether knowledge, actual or constructive, of the damage is necessary before time begins to run. Cooke J., delivering a joint judgment with Somers J., came up with a general test for when causes of action will accrue against councils and builders. It appears from an analysis of the previous authorities that councils and builders had in the past been treated differently, but that distinction is not recognised in *Johnson*. Though the resulting test is one which accords with common sense on the question of knowledge, there remains a possible distinction in whether physical damage to the house is necessary.

B. Authority

It was held in *Dutton* that the damage which is a necessary element of a cause of action in negligence is done by the builders when they lay the faulty foundations, and by the council when those foundations are approved. In *Sparham-Souter* the matter was reconsidered and a different view taken, it being held that a cause of action in negligence accrues not at the date of the negligent act but when the plaintiff suffers some damage. In a case like the present the cause

5 "The general principle of English law is that he only can sue for negligent damage to property who had a proprietary interest in that property at the time when the damage occurred" — *Bowen* v. *Paramount Builders Ltd.*, [1977] 1 N.Z.L.R. 394, 414.

of action on this test does not accrue until the damage manifests itself or when a person who has an interest in the property first discovers the damage or should with reasonable diligence have discovered it.

Bowen's case formulated the rules relating to builder's liability to subsequent purchasers. In it Richmond P. held that the cause of action arises when the negligence of the builder results in actual structural damage to the building which is more than minimal.[6] He also said that it would seem reasonable for a purchaser to be able to sue if he discovers a latent defect before actual structural damage occurs, so as to prevent threatened damage. Woodhouse J. did not expressly discuss this but infers that a cause of action accrues when there is some physical damage to the structure, and suggests that a purchaser should be able to sue if he discovers a defect before any damage is caused.[7] Cooke J. seems to say the action accrues when damage becomes manifest,[8] and he also would probably allow the purchaser a cause of action if he had merely discovered the defect.

In *Anns* v. *Merton London Borough Council*[9] the House of Lords considered the position of a local authority acting under by-laws made under the Public Health Act 1936 (U.K.), and decided that the council's liability had to be considered in the light of the purpose of those by-laws, as a body such as the council, acting in accordance with public powers and duties, was subject to special considerations concerning the extent of its duties at Common Law. It was held that a duty of care existed and that a cause of action would accrue to the plaintiff when the state of the building was such that there is present or imminent danger to the safety or health of persons occupying it. This closely tied in with the purpose of the by-laws, being to prevent damage arising from weak foundations which would lead to danger to the safety of the occupants.

Whether knowledge of the damage is necessary was not discussed in *Bowen* and only by Lord Salmon in *Anns.* As the test for accrual in that case was "danger to the safety or health of occupants" the relevant issue becomes whether the plaintiff must know of the danger he or she is in before the limitation period begins to run. Lord Salmon took the view that the time began to run when the damage had occurred which put the occupants in danger, whether they were aware of that damage or not.[10] He cited as his authority *Cartledge* v. *E. Jopling and Sons Ltd.*[11] a case of personal injury, where workman's lungs were damaged by fragments of material he was breathing in: the fact that he was not aware of this damage for several years did not prevent the limitation period running from the date damage was sustained. Although Lord Wilberforce is silent on this issue an indication of what his view might be can be found in the passage which follows immediately after discussion of the time of accrual, in which he says:[12]

> If the fact is that defects to the maisonettes first appeared in 1970, then, since the writs were issued in 1972, the consequence must be that none of the present actions are barred by the Act.

6 [1977] 1 N.Z.L.R. 394, 414.
7 Ibid. 417.
8 Ibid. 423
9 [1978] A.C. 728.
10 Ibid. 770.
11 [1963] A.C. 758.
12 [1978] A.C. 728, 760.

The inference is that the cause of action will not accrue until the defects are discovered, or perhaps at least discoverable. This inference comes from the word "appear", which on normal interpretation, it is submitted, implies that somebody must be able to perceive the damage.

C. Treatment of the Issue in Johnson

Cooke J. in *Johnson* limits Lord Salmon's observations to damage endangering the safety of occupants, and damage is not an element of the test he adopts. He further distinguishes *Anns* as a case involved with the Public Health Act 1936 (U.K.) and therefore with protecting the health or safety of persons.

After distinguishing *Anns* he goes on to state what he regards as the law in New Zealand. He sees *Bowen* as authority for the proposition that[13] " . . . a purchaser in Miss Johnson's position can recover in tort for economic loss caused by negligence, at least when the loss is associated with physical damage" and that her cause of action will arise " . . . either when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution."

Cooke J. later brings the *Johnson* case within the *Anns* test of "imminent danger to health or safety" as well, even though he does not think this is a necessary element of the test applicable to the *Johnson* facts. The danger lies, he finds, in the separation of the outside steps from the house and the sloping of the floor.[14]

D. Discussion of Cooke J.'s Approach

1. *Grounds for distinguishing the Anns case*

What Cooke J. says about the concern of protecting the health or safety of persons is plainly true, but on analysis it seems there are good reasons for imposing the criteria of knowledge into the "danger to safety or health" test. To allow a cause of action to accrue before the plaintiff ought reasonably to be aware of the danger seems contrary to fairness. Also it allows the action to accrue before the plaintiff has personally suffered any damage. *Sparham-Souter* discusses this point and emphasises how in actions for negligence, where some damage has to be suffered by the plaintiff before he has an action, a cause of action cannot accrue before the plaintiff discovers some damage to the house, as before then he can sell the house for full value and have suffered no loss. This is a basis for distinguishing *Cartledge*, as in a situation of bodily injury the damage is personal to and affects the plaintiff as soon as it is suffered, whether he is aware of it or not. In the situation of damage to a home, if the plaintiff knows of the dangerous state of affairs he has suffered some damage as that state of affairs would render the house less valuable. This would be the situation whether or not there was physical damage to the structure of the house or circumstances surrounding the house which made damage to the house in the future inevitable.[15]

13 [1979] 2 N.Z.L.R. 234, 239. 14 Idem.
15 E.g. where there was a threatened landslide, due to the unstable nature of the soil.

But before this, at the point where the plaintiff is not aware of the danger, it is hard to imagine what damage he personally has suffered.[16] Therefore it is submitted that there are good reasons for having a knowledge or constructive knowledge criterion in the *Anns* test of accrual.

2. *Cooke J.'s formulation of the test for accrual*

Not only does it seem more reasonable that the cause of action should not accrue until the defect becomes apparent or manifest, but this would also be the stage at which some damage had been suffered by the plaintiff personally.

There is no indication here that Cooke J. sees any relevance in the fact that *Anns* was a case solely about councils, which decided that the extent of their liability, including the time of accrual of actions, has to be determined in light of the legislation under which they operate. On this view the *Anns* test of accrual can be limited as applicable only to —

(i) councils, and
(ii) the particular by-laws there in question.

If it were assumed that the council in *Johnson* was also acting under some legislation concerned with public safety there is still the possibility that the test may have no application to builders. If *Anns* can be taken as authority for the proposition that causes of action accrue against the council possibly before there is any knowledge of the danger, there remains the question whether *Bowen* establishes any knowledge criteria for actions against builders. Though in *Bowen* nothing is expressly said as to whether actual or constructive knowledge of damage to the building is necessary, Richmond P. gives clear support for the *Sparham-Souter* decision,[17] in which the plaintiff's knowledge of the defect was essential to start the limitation period running. In addition, knowledge can be imputed more easily into the builder's test of accrual than the council's as there is no authority specifically against it, rather there is some in support of it. In *Johnson* Cooke J. decides knowledge is necessary for actions both against councils and builders.

The *Anns* test of danger to health has on the face of it no requirement of physical damage, either to the structure of the building or to other property of the plaintiff. The *Bowen* test does seem to require some physical damage or threat of physical damage to the structure of the building. If the *Anns* test is taken literally it would appear that a cause of action can accrue to the plaintiff when there is no damage, or threat of, to the structure of the house, so long as the occupants have their safety or health endangered.[18] Such would, for

16 This is so whether there is actual structural damage or not, if he is unaware of it, unless it can be argued that he has an interest in living in safe surroundings. This is not, however, a recognised loss to the plaintiff, as it is not financial or property damage or personal injury.

17 [1977] 1 N.Z.L.R. 394, 414.

18 This was the interpretation of the *Anns* test adopted in the English Court of Appeal case *Batty* v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554, 571-572 per Megaw L.J. It should be noted that the *Anns* test was applied here to a developer and there was no council involved in the litigation. It is submitted that the application of that test, formulated to deal with councils, may not have been strictly appropriate.

example, be the situation where houses are built on land which latter, due to its geoglogical structure, proves to contain poisonous gases which start to seep up through the soil. Though there is no danger to the structure of the buildings, humans cannot live there without danger to health or safety. In such a situation, on the *Anns* test, the local council would be liable if its statutory duties extended to carrying out surveys of the soil in the area in the interests of general public health and safety, which might reasonably be expected to detect such a fault. Liability would attach to the council regardless of whether there was any physical damage, so long as danger to health or safety was threatened. On the *Bowen* test (and the test adopted by Cooke J. in *Johnson*) there could be no liability as there is no damage or threat of damage to the structure of the buildings.

That Cooke J. goes on to satisfy the *Anns* test of "imminent danger" as well leaves the precise requirements for future actions uncertain. Perhaps both imminent danger and physical damage are necessary. Cooke J. clearly does not see the former as an essential element of Miss Johnson's cause of action. In any case, as the danger he indicates as sufficient to satisfy the test is minimal, this requirement will not be difficult to satisfy if there is any damage to the structure of the house.

It is worth pondering whether the judges who decided *Bowen* would have modified their views in light of the *Anns* decision. There is comment on this in Cooke J.'s judgment in *Bowen*:[19]

> It seems possible that the House of Lords may shortly throw light on builder's liability in the appeal from *Anns* v. *Walcroft Property Co. Ltd.* [1976] Q.B. 882, even though that appeal apparently relates directly only to the local authority's position. Anything decided or said in the House of Lords would, of course, be of high persuasive authority for us, though not binding, and any unnecessary or unintended divergence on a point of common law priciple is to be avoided.

It is submitted that in light of the emphasis in *Anns* on the special position of councils due to their public law setting, anything said as relates to council's liability should be extended only with careful consideration to builders' liability.

E. Conclusion

So we are left with two different tests. In *Johnson* the *Bowen* test, as worded and modified by Cooke J., was applied to both the council and the builders (Sydney). If the two different tests lead to different results it is important to apply them separately to each defendant. It appears that the results may be different in two ways:

— the council's liability may accrue at a different time from the builder's liability, i.e. when it can be said objectively that there is danger to the health or safety of occupants, while the builder's liability will not accrue until the plaintiff has or perhaps ought to have knowledge of the damage or imminent damage to the structure of his house; and

— the council may be liable for loss when there is no possibility of physical

19 [1977] 1 N.Z.L.R. 394, 423-424.

damage to the structure of the house, so long as there is some danger to health or safety. This would be economic loss, in loss of value of the house. As the *Bowen* test stands there must be some physical damage or threat of it to the house, but it seems unlikely that there could be recovery for economic loss where there is not at least the threat of physical damage.[20]

This second difference seems to put a heavier liability on the council. Is this warranted in light of Lord Wilberforce's statements in *Anns* that " . . . the inspector's function is supervisory"[21] and later " . . . the builder, whose primary fault it was . . . "[22]? A way of reconciling the discrepancy in the extent of the builder's and the council's liability could be to sue the builder not for breach of any Common Law duty, but for breach of his statutory duty, an alternative suggested by Lord Wilberforce.[23] He would then be liable to the same extent as the council. This would be dependent on the builder, as opposed to the council, having a duty to comply with the by-laws. In *Anns* the builder did have a duty to comply with the by-laws, but this will not always be the case. In the case of land containing gases the council may be under a duty to carry out tests on the land and ensure it is safe, while the builder would only have the duties normally encumbent on a person building on normal land. This is because the council is under a heavier responsibility to concern itself with general matters of public health and safety. This remedy, both against the council and the builder, is also dependent on the court finding that the Legislature intended there to be a right of civil action co-existent with the criminal penalty for breach of the relevant statute, if a civil action is not expressly allowed for.

III. A DEVELOPING NEW APPROACH TO QUESTIONS OF ECONOMIC LOSS

A. Introduction of the Issue

In his judgment Cooke J. gives[24] a broad formulation of the law relating to economic loss which invites some discussion of the way this area of tort law is developing.

Recovery for financial loss which is not a consequence of any physical damage was traditionally denied, until 1963, when the House in *Hedley Byrne* v. *Heller*[25]

20 "For the purposes of the present case it is not necessary to deal with the question of "pure" economic loss, that is to say economic loss which is not associated with a latent defect which causes or threatens physical harm to the structure itself" — [1977] 1 N.Z.L.R. 394, 410 per Richmond P. On the other hand Cooke J. does take the opportunity to make some statements on this issue, ibid. 423.

21 [1978] A.C. 728, 755.

22 Ibid. 758.

23 Ibid. 759.

24 [1979] 2 N.Z.L.R. 234 at 239. It is submitted that Cooke J.'s reference here to "physical damage" does not detract from the wide scope of the statement, as this only qualifies the statement to the extent that there must be some damage or threat of damage to the property. This itself is traditionally regarded as economic loss. The important thing is that Cooke J. is not disguising the fact that this is actually economic loss, which, with respect, is perhaps what their Honours in *Bowen* were effectively doing by renaming it "physical damage".

25 [1964] A.C. 465.

felt that certain loss suffered as a result of negligent misstatement could in certain circumstances be recovered. Since this decision it is no longer possible to assert the finality of the old rule, and in other areas where purely economic loss is suffered, as where a plaintiff suffers loss of profits when his factory is closed down as a result of negligent damage to the power supply, the courts are re-assessing the rules relating to recovery. It appears from the cases that a new approach to questions of economic loss is developing, an approach which allows full and open consideration of the policy issues involved.

B. The Trend Away from the Traditional Approach in the Area of Products Liability

The view traditionally held is that damage confined to the article purchased is not recoverable in an action in tort, as suing for cost of replacement or repair or for lost value is an attempt to get full value for the article, and the claim lies in contract only.[26] Recovery for the cost of repair of damage to the structure of a house was first allowed in *Dutton*, where Lord Denning replied to the argument that this was a claim for purely economic loss by calling the damage "physical damage" to the house, and said it would be "an impossible distinction" to allow recovery when a defect causes injury to a person but not when it is discovered before any personal injury is caused.[27] Stamp L.J.[28] could rationalise allowing recovery for such loss against the council, by emphasising its acting under an Act to perform the very function of making sure foundations are safe, while he would not allow such a loss to be claimed against the builder.

In *Anns* the approach taken by Lord Wilberforce is that damages which can be recovered:[29]

> may also include damage to the dwelling house itself; for the whole purpose of the byelaws in requiring foundations to be of a certain standard is to prevent damage arising from weakness of the foundations which is certain to endanger the health or safety of the occupants.

This is along the same lines as Stamp L.J.'s approach.

In *Bowen* all three members of the court allowed recovery for this head of loss. Richmond P. called the damage "physical damage",[30] following Lord Denning in *Dutton*. Woodhouse J. also called the loss "physical damage", but was clearly influenced by the consideration that it is only sensible to encourage home owners to repair defects and allow them to recover the cost, rather than force them to wait until more serious damage occurs.[31] Cooke J. said it was enough to dispose of the case before him to say that the damage was basically physical.[32]

It is submitted that the argument for allowing recovery of this loss from the council is much more firmly grounded than for allowing recovery against the builder. The council's liability can extend to economic loss such as this on the

26 See Bennett, "Products Liability: Tortious Recovery For Economic Loss" (1974) V.U.W.L.R. 330, 331-332.
27 [1972] 1 Q.B. 373, 396.
28 Ibid. 415.
29 [1978] A.C. 728, 759.
30 [1977] 1 N.Z.L.R. 394, 410.
31 Ibid. 417.
32 Ibid. 423

ground that the by-laws determine the extent of the duty. With the builder, however, it is not as easy to get over the traditional hurdle of not allowing recovery for economic loss. This also could be remedied by suing the builder for breach of statutory duty, but again only where the statute imposes a duty not only on the council but also on the builder.

C. Rationale for this Trend

Both in *Dutton* and in *Bowen* there is a common sense consideration clearly influencing the judges: it is absurd to force people to wait until personal injury or other property damage has occurred before they have some means of redress, rather they should be encouraged to take precautionary measures before there is more serious damage.[33] One possible analysis of the development of this area of law is that this is a special area of economic loss that is to be separated off because of its nature, and recovery allowed. This would mean the rules have no application where personal injury or property damage is not threatened.[34]

On the other hand, it may be that this is another of several indications that the whole field of economic loss in tort law is undergoing change, and that soon all economic questions will be approached in the manner indicated by Lord Wilberforce in *Anns*. This approach is firstly to see if there is a situation of proximity between the defendant and the plaintiff. Proximity will exist when it can be said that the defendant can reasonably forsee that carelessness on his part may be likely to cause damage to the plaintiff. Secondly, the court must consider whether there are any policy reasons to limit the scope of the duty in any way, or the class of persons to whom it is owed.[35]

Support for the propostion that economic loss questions may soon be subject to this new approach comes from *Scott Group Ltd.* v. *McFarlane*,[36] a recent Court of Appeal decision, where the *Anns* approach was used to decide what the necessary proximity was between defendants and plaintiffs to create a duty of care in the field of negligent misstatement.[37] Woodhouse J. says of the *Anns* test in general:[38]

> With respect, I think that statement is a valuable and logical guide to the way in which a decision should be made as to whether a duty of care exists in an apparently novel situation.

This suggests we may be limited in our application of the *Anns* test to "apparently novel" situations, but as the degree of fact difference in *Scott Group* itself

33 This is a legal consideration as well as a common sense one, as a purchaser who knows of a defect and does nothing, then sues when personal injury or other property damage is suffered could have a defence of contributory negligence put up against his action. In New Zealand personal injuries no longer give rise to causes of action, due to the Accident Compensation Act 1972. The same considerations apply nonetheless, as personal injury is a serious damage which should be averted if possible.

34 See Laskin J.'s dissenting judgment in *Rivtow Marine Ltd.* v. *Washington Iron Works* [1973] 6 W.W.R. 692 (Supreme Court).

35 [1978] A.C. 728, 752.

36 [1978] 1 N.Z.L.R. 553.

37 The *Anns* test was used by Woodhouse and Cooke JJ. but not by Richmond P., who wrote a dissenting judgment.

38 [1978] 1 N.Z.L.R. 553, 573.

from former negligent misstatement cases was not great,[39] an "apparently novel" situation will not have to be radically different from former authority. Alternatively, it may be found that it is not necessary to have an apparently novel situation at all, rather that Woodhouse J. was attempting to limit the scope of his decision so it would appear as less of a radical departure from precedent. It seems probable that the new approach will be applied in areas already well covered by precedent, such as the cases of "pure" economic loss.[40] Lord Wilberforce himself cites these as examples,[41] but of cases where policy reasons might lead the court to impose limits on the scope of the duty, even though a situation of proximity exists.

Pure economic loss is where the defendant's act causes the plaintiff financial damage, which is not consequential on any physical damage. A series of recent pure economic loss cases in the United Kingdom[42] in which the plaintiff suffered a loss of expected financial gain leaves intact the traditional analysis given in *Spartan Steel and Alloys Ltd.* v. *Martin and Co. (Contractors) Ltd.*[43] This is that the plaintiff can recover only for economic loss which is consequential on physical damage he has suffered. Lord Denning alone wants to see each case considered on its own facts and a decision made whether as a matter of policy non-consequential (pure) economic loss should be recoverable. Edmund Davies L.J. suggests that any economic loss which is both a "direct"[44] and a reasonably foreseeable result of the defendant's negligent act should be recoverable. It appears from these judgments that there is a desire to reassess the rules relating to recovery for economic loss, and the most desirable approach would be, it is submitted, one which allows open consideration of the policy issues involved.

The recent Australian High Court decision *Caltex Oil (Aust.) Pty. Ltd.* v. *The Dredge "Willemstad"*[45] leaves the law relating to economic loss in Australia in an uncertain state, as the five judgments all formulate the test for when pure economic loss is recoverable slightly differently. We are left with the situation that if the defendant knows or perhaps ought to know of the plaintiff as a particular person who may suffer loss, then there will probably be recovery. This test is reminiscent of Lord Denning's test in his dissenting judgment in *Candler* v. *Crane Christmas and Co.*,[46] for when there will be a duty of care and consequential liability

39 Cooke J. expressly distinguishes *Hedley Byrne* and *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793, which followed *Hedley Byrne,* as situations where there was a specific request for advice, while there was none in *Scott Group* ([1978] 1 N.Z.L.R. 553, 583). Those two decisions were primarily concerned with the question of who would owe a duty in the negligent misstatement context rather than to whom a duty would be owed. On this view *Scott Group* is deciding a different point than that in issue in those cases. Arguably, however, their Honours are purporting to lay down that the reasonable foresight test applies to both the question of to whom the duty will be owed and who will owe a duty.

40 E.g. infra n.42.

41 [1978] A.C. 728, 752.

42 *Weller* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittall and Son Ltd.* [1971] 1 Q.B. 337; *Spartan Steel and Alloys Ltd.* v. *Martin and Co. (Contractors) Ltd.* [1973] Q.B. 27.

43 [1973] Q.B. 27.

44 Undefined.

45 (1976) 11 A.L.R. 227.

46 [1951] 2 K.B. 164.

for financial loss caused by negligent mistatement.[47] The test related to the question of to whom a duty would be owed, as does the *Caltex* test. The scope of the duty was subsequently broadened by *Scott Group*, where it was held that the class of plaintiffs to whom the duty was owed was all those the defendant ought reasonably to have foreseen might suffer damage.[48]

Caltex has been followed in the recent New Zealand decision of *J. and J.C. Abrams Ltd.* v. *Ancliff*.[49] Casey J. held that *Caltex* is authority for the view that liability exists for pure economic loss but is limited to the situation where the defendant could reasonably foresee that a particular plaintiff will suffer loss, as distinct from a general class of people. He applies the *Anns* two-stage test here to establish whether there is a duty of care, and whether it ought to include liability for economic loss.[50]

It is clear that *Caltex* has extended recovery for economic loss beyond only that consequential on physical damage. It has not put economic loss under the *Wagon Mound*[51] principle of reasonable foresight. This suggests there may be good policy reasons for limiting the scope of the duty in economic loss cases.[52]

D. Applying the Anns *Test to the* Johnson *Situation*

It is submitted that we therefore have a basis for reassessing the *Johnson* case in a broader context. Rather than separating it off as an exception to the rule, we can say Miss Johnson's claim for damage to the structure of her house may in traditional thought be a claim for pure economic loss, but this will not automatically defeat her claim. Instead one is to apply the *Anns* test and assess whether there was a relationship of proximity, and if so whether there are any policy reasons for limiting the scope of the duty, or the class to whom it is owed, or the nature of the damages recoverable.

There is no way that the application of this test results in all economic loss being automatically recoverable, as the scope of the duty can be limited to any extent if policy considerations indicate it should be.

47 In Lord Denning's judgment recovery would be allowed, notwithstanding the fact that loss was purely economic, when the person making the statement knows or ought to know of the particular person who will rely on it and knows or ought to know of the particular transaction it will be relied on for.

48 It is not absolutely clear that the "reasonable foresight" test was the sole criteria applied in *Scott Group*. Both majority judges appear to have considered other facts in the particular circumstances of that case were relevant to deciding the proximity issue.

49 [1978] 2 N.Z.L.R. 420.

50 Ibid. 429.

51 [1961] A.C. 388.

52 Note also *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1976] 3 W.L.R. 66 where loss suffered was purely economic, caused by one company's failure to register a hire-purchase agreement on their files, on which the defendant had relied when buying a car. Lord Salmon alone takes the opportunity to discuss whether the loss is too remote, and expressly limits the effect of the *S.C.M. (United Kingdom) Ltd.*. decision. Also, in *Taupo Borough Council* v. *Birnie* [1978] 2 N.Z.L.R. 397, recovery was allowed for "pure" economic loss by way of loss of profits. Richmond P. at page 402 talks about the loss being not only a foreseeable but also an immediate consequence of the negligence

In Miss Johnson's case, firstly, proximity is satisfied. Secondly, the policy reasons normally given for not allowing recovery of pure economic loss do not seem to apply. The usual reasons for not allowing recovery are:

(1) *The potentially enormous class of persons likely to suffer some financial loss.* In the *Johnson* situation there will usually be only one purchaser who sues to repair a defect. This is because the cause of action will normally accrue once and for all when the defect first becomes manifest. Any later manifestation will be related in causation to the vendor who sued for its repair, and that vendor perhaps also takes on a duty to inform subsequent purchasers,[53] or if no action is brought the defect becomes something that a subsequent purchaser ought reasonably to discover on inspection of the property.

(2) *The potential size of claims, which would place an unfairly heavy burden on the defendant.* In the *Johnson* situation the defendant's liability, if limited to *direct* economic loss,[54] would not exceed the cost of repair, or at the most replacement, of any building.

(3) *That claims of this sort ought to be founded in contract.* In a case like *Johnson* the vendor may be unaware of the defect and so not responsible. Also the vendor of a house is often an ordinary person not in a position to insure against claims such as these, while the builder and the council are in a position to insure.

The main reason in favour of allowing recovery for this type of economic loss seems to be the practical one, that it is allowing the plaintiff to make and recover the cost of timely repairs before any other property damage or personal injury is suffered. It may be that the Court of Appeal in *Johnson* lost sight of this consideration as there is no mention of it. On the facts of *Johnson*, however, if subsidence had continued, personal injury or other property damage would have been likely to occur. To extend liability to cases where there is no threat of damage at all to people or other property would require reconsideration of the matter without the support of this main practical policy consideration.

Whether the courts would recognize a duty to not put out a merely defective but safe product is at present unclear. Cooke J. has commented: "I do not see why the law of tort should necessarily stop short of recognizing a duty not to put out carelessly a defective thing . . ."[55]. Cooke J. was also the formulator of the test in *Johnson* and in light of his earlier comment in *Bowen*, he could have had in mind the situation where there is a threat to people or other property.

53 See Smillie, "Liability of Builders, Manufacturers and Vendors for Negligence" (1978) 8 N.Z.U.L.R. 109, 131-135.

54 A distinction has been drawn between "direct" and "consequential" economic loss. "*Direct* economic loss is the out of pocket loss or loss of bargain to the purchaser caused by the defect causing damage to the product itself or rendering the product unfit for its normal intended purposes [. . .] *Consequential* economic loss includes all other indirect loss such as loss of profits from inability to use the defective product". — Smillie, "Liability of Builders, Manufacturers and Vendors for Negligence" (1978) 8 N.Z.U.L.R. 109, 117

55 [1977] 1 N.Z.L.R. 394, 423.

IV. THE PROBLEM OF SUCCESSIVE CAUSES OF ACTION

A. Introduction of the Issue

All three judges in *Johnson* found that a cause of action arose in 1967, when remedial work for cracks in the steps, the plaster and the ceiling was done.[56] The issue arose whether Miss Johnson could have a separate cause of action accruing to her in 1970, after her purchase of the property and the appearance of fresh damage. A fear of opening the door to an endless series of claims by subsequent purchasers had been expressed in earlier cases, but not until *Johnson* had a situation of subsequent damage actually arisen. *Johnson* decides when it will be possible to have a second cause of action arising.

B. Discussion of the issue by previous authority

In *Anns* the question of successive causes of actions is not expressly discussed but Cooke J. in *Johnson* gets support from a passage in Lord Wilberforce's judgment which states: " . . . a cause of action arises at the point I have indicated".[57] Cooke J. infers that Lord Wilberforce is recognising the possibility of more than one cause of action.[58]

In *Bowen* all three judgments suggest methods of limiting the potential liability to a determinate class of plaintiffs. Richmond P., discussing the possibility of successive actions by subsequent purchasers, first puts forward the general principle that: "he only can sue for negligent damage to property who had a proprietary interest in that property at the time when the damage occurred".[59] He later cites a passage from Lord Denning in *Sparham-Souter* which says: "He [the owner in whose time the damage appears] alone can sue for it"[60] and suggests Lord Denning may have been intending to exclude the possibility of successive purchasers acquiring separate causes of action.[61] Richmond P. does not finally decide the question. Woodhouse J. sees the solution lying in causation, and that:[62]

> if proper settlement were made then any actual loss suffered by a subsequent owner would seem to result not from the activity of the builder but from an intervening cause associated with the acts or omissions of those buying or selling the property after he had made the settleemnt.

Meaning that any later damage would be traceable either to the acts of those who carried out the first remedial work, or to the negligence of any later purchaser in not properly inspecting the property when it was bought. Cooke J. also requires that for all actions by subsequent purchasers causation would have to be proved, and a reasonable expectation of intermediate examination would be a defence

56 Richardson J. delivered a separate judgment concurring with the decision reached by Cooke and Somers JJ., but giving his own reasons why Miss Johnson had a separate cause of action accruing to her.

57 [1978] A.C. 728, 760.

58 [1979] 2 N.Z.L.R. 234, 239-240.

59 [1977] 1 N.Z.L.R. 394, 414.

60 [1976] Q.B. 858, 868.

61 This point was not in issue in *Sparham-Souter* and it is submitted that Lord Denning's statement should not be interpreted strictly. The other judgments in *Sparham-Souter* can be read as *allowing* for the possibility of successive causes of action — see Spencer. "A House which is built on Sand . . ." 35 C.L.J. 222, 224.

62 [1977] 1 N.Z.L.R. 394, 418.

open to the builder.[63] He goes on to say he adopts in principle a passage from *Salmond on Torts*,[64] which states that when an act is actionable only on proof of actual damage (as are negligence actions) successive actions will in principle lie for each successive and distinct accrual of damage. But that the later damage, in order to be recoverable in a second action, must arise directly from the wrongful act of the defendant, and not indirectly through the damage already sued on.

Cooke J. is concerned with the situation where property suffers damage more or less continuously, as in the case of continuous subsistence, which may manifest itself in damage to the structure more than once, and decides it must be a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action.[65] On the facts of *Bowen* he suggests by implication that the damage first suffered by MacKay may have given rise to a cause of action, as he finds it necessary to consider whether it was just a later manifestation of continuous damage that was suffered by the Bowens.[66] In deciding this he considers the interval between the first and second incidents damage and the differences between them.[67]

C. Treatment of the Issue in Johnson

In *Johnson* this very problem arose. The damage which manifested itself in 1970 was found by the consulting engineer, Mr Kayes, to be due to consolidation of the fill beneath the building, as the foundations were not adequate for construction of a building on filled ground; it was said that this should have been a progressive process, not an interrupted progression.

As all judges agreed that a cause of action arose in 1967, the first question was whether the damage which arose later, in 1970, was just a continuation of the subsistence that had started sometime around 1967, in which case the cause of action had occurred for that damage in 1967. The point is discussed both in Cooke and Richardson J.J.'s judgments and both apply the "fact and degree"[68] test, which involves close analysis of the particular facts in *Johnson.*

Richardson J. found the important facts to be —

(1) After the remedial work in 1967, until late 1970, there was no evidence of any further subsidence having occurred. This absence of any manifestation of damage suggests that the remedial work had the effect of stabilising the building for some time, then new subsidence must have occurred which gave rise to the damage in 1970.

(2) Miss Johnson inspected the property as well as she could when she was purchasing it. The condition then was immaculate. Not until October 1970 did she notice any damage, and then it was only small, hair-line cracks. That there

63 Ibid. 424.
64 16th ed. 1973, 606-607.
65 [1977] 1 N.Z.L.R. 394, 424.
66 Idem.
67 But he later says this issue is not a real problem in this particular case: ibid. 425-426
68 From Cooke J.'s judgment in *Bowen*: ibid. 424.

was no visible damage at all when she purchased the property, suggests that the building had stabilised for a period. That the initial damage in 1970 was only very slight suggests a process of new subsidence was only just beginning.

All three judges came to the conclusion that this was not therefore a case of continuous damage, but rather of two distinct occurrences of damage.

It is interesting that in both *Bowen* and *Johnson* Cook J. draws an analogy with subsidence cases, to help decide the problem of successive causes of action:[69]

> the subsidence cases concerning rights of support are of some help as an analogy (albeit not a perfect one) in that, although an excavation threatens an adjoining property by withdrawing its support, no cause of action arises until a subsidence occurs.

It is submitted that there are some major differences in the right of support cases which make it impossible to draw much help from them in the *Johnson* situation.

In support cases the underlying cause of the damage is not on the plaintiff's land, so he is not in a position to eradicate the underlying cause, but can only sue when damage is caused which affects him personally, and it may not be possible or practicable to eradicate the underlying cause, as in the case of a mine which may possibly cause the owner of the land above some damage, but it is not possible to predict when or if at all, and not practical or possible to fill in the whole mine. Therefore there are special reasons why each separate subsidence should give rise to a separate cause of action in right of support cases.

The second problem facing any purchaser trying to bring a second or subsequent cause of action is causation. The second incidence of damage must be attributable to the defendant's act of negligence and not to any intervening act. The chain of causation in the *Johnson* case could have been broken if:

(1) Miss Johnson ought reasonably to have discovered the defect when she inspected the property. If she then failed to discover it, her act would constitute a novus actus interveniens and she would become the sole cause of her loss. Neither the builder nor the council would be liable.

(2) the builders had suspected the fundamentally defective nature of the foundations in 1967, and had attempted to fix them, but had done so negligently, so that the later damage could be said to be attributable solely to the builders' second act of negligence in 1967. The previous negligent acts in 1965 would no longer have been legally contributing causes, and the council would have been completely relieved of liability. This would also constitute a novus actus interveniens.

In *Johnson* the trial judge had found that Miss Johnson's inspection was faultless and that the builder had not anticipated any further settlement after the remedial work had been completed, and that they therefore cannot have suspected

69 [1979] 2 N.Z.L.R. 234, 239.

the defective foundations in 1967. There was therefore no problem of causation, clearly the 1965 events were the sole cause of the 1970 damage.[70]

There is a question of whether the events in 1967 could have constituted a negligent examination, i.e. that the builders should have discovered the defect but due to their negligence they did not. As Mr Huljich (of Sydney) acknowledged in cross-examination that he and Fry and Hayter (the contractors) had supposed the cracking in 1967 to have been caused by subsidence, it is arguable that they were negligent in not checking out the foundations at that stage. This would not have exonerated the council from liability to Miss Johnson however. "[T]he prevalent view now is that the manufacturer is not in general excused by the fact that an intermediary has failed to perform his duties properly".[71]

There is also the question of whether the builders' omission to tell the council of the remedial work they were undertaking in 1967 could exonerate the council from liability. Cooke J. considered this question:[72]

> Given the Council's negligence in allowing the inadequate foundations in the first place, Sydney's omissions in 1967 were not so unpredictable as to rank as a novus actus interveniens excluding the Council from liability to Miss Johnson.

D. Conclusions on this Issue

The result of *Johnson* in the area of successive causes of actions is to allow them, subject to considerations of whether the second damage is truly distinct damage, as opposed to being a continuation of the earlier damage, in which case no new cause of action arises, and whether causation is satisfied.

In *Johnson*, on the evidence as accepted by Mahon J., there was no break in the chain of causation. It would seem that there could theoretically be an endless series of claims, whenever the defect manifests itself in damage to the structure of the building, and on the strength of that visible damage alone, if it is "more than minimal",[73] any person who has an interest in the property at the time has a cause of action. That cause of action would be subject to the requirement that the damage be new and distinct structural damage as opposed to being merely a continuation of the damge previously sued on, and could only give each new purchaser a potential cause of action until the defect itself is discovered and sued on, which would break the chain of causation. Negligent examinations which failed to detect the defect would not relieve the builder from liability but would enable him to bring in the negligent examiner as a joint tortfeasor.

70 If there had been allegations of negligence on the part of the builders in 1967, and that that negligence worsened the existing defect, while they never actually suspected the major defect, both the acts of negligence in 1965 (by the council and the builders) and the negligence in 1967 would have been contributing causes to the 1970 damage. There were no such allegations in the *Johnson* case, however.

71 *Salmond on Torts* (17th ed., Sweet & Maxwell, London, 1977) 311. *Power* v. *Bedford Motor Co.* [1959] *I.R.* 391 and *Clay* v. *A. J. Crump and Sons Ltd.* [1964] 1 Q.B. 533 are cited as authorities. It is exactly the same situation as where a council has failed to detect defective foundations through negligent examination. There is no question of exonerating the builder from liability.

72 [1979] 2 N.Z.L.R. 234, 241.

73 [1977] 1 N.Z.L.R. 394, 414 (per Richmond P)

E. Problems with this Approach and Suggested Alternatives

If the underlying defect is discovered and sued on in the first action the chain of causation would be broken and logically only the purchaser who brought the first action can be looked to for recovery for later damage. Smillie[74] sees some complications with this approach. He suggests that in the case where a first purchaser has sued to repair a defect but, without negligence, has failed to repair it completely, and later damage results, rather than leave the subsequent purchaser remediless, the builder should still have some liability in respect of that defect. He sees the possibility of applying Cooke J.'s test from *Bowen*, so that if you can say the later damage is "new and distinct structural damage" which has arisen directly from the negligently created source of danger, as opposed to damage which arises indirectly through damage for which the builder has already paid compensation, it will give rise to a new cause of action.[75] This distinction is taken from *Salmond on Torts*, as cited in *Bowen*[76] and seems to allow for a situation where the first cause of action does not account for the total effect of the defendant's negligent act, for example, where in the first cause of action the extent of the defective foundations was not fully realised. The builder therefore had not paid compensation for all of the damage his neglect had caused, and there remained some of the original defect left in the foundations which caused a subsequent purchaser some damage. In theory this is perfectly possible.

Smillie sees a further problem being that a purchaser may sue to recover compensation for a defect but instead of applying the money to fix it up he pockets it and disappears. Smillie suggests as an answer to this problem the recognition of a duty on the part of the vendor who has actual knowledge of a dangerous but latent defect to warn the next purchaser. Failure in this duty would mean the vendor could be brought in as a joint tortfeasor with the builder. Further support for this duty comes from Richmond P. in *Bowen*.[77]

A further solution to the whole problem suggested by Smillie could be to require details of any damage claimed from the builder to be recorded on the certificate of title to the land, thus giving subsequent purchasers warning, and they could not then subsequently sue the builder for any later manifestations of damage arising from that defect.

V. THE CONTRIBUTION ISSUE

A. Introduction

The question arises whether the council and the builders are to be attributed equal blame for the damage that occurred. There is some support for the proposition that the council should take less responsibility as it did not in fact create the dangerous situation but only let it continue. This article now examines that authority and discusses the policy issues involved in apportioning blame, and

74 Op. cit. supra n.53.
75 Ibid. 128.
76 [1977] 1 N.Z.L.R. 394, 424
77 Ibid. 415.

the factors which have influenced the courts when deciding where responsibility lies.

B. Treatment of the Issue in Johnson

In the Supreme Court Mahon J. saw no reason to apportion different degrees of blame to the two defendants, as section 17 of the Law Reform Act 1936 permits him to do. He said he was influenced by the fact that the council knew of the filled nature of the land but still issued a building permit, and "without any qualification as to the type of foundations"[78] and still passed the inadequate foundations on inspection.

The first reason appears ill-founded in light of the fact that the permit was expressed to be subject to compliance with the council's by-laws, which included a requirement that foundations be taken down to a solid and approved bottom. There was therefore no need to impose any qualifications on the permit, because if foundations had gone down this far they would have been adequate. With respect, his Honour perhaps should instead have been considering the fact that the council was negligent in issuing a permit when the application was incomplete, in that a description of the soil had been left off. If this had been filled in, the council would perhaps have been prompted to put something extra on the permit by way of emphasising that the foundations had to go down to a solid base.

In the Court of Appeal, Cooke J. does see reason for apportioning different degrees of blame. He points out two statements in Lord Wilberforce's judgment in *Anns* which suggest the council should be regarded as prima facie less responsible. In one he says that the builder has the primary fault,[79] and in the other that the inspector's function is supervisory.[80] He points out that in *Johnson* there are further facts which should go towards lessening the degree of responsibility put on the Council:

— the Council had no knowledge of the remedial work undertaken in 1967 and therefore did not have any opportunity of further inspection, which may have resulted in the council becoming alerted to the defective foundations and preventing any later damage.

— Sydney's remedial work in 1967 was not thorough, which put them more at fault for any later damage.

Cooke J., in determining apportionment, considers, as the statute directs, attributing blame "as may be fair and equitable having regard to the extent of the other defendants' responsibility for the damage" taking into account that "the whole history between the negligence and the damage is relevant".[81]

78 [1977] 2 N.Z.L.R. 530, 535. This statement is slightly ambiguous, as it could mean either that the council should have added conditions to the permit or alternatively he could be referring to the fact that the builder had left the space for descripion of the soil blank. It is submitted that the natural meaning of the words is the former.

79 [1978] A. C. 728, 758.

80 Ibid. 755.

81 [1979] 2 N.Z.L.R. 234, 241

He apportioned responsibility at one-fifth to the council and four-fifths to Sydney.

C. Recent Authority Supporting the Approach Taken in Johnson

The view of the council's role as supervisory only and thus attracting less responsibility was adopted in a recent Supreme Court decision, *Young* v. *Tomlinson and Others.*[82] This involved four different claims for damages, each being considered separately, as different defendants were sued separately in respect of different parts of the building.

For one wall responsibility was shared between the builder, for negligent construction, and the council, for negligent inspection. Initially the builder must, the court said, have primary responsibility, due to the supervisory role of the inspector. In addition, in this case the council had every reason to believe the construction was being supervised by an architect, which in fact it was not, but this further relieved them of responsibility. Blame was apportioned 90% to the builders and 10% to the council.

For a second wall the responsibility was shared between the architects, (who were supervising, and the council, for negligent inspection. Again it is initially stated that the council's role is a supervisory one, but here the council had, by an additional act of negligence, contributed further to the damage. The plans for this wall were of such a nature that they should have been referred to the Structural Engineering Department, and if this had been done, the inadequacy of the design would have been discovered. Apportionment was 75% to the architects, 25% to the council.

In respect of the garage responsibility should have lain on the previous owners of the property, who had built the garage, and the council, for negligent inspection. There was a debate about whether the owners could be sued in tort as opposed to contract, and it was held that they could not. If there had been a tortious action against the owners, the court stated that it would have put apportionment at 80%/20%. There was no question of any supervision by the architects here and it seems reasonable to say that this can be taken as normal apportionment between negligent builders and councils. As there was no second defendant however the council was landed with 100% responsibility.

There was a fourth claim, for general damages. These were to be apportioned among the builders, the architects and the council. The main subject of this claim was the first wall, for which the builders were mostly responsible. Apportionment was 55% to the builders, 35% to the architects and 10% to the council.

What can be taken from this case and from *Johnson* is that for future situations of builders' and councils' negligence causing damage to subsequent purchasers, the council can expect to be apportioned no more than 20% of the blame in the majority of cases.

82 Unreported, Supreme Court, Wellington, 20 Dec. 1979, No. A 14/78

D. Considerations involved in Apportionment of Contribution

Once it is established that the council is to bear some legal responsibility for its acts, it provides an ever present, always financial defendant to look to for redress. It will not normally be the only defendant however, and in determining the extent of its liability several factors come up for consideration:

1. The particular facts of each case.
2. The council as an intermediary.
3. Financial and other burdens on councils.

The first two are openly considered by the courts, while the third involves policy arguments that should be considered when imposing liability.

1. *The particular facts of the case*

The responsibility which each party should bear is determined by the courts to a large extent by reference to the actual facts of each case. The extent of each party's liability will be affected by:

(a) The extent of their negligence.

In the *Tomlinson* case the council was apportioned heavier liability in respect of one wall, as they were negligent not only in careless inspection, but also in that plans for that wall should have been submitted to another department for approval.

Tomlinson also shows that the court will expect a lower standard of care if the council reasonably believes that an architect is in supervision.

(b) Causation.

This is the reason for putting a prima facie heavier burden on the builder, as he is the main cause of any later damage due to inadequate foundations he has constructed.[83] Normally the council only has a small part in causation as it just let the dangerous state of things continue by passing foundations on inspection, but it may contribute more to causation if, for example, it took part in the initial decision to build on the land. An architect might contribute to the causation factor if he supervises the work negligently, and his contribution is greater than the council's if he is always on the site watching and approving the work.

(c) The extent of the duty owed.

The responsibility the council bears might be affected by the statute under which it operates, in that it may impose a duty on the council where there is no corresponding duty on the builder. For example, the council may have responsibility to ensure there is adequate drainage in the area, and the builder would be reasonably entitled to consider this matter left in the hands of the council entirely. This could result in the council having sole liability for later claims for damage to property due to overflowing drains.

83 See infra, 2. *The council as an intermediary.*

2. *The Council as an intermediary*

The approach taken by the courts is that the council is never to have liability equal to that of the builder as it did not create the dangerous situation but only negligently let it continue. Against this should be weighed the argument that the council is holding itself out as an expert body, and it is reasonable for the builders to rely on its judgment, even to the extent of allaying any doubts they might have themselves. The fact that it is a body financed with public funds for the very purpose, amongst others, of ensuring buildings are safe makes it much more than just a chance intermediary. In addition, it usually enters the scene at the last possible moment before any defects become hidden, and thus is the only intermediary that has the chance to make a full inspection.

All these factors favour the council bearing more responsibility than any other body that happens to make an intermediate examination. The 20% / 80% apportionment appears lenient on the council in this light.

3. *Financial and other burdens on councils*

The council and thus the ratepayers must now be financially responsible for a proportion of what can be substantial claims, and since liability has been established, litigation has been quite frequent. It does not seem unjust that the council should have to pay when it, as a public body, causes loss to innocent individuals by its employees' negligence. It might be hoped that the possibility of litigation will act positively to encourage a higher standard of care in their work. One must, however, ask whether the council ought truly to bear a share of the responsibility in every case, that is, has there been causal negligence. The council makes a particularly attractive defendant; it can never disappear and is always financial.

It has also been suggested that there is now an unreasonable burden on councils to preserve all records for an indefinite period. In many cases a cause of action will not accrue until years after the local council has acted, as it often takes a long time for faulty foundations to manifest themselves in damage. In the writer's view it is not unreasonable to expect at least basic records of actions to be kept, if for example an inspection has been made, or whether a permit was issued. Proof of actual actions would be no more difficult than in other disputes.

E. Summation

It seems reasonable that the council should bear a slightly smaller share of responsibility mainly on the ground that it is an intermediary. Even so the proportion that the courts seem to have decided on, i.e. about 20%, appears favourable to the council, as its negligence is still usually a major causative factor. This may be due to conservatism on the courts' part. A major problem that could arise since liability has been established is that building companies can now place all financial responsibility on the council by disappearing as soon as the construction work is completed and the building sold. Alternatively, as in *Tomlinson*, the council will be liable for all costs when the builder is unable to be sued. This result seems unfair, especially when the council is deemed to be responsible

only for such a small percentage. Perhaps the solution to at least the first part of the problem lies in stricter control of building concerns.

VI. CONCLUSION

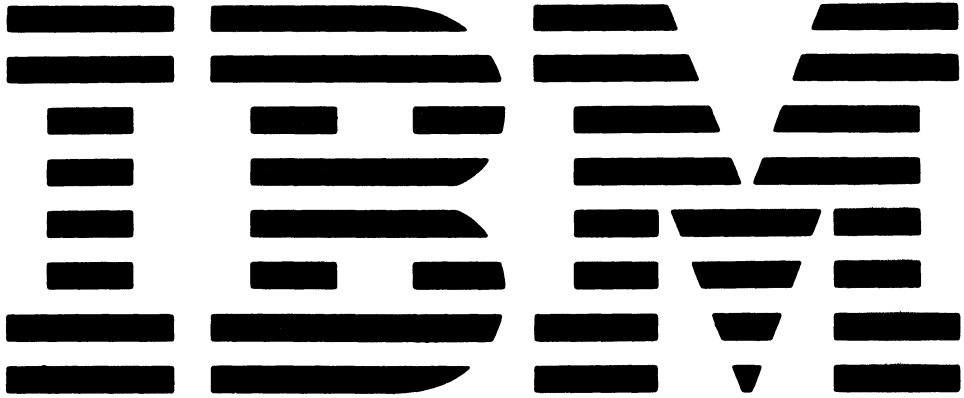
The *Johnson* case has clearly developed some aspects of the law relating to councils' and builders' liability for negligent building construction. Analysis of earlier cases has shown that the case failed to deal with possible discrepancies in the legal rules relating to builders as compared with councils, and the implications of those discrepancies.

In particular, the *Johnson* case deals with the problem of subsequent damage and when this will give rise to a separate cause of action.

The issue of accrual is also discussed and Cooke J. has held there is a universal test to be applied to builders and councils to determine when a cause of action will accrue against them. Cooke J. was able to do this notwithstanding that in the *Anns* decision the House of Lords made it clear that councils must be considered separately, and that the scope of their duty of care must be determined with reference to their empowering legislation. It is submitted that Cooke J.'s test accords with common sense and justice as it requires that any defect must be apparent or manifest before any action accrues in respect of it.

Another important feature of the *Johnson* decision is that Cooke J. allows recovery for damage to the structure of the plaintiff's house, while recognizing that this is a claim for economic loss. While previous decisions had allowed recovery for this type of damage they had avoided calling it economic loss, by renaming it "physical damage". The *Johnson* decision is in line with a current trend, in which the courts are generally taking a more liberal approach to economic loss issues. There are special features of this type of economic loss which make its recovery particularly justifiable, the most important being that it is in the nature of a precautionary measure. It is therefore not possible to say whether this decision will have any influence on claims for other types of economic loss.

Cooke J. has stated that he believes a pragmatic approach is now appropriate in the field of negligence. This could explain why he has no great difficulties in reaching a just result in the case before him and does not find himself fettered by possible legal anomalies created by precedent. This is perhaps indicative of the approach the New Zealand Court of Appeal will be taking to cases that come before it in the future.



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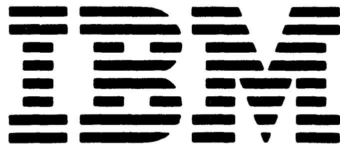

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