Murphy (Respondent)

v.
Brentwood District Council (Appellants)

JUDGMENT

Die Jovis 26° Julii 1990

Upon Report from the Appellate Committee to whom was referred the Cause Murphy against Brentwood District Council, That the Committee had heard Counsel on Monday the 14th, Tuesday the 15th, Wednesday the 16th, Tuesday the 17th, Monday the 21st, Tuesday the 22nd and Wednesday the 23rd days of May last, upon the Petition and Appeal of Brentwood District Council of Council Offices, Brentwood, Essex, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 21st day of December 1989, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Thomas Murphy lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 21st day of December 1989 complained of in the said Appeal be, and the same is hereby, **Set Aside** and that the Order o£ His Honour Judge Esyr Lewis of the 25th day of February 1988 be and the same is hereby **Set Aside:** And it is further Ordered, That the Respondent do pay or cause to be paid to the said Appellants the Costs incurred by them in the Courts below and also the Costs incurred by them in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments if not agreed between the parties: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Cler: Parliamentor:

Judgment: 26.7.90

HOUSE OF LORDS

MURPHY
(RESPONDENT)

v.

BRENTWOOD DISTRICT COUNCIL
(APPELLANTS)

Lord Chancellor
Lord Keith of Kinkel
Lord Bridge of Harwich
Lord Brandon of Oakbrook
Lord Ackner
Lord Oliver of Aylmerton
Lord Jauncey of Tullichettle

LORD MACKAY OF CLASHFERN L.C.

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Keith of Kinkel and Lord Bridge of Harwich. They have comprehensively analysed the issues arising in this appeal and in consequence I am able to express my conclusion briefly.

We are asked to depart from the judgment of this House in Anns v. Merton London Borough Council [1978] AC 728 under the practice statement of 1966 (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234). That decision was taken after very full consideration by a committee consisting of most eminent members of this House. In those circumstances I would be very slow to accede to the suggestion that we should now depart from it. However, the decision was taken as a preliminary issue of law and accordingly the facts had not at that stage been examined in detail and the House proceeded upon the basis of the facts stated in the pleadings supplemented by such further facts and documents as had been agreed between the parties. Under the head "Nature of the damages recoverable and arising of the cause of action" Lord Wilberforce said, at p. 759:

"There are many questions here which do not directly arise at this stage and which may never arise as the actions are tried. But some conclusions are necessary if we are to deal with the issue as to limitation."

When one attempts to apply the proposition established by the decision to detailed factual situations difficulties arise and this was clearly anticipated by Lord Wilberforce when he said, at p. 760:

"We are not concerned at this stage with any issue relating to remedial action nor are we called upon to decide upon what the measure of the damages should be; such questions, possibly very difficult in some cases, will be for the court

to decide. It is sufficient to say that a cause of action arises at the point I have indicated."

That point was when damage to the house had occurred resulting in there being a present or imminent danger to the health or safety of persons occupying it.

As I read the speech of Lord Wilberforce the cause of action which he holds could arise in the circumstances of that case can only do so when damage occurs to the house in question as a result of the weakness of the foundations and therefore no cause of action arises before that damage has occurred even if as a result of information obtained about the fundations it may become apparent to an owner that such damage is likely.

The person to whom the duty is owed is an owner or occupier of the house who is such when the damage occurs. And therefore an owner or occupier who becomes aware of the possibility of damage arising from a defective foundation would not be within the class of persons upon whom the right of action is conferred.

As had been demonstrated in the speeches of my noble and learned friends, the result of applying these qualifications to different factual circumstances is to require distinctions to be made which have no justification on any reasonable principle and can only be described as capricious. It cannot *be* right for this House to leave the law in that state.

Two options call for consideration. The first is to remove altogether the qualifications on the cause of action which Anns held to exist. This would be in itself a departure from Anns since these qualifications are inherent in the decision. The other option is to go back to the law as it was before Anns was decided and this would involve also overruling Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373.

Faced with the choice I am of the opinion that it is relevant to take into account that Parliament has made provisions in the Defective Premises Act 1972 imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise

of judicial power. I am confirmed in this view by the consideration that it is not suggested, and does not appear to have been suggested in Anns, that the Public Health Act 1936, in particular Part n, manifests any intention to create statutory rights in favour of owners or occupiers of premises against the local authority charged with responsibility under the Act. The basis of the decision in Anns is that the common law will impose a duty in the interests of the safety and health of owners and occupiers of buildings since that was the purpose for which the Act of 1936 was enacted. While of course I accept that duties at common law may arise in respect of the exercise of statutory powers or the discharge of statutory duties I find difficulty in reconciling a common law duty to take reasonable care that plans should conform with byelaws or regulations with the statute which

has imposed on the local authority the duty not to pass plans unless they comply with the byelaws or regulations and to pass them if they do.

In these circumstances I have reached the clear conclusion that the proper exercise of the judicial function requires this House now to depart from Anns in so far as it affirmed a private law duty of care to avoid damage to property which causes present or imminent danger to the health and safety of owners, or occupiers, resting upon local authorities in relation to their function of supervising compliance with building byelaws or regulations, that Dutton v. Bognor Regis Urban District Council should be overruled and that all decisions subsequent to Anns which purported to follow it should be overruled. I accordingly reach the same conclusion as do my noble and learned friends.

I should make it clear that I express no opinion upon the question whether, if personal injury were suffered by an occupier of defective premises as a result of a latent defect in those premises, liability in respect of that personal injury would attach to a local authority which had been charged with the public law duty of supervising compliance with the relevant building byelaws or regulations in respect of a failure properly to carry out such duty.

LORD KEITH OF KINKEL

My Lords,

This appeal raises directly the question whether Anns v. Merton London Borough Council [1978] AC 728 was in all respects correctly decided.

The facts are that over a period ending in 1969 a concern called ABC Homes constructed an estate of 160 dwelling houses on a site in Brentwood. Two of these houses, nos. 36 and 38 Vineway, were built over filled ground upon a concrete raft foundation. The raft was designed by a firm of civil engineers called Grahame Rudkins Associates. The design, which included certain steel reinforcement, was submitted to the appellant council, together with supporting calculations, for approval under section 64 of the Public Health Act 1936. The council, whose building control staff did not include any persons qualified to judge the suitability of the design, sought the advice of independent consulting engineers, Messrs. S. D. Mayer & Partners. Their advice was to the effect that the design was appropriate to the conditions and could properly be approved. The council accordingly approved it on 1 January 1969. The plaintiff purchased 38, Vineway from ABC Homes in 1970 and took up residence there. From 1981 onwards serious cracks started appearing in the internal walls of the house. In addition, wet patches appeared in the lawn. The plaintiff dug a hole in front of the house and exposed part of the foundation raft. He observed a crack in it about three-quarters of an inch wide at the bottom tapering to nothing at the top. The plaintiff contacted his insurance company, Norwich Union, which caused investigations to be made by consulting

engineers. These revealed that the concrete raft had subsided differentially, so causing distortion and cracking. In July 1985 the gas pipe leading to a fire in the living room cracked and was replaced at a cost of £48. It was found that the soil pipe leading to the main drain had cracked and was leaking into the foundations. The plaintiff's neighbour at 36, Vineway also suffered damage to his house through the settlement, and made a claim on his insurers. Liability was not accepted, and accordingly the neighbour was unable to afford any contribution to the cost of remedial work to the joint structure of the two houses. The plaintiff's insurers, Norwich Union, were not prepared to pay the whole cost. The plaintiff therefore decided to sell his house and move elsewhere. He sold it in July 1986 for £30,000 to a builder who was aware of the structural defects, and who has since occupied it with his family without carrying out any remedial work. The value of the house had it been free from defect was agreed to have been at the time £65,000. Norwich Union paid the plaintiff £35,000 in settlement of his claim for subsidence damage. There was evidence that the cost of remedial work on the foundations of the house would have been in the region of £45,000. The damages claimed by the plaintiff against the council, in proceedings commenced in September 1983, included the sum of £35,000 and also the sum of £3,631.25 in respect of costs incurred

in selling 38, Vineway and buying a new house and moving there, £98 for refitting carpets in the new house, and £48 for replacing the fractured gas pipe.

The case was tried before Judge Esyr Lewis Q.C. as official referee. He gave judgment on 18 March 1988 awarding the plaintiff damages of £38,777.25, made up of the four items mentioned above, together with interest of £7,173.75. In the course of his judgment he made the following findings: (a) The design of the concrete raft was defective in that it did not provide for sufficient steel reinforcement and was therefore unsuitable for the site. (b) Messrs. Mayer were competent engineers and the council were entitled to rely on their skill and experience. (c) Messrs. Mayer were negligent in approving the design of the concrete raft as suitable for the site, (d) As a result of its defective design the raft cracked and became distorted so that differential settlement occurred and cracks were caused in some walls and a gas pipe and a soil pipe were fractured, (e) Sporadic and unpredictable settlement of the raft would occur in the future though the total amount of future settlement might be small, (f) There was a risk that the main gas pipe might fracture and that water pipes might also fracture causing water to leak into electrical fittings. This, together with leakage of sewage into the foundations from the fractured soil pipe, constituted an imminent danger to the health and safety of occupants of the house.

In the light of these findings Judge Esyr Lewis held that the council were liable to the plaintiff in negligence under the principle of Anns v. Merton London Borough Council. He further held that the council's duty to take reasonable care in considering the suitability of the design of the concrete raft had not been discharged by obtaining and acting upon the advice of competent independent consulting engineers. He also decided against the council a limitation point which is no longer a live issue.

An appeal by the council to the Court of Appeal was dismissed by that court (Fox, Ralph Gibson and Nicholls L.JJ.) [1990] 2 W.L.R. 944 on 21 December 1989. The council now appeals, with leave given in the Court of Appeal, to your Lordships' House.

Both Judge Esyr Lewis and the Court of Appeal proceeded on the basis that the plaintiff had a good cause of action by virtue of the decision in Anns. It was held that the diminution in the value of the plaintiff's house by reason of the state of its foundations formed an item of damages recoverable in law. Ralph Gibson L.J. said, at pp. 966-967:

"In this case, upon the facts as the plaintiff contended that they were on the evidence, the plaintiff's loss on sale as awarded was substantially less than the cost of eliminating the danger found by the judge to exist. Full effect is given to the nature of the cause of action as established in Anns, and to any limitations necessarily imposed upon that cause of action by the nature of the statutory purposes of the [Public Health Act 1936], if the damages awarded are justified by proof of imminent danger to health and safety, by proof of the fact that the loss on sale was caused by the existence of that danger, and proof that the amount awarded does not exceed the cost of eliminating that danger."

Before your Lordship's House it was argued on behalf of the council that Anns was wrongly decided and should be departed from under the practice statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234). The speeches of my noble and learned friends Lord Bridge of Harwich and Lord Oliver of Aylmerton in D. & F. Estates Ltd v. Church Commissioners for England [1989] AC 177 contain some passages expressing doubts as to the extent to which the decision in Anns is capable of being reconciled with pre-existing principle. It is therefore appropriate to subject the decision to careful reconsideration.

As is well known, it was held in Anns that a local authority might be liable in negligence to long lessees occupying maisonettes built on inadequate foundations not complying with relevant building regulations, on the ground of failure by the authority to discover by inspection the inadequacy of the foundations before they were covered over. The proceedings arose out of the trial of a preliminary issue as to whether or not the plaintiffs had any cause of action against the local authority, and the damages claimed by them were not specified in the pleadings. It appeared, however, that such damages would include the cost of repairing cracks in the structure and of underpinning the foundations of the block of maisonettes.

The leading speech was that of Lord Wilberforce. His examination of law started with the formulation of the two stage test of liability in negligence which, though it has since become very familiar, I venture to quote again [1978] AC 728, 751-752:

'Through the trilogy of cases in this House - Donoghue v. Stevenson [1932] AC 562, Hedley Byrne & Co. Ltd. v.

Heller & Partners Ltd. [1964] AC 465, and Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] AC 1004, per Lord Reid at p. 1027. Examples of this are Hedley Byrne's case [1964] A.C. 465 where the class of potential plaintiffs was reduced to those shown to have relied upon the correctness of statements made, and Weller & Co. v. Foot and Mouth Disease Research Institute [1966] 1 Q.B. 569; and (I cite these merely as illustrations, without discussion) cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited: see S.C.M. (United Kingdom) Ltd. v. W. J. Whittall & Son Ltd. [1971] 1 Q.B. 337 and Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. [1973] QB 27."

I observe at this point that the two-stage test has not been accepted as stating a universally applicable principle. Reservations about it were expressed by myself in Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210, 240, by Lord Brandon of Oakbrook in Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] AC 785, 815 and by Lord Bridge of Harwich in Curran v. Northern Ireland Co-ownership Housing Association Ltd. [1987] A.C. 718. In Council of the Shire of Sutherland v. Heyman (1985) 157 C.L.R. 424, where the High Court of Australia declined to follow Anns, Brennan J. expressed his disagreement with Lord Wilberforce's approach, saying, at p. 481:

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to

reduce or limit the scope of the duty or the class of person to whom it is owed.'"

In the Privy Council case of Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175, 191 that passage was quoted with approval and it was said, at p. 194:

"In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test ... is not to

be regarded as in all circumstances a suitable guide to the existence of a duty of care."

Finally, in Yuen Kun Yeu 193, and in Hill v. Chief Constable of West Yorkshire [1989] AC 53, 63, I expressed the opinion, concurred in by the other members of the House who participated in the decisions, that the second stage of the test only came into play where some particular consideration of public policy excluded any duty of care. As regards the ingredients necessary to establish such a duty in novel situations, I consider that an incremental approach on the lines indicated by Brennan J. in the Shire of Sutherland case is to be preferred to the two-stage test.

Lord Wilberforce thereafter went on to consider the purposes of the Act of 1936, to hold that the local authority were under a duty to give proper consideration to the question whether they should inspect or not and to hold further that in relation to an inspection which it was decided to make there was a duty to exercise reasonable care in making it. Having considered East Suffolk Rivers Catchment Board v. Kent [1941] AC 74 and Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004, he continued, at p. 758:

"To whom the duty is owed. There is, in my opinion, no difficulty about this. A reasonable man in the position of the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them - not of course to a negligent building owner, the source of his own loss. I would leave open the case of users, who might themselves have a remedy against the occupier under the Occupiers' Liability Act 1957. A right of action can only be conferred upon an owner or occupier, who is such when the damage occurs (see below). This disposes of the possible objection that an endless,

indeterminate class of potential plaintiffs may be called into existence.

"The nature of the duty. This must be related closely to the purpose for which powers of inspection are granted, namely, to secure compliance with the byelaws. The duty is to take reasonable care, no more, no less, to secure that the builder does not cover in foundations which do not comply with byelaw requirements. The allegations in the statements of claim, in so far as they are based upon non-compliance with the plans, are misconceived."

Lord Wilberforce went on, at pp. 758-759, to consider the position of the builder, upon the view that it would be unreasonable to impose liability in respect of defective foundations upon the council if the builder, whose primary fault it was, should be immune from liability. This consideration was, I think, a necessary part of the reasoning which led to his conclusion about the liability of the local authority. The Dorset Yacht case, upon which Lord Wilberforce was proceeding, was concerned with the liability of prison officers for failing to take reasonable care to prevent the Borstal boys in their charge from acting tortiously

towards the owners of yachts moored in the vicinity of their encampment. If the conduct of the boys had not been tortious there would have been no liability on the prison officers. So, likewise, if the builder of defective foundations had been under no liability in tort, the local authority could have been under no liability for not taking reasonable care to see that he did not construct defective foundations. Lord Wilberforce took the view that the principle of Donoghue v. Stevenson [1932] AC 562 applied to the builder of defective premises, there being no sound reason why that principle should be limited to defective chattels.

I see no reason to doubt that the principle of Donoghue v. Stevenson does indeed apply so as to place the builder of premises under a duty to take reasonable care to avoid injury through defects in the premises to the person or property of those whom he should have in contemplation as likely to suffer such injury if care is not taken. But it is against injury through latent defects that the duty exists to guard. I shall consider this aspect more fully later.

Lord Wilberforce went on, at pp. 759-760:

"Nature of the damages recoverable and arising of the cause of action. There are many questions here which do not directly arise at this stage and which may never arise if the actions are tried. But some conclusions are necessary if

we are to deal with the issue as to limitation. The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they 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 occupants.

"To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement. On the question of damages generally I have derived much assistance from the judgment (dissenting on this point, but of strong persuasive force) of Laskin J. in the Canadian Supreme Court case of Rivtow Marine Ltd. v. Washington Iron Works [1973] 6 W.W.R. 692, 715 and from the judgments of the New Zealand Court of Appeal (furnished by courtesy of that court) in Bowen v. Paramount Builders (Hamilton) Ltd.[1975] 2 N.Z.L.R. 546.

"When does the cause of action arise? We can leave aside cases of personal injury or damage to other property as presenting no difficulty. It is only the damage for the

house which requires consideration. In my respectful opinion the Court of Appeal was right when, in Sparham-Souter *v.* Town and Country Developments (Essex) Ltd. [1976] Q.B. 858 it abjured the view that the cause of action arose immediately upon delivery, i.e., conveyance of the defective house. It can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it. We are not concerned at this stage with any issue relating to remedial action nor are we called upon to decide upon what the measure of the damages should be; such questions, possibly very difficult in some cases, will be for the court to decide. It is sufficient to say that a cause of action arises at the point I have indicated."

Counsel for the council did not seek to argue that a local authority owes no duty at all to persons who might suffer injury through a failure to take reasonable care to secure compliance with building byelaws. He was content to accept that such a duty existed but maintained that its scope did not extend beyond injury to person or health and (possibly) damage to property other than the defective building itself. Not having heard argument upon the matter, I prefer to reserve my opinion on the question whether any duty at all exists. So far as I am aware, there has not yet been any case of claims against a local authority based on injury to person or health through a failure to secure compliance with building byelaws. If and when such a case arises, that question may require further consideration. The present problem is concerned with the scope of the duty. The question is whether the appellant council owed the respondent a duty to take reasonable care to safeguard him against the particular kind of damage which he has in fact suffered, which was not injury to person or health nor damage to anything other than the defective house itself (see Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd., (The Wagon Mound) [1961]) A.C. 388, 425, per Viscount Simonds: Caparo Industries Plc, v. Dickman [1990] 2 W.L.R. 358, 373, 396 per Lord Bridge of Harwich and Lord Oliver of Aylmerton, quoting the judgment of Brennan J. in the Shire of Sutherland case; 157 C.L.R. 424, 487). 60 A.L.R. 1, 48.

Lord Wilberforce, in the passage last quoted from his speech in Anns, does not devote precise consideration to the scope of the duty owed by a local authority as regards securing compliance with building byelaws. The question whether recovery could be allowed for damage to the house and for the cost putting it in such a state as to be no longer a danger to health or safety was treated in the context of the measure of damages and the answer was said to follow from normal principle. It appears that the normal principle concerned was that which emerged from Donoghue v. Stevenson, as extended to the sphere of statutory functions of public bodies in Dorset Yacht Co. Ltd. v. Home Office. However, an essential feature of the species of liability in negligence established by Donoghue v. Stevenson was that the carelessly manufactured -product should be intended to reach the injured consumer in the same state as that in which it was put up with no reasonable prospect of intermediate examination (see per Lord Atkin, at p. 599; also Grant v. Australian Knitting Mills Ltd. [1936] AC 85, per Lord Wright, at pp. 103-105). It is the latency of the defect which constitutes the mischief. There may be room

for disputation as to whether the likelihood of intermediate examination and consequent actual discovery of the defect has the

effect of negativing a duty of care or of breaking the chain of causation (compare Farr v. Butters Brothers & Co. [1932] 2 K.B. 606 with Denny v. Supplies & Transport Co. Ltd. [1950] 2 K.B. 374). But there can be no doubt that, whatever the rationale, a person who is injured through consuming or using a product of the defective nature of which he is well aware has no remedy against the manufacturer. In the case of a building, it is right to accept that a careless builder is liable, on the principle of Donoghue v. Stevenson, where a latent defect results in physical injury to anyone, whether owner, occupier, visitor or passer-by, or to the property of any such person. But that principle is not apt to bring home liability towards an occupier who knows the full extent of the defect yet continues to occupy the building. The Dorset Yacht case was concerned with the circumstances under which one person might come under a duty to another to take reasonable care to prevent a third party from committing a tort against that other. So the case had affinities with Anns where a local authority was held to be under a duty to take reasonable care to prevent a builder from causing damage through carelessness to subsequent occupiers of houses built by him. In Dorset Yacht, however, the damage caused was physical damage to property, and, as I explained in Hill v. Chief Constable of West Yorkshire [1989] A.C. 53, 61, the prison officers in charge of the Borstal boys had created a potential situation of danger for the owners of yachts moored in the vicinity of the encampment by bringing the boys into that locality. No such feature was present in Anns.

In Anns the House of Lords approved, subject to explanation, the decision of the Court of Appeal in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373. In that case Lord Denning M.R. said, at p. 396:

"Mr Tapp [for the council] submitted that the liability of the council would, in any case, be limited to those who suffered bodily harm: and did not extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. ... I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr Tapp's submission were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defect in time to repair it - and he does repair it - the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it

breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair."

The jump which is here made from liability under the Donoghue v. Stevenson principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for

the cost of rectifying a defect in such an article which is **ex** hypothesi no longer latent is difficult to accept. As Stamp L.J. recognised in the same case, at pp. 414-415, there is no liability in tort upon *a* manufacturer towards the purchaser from a retailer of an article which turns out to be useless or valueless through defects due to careless manufacture. The loss is economic. It is difficult to draw a distinction in principle between an article which is useless or valueless and one which suffers from a defect which would render it dangerous in use but which is discovered by the purchaser in time to avert any possibility of injury. The purchaser may incur expense in putting right the defect, or, more probably, discard the article. In either case the loss is purely economic. Stamp L.J. appears to have taken the view that in the case of a house the builder would not be liable to a purchaser where the defect was discovered in time to prevent injury but that a local authority which had failed to discover the defect by careful inspection during the course of construction was so liable.

Batty v. Metropolitan Property Realisations Ltd. [1978] Q.B. 554 was a case where a house which suffered no defects of construction had been built on land subject to the danger of slippage. A landslip carried away part of the garden but there was no damage to the house itself. Due to the prospect, however, that at some future time the house might be completely carried away, it was rendered valueless. There was no possibility of remedial works such as might save the house from being carried away. The Court of Appeal allowed recovery in tort against the builder of damages based on loss of the value of the house. That again was purely economic loss.

Consideration of the nature of the loss suffered in this category of cases is closely tied up with the question of when the cause of action arises. Lord Wilberforce in Anns [1978] AC 728, 760 as regarded it as arising when the state of the building is such that there is present an imminent danger to the health or safety of persons occupying it. That state of affairs may exist when there is no actual physical damage to the building itself, though Lord Wilberforce had earlier referred to the relevant damage being material physical damage. So his meaning may have

been that there must be a concurrence of material physical damage and also present or imminent danger to the health or safety of occupants. On that view there would be no cause of action where the building had suffered no damage (or possibly, having regard to the word "material," only very slight damage) but a structural survey had revealed an underlying defect, presenting imminent danger. Such a discovery would inevitably cause a fall in the value of the building, resulting in economic loss to the owner. That such is the nature of the loss is made clear in cases where the owner abandons the building as incapable of being put in a safe condition (as in Batty), or where he choses to sell it at the lower value rather than undertake remedial works. In Pirelli General Cable Works Ltd. v. Oscar Faber & Partners [1983] 2 A.C. 1 it was held that the cause of action in tort against consulting engineers who had negligently approved a defective design for a chimney arose when damage to the chimney caused by the defective design first occurred, not when the damage was discovered or with reasonable diligence might have been discovered. The defendants there had in relation to the design been in contractual relations with the plaintiffs, but it was

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common ground that a claim in contract was time-barred. If the plaintiffs had happened to discover the defect before any damage had occurred there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage, without having to wait until some damage had occurred. They would have suffered economic loss through having a defective chimney upon which they required to expend money for the purpose of removing the defect. It would seem that in a case such as Pirelli where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given. The plaintiffs built the chimney as they did in reliance on that advice. The case would accordingly fall within the principle of Medley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465. I regard Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 AC 520 as being an application of that principle.

In my opinion it must now be recognised that, although the damage in Anns was characterised as physical damage by Lord Wilberforce, it was purely economic loss. In Council of the Shire of Sutherland v. Heyman, 157 C.L.R. 424 where, as observed above, the High Court of Australia declined to follow Anns when dealing with a claim against a local authority in respect of a defectively constructed house, Deane J. said, at pp. 503-505:

"Nor is the respondents' claim in the present case for ordinary physical damage to themselves or their property. Their claim, as now crystallized, is not in respect of damage to the fabric of the house or to other property caused by collapse or subsidence of the house as a result of the inadequate foundations. It is for the loss or damage represented by the actual inadequacy of the foundations, that is to say, it is for the cost of remedying a structural defect in their property which already existed at the time when they acquired it. In Anns v. Merton London Borough Council [1978] AC 728, it was held by the House of Lords that a local government authority owed a relevant duty of care, in respect of inspection of the foundations of a building, to persons who subsequently became long term lessees (either as original lessees or as assignees) of parts of the building. Lord Wilberforce, at p. 759, in a speech with which three of the other four members of the House of Lords agreed, expressed the conclusion that the appropriate classification of damage sustained by the lessees by reason of the inadequacy of the foundations of the completed building was 'material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.' While, in a case where a subsequent purchaser or long term tenant reasonably elects to retain the premises and to reinforce the foundations, one possible measure of the damages involved in the actual inadequacy would (if such damages were recoverable) be that suggested by his Lordship, I respectfully disagree with the classification of the loss sustained in such circumstances as 'material, physical damage.' Whatever may be the position with respect to consequential damage to the fabric of the

building or to other property caused by susequent collapse or subsidence, the loss or Injury involved in the actual inadequacy of . the foundations cannot, in the case of a person who purchased or leased the property after the inadequacy existed but before it was known or manifest, properly be seen as ordinary physical or material damage. The only property which could be said to have been damaged in such a case is the building. The building itself could not be said to have been subjected to "material, physical damage" by reason merely of the inadequacy of its foundations since the building never existed otherwise than with its foundations in that state. Moreover, even if the

inadequacy of the foundations could be seen as material, physical damage to the building, it would be damage to property in which a future purchaser or tenant had no interest at all at the time when it occurred. Loss or injury could only be sustained by such a purchaser or tenant on or after the acquisition of the freehold or leasehold estate without knowledge of the faulty foundations. It is arguable that any such loss or injury should be seen as being sustained at the time of acquisition when, because of ignorance of the inadequacy of the foundations, a higher price is paid (or a higher rent is agreed to be paid) than is warranted by the intrinsic worth of the freehold or leasehold estate that is being acquired. Militating against that approach is the consideration that, for so long as the inadequacy of the foundations is neither known nor manifest, no identifiable loss has come home: if the purchaser or tenant sells the freehold or leasehold estate within that time, he or she will sustain no loss by reason of the inadequacy of the foundations. The alternative, and in my view preferable, approach is that any loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the premises occurs. On either approach, however, any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed is merely economic in its nature."

I find myself in respectful agreement with the reasoning contained in this passage, which seems to me to be incontrovertible.

It being recognised that the nature of the loss held to be recoverable in Anns was pure economic loss, the next point for examination is whether the avoidance of loss of that nature fell within the scope of any duty of care owed to the plaintiffs by the local authority. On the basis of the law as it stood at the time of the decision the answer to that question must be in the negative. The right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the Joss had been sustained through reliance on negligent mis-statements, as in Hedley Byrne. There is room for the view that an exception is to be found in The Greystoke Castle [1947] A.C. 265. That case, which was decided by a narrow majority, may, however, be regarded as turning on specialties of maritime Jaw concerned in the relationship of joint adventurers at sea.

Further, though the purposes of the Act of 1936 as regards securing compliance with building byelaws covered the avoidance of injury to the safety or health of inhabitants of houses and of members of the public generally, these purposes did not cover the avoidance of pure economic loss to owners of buildings (see Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210, 241). Upon analysis, the nature of the duty held by Anns to be incumbent upon the local authority went very much further than a duty to take reasonable care to prevent injury to safety or health. The duty held to exist may be formulated as one to take reasonable care to avoid putting a future inhabitant owner of a house in a position in which he is threatened, by reason of a defect in the house, with avoidable physical injury to person or health and is obliged, in order to continue to occupy the house without suffering such injury, to expend money for the purpose of rectifying the defect.

The existence of a duty of that nature should not, in my opinion, be affirmed without a careful examination of the implications of such affirmation. To start with, if such a duty is incumbent upon the local authority, a similar duty must necessarily be incumbent also upon the builder of the house. If the builder of the house is to be so subject, there can be grounds in logic or in principle for not extending liability upon like grounds to the manufacturer of a chattel. That would open on an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality. The purchaser of an article who discovered that it suffered from a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect, and presumably, if the article was not capable of economic repair, the amount of loss sustained through discarding it. Then it would be open to question whether there should not also be a right to recovery where the defect renders the article not dangerous but merely useless. The economic loss in either case would be the same. There would also be a problem where the defect causes the destruction of the article itself, without causing any personal injury or damage to other property. A similar problem could arise, if the Anns principle is to be treated as confined to real property, where a building collapses when unoccupied.

In America the courts have developed the view that in the case of chattels damage to the chattel itself resulting from careless manufacture does not give a cause of action in negligence or in product liability. Thus in East River Steamship Corporation v. Transamerica Delaval Inc. (1986) 106 S.Ct. 2295 charterers of a supertanker were denied recovery on either of these grounds, against the manufacturers of turbines which had suffered damage through design or manufacturing defect and which had had to be

replaced. Blackmun J. delivering the judgment of the Supreme Court expressed the opinion, at pp. 2302-2304, that a claim of this character fell properly into the sphere of warranty under contract law. This judgment was followed by the United States Court of Appeals, Third Circuit, in Aloe Coal Co. v. Clark Equipment Co. (1987) 816 F.2d 110, where recovery in negligence was refused in respect of damage to a tractor shovel which caught fire and was destroyed, allegedly due to careless manufacture. The view of these courts is in line with the dissenting judgment of Lord Brandon of Oakbrook in Junior Books Ltd. v. Veitchi Co. Ltd. [1983] 1 AC 520.

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These American cases would appear to destroy the authority of the earlier decision in Quackenbush v. Ford Motor Co. (1915) 153 N.Y.S. 131 founded on by the New Zealand Court of Appeal in Bowen v. Paramount Builders (Hamilton) Ltd. [1977] 1 N.Z.L.R. 394. from which Lord Wilberforce in Anns [1978] AC 728, 759-760 said he had derived assistance. He referred similarly to the dissenting judgment of Laskin J. in the Canadian Supreme Court case of Rivtow Marine Ltd. v. Washington Iron Works [1973] 6 W.W.R. 692, 715. That was a case where a crane installed on the plaintiffs' barge was revealed as being dangerously defective as a result of a similar crane having collapsed and killed a man while being operated elsewhere. The manufacturers and the suppliers were aware of this occurrence but delayed considerably in warning the plaintiffs so that they were placed under the necessity of taking the crane out of service for rectification at the height of the logging season instead of in the slack season. The majority of the Supreme Court held the manufacturers and suppliers liable for the loss of profit sustained by the plaintiffs through not having been given earlier warning of the defect. This was upon the Hedley Byrne principle. They did not allow recovery for the cost of putting right the defect. The minority, Laskin and Hall JJ., were in favour of allowing recovery of that cost. For my part, I consider that the decision of the majority was correct. The defect in the crane was discovered before it had done any damage, so that there could be no question of application of the Donoghue v. Stevenson [1932] AC 562 principle. The cost of rectifying the defect was incurred for the purpose of enabling the crane to be profitably operated. The danger of injury from the defect, once it was known, could have been averted simply by laying up the crane. The loss was purely economic.

In D. & F. Estates Ltd. v. Church Commissioners for England [1989] AC 177 both Lord Bridge of Harwich and Lord Oliver of Aylmerton expressed themselves as having difficulty in

reconciling the decision in Anns with pre-existing principle and as being uncertain as to the nature and scope of such new principle as it introduced. Lord Bridge, at p. 206, suggested that in the case of a complex structure such as a building one element of the structure might be regarded for Donoghue v. Stevenson purposes as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part might qualify to be treated as damage to "other property." I think that it would be unrealistic to take this view as regards a building the whole of which had been erected and equipped by the same contractor. In that situation the whole package provided by the contractor would, in my opinion, fall to be regarded as one unit rendered unsound as such by a defect in the particular part. On the other hand where, for example, the electric wiring had been installed by a subcontractor and due to a defect caused by lack of care a fire occurred which destroyed the building, it might not be stretching ordinary principles too far to hold the electrical subcontractor liable for the damage. If in the East River case the defective turbine had caused the loss of the ship the manufacturer of it could consistently with normal principles, I would think, properly have been held liable for that loss. But even if Lord Bridge's theory were to be held acceptable, it would not seem to extend to the founding of liability upon a local authority, considering that the purposes of the Act of 1936 are concerned

with averting danger to health and safety, not danger or damage to property. Further, it would not cover the situation which might arise through discovery, before any damage had occurred, of a defect likely to give rise to damage in the future.

Liability under the Anns decision is postulated upon the existence of a present or imminent danger to health or safety. But considering that the loss involved in incurring expenditure to avert the danger is pure economic loss, there would seem to be no logic in confining the remedy to cases where such danger exists. There is likewise no logic in confining it to cases where some damage (perhaps comparatively slight) has been caused to the building, but refusing it where the existence of the danger has come to light in some other way, for example through a structural survey which happens to have been carried out, or where the danger inherent in some particular component or material has been revealed through failure in some other building. Then there is the question whether the remedy is available where the defect is rectified, not in order to avert danger to an inhabitant occupier himself, but in order to enable an occupier, who may be a corporation, to continue to occupy the building through its employees without putting those employees at risk.

In my opinion it is clear that Anns did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.

The practice statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234) leaves it open to this House to depart from a previous decision of its own if it so chooses. In Reg. v. National Insurance Commmissioner, Ex parte Hudson [1972] A.C. 944, 966 Lord Reid said:

"The old view was that any departure from rigid adherences to precedent would weaken [the certainty of the law]. I did not and do not accept that view. It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing: they are only adopting the less bad of the only alternatives open to them. But this is bound to add to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law."

In my opinion there can be no doubt that Anns has for long been widely regarded as an unsatisfactory decision. In relation to the scope of the duty owed by a local authority it proceeded upon what must, with due respect to its source, be regarded as a somewhat superficial examination of principle and there has been extreme difficulty, highlighted most recently by the speeches in D. & F. Estates, in ascertaining upon exactly what basis of principle it did proceed. I think it must now be recognized that it did not proceed on any basis of principle at all, but constituted a

remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. Others have been distinguished in the Court of Appeal. The result has been to keep the effect of the decision within reasonable bounds, but that has been achieved only by applying strictly the words of Lord Wilberforce and by refusing to accept the logical implications of the decision itself. These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss. There can be no doubt that to depart from the

decision would re-establish a degree of certainty in this field of law which it has done a remarkable amount to upset.

So far as policy considerations are concerned, it is no doubt the case that extending the scope of the tort of negligence may tend to inhibit carelessness and improve standards of manufacture and construction. On the other hand, overkill may present its own disadvantages, as was remarked in Rowling v. Takaro Properties Ltd. [1988] AC 473, 502. There may be room for the view that Anns-type liability will tend to encourage owners of buildings found to be dangerous to repair rather than run the risk of injury. The owner may, however, and perhaps quite often does, prefer to sell the building at its diminished value, as happened in the present case.

It must, of course, be kept in mind that the decision has stood for some 13 years. On the other hand, it is not a decision of the type that is to a significant extent taken into account by citizens or indeed local authorities in ordering their affairs. No doubt its existence results in local authorities having to pay increased insurance premiums, but to be relieved of that necessity would be to their advantage, not to their detriment. To overrule it is unlikely to result in significantly incurred insurance premiums for householders. It is perhaps of some significance that most litigation involving the decision consists in contests between insurance companies, as is largely the position in the present case. The decision is capable of being regarded as affording a measure of justice, but as against that the impossibility of finding any coherent and logically based doctrine behind it is calculated to put the law of negligence into a state of confusion defying rational analysis. It is also material that Anns has the effect of imposing upon builders generally a liability going far beyond that which Parliament thought fit to impose upon house builders alone by the Defective Premises Act 1972, a statute very material to the policy of the decision but not adverted to in it. There is much to be said for the view that in what is essentially a consumer protection field, as was observed by Lord Bridge of Harwich in D. & F. Estates, at p. 207, the precise extent and limits of the liabilities which in the public interest should be imposed upon builders and local authorities are best left to the legislature.

My Lords, I would hold that Anns was wrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building byelaws or regulations and should be departed from. It follows that Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373 should be overruled, as should all cases subsequent to Anns which were decided in reliance on it.

In the circumstances I do not consider it necessary to deal with the question whether, assuming that the council were under a duty of the scope contended for by the plaintiff, they discharged that duty by acting on the advice of competent consulting engineers.

My Lords, for these reasons I would allow the appeal.

LORD BRIDGE OF HARWICH

My Lords,

The speech of my noble and learned friend Lord Keith of Kinkel addresses comprehensively all the issues on which the outcome of this appeal depends. I find myself in full agreement with it and would not think it necessary to say more if we were not proposing to take the important step of departing, under the practice statement of 1966 (Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234, from propositions of law laid down by this House in Anns v. Merton Borough London Council [1978] AC 728, which have had a profound influence throughout the common law world. In the circumstances I think it right to explain in my own words, as briefly as I may, my reasons for thinking it right to take that step.

The origin of the Anns doctrine

The Anns doctrine, expressed in its most general form, holds a local authority which exercises statutory control over building operations liable in tort to a building owner or occupier for the cost of remedying a dangerous defect in a building which results from the negligent failure by the authority to ensure that the building was erected in conformity with applicable standards prescribed by building byelaws or regulations. The liability arises not from the breach of any statutory duty, but from the breach of a common law duty of care said to arise from the performance of the statutory functions. The doctrine, as propounded in the speech of Lord Wilberforce in this House, was, with some modifications, an adoption of principles of law first enunciated by the Court of Appeal in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373. That decision was certainly without precedent and was, I think, widely regarded as judicial legislation. If one reads the passage in the judgment of Lord Denning M.R., at pp. 397-398, under the rubric "Policy," it is difficult to think that he would have demurred to that criticism.

Development of the Anns doctrine in the Commonwealth

The doctrine arises from statutory provisions of a kind to be found in any developed society. The relevant statutes which operate in various Commonwealth jurisdictions differ in detail but

have sufficient in common in their general structure and operation to make it legitimate and instructive to compare the fate of the Anns doctrine in those jurisdictions. The High Court of Australia declined to follow Anns in Council of the Shire of Sutherland v. Heyman. 157 C.L.R. 424. In Canada and New Zealand, however, the Anns doctrine has been both followed and further developed.

In City of Kamloops v. Nielsen (1984) 10 D.L.R. (4th) 641, the Supreme Court of Canada, by a majority of three to two, held the municipal authority liable in damages in the following circumstances. When a dwelling house was in course of construction, the authority discovered that the foundations were defective. They issued a "stop work" order to prevent further building until proper foundations had been provided. The builder and the building owner ignored the order and when the building was completed the owner went into occupation without the requisite occupancy permit. Three years later he sold the house to the plaintiff who, after acquisition, discovered the defects in the foundation and sued the original owner in fraud and the authority in negligence. The only fault of the authority was their failure to take the appropriate legal proceedings to enforce the "stop work" order or to prevent occupation of the house without an occupancy permit. They were held liable jointly with the original owner. The majority of the court held in terms that the plaintiff was entitled to recover his purely economic loss represented by the cost of making good the foundations. The decision of the New Zealand Court of Appeal in Stieller v. Porirua City Council [1986] 1 N.Z.L.R. 84 is no less striking. In that case the plaintiffs had bought a house under construction. It was found in due course that the weather-boards on the exterior of the house were not of the standard required by the building byelaws. The court held the local authority liable in damages for their failure to discover this on inspection notwithstanding that the condition of the weather-boards never represented in any sense a danger to persons or property.

The present position in our own jurisdiction

Here, as Lord Keith of Kinkel has pointed out, we have shown a marked inclination to confine the Anns doctrine within narrow limits, as in Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210 and Curran v. Northern Ireland Co-ownership Housing Association Ltd. [1987] A.C. 718, and most recently, in examining the liability in tort of a builder for defects in the quality of a building which presented no danger, the reasoning of the speeches in D. & F. Estates Ltd. v. Church Commissioners for England [1989] AC 177 has gone far to question the principles on which the doctrine rests. Meanwhile,

uncertainty in the law has inevitably been a fertile breeding ground for litigation and the Court of Appeal have grappled as best they could with the problem of seeking to determine where the limits of the doctrine are to be drawn: see for example Investors in Industry Commercial Properties Ltd. v. South Bedfordshire District Council [1986] Q.B. 1034 and Richardson v. West Lindsey District Council [1990] 1 W.L.R. 522. Sooner or later, in this unhappy situation, a direct challenge to the authority of Anns was inevitable. Perhaps it is unfortunate that it did not come sooner, but the House could not, I think, have contemplated departing from the decision of an Appellate Committee so eminently constituted unless directly invited to do so. Now that the challenge has to be faced, I believe, for reasons which I hope will become apparent, that the choice before the House lies between following Australia and rejecting Anns altogether or following Canada and New Zealand in carrying the Anns doctrine a large, legislative step forward to its logical conclusion and holding that the scope of the duty of care, imposed by the law on local

authorities for the negligent performance of their functions under the relevant statutes, embraces all economic loss sustained by the owner or occupier of a building by reason of defects in it arising from construction in breach of building byelaws or regulations.

Dangerous defects and defects of quality

If a manufacturer negligently puts into circulation a chattel containing a latent defect which renders it dangerous to persons or property, the manufacturer, on the well known principles established by Donoghue v. Stevenson [1932] AC 562, will be liable in tort for injury to persons or damage to property which the chattel causes. But if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality. If a dangerous defect in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot be safely be used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But it is

not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss. There is no such special relationship between the manufacturer of a chattel and a remote owner or hirer.

I believe that these principles are equally applicable to buildings. If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect. But if the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. If the defect can be repaired at economic cost, that is the measure of the loss. If the building cannot be repaired, it may have to be abandoned as unfit for occupation and therefore valueless. These economic losses are recoverable if they flow from breach of a relevant contractual duty, but, here again, in the absence of a special relationship of proximity they are not recoverable in tort. The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties.

The fallacy which, in my opinion, vitiates the judgments of Lord Denning M.R. and Sachs L.J. in Dutton [1972] 1 Q.B. 373 is that they brush these distinctions aside as of no consequence: see per Lord Denning M.R., at p. 396D-F, and per Sachs L.J., at pp. 403H-404B. Stamp L.J., on the other hand, fully understood and appreciated them and his statement of the applicable principles as between the building owner and the builder, at p. 414D-H, seems to me unexceptionable. He rested his decision in favour of the plaintiff against the local authority on a wholly distinct principle which will require separate examination.

The complex structure theory

In my speech in D. & F. Estates at pp. 206G-207H I mooted the possibility that in complex structures or complex chattels one part of a structure or chattel might, when it caused damage to another part of the same structure or chattel, be regarded in the law of tort as having caused damage to "other property" for the purpose of the application of Donoghue v. Stevenson principles. I

expressed no opinion as to the validity of this theory, but put it forward for consideration as a possible ground on which the facts considered in Anns [1978] AC 728 might be distinguishable from the facts which had to be considered in D. & F. Estates itself. I shall call this for convenience "the complex structure theory" and it is, so far as I can see, only if and to the extent that this theory can be affirmed and applied that there can be any escape from the conclusions I have indicated above under the rubric "Dangerous defects and defects of quality."

The complex structure theory has, so far as I know, never been subjected to express and detailed examination in any English authority. I shall not attempt a review of the numerous authorities which bear upon it in the different state jurisdictions in the United States of America. However, some significant landmarks must be mentioned. In Quackenbush v. Ford Motor Co., 153 N.Y.S. 131, a decision of the Appellate Division of the Supreme Court of New York, the plaintiff recovered damages in tort from the manufacturer for damage to her Ford motor car caused by an accident attributable to faulty manufacture of the brakes. It is at least highly doubtful if the reasoning of this decision can now be supported consistently with the unanimous opinion of the United States Supreme Court in East River Steamship Corporation v. Transamerica Delaval Inc., (1986) 106 S. Ct. 2295 that a manufacturer incurs no liability in tort for damage occasioned by a defect in a product which injures itself. Blackmun J., delivering the opinion of the court, said, at p. 2302:

"We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. . . . But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain - traditionally the core concern of contract law."

Quackenbush is, in any event, no authority for the proposition that, once a defect in a complex chattel is discovered, there is a remedy in tort against the manufacturer on the ground that the cost of repairing the defect was necessarily incurred in order to prevent further damage to other parts of the chattel. A striking illustration of this is Transworld Airlines Inc. v. Curtiss-Wright Corporation (1955) 148 N.Y.S. 2d 284 in which the airline, having discovered defects in the engines fitted to some of their planes, fortunately before any accident occurred, chose not to sue

the plane manufacturer in contract, but sued the engine manufacturer in tort. The manufacturer was held not liable. This and other relevant American authorities are extensively reviewed in the illuminating judgment of the British Columbia Court of Appeal delivered by Tysoe J.A. in Rivtow Marine Ltd v. Washington Iron Works [1972] 3 W.W.R. 735. The court held that the manufacturers were not liable in tort to the hirers of a crane for the cost of repair rendered necessary when the crane was found to be dangerously defective in use. This decision was affirmed by the Supreme Court of Canada by a majority of seven to two [1973] 6 W.W.R. 692. Since Lord Wilberforce in Anns referred with approval to the dissenting judgment of Laskin J. in that case, which he described, at p. 760, as "of strong persuasive force," I have read and re-read that judgment with the closest attention. I have to say, with all respect, that I find it wholly unconvincing. It depends on the same fallacy as that which vitiates the judgments of Lord Denning M.R. and Sachs L3 in Dutton. In particular, in equating the damage sustained in repairing the chattel to make it safe with the damage which would have been suffered if the latent defect had never been discovered and the chattel had injured somebody in use, the judgment ignores the circumstance that once a chattel is known to be dangerous it is simply unusable. If I buy a second hand car and find it to be faulty, it can make no difference to the manufacturer's liability in tort whether the fault is in the brakes or in the engine, i.e. whether the car will not stop or will not start. In either case the car is useless until repaired. The manufacturer is no more liable in tort for the cost of the repairs in the one case than in the other.

Bowen v. Paramount Builders (Hamilton) Ltd. [1977] 1 N.Z.L.R. 394 was a case where the plaintiff building owner sued the builder in tort for the cost of making good damage caused by subsidence caused by inadequate foundations. The trial judge dismissed the claim on the ground that the principle of Donoghue v. Stevenson did not apply to entitle the plaintiff to recover in tort for a defect in the quality of the building. The judgments of the New Zealand Court of Appeal to the opposite effect were referred to with approval by Lord Wilberforce in Anns. The critical paragraph from the judgment of Richmond P., at p. 410, reads:

"Does damage to the house itself give rise to a cause of action? As I have already said, I agree with Speight J. that the principles laid down in Donoghue v. Stevenson [1932] A.C. 562 apply to a builder erecting a house under a contract with the owner. He is under a duty of care not to create latent sources of physical danger to the person or

property of third persons whom he ought reasonably to foresee as likely to be affected thereby. If the latent

defect causes actual physical damage to the structure of the house then I can see no reason in principle why such damage should not give rise to a cause of action, at any rate if that damage occurs after the house has been purchased from the original owner. This was clearly the view of Lord Denning M.R. and of Sachs L.J. in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373, 396, 403-404. In the field of products liability this has long been the law in the United States: see Prosser's Law of Torts, p. 665, sec. 101, and Quackenbush v. Ford Motor Co., 167 Appellate Division 433, 153 N.Y.S. 131 (1915). 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."

Richmond P. goes on to hold that the measure of damages would include the whole cost of remedial works plus any diminution in value of the house in so far as it was impossible to effect a complete remedy.

I cannot see any way in which the reasoning in the paragraph quoted and the consequences in relation to the measure of damages can in principle be supported except by an extreme application of the complex structure theory treating each part of the entire structure as a separate item of property. But such an application of the theory seems to me quite unrealistic. The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to "other property."

A critical distinction must be drawn here between some part of a complex structure which is said to be a "danger" only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central

heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor on the other, can recover damages in tort on Donoghue v. Stevenson [1932] AC 562 principles. But the position in law is entirely different where, by reason of the inadequacy of the foundations of the building to support the weight of the superstructure, differential settlement and consequent cracking occurs. Here, once the first cracks appear, the structure as a whole is seen to be defective and the nature of the defect is known. Even if, contrary to my view, the initial damage could be regarded as damage to other property caused by a latent defect, once the

defect is known the situation of the building owner is analogous to that of the car owner who discovers that the car has faulty brakes. He may have a house which, until repairs are effected, is unfit for habitation, but, subject to the reservation I have expressed with respect to ruinous buildings at or near the boundary of the owner's property, the building no longer represents a source of danger and as it deteriorates will only damage itself.

For these reasons the complex structure theory offers no escape from the conclusion that damage to a house itself which is attributable to a defect in the structure of the house is not recoverable in tort on Donoghue v. Stevenson principles, but represents purely economic loss which is only recoverable in contract or in tort by reason of some special relationship of proximity which imposes on the tortfeasor a duty of care to protect against economic loss.

The relative positions of the builder and the local authority

I have so far been considering the potential liability of a builder for negligent defects in the structure of a building to persons to whom he owes no contractual duty. Since the relevant statutory function of the local authority is directed to no other purpose than securing compliance with building byelaws or regulations by the builder, I agree with the view expressed in Anns [1978] AC 728 and by the majority of the Court of Appeal in Dutton [1972] 1 Q.B. 373 that a negligent performance of that function can attract no greater liability than attaches to the negligence of the builder whose fault was the primary tort giving rise to any relevant damage. I am content for present purposes to assume, though I am by no means satisfied that the assumption is correct, that where the local authority, as in this case or in Dutton, have in fact approved the defective plans or inspected the

defective foundations and negligently failed to discover the defect, their potential liability in tort is coextensive with that of the builder.

Only Stamp L.J. in Dutton was prepared to hold that the law imposed on the local authority a duty of care going beyond that imposed on the builder and extending to protection of the building owner from purely economic loss. I must return later to consider the question of liability for economic loss more generally, but here I need only say that I cannot find in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 or Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004 any principle applicable to the circumstances of Dutton or the present case that provides support for the conclusion which Stamp L.J. sought to derive from those authorities.

Imminent danger to health or safety

A necessary element in the building owner's cause of action against the negligent local authority, which does not appear to have been contemplated in Dutton but which, it is said in Anns, must be present before the cause of action accrues, is that the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it. Correspondingly the damages recoverable are said to include the amount of expenditure necessary to restore the building to a

condition in which it is no longer such a danger, but presumably not any further expenditure incurred in any merely qualitative restoration. I find these features of the Anns doctrine very difficult to understand. The theoretical difficulty of reconciling this aspect of the doctrine with previously accepted legal principle was pointed out by Lord Oliver of Aylmerton in D. & F. Estates [1989] AC 177, 212D-213D. But apart from this there are, as it appears to me, two insuperable difficulties arising from the requirement of imminent danger to health or safety as an ingredient of the cause of action which lead to quite irrational and capricious consequences in the application of the Anns doctrine. The first difficulty will arise where the relevant defect in the building, when it is first discovered, is not a present or imminent danger to health or safety. What is the owner to do if he is advised that the building will gradually deteriorate, if not repaired, and will in due course become a danger to health and safety, but that the longer he waits to effect repairs the greater the cost will be? Must he spend £1,000 now on the necessary repairs with no redress against the local authority? Or is he entitled to wait until the building has so far deteriorated that he has a cause of action and then to recover from the local authority the £5,000 which the

necessary repairs are now going to cost? I can find no answer to this conundrum. A second difficulty will arise where the latent defect is not discovered until it causes the sudden and total collapse of the building, which occurs when the building is temporarily unoccupied and causes no damage to property except to the building itself. The building is now no longer capable of occupation and hence cannot be a danger to health or safety. It seems a very strange result that the building owner should be without remedy in this situation if he would have been able to recover from the local authority the full cost of repairing the building if only the defect had been discovered before the building fell down.

Liability for economic loss

All these considerations lead inevitably to the conclusion that a building owner can only recover the cost of repairing a defective building on the ground of the authority's negligence in performing its statutory function of approving plans or inspecting buildings in the course of construction if the scope of the authority's duty of care is wide enough to embrace purely economic loss. The House has already held in D. & F. Estates that a builder, in the absence of any contractual duty or of a special relationship of proximity introducing the Hedley Byrne principle of reliance, owes no duty of care in tort in respect of the quality of his work. As I pointed out in D. & F. Estates, to hold that the builder owed such a duty of care to any person acquiring an interest in the product of the builder's work would be to impose upon him the obligations of an indefinitely transmissible warranty of quality.

By section 1 of the Defective Premises Act 1972 Parliament has in fact imposed on builders and others undertaking work in the provision of dwellings the obligations of a transmissible warranty of the quality of their work and of the fitness for habitation of the completed dwelling. But besides being limited to dwellings, liability under the Act is subject to a limitation period of six years from the completion of the work and to the exclusion

provided for by section 2. It would be remarkable to find that similar obligations in the nature of a transmissible warranty of quality, applicable to buildings of every kind and subject to no such limitations or exclusions as are imposed by the Act of 1972, could be derived from the builder's common law duty of care or from the duty imposed by building byelaws or regulations. In Anns Lord Wilberforce expressed the opinion that a builder could be held liable for a breach of statutory duty in respect of buildings which do not comply with the byelaws. But he cannot, I think, have

meant that the statutory obligation to build in conformity with the byelaws by itself gives rise to obligations in the nature of transmissible warranties of quality. If he did mean that, I must respectfully disagree. I find it impossible to suppose that anything less than clear express language such as is used in section 1 of the Act of 1972 would suffice to impose such a statutory obligation.

As I have already said, since the function of a local authority in approving plans or inspecting buildings in course of construction is directed to ensuring that the builder complies with building byelaws or regulations, I cannot see how, in principle, the scope of the liability of the authority for a negligent failure to ensure compliance can exceed that of the liability of the builder for his negligent failure to comply.

There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss. The decision in Junior Books Ltd v. Veitchi Co. Ltd. [1983] 1 AC 520 can, I believe, only be understood on this basis.

In Council of the Shire of Sutherland v. Heyman 157 C.L.R. 424 the critical role of the reliance principle as an element in the cause of action which the plaintiff sought to establish is the subject of close examination, particularly in the judgment of Mason J. The central theme of his judgment, and a subordinate theme in the judgments of Brennan and Deane JJ, who together with Mason J formed the majority rejecting the Anns doctrine, is that a duty of care of a scope sufficient to make the authority liable for damage of the kind suffered can only be based on the principle of reliance and that there is nothing in the ordinary relationship of a local authority, as statutory supervisor of building operations, and the purchaser of a defective building capable of giving rise to such a duty. I agree with these judgments. It cannot, I think, be suggested, nor do I understand Anns or the cases which have followed Anns in Canada and New Zealand to be in fact suggesting, that the approval of plans or the inspection of a building in the course of construction by the local authority in performance of their statutory function and a subsequent purchase of the building by the plaintiff are circumstances in themselves sufficient to introduce the principle of reliance which is the foundation of a duty of care of the kind identified in Hedley Byrne.

In Dutton Lord Denning M.R. said, at pp. 397-398:

"Mrs. Dutton has suffered a grievous loss. The house fell down without any fault of hers. She is in no position herself to bear the loss. Who ought in justice to bear it? I should think those who were responsible. Who are they? In the first place, the builder was responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss."

These may be cogent reasons of social policy for imposing liability on the authority. But the shoulders of a public authority are only "broad enough to bear the loss" because they are financed by the public at large. It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficent for imposing on the public the burden of providing compensation for private financial losses. If they do so decide, it is not difficult for them to say so.

I would allow the appeal.

LORD BRANDON OF OAKBROOK

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Keith of Kinkel. I agree with it, and for the reasons which he gives I consider that the House should depart from its previous decision in Anns v. Merton London Borough Council [1978] AC 728 to the extent proposed by him, and that the appeal should be allowed accordingly.

LORD ACKNER

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Oliver of Aylmerton and Lord Jauncey of

Tullichettle. For the reasons which they have given, I too would allow this appeal.

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LORD OLIVER OF AYLMERTON

My Lords,

I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Keith of Kinkel and Lord Bridge of Harwich. For the reasons which they have given I too would allow this appeal. Since, however, this involves departing from a seminal decision of this House which has stood for a considerable period and which has had the most profound influence on the development of the law of negligence both in the United Kingdom and in other jurisdictions it is, I think, only right that I should also state my reasons independently.

In the 13 years which have elapsed since the decision of this House in Anns v. Merton London Borough Council [1978] A.C. 728 the anomalies which arise from its literal application and the logical difficulty in relating it to the previously established principles of the tort of negligence have become more and more apparent. This appeal and the appeal in the case of Department of the Environment v. Thomas Bates and Sons Ltd. which was heard shortly before it, have highlighted some of the problems which Anns has created and underline the urgent need for it now to be re-examined.

In approaching such a re-examination there are number of points to be made at the outset. First, it has to be borne in mind that neither in Anns nor in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373, which preceded it, was the liability of the local authority based upon the proposition that the Public Health Act 1936 gave rise to an action by a private individual for breach of statutory duty of the type contemplated in Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398, a type of claim quite distinct from a claim in negligence (see London Passenger Transport Board v. Upson [1949] A.C. 155, 168, per Lord Wright.) The duty of the local authority was, as Lord Wilberforce stressed in the course of his speech in Anns, at p. 758, the ordinary common law duty to take reasonable care, no more and no less.

Secondly, in neither case was it possible to allege successfully that the plaintiffs had relied upon the proper performance by the defendant of its Public Health Act duties so as to invoke the principles expounded in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465. In the course of his

speech in Anns, at p.p. 768-769, Lord Salmon was at pains to emphasise that the claim had nothing to do with reliance.

Thirdly, the injury of which the plaintiffs complained in Anns was not "caused" by the defendant authority in any accepted sense of the word. The complaint was not of what the defendant had done but of what it had not done. It had failed to prevent the builder of the flats from erecting a sub-standard structure. It is true that in Dutton the basis for liability was said, by both Lord Denning M.R. and Sachs L.J., to rest on the defendant's ability to control the building operation, from which it might be inferred that it was so involved in the operation as to be directly responsible for the defective foundations. This, whilst it goes no way towards resolving many of the difficulties arising from the

decision, might be thought perhaps to provide a more acceptable basis for liability, but it was specifically rejected in Anns (see per Lord Wilberforce, at p. 754).

Fourthly, although in neither case was the builder who had actually created the defect represented at the hearing, the fact that the claim was, in essence, one based upon the failure of the defendant to prevent the infliction of tortious injury by the builder rendered it necessary to determine also the question of what, if any, liability lay upon him. If the builder was under no obligation to the plaintiffs to take reasonable care to provide proper foundations it is difficult to see how the defendant authority could be liable for failing to prevent what was, vis-a-vis the plaintiffs, lawful conduct on his part save on the footing that the Act of 1936 imposed an absolute statutory duty to ensure that no sub-standard building was erected. But, as already mentioned, the action was not one for breach of statutory duty. The liability of the local authority and that of the builder are not, therefore, logically separable.

Finally, despite the categorisation of the damage as "material, physical damage" (Anns, per Lord Wilberforce, at p. 759) it is, I think, incontestable on analysis that what the plaintiffs suffered was pure pecuniary loss and nothing more. If one asks, "What were the damages to be awarded for?" clearly they were not to be awarded for injury to the health or person of the plaintiffs for they had suffered none. But equally clearly, although the "damage" was described, both in the Court of Appeal in Dutton and in this House in Anns, as physical or material damage, this simply does not withstand analysis. To begin with, it makes no sort of sense to accord a remedy where the defective nature of the structure has manifested itself by some physical sympton, such as a crack or a fractured pipe, but to deny it where the defect

has been brought to light by, for instance, a structural survey in connection with a proposed sale. Moreover, the imminent danger to health or safety which was said to be the essential ground of the action was not the result of the physical manifestations which had appeared but of the inherently defective nature of the structure which they revealed. They were merely the outward signs of a deterioration resulting from the inherently defective condition with which the building had been brought into being from its inception and cannot properly be described as damage caused to the building in any accepted use of the word "damage."

In the speech of my noble and learned friend, Lord Bridge of Harwich, and in my own speech in D. & F. Estates Ltd. v. Church Commissioners for England [1989] A.C. 167 there was canvassed what has been called "the complex structure theory." This has been rightly criticised by academic writers although I confess that I thought that both my noble and learned friend and I had made it clear that it was a theory which was not embraced with any enthusiasm but was advanced as the only logically possible explanation of the categorisation of the damage in Anns as "material, physical damage." My noble and learned friend has, in the course of his speech in the present case, amply demonstrated the artificiality of the theory and, for the reasons which he has given, it must be rejected as a viable explanation of the underlying basis for the decision in Anns. However that decision is analysed, therefore, it is in the end inescapable that

the only damage for which compensation was to be awarded and which formed the essential foundation of the action was pecuniary loss and nothing more. The injury which the plaintiff suffers in such a case is that his consciousness of the possible injury to his own health or safety or that of others puts him in a position in which, in order to enable him either to go on living in the property or to exploit its financial potentiality without that risk, whether substantial or insubstantial, he has to expend money in making good the defects which have now become patent. In the course of his speech in Anns [1978] AC 728, Lord Wilberforce acknowledged the assistance that he had derived from the dissenting judgment of Laskin J. in Rivtow Marine Ltd. v. Washington Iron Works [1973] 6 W.W.R. 692. That case presents an interesting parallel, though not a precise one, for the danger there was not to the plaintiffs but to their workmen. The expenditure which they were there seeking to recover and for which Laskin J. would have reimbursed them was incurred not because it was necessary in order to rescue employees or others from imminent injury, for the crane was not dangerous in itself and the potential danger was known and foreseen. It was a danger

to them only if the plaintiffs chose to go on using it for the purpose for which it was designed and the expenditure was incurred in order to enable them to reap such economic advantages as lay in their continued ability to use it for that purpose.

The fact is that the categorisation of the damage in Anns as "material, physical damage," whilst, at first sight, lending to the decision some colour of consistency with the principle of Donoghue v. Stevenson [1932] AC 562, has served to obscure not only the true nature of the claim but, as a result, the nature and scope of the duty upon the breach of which the plaintiffs in that case were compelled to rely.

It does not, of course, at all follow as a matter of necessity from the mere fact that the only damage suffered by a plaintiff in an action for the tort of negligence is pecuniary or "economic" that his claim is bound to fail. It is true that, in an uninterrupted line of cases since 1875, it has consistently been held that a third party cannot successfully sue in tort for the interference with his economic expectations or advantage resulting from injury to the person or property of another person with whom he has or is likely to have a contractual relationship (see Cattle v. Stockton Waterworks Co. (1875) L.R. 10 Q.B. 453; Simpson & Co. v. Thomson (1877) 3 App.Cas. 279; La Societe Anonyme de Remorquage a Helice v. Bennetts [1911] 1 K.B. 243). That principle was applied more recently by Widgery J. in Weller & Co. v. Foot and Mouth Disease Research Institute [1966] 1 Q.B. 569 and received its most recent reiteration in the decision of this House in Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] AC 785. But it is far from clear from these decisions that the reason for the plaintiff's failure was simply that the only loss sustained was "economic." Rather they seem to have been based either upon the remoteness of the damage as a matter of direct causation or, more probably, upon the "floodgates" argument of the impossibility of containing liability within any acceptable bounds of the law were to permit such claims to succeed. The decision of this House in Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners) [1947] A.C. 265 demonstrates that the mere fact that the primary damage suffered by a plaintiff is pecuniary

is no necessary bar to an action in negligence given the proper circumstances - in that case, what was said to be the "joint venture" interest of shipowners and the owners of cargo carried on board - and if the matter remained in doubt that doubt was conclusively resolved by the decision of this House in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 where Lord Devlin, at p. 517 convincingly demonstrated the illogicality of a

distinction between financial loss caused directly and financial loss resulting from physical injury to personal property.

The critical question, as was pointed out in the analysis of Brennan J. in his judgment in Council of the Shire of Sutherland v. Heyman (1985) 157 C.L.R. 424, is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained (see Caparo Industries Plc, v. Dickman [1990] 2 W.L.R. 358). The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the plaintiff and the defendant is such - or, to use the favoured expression, whether it is of sufficent "proximity" - that it imposes upon the latter a duty to take care to avoid or prevent that loss which has in fact been sustained. That the requisite degree of proximity may be established in circumstances in which the plaintiff's injury results from his reliance upon a statement or advice upon which he was entitled to rely and upon which it was contemplated that he would be likely to rely is clear from Hedley Byrne and subsequent cases, but Anns [1978] AC 728 was not such a case and neither is the instant case. It is not, however, necessarily to be assumed that the reliance cases form the only possible category of cases in which a duty to take reasonable care to avoid or prevent pecuniary loss can arise. Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners), for instance, clearly was not a reliance case. Nor indeed was Ross v. Caunters [1980] Ch. 297 so far as the disappointed beneficiary was concerned. Another example may be Ministry of Housing and Local Government v. Sharp [1980] 2 Q.B. 223, although this may, on analysis, properly be categorised as a reliance case.

Nor is it self-evident logically where the line is to be drawn. Where, for instance, the defendant's careless conduct results in the interruption of the electricity supply to business premises adjoining the highway, it is not easy to discern the logic in holding that a sufficient relationship of proximity exists between him and a factory owner who has suffered loss because material in the course of manufacture is rendered useless but that none exists between him and the owner of, for instance, an adjoining restaurant who suffers the loss of profit on the meals which he is unable to prepare and sell. In both cases the real loss is pecuniary. The solution to such borderline cases has so far been achieved pragmatically (see Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. [1973] QB 27) not by the application of logic but by the perceived necessity as a matter of policy to place some limits - perhaps arbitrary limits - to what would otherwise

be an endless, cumulative causative chain bounded only by theoretical foreseeability.

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I frankly doubt whether, in searching for such limits, the categorisation of the damage as "material," "physical," "pecuniary" or "economic" provides a particularly useful contribution. Where it does, I think, serve a useful purpose is in identifying those cases in which it is necessary to search for and find something more than the mere reasonable foreseeability of damage which has occurred as providing the degree of "proximity" necessary to support the action. In his classical exposition in Donoghue v. Stevenson [1932] AC 562, 580-581, Lord Atkin was expressing himself in the context of the infliction of direct physical injury resulting from a carelessly created latent defect in a manufactured product. In his analysis of the duty in those circumstances he clearly equated "proximity" with the reasonable foresight of damage. In the straightforward case of the direct infliction of physical injury by the act of the plaintiff there is, indeed, no need to look beyond the foreseeability by the defendant of the result in order to establish that he is in a "proximate" relationship with the plaintiff. But, as was pointed out by Lord Diplock in Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004, at p. 1060, Lord Atkin's test, though a useful guide to characteristics which will be found to exist in conduct and relationships giving rise to a legal duty of care, is manifestly false if misused as a universal; and Lord Reid, in the course of his speech in the same case, recognised that the statement of principle enshrined in that test necessarily required qualification in cases where the only loss caused by the defendant's conduct was economic. The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required and it is one of the unfortunate features of Anns that it resulted initially in this essential distinction being lost sight of.

The two-stage test propounded by Lord Wilberforce in Anns was at first interpreted as indicating as a universal proposition that the relationship between defendant and plaintiff encapsulated in the word "proximity" arose from the foreseeability of damage alone regardless of whether the case was one of direct physical injury or of pure pecuniary loss. Both Dutton [1972] 1 Q.B. 373 and Bowen v. Paramount Builders (Hamilton) Ltd. [1977] 1 N.Z.L.R. 394 are examples of the application of Lord Atkin's principle as a

universal. There can, of course, be no doubt that it can reasonably be foreseen that if an inherently defective house is built or an inherently defective chattel is manufactured some future owner will be likely to sustain loss when the defect comes to light, if only because it is less valuable than it was thought to be when he bought and paid for it. A series of decisions in this House and in the Privy Council since Anns, however, have now made it clear beyond argument that in cases other than cases of direct physical injury the reasonable foreseeability of damage is not of itself sufficient and that there has to be sought in addition in the relationship between the parties that elusive element comprehended in the expression "proximity" (see Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210; Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175; Hill v. Chief Constable of West Yorkshire [1989] A.C.

53). It is an expression which persistently defies definition but my difficulty in rationalising the basis of Dutton and Anns is and has always been not so much in defining it as in discerning the circumstances from which it could have been derived. For reasons which I have endeavoured to explain, the starting-point in seeking to rationalise these decisions must, as it seems to me, be to establish the basis of the liability of the person who is the direct and immediate cause of the plaintiff's loss. Anyone, whether he be a professional builder or a do-it-yourself enthusiast, who builds or alters a semi-permanent structure must be taken to contemplate that at some time in the future it will, whether by purchase, gift or inheritance, come to be occupied by another person and that if it is defectively built or altered it may fall down and injure that person or his property or may put him in a position in which, if he wishes to occupy it safely or comfortably, he will have to expend money on rectifying the defect. The case of physical injury to the owner or his licensees or his or their property presents no difficulty. He who was responsible for the defect - and it will be convenient to refer to him compendiously as "the builder" - is, by the reasonable foreseeability of that injury, in a proximate "neighbour" relationship with the injured person on ordinary Donoghue v. Stevenson principles. But when no such injury has occurred and when the defect has been discovered and is therefore no longer latent, whence arises that relationship of proximity required to fix him with responsibility for putting right the defect? Foresight alone is not enough but from what else can the relationship be derived? Apart from contract, the manufacturer of a chattel assumes no responsibility to a third party into whose hands it has come for the cost of putting it into a state in which it can safely continue to be used for the purpose for which it was intended. Anns, of course, does not go so far as

to hold the builder liable for every latent defect which depreciates the value of the property but limits the recovery, and thus the duty, to the cost of putting it into a state in which it is no longer an imminent threat to the health or safety of the occupant. But it is difficult to see any logical basis for such a distinction. If there is no relationship of proximity such as to create a duty to avoid pecuniary loss resulting from the plaintiff's perception of non-dangerous defects, upon what principle can such a duty arise at the moment when the defect is perceived to be an imminent danger to health? Take the case of an owner-occupier who has inherited the property from a derivative purchaser. He suffers, in fact, no "loss" save that the property for which he paid nothing is less valuable to him by the amount which it will cost him to repair it if he wishes to continue to live in it. If one assumes the parallel case of one who has come into possession of a defective chattel - for instance, a yacht - which may be a danger if it is used without being repaired, it is impossible to see upon what principle such a person, simply because the chattel has become dangerous, could recover the cost of repair from the original manufacturer.

The suggested distinction between mere defect and dangerous defect which underlies the judgment of Laskin J. in Rivtow Marine Ltd. v. Washington Iron Works [1973] 6 W.W.R. 692 is, I believe, fallacious. The argument appears to be that because, if the defect had not been discovered and someone had been injured, the defendant would have been liable to pay damages for the resultant physical injury on the principle of Donoghue v.

Stevenson it is absurd to deny liability for the cost of preventing such injury from ever occurring. But once the danger ceases to be latent there never could be any liability. The plaintiff's expenditure is not expenditure incurred in minimising the damage or in preventing the injury from occurring. The injury will not now ever occur unless the plaintiff causes it to do so by courting a danger of which he is aware and his expenditure is incurred not in preventing an otherwise inevitable injury but in order to enable him to continue to use the property or the chattel.

My Lords, for the reasons which I endeavoured to state in the course of my speech in D. & F. Estates Ltd. v. Church Commissioners for England [1989] AC 177 and which are expounded in more felicitous terms both in the speeches of my noble and learned friends in the instant case and in that of my noble and learned friend, Lord Keith of Kinkel, in Department of the Environment v. Thomas Bates and Sons Ltd., I have found it impossible to reconcile the liability of the builder propounded in Anns with any previously accepted principles of the tort of

negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship. Whether, as suggested in the speech of my noble and learned friend, Lord Bridge of Harwich, he could be held responsible for the cost necessarily incurred by a building owner in protecting himself from potential liability to third parties is a question upon which I prefer to reserve my opinion until the case arises, although I am not at the moment convinced of the basis for making such a distinction.

If, then, the law imposes upon the person primarily responsible for placing on the market a defective building no liability to a remote purchaser for expenditure incurred in making good defects which, ex hypothesi, have injured nobody, upon what principle is liability in tort to be imposed upon a local authority for failing to exercise its regulatory powers so as to prevent conduct which, on this hypothesis, is not tortious? Or, to put it another way, what is it, apart from the foreseeability that the builder's failure to observe the regulations may create a situation in which expenditure by a remote owner will be required, that creates the relationship of proximity between the authority and the remote purchaser? A possible explanation might, at first sight, seem to be that the relationship arises from the mere existence of the public duty of supervision imposed by the statute. That, I think, must have been the view of Stamp L.J. in Dutton [1972] 1 Q.B. 373, for he regarded the liability of the local authority as arising quite independently of that of the builder. His was, however, a minority view which derives no support from the reasoning of this House in Anns [1978] AC 728 and cannot stand up to analysis except on the basis (a) that the damage sustained was physical damage and (b) that the local authority, by reason of its ability to oversee the operation, was the direct cause of the defective construction. Neither of these propositions in my judgment is tenable.

The instant case is, to an extent, a stronger case than Anns, because there the authority was under no duty to carry out an inspection whereas here there was a clear statutory duty to

withold approval of the defective design. This, however, can make no difference in principle and the reasoning of the majority in Anns, which clearly links the liability of the local authority to that of the builder, must equally apply. The local authority's duty to future owners of the building to take reasonable care in exercising its supervisory function was expressed in Anns to arise "on principle," but it is not easy to see what the principle was,

unless it was simply the foreseeability of possible injury alone, which, it is now clear, is not in itself enough. The only existing principle upon which liability could be based was that propounded in Dorset Yacht [1970] AC 1004, that is to say, that the relationship which existed between the authority and the plaintiff was such as to give rise to a positive duty to prevent another person, the builder, from inflicting pecuniary injury. But in a series of decisions in subsequent cases - in particular Curran v. Northern Ireland Co-ownership Housing Association [1987] A.C. 718 and Hill v. Chief Constable of West Yorkshire - this House has been unable to find in the case of other regulatory agencies with powers as wide as or wider than those under the Public Health Acts, such a relationship between the regulatory authority and members of the public for whose protection the statutory powers were conferred (see also Yuen Kun Yeu v. Attorney-General of Hong Kong).

My Lords, I can see no reason why a local authority, by reason of its statutory powers under the Public Health Acts or its duties under the building regulations, should be in any different case. Ex hypothesi there is nothing in the terms or purpose of the statutory provisions which support the creation of a private law right of action for breach of statutory duty. There is equally nothing in the statutory provisions which even suggest that the purpose of the statute was to protect owners of buildings from economic loss. Nor is there any easily discernible reason why the existence of the statutory duties, in contra-distinction to those existing in the case of other regulatory agencies, should be held in the case of a local authority to create a special relationship imposing a private law duty to members of the public to prevent the conduct of another person which is not itself tortious. Take the simple example of the builder who builds a house with inadequate foundations and presents it to his son and daughter-in-law as a wedding present. It would be manifestly absurd, if the son spends money on rectifying the defect which has come to light, to hold him entitled to recover the expenditure from his father because the gift turns out to be less advantageous than he at first supposed. It seems to me no less absurd to hold that nevertheless there exists between the authority which failed properly to inspect and the donee of the property a relationship entitling the latter to recover from the authority the expenditure which he cannot recover from the donor. Yet that must be the logical result of the application of Anns, unless one is to say that the necessary relationship of proximity exists, not between the authority and all subsequent owners and occupiers, but only between the authority and the owners and occupiers who have acquired a property for value. With the greatest deference to the high authority of the opinions expressed in Anns and in Dutton, I

cannot see, once it is recognised, as I think that it has to be, that the only damage sustained by discovery of the defective condition of the structure is pure pecuniary loss, how those decisions can be sustained as either an application or a permissible extension of existing principle.

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The question that I have found most difficult is whether, having regard to the time which has elapsed and the enormous amount of litigation which has been instituted in reliance upon Anns, it is right that this House should now depart from it. In his speech in Dorset Yacht, Lord Diplock observed, at p. 1064:

"As any proposition which relates to the duty of controlling another man to prevent his doing damage to a third deals with a category of civil wrongs of which the English courts have hitherto had little experience it would not be consistent with the methodology of the development of the law by judicial decision that any new proposition should be stated in wider terms than are necessary for the determination of the present appeal. Public policy may call for the immediate recognition of a new sub-category of relations which are the source of the duty of this nature additional to the sub-category described in the established proposition, but further experience of actual cases would be needed before the time became ripe for the coalescence of sub-categories into a broader category of relations giving rise to the duty, such as was effected with respect to the duty of care of a manufacturer of products in Donoghue v. Stevenson [1932] AC 562. Nevertheless, any new sub-category will form part of the English law of civil wrongs and must be consistent with its general principles."

For the reasons which I have endeavoured to express I do not think that Anns can be regarded as consistent with those general principles. Nor do I think that it can properly be left to stand as a peculiar doctrine applicable simply to defective buildings, for I do not think that its logical consequences can be contained within so confined a compass. It may be said that to hold local authorities liable in damages for failure effectively to perform their regulatory functions serves a useful social purpose by providing what is, in effect, an insurance fund from which those who are unfortunate enough to have acquired defective premises can recover part at least of the expense to which they have been put or the loss of value which they have sustained. One cannot but have sympathy with such a view although I am not sure that I see why the burden should fall on the community at large rather than be left to be covered by private insurance. But, in any event, like my noble and learned friends, I think that the

achievement of beneficial social purposes by the creation of entirely new liabilities is a matter which properly falls within the province of the legislature and within that province alone. At the date when Anns was decided the Defective Premises Act 1972, enacted after a most careful consideration by the Law Commission, had shown clearly the limits within which Parliament had thought it right to superimpose additional liabilities upon those previously existing at common law and it is one of the curious features of the case that no mention even of the existence of this important measure, let alone of its provisions - and in particular the provision regarding the accrual of the cause of action - appears in any of the speeches or in the summary in the Law Reports of the argument of counsel.

There may be very sound social and political reasons for imposing upon local authorities the burden of acting, in effect, as

insurers that buildings erected in their areas have been properly constructed in accordance with the relevant building regulations. Statute may so provide. It has not done so and I do not, for my part, think that it is right for the courts not simply to expand existing principles but to create at large new principles in order to fulfil a social need in an area of consumer protection which has already been perceived by the legislature but for which, presumably advisedly, it has not thought it necessary to provide. I would accordingly allow the appeal. It is unnecessary in these circumstances to determine the interesting question of whether, in fact, the appellants in the instant case, who took the only course practically open to them, could be held responsible in law for the negligence of the ex facie competent experts whom they consulted.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friends, Lord Keith of Kinkel and Lord Bridge of Harwich. They have dealt so fully with all the important matters which arise in this appeal that I doubt whether anything which I say can make a useful contribution to the decision. However, in view of the importance of the course which they propose, I feel that I must briefly state my reasons for agreeing to that course.

In Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] AC 210 Lord Keith pointed out that in each case of alleged negligence the true question was whether the particular defendant owed to the particular plaintiff a duty of care having the scope intended for and whether he was in breach

of that duty. A relationship of proximity in the sense used by Lord Atkin in Donoghue v. Stevenson [1932] AC 562 must exist before any duty of care can arise, but the scope of the duty must depend upon all the circumstances of the case. In this appeal the appellant defendants have accepted that there was a common law duty of care incumbent upon them in relation to the passing of the plans and we are therefore only concerned with the scope of that duty. Like my noble and learned friend, Lord Keith, I prefer, in the absence of argument, to express no view as to whether the defendants in truth did owe such a duty.

The issue is whether the scope of the defendants' duty extended to the avoidance of economic loss resulting from a defect in or damage to the very property for whose safety they bore some responsibility. The courts below, relying on Anns v. Merton London Borough Council [1978] AC 728, held that it did. In the 40 years after Donoghue v. Stevenson it was accepted that the principles enunciated by Lord Atkin were limited to cases where there was physical damage to person or to property other than the property which gave rise to the damage and where there was no reasonable opportunity of discovering the defect which ultimately caused the damage (Grant v. Australian Knitting Mills Ltd. [1936] AC 85, Farr v. Butters Brothers & Co. [1932] 2 K.B. 606). Actual damage had to occur before tortious liability for

negligence arose, mere apprehension of such damage giving rise to no liability (Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. (The Wagon Mound) [1961] AC 388, per Viscount Simonds, at p. 425). Furthermore, pure economic loss unaccompanied by physical injury to person or property was not recoverable unless there was between the parties such a special relationship as existed in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465. This is quite logical because in most cases where damage or a defect which solely affects the article in question is discovered before it causes other damage the owner is presented with two realistic alternatives: either he repairs it or he discards it as useless. In either event his loss is purely economic being the cost of repair or replacement.

However, in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373, the Court of Appeal purported to apply the principle of Donoghue v. Stevenson to a case in which there was no damage to person or property other than to the property with which the duty of care was concerned. A local authority was held liable in negligence to the second owner of a house for failing to take reasonable care to see that the foundations thereof were constructed in accordance with building byelaws. Serious defects occurred in the house and the plaintiff recovered the estimated

cost of repair together with a sum representing the diminished value of the house as repaired. Lord Denning M.R. rejected a submission that the damage was purely economic saying, at p. 396:

"The damage done here was not solely economic loss. It was physical damage to the house. If Mr. Tapp's submission [for the council] were right, it would mean that if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable: but if the owner discovers the defect in time to repair it - and he does repair it - the council are not liable. That is an impossible distinction. They are liable in either case.

"I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair."

In rejecting Mr. Tapp's argument, Lord Denning appears to have impliedly accepted that a claim for pure economic loss would not have been available to the plaintiff. However, his conclusion that the cost of repairing a defect which had become patent in the building or article in question was recoverable, albeit no damage to the person or other property had resulted, extended the scope of the Donoghue v. Stevenson duty in two respects. It extended the scope in the first place to cover damage to the article itself and in the second place to remedying a defect which had become patent. Such an extension, if universally applied, would mean that the owner of a chattel which developed a defect could recover from the negligent manufacturer the cost of repair or replacement at least if continued use of the chattel in its defective state was likely to give rise to injury - a situation very different from those in which the principle of Donoghue v. Stevenson had previously been held to apply.

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Anns v. Merton London Borough Council [1978] AC 728
came to this House on two preliminary questions of law, namely, (1) whether a local authority was under any duty of care towards owners or occupiers of houses in relation to inspection during the building process and (2), if so, what period of limitation applied to any such claims by owners or occupiers. The first question was by far the more important. In order to answer the second question it was necessary to determine when the cause of action arose but, as Lord Wilberforce pointed out, at p. 751E, no question arose directly at that stage as to the damages which the plaintiff could recover. However, he considered that it was nevertheless

necessary to give some general consideration to the matter in the context of the limitation question (p. 759F). It follows that his observations as to damages, while no doubt of considerable assistance to the parties, were peripheral to the two main questions. Lord Wilberforce then went on, at pp. 759-760, to refer to the sort of damages which might be recovered:

"The damages recoverable include all those which foreseeably arise from the breach of the duty of care which, as regards the council, I have held to be a duty to take reasonable care to secure compliance with the byelaws. Subject always to adequate proof of causation, these damages may include damages for personal injury and damage to property. In my opinion they 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 occupants.

"To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement. On the question of damages generally I have derived much assistance from the judgment (dissenting on this point, but of strong persuasive force) of Laskin J. in the Canadian Supreme Court case of Rivtow Marine Ltd. v. Washington Iron Works [1973] 6 W.W.R. 692, 715 and from the judgments of the New Zealand Court of Appeal (furnished by courtesy of that court) in Bowen v. Paramount Builders (Hamilton) Ltd. [1975] 2 N.Z.L.R. 546."

Lord Wilberforce then posed the question, "When does the cause of action arise?" and gave the answer, "It can only arise when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it." He went on to hold that Dutton v. Bognor Regis Urban District Council had, in the result, been rightly decided.

My Lords, Lord Wilberforce justified inclusion of damages for damage to the house itself as following from normal principle, by which I understand him to be referring to that which was propounded in Donoghue v. Stevenson [1932] AC 562 and applied

in Dorset Yacht Co. Ltd. v. Home Office [1970] AC 1004. Two matters emerge clearly from Lord Atkin's speech in Donoghue v. Stevenson, namely, (1) that damage to the offending article was not within the scope of the duty and (2) that the duty only extended to articles which were likely to be used before a reasonable opportunity of inspection had occurred. This second matter was again emphasised by Lord Wright in Grant v. Australian Knitting Mills [1936] AC 85, 105. Application of the principle enunciated by Lord Atkin in Donoghue v. Stevenson would therefore appear to negative rather than support the recovery of damages for damage to the house itself detected before the damage had caused resultant injury to persons or other property. Dorset Yacht takes the matter no further and among British cases only in Dutton can support be found for such an application of the principle. Lord Wilberforce derived support for his conclusion from two Commonwealth cases. In Rivtow Marine Ltd. v. Washington Iron Works (1973) 40 D.L.R. (3d) 530, the Supreme Court of Canada by a majority of seven to two rejected a claim against manufacturers for the cost of repairing a dangerous defect in a crane upon the ground that the manufacturer of a potentially dangerous article was not liable in tort for damage arising in the article itself or for economic loss arising from the defect in the article. Laskin J., however, in a dissenting judgment, after considering the liability of the manufacturers for injury to consumers or users of their products resulting from negligence stated, at p. 552:

"This rationale embraces, in my opinion, threatened physical harm from a negligently-designed and manufactured product resulting in economic loss. I need not decide whether it extends to claims for economic loss where there is no threat of physical harm or to claims for damage, without more, to the defective product.

"It is foreseeable injury to person or to property which supports recovery for economic loss suffered by a consumer or user who is fortunate enough to avert such injury. If recovery for economic loss is allowed when such injury is suffered, I see no reason to deny it when the threatened injury is forestalled."

In Bowen v. Paramount Builders (Hamilton) Ltd. [1977] 1 N.Z.L.R. 394, the New Zealand Court of Appeal held that where a latent defect created by a builder's negligence caused damage to the structure an action of damages would lie on the ground of it being physical damage. Richmond P., after asking the question whether damage to the house itself gave rise to a cause of action, applied the principle of Donoghue v. Stevenson to a builder erecting a house as follows, at p. 410:

"He is under a duty of care not to create latent sources of physical danger to the person or property of third persons whom he ought reasonably to foresee as likely to be affected thereby. If the latent defect causes actual physical damage to the structure of the house then I can see no reason in principle why such damage should not give rise to a cause of action, at any rate if that damage occurs after the house has been purchased from the original owner."

In support of this proposition he relied on the view of Lord Denning M.R. in Dutton v. Bognor Regis Urban District Council [1972] 1 Q.B. 373 and upon the American case of Quackenbush v. Ford Motor Co., 167 App.Div. 433; 153 N.Y.S. 131 - a case whose authority must now be substantially destroyed by the decision of the Supreme Court in East River Steamship Corporation v. Transamerica Delaval Inc. (1986) 106 S.Ct. 2295, to the effect that no liability in negligence attached to a manufacturer whose product malfunctioned injuring only the product itself and causing pure economic loss. This decision of the Supreme Court is in complete accord with the decision of the majority of the Supreme Court of Canada in Rivtow Marine Ltd. v. Washington Iron Works. If Quackenbush v. Ford Motor Co. is no longer good law the only remaining support for Richmond. P.'s proposition is Dutton.

In D. & F. Estates Ltd. v. Church Commissioners for England [1989] AC 177 my noble and learned friends, Lord Bridge of Harwich and Lord Oliver of Aylmerton were only able to reconcile the decision in Anns v. Merton London Borough Council [1978] AC 728 with the principle of Donoghue v. Stevenson upon the basis that in a complex structure the constituent parts can be treated as separate items of property distinct from the part which has given rise to the damage. Lord Bridge after stating that when the hidden defect in a chattel is discovered before it causes external injury or damage there is no room for the application of the Donoghue v. Stevenson principle, said, at p. 206:

"If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic."

Lord Oliver, at p. 211B, said that Anns had introduced in relation to the construction of buildings an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence. He later said, at p. 212:

"The proposition that damages are recoverable in tort for negligent manufacture when the only damage sustained is either an initial defect in or subsequent injury to the very thing that is manufactured is one which is peculiar to the construction of a building and is, I think, logically explicable only on the hypothesis suggested by my noble and learned friend, Lord Bridge of Harwich, that in the case of such a complicated structure the other constituent parts can be treated as separate items of property distinct from that portion of the whole which has given rise to the damage - for instance, in Anns' case, treating the defective foundations as something distinct from the remainder of the building. So regarded this would be no more than the ordinary application of the Donoghue v. Stevenson principle. It is true that in such a case the damages would include, and in some cases might be restricted to, the costs of

replacing or making good the defective part, but that would be because such remedial work would be essential to the repair of the property which had been damaged by it."

My Lords I agree with the views of my noble and learned friend, Lord Bridge of Harwich, in this appeal that to apply the complex structure theory to a house so that each part of the entire structure is treated as a separate piece of property is quite unrealistic. A builder who builds a house from foundations upwards is creating a single integrated unit of which the individual components are interdependent. To treat the foundations as a piece of property separate from the walls or the floors is a wholly artificial exercise. If the foundations are inadequate the whole house is affected. Furthermore, if the complex structure theory is tenable there is no reason in principle why it should not also be applied to chattels consisting of integrated parts such as a ship or a piece of machinery. The consequences of such an application would be far reaching. It seems to me that the only context for the complex structure theory in the case of a building would be where one integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure, e.g. a steel frame erected by a specialist contractor which failed to give adequate support to floors or walls. Defects in such ancillary equipment as central heating boilers or electrical installations would be subject

to the normal Donoghue v. Stevenson principle if such defects gave rise to damage to other parts of the building.

My Lords if, as I believe, the decision in Anns cannot be reconciled with the principle of Donoghue v. Stevenson upon the basis of the complex structure theory, is there any other established principle upon which it could be justified? When Lord Wilberforce said that the the damages recoverable might include those for damage to the house itself, it is clear that he was referring to damage separate from but caused by the defective foundations. However, the measure of such damages would be limited to what was necessary to remove the danger to the health or safety of the occupants, which might well include the cost of repairing the initial defect but might equally well be less than that required to repair all the damage. Furthermore, the cause of action would only arise when there was present or imminent danger to the occupants. Thus the two prerequisites to an action based on Anns were (1) the existence of material physical damage resulting from the original defect and (2) the presence or imminence of danger associated with that damage. These prerequisites give rise to a number of difficulties. In the first place, if the basis of the duty is that persons should not be placed in a position of danger it is difficult to draw a logical distinction between danger which manifests itself because of physical damage and danger which is discovered fortuitously, for example, by a survey or inspection. Why, it might be asked, should the houseowner in the latter case have no right of action if he takes steps to remove the danger before physical damage has occurred but have such a right if he waits until damage has occurred when remedial costs may very well be much higher? In the second place, the concept of imminent danger gives rise to considerable practical difficulties. Is a danger imminent when it is bound to occur, albeit not for some time, or is it imminent only if it is likely to occur in the immediate future? Different persons will

have different views as to what constitutes imminence and plaintiffs will be in doubt as to when their causes of action accrue. If the house collapses without any warning and injures nobody any danger inherent in its construction has been removed. It would be a very strange result that the owner should have no remedy in such an event but should have a remedy if the danger had manifested itself before collapse.

My Lords, as my noble and learned friend, Lord Keith of Kinkel, has pointed out, Anns has given rise to considerable litigation and has long been regarded as an unsatisfactory decision. It is clear, particularly from the careful analysis to which it was subjected by Lord Bridge of Harwich and Lord Oliver of Aylmerton

in D. & F. Estates Ltd. v. Church Commissioners for England that it was not based on any recognized principle. It is further apparent that it conflicts with established principles in a number of respects to which I have already referred. If it were to stand as good law there is no logical reason why it should not extend to defective chattels thereby opening the door to a mass of product liability claims which the law has not previously entertained. I therefore agree with my noble and learned friend, Lord Keith of Kinkel, that Anns was wrongly decided and should be departed from to the extent which he proposes.

Parliament imposed a liability on builders by the Defective Premises Act 1972 - a liability which falls far short of that which would be imposed upon them by Anns. There can therefore be no policy reason for imposing a higher common law duty on builders, from which it follows that there is equally no policy reason for imposing such a high duty on local authorities. Parliament is far better equipped than the courts to take policy decisions in the field of consumer protection.

I would allow the appeal.