House of Lords before Lords Bridge; Templeman; Ackner; Oliver; Jauncey. 14th July 1988

LORD BRIDGE OF HARWICH : My Lords,

1. The only parties to the litigation from which this appeal arises who are now concerned in the appeal are D. & F. Estates Ltd. and Mr. and Mrs. Tillman, who were plaintiffs in the action, and Wates Ltd. who were the third defendants in the action. Between 1963 and 1965 Wates were the main contractors employed by a company now in liquidation to build a block of flats on land belonging to the Church Commissioners in Gloucester Square, London W.2. The building was completed in October 1965 and was named Chelwood House. On 15 October 1965 the Church Commissioners granted a lease of flat 37 to D. & F. Estates for a term of 98 years from 25 March 1963. D. & F. Estates is one of a group of companies controlled by Mr. and Mrs. Tillman. From 1965 to 1981 Mr. and Mrs. Tillman occupied flat 37 pursuant to an arrangement with D. & F. Estates, the terms of which we do not know, but which I presume to have been a licence.

2. In August 1980, while Mr. and Mrs. Tillman were away on holiday and the flat was being redecorated, the decorators discovered that the plaster on certain ceilings and on one wall was loose and some of the plaster fell down. All the loose plaster then discovered which had not already fallen was hacked off and the areas affected were replastered and redecorated at a cost of £10,676.70. The present action was commenced in December 1980 advancing claims by D. & F. Estates in respect of that damage and by Mr. and Mrs. Tillman in respect of disturbance caused to them while the works in the flat were being carried out. But following an expert investigation in 1983 further defective plaster to both walls and ceilings was discovered and when the action came for trial before Judge Esyr Lewis Q.C. in June 1985 the damages claimed by D. & F. Estates included the estimated cost of further remedial work and prospective loss of rent which would be suffered while that remedial work was carried out.

3. When Chelwood House was built the plaster-work was carried out not by Wates themselves but by a firm of sub-contractors whom they employed called R. S. Hitchens. The judge found that all the plaster applied to concrete surfaces was defective because the sub-contractors, using a particular plaster then newly on the market called *"Gyplite,"* had failed to follow the manufacturers' instructions. They should have applied one coat of bonding plaster and one coat of finishing plaster, but instead had interposed a coat of browning plaster and it was this that in due course caused plaster, which should have remained sound for the lifetime of the building, to lose its key and require replacement. He said: *"in my judgment, a careful and competent plasterer would not have taken the risk of departing from what I find to be clear and unambiguous instructions to use bonding plaster followed by finishing plaster on concrete surfaces generally. In other words I consider that the plasterers were at fault. It was suggested on behalf of the plaintiffs that a reason why the plasterers did not follow the manufacturers' instructions was because it was more economical and easier to use undercoats of bonding plaster and browning plaster to achieve the desired thickness instead of a single undercoat of bonding plaster. I am not satisfied, having heard the evidence of Mr. Marshall about the cost of applying the different grades of plaster, that this is the correct explanation and it is not necessary for me to come to any conclusion about it. It is sufficient for me to say that in my judgment the plasterers did not exercise due care in that they failed to follow the manufacturers' instruction."*

4. When he turned to consider the liability of Wates, the judge, in a key passage, said: *"I have to decide in this case what the scope of Wates' duty of care to the three plaintiffs was and whether the plaintiffs or any of them have suffered loss as a result of its breach by Wates. The duty of care itself is of course not delegable. In the end, [counsel for the plaintiffs'] submission was that Wates owed a duty to the plaintiffs adequately to supervise the work of the plasterers and that they failed to discharge that duty. I consider this to be the correct analysis of the scope and extent of Wates' duty of care. It has never been suggested that Wates acted improperly in sub-contracting the plastering work or that they failed to take care to appoint competent sub-contractors. Clause 17 of the J.C.T. form of contract entitled Wates to sub-contract with a written consent of the architect and the evidence of Mr. Perry showed that great care was taken in the choice of sub-contractors. If, as I find, Wates acted properly in sub-contracting the plastering work, the only way in which they could discharge their duty of care was by taking reasonable steps to see that the plasterers did their work properly. Wates cannot, in my judgment, be held liable to the plaintiffs merely because the plasterers did not in fact do their work properly."*

5. Later the judge said: "*should proper supervision by Wates have ascertained that the manufacturers' instructions were not being followed in relation to the plastering of concrete surfaces in flat 37? In my view the critical issue is whether Wates' supervisors knew or ought to have known what the manufacturers' instructions were."*

6. The judge then reviewed the evidence of witnesses in relation to the general practice of supervision of sub-contractors by main contractors. He found that Wates' supervisors must have known that three coats of plaster were being applied. He made no finding that they knew that this contravened the manufacturers' instructions, but he held in effect that they ought to have known and added: "I therefore conclude that Wates were in breach of their duty to provide adequate and proper supervision of the plastering work in relation to the concrete surfaces and that they are liable in negligence to the plaintiffs for this breach of their duty."

7. The judge awarded damages exclusive of interest to D. & F. Estates of £10,676.70 in respect of the cost of the remedial work undertaken in 1980, £53,549 in respect of the estimated cost of future remedial works, and £24,000 in respect of loss of rent while the future remedial works were carried out. To Mr. and Mrs. Tillman he awarded £500 each, exclusive of interest, in respect of loss of amenity during the period when they were occupying the flat while the remedial works were done in 1980.

8. On appeal by Wates the Court of Appeal (Fox and Glidewell L.JJ and Sir Roualeyn Cumming-Bruce) reversed the judge's decision primarily on the ground that Wates, having employed competent sub-contractors to carry out the plastering work owed no further duty of care to the plaintiffs in relation to the execution of the work by the sub-contractors. But the Court of Appeal also considered a submission made on behalf of Wates that the cost of repairing the defective plaster, even if the plaster work had been done by their own employees, was not damage which D. & F. Estates could recover in tort since it represented pure economic loss. The Court of Appeal rejected this submission in relation to the cost of repairs carried out in 1980 on the ground that D. & F. Estates were liable to Mr. and Mrs. Tillman to carry out the repairs, but accepted it in relation to the cost of future remedial works not yet carried out, although they assumed the factual premise, which they did not think it open to Wates to challenge, that the remaining defective plaster represented a continuing risk of personal injury.

9. The plaintiffs now appeal by leave of your Lordships' House.

10. In relation to both issues, it is instructive and, I think, necessary to consider two developments of the law in relation to a builder's liability in tort for defective premises which have been effected on the one hand by statute and on the other by judicial development of the law by the adaptation and application of common law principles to situations to which they had not previously been applied. Both these developments have taken place since 1970. Both have effected far-reaching changes in the law, at all events as it had been supposed to be before 1970. But the two developments have been markedly different in their scope and effect. The statutory development enacted by the Defective Premises Act 1972 effected clear and precise changes in the law imposing certain specific statutory duties subject to carefully defined limitations and exceptions. This change did not, of course, operate retrospectively. The common law developments have effected changes in the law which inevitably lack the kind of precision attainable by statute though limits have had to be and are still being worked out by decisions of the courts in a spate of ensuing litigation, including the instant case, and since our jurisprudence knows nothing of the American doctrine of "prospective overruling" and the law once pronounced authoritatively by the courts here is deemed always to have been the law, the changes have full retrospective operation.

11. The Act of 1972 was enacted following and substantially implementing the recommendations of a Law Commission report on *"Civil Liability of Vendors and Lessors for Defective Premises*" (Law Commission No. 40) dated 15 December 1970. The report followed the issue of two working papers and extensive consultations thereupon as explained in paragraph 5 to 8. The report makes this clear distinction between different kinds of defects in defective premises:

> *"2. We have set out, therefore, to examine the liability of a vendor or lessor of defective premises both in contract and in tort; and it follows that we use the term 'defective' in two different senses. From the point of view of tort liability premises are defective only if they constitute a source of danger to the person or property of those who are likely to come on to them or to find themselves in their vicinity. In the contractual sense they are defective if their condition falls short of the standard of quality which the purchaser or lessee was entitled to expect in the circumstances. We refer to these different kinds of defects as dangerous defects and defects of quality respectively, where it is necessary to point the contrast."*

12. In Part B of the report, dealing with *"defects of quality*" in the sense defined in the passage quoted, the report records, at paragraph 14: *"We are not aware of any substantial criticism of the present law as it applies to commercial or industrial premises. In such cases the parties are normally in a position to protect their own interests with the help of their professional advisers. The appropriate terms for inclusion in the contract in such cases are the subject of negotiation. Considerable disquiet has, however, been expressed in recent years as to the operation of the law in relation to the purchase of dwellings."*

13. There follows a full consideration of the position of builders and others concerned in the construction of dwellings leading to a series of recommendations from which I quote two significant paragraphs:

> *"26. Amendment of the law should be directed at improving the legal position of the purchasers of dwellings and should in our view be designed to achieve the following results:- (a) that a builder of a dwelling (i.e. anyone who provides a dwelling by constructing a new building or converting or enlarging an existing one) should be placed under a duty, similar to his common law obligations, to build properly and should not be able to contract out of this duty; (b) that this duty should be imposed not only on builders, but also on anyone else, in particular any sub-contractor or professional man, who takes on work for or in connection with the provision of a new dwelling . . .; (c) that a right of action in respect of faulty building of a dwelling should be available during a limited period - (i) if the builder builds to the order of a client, to that client; (ii) if the builder sells to a purchaser, to the purchaser; and (iii) in either event, to anyone who subsequently acquires an interest in the dwelling; (d) that those who (without being builders or otherwise concerned with work taken on for or in onnection with the provision of the dwelling) arrange in the course of their business for the construction of dwellings for sale or letting to the public, should be placed under the same duty as builders towards persons who acquire interests in those dwellings. ... 32. Those persons on whom the obligations are to be imposed should not, however, be left at risk for an indefinite period. There should be a limit of time within which an action could be brought, running from the date when the work was completed."*

14. The long title of the Act of 1972 is *"An Act to impose duties in connection with the provision of dwellings and otherwise to amend the law of England and Wales as to liability for injury or damage caused to persons through defects in the state of premises"* and the following provisions of section 1 enact, with only minor changes of draftsmanship, provisions contained in the draft bill annexed to the Law Commission's report:

> *"(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty - (a) if the dwelling is provided to the order of any person, to that person; and (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling; to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards the work the dwelling will be fit for habitation when completed. . . (4) A person who - (a) in the course of a business which consists of or includes providing arranging for the provision of dwellings or installations in dwellings; or (b) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment; arranges for another to take on work for or in connection with the provision of a dwelling shall be treated for the purposes of this section as included among the persons who have taken on the work. (5) Any cause of action in respect of a breach of the duty imposed by this section shall be deemed, for the purposes of the Limitation Act 1939, the Law Reform (Limitation of Actions, &c.) Act 1954 and the Limitation Act 1963, to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any such cause of action in respect of that further work shall be deemed for those purposes to have accrued at the time when the further work was finished."*

15. Section 2 of the Act then specifically excludes from the application of section 1 dwellings to which an *"approved scheme"* applies conferring rights in respect of defects when they are first let or sold for habitation. This limitation upon the new statutory duty does not follow directly from any specific recommendation in the Law Commission's report, although the report discusses the scheme operated by the National House-Builders Registration Council and it was presumably such schemes as this that Parliament contemplated might receive the approval of the Secretary of State under section 2, conferring exemption from liability for breach of statutory duty under section 1.

16. Between the date of the Law Commission's report and the passing of the Act of 1972 the courts were concerned with the first of a series of cases relating directly to the liability in tort of local authorities for the negligent exercise of their powers under the Public Health Act 1936 or other parallel legislation in respect of defects in premises erected in contravention of building byelaws, but also indirectly with the liability in tort of the builder himself. This was ***Dutton v. Bognor Regis Urban District Council*** [1971] 2 All E.R. 1003; [1972] 1 Q.B. 373 decided by Cusack J. at first instance in March 1971 and by the Court of Appeal in December 1971, the very month in which the Bill which became the Act of 1972 was introduced into the House of Commons. The case related to a house with defective foundations which settled and cracked. The aspect of the judgments relevant for present purposes is that concerned with the liability of the builder, had he been sued. Referring to the application of the principle of ***Donoghue v. Stevenson*** [1932] A.C. 562 to the liability of a builder in tort for injury caused by dangerous defects in a building, Lord Denning M.R. said in a well known passage [1972] 1 Q.B. 373, 393-394: *"The distinction between chattels and real property is quite unsustainable. If the manufacturer of an article is liable to a person injured by his negligence, so should the builder of a house be liable. After the lapse of 30 years this was recognised. In **Gallagher v. N. McDowell Ltd.** [1961] N.I. 26, Lord MacDermott C.J. and his colleagues in the Northern Ireland Court of Appeal held that a contractor who built a house negligently was liable to a person injured by his negligence. This was followed by Nield J. in **Sharpe v. E. T. Sweeting & Son Ltd.** [1963] 1 W.L.R. 665. But the judges in those cases confined themselves to cases in which the builder was only a contractor and was not the owner of the house itself. When the builder is himself the owner, they assumed that **Bottomley v. Bannister** [1932] 1 K.B. 458 was still authority for exempting him from liability for negligence. There is no sense in maintaining this distinction. It would mean that a contractor who builds a house on another's land is liable for negligence in constructing it, but that a speculative builder, who buys land and himself builds houses on it for sale, and is just as negligent as the contractor, is not liable. That cannot be right. Each must be under the same duty of care and to the same persons."*

17. This view of the law has, of course, never been doubted since. But the presently relevant passage in the judgment is that headed "Economic Loss," at p. 396, which reads: *"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. He referred to the recent case of **S.C.M. (United Kingdom) Ltd, v. W. J. Whittall & Son Ltd.** [1971] 1 Q.B. 337. 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."*

18. Referring to the issue of economic loss, Sachs L.J. said at pp. 403-404: *"In the instant case there is ample evidence of physical damage having occurred to the property. But it has been argued that this damage is on analysis the equivalent of a diminution of the value of the premises and does not rank for consideration as physical injury. Mr. Tapp found himself submitting that if, for instance, the relevant defect had been in the ceiling of a room, and if it fell on somebody's head or on to the occupier's chattels and thus caused physical damage, then (subject of course to his other points failing) there could be a cause of action in negligence, but not if it fell on to a bare floor and caused no*

further damage. Apparently in the former case damages would be limited so as to exclude repairs to the ceiling: in the latter case there would be no cause of action at all. That subtle line of argument failed to attract me and would lead to an unhappily odd state of the law."

19. Stamp L.J., although he expressed no concluded opinion, indicated a significantly different approach to the liability of the builder in the following passage, at pp.414-415 *"I now come to consider the submission advanced by Mr. Tapp to the effect that it would be an extension of the law to hold that the particular injury suffered by the plaintiff is an injury for which damages may be recovered. It is pointed out that in the past a distinction has been drawn between constructing a dangerous article and constructing one which is defective or of inferior quality. I may be liable to one who purchases in the market a bottle of ginger beer which I have carelessly manufactured and which is dangerous and causes injury to person or property; but it is not the law that I am liable to him for the loss he suffers because what is found inside the bottle and for which he has paid money is not ginger beer but water. I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose. The submission is, I think, a formidable one and in my view raises the most difficult point for decision in this case. Nor can I see any valid distinction between the case of a builder who carelessly builds a house which, though not a source of danger to person or property, nevertheless, owing to a concealed defect in its foundations, starts to settle and crack and becomes valueless, and the case of a manufacturer who carelessly manufactures an article which, though not a source of danger to a subsequent owner or to his other property, nevertheless owing to a hidden defect quickly disintegrates. To hold that either the builder or the manufacturer was liable except in contract would be to open up a new field of liability the extent of which could not, I think, be logically controlled, and since it is not in my judgment necessary to do so for the purposes of this case, I do not, more particularly because of the absence of the builder, express an opinion whether the builder has a higher or lower duty than the manufacturer."*

20. The next important decision is that of the New Zealand Court of Appeal in ***Bowen v. Paramount Builders (Hamilton) Ltd.*** [1977] 1 N.Z.L.R. 394. This was another case of defective foundations. The defendant builders had erected a building comprising two flats under contract with the first owner who sold it to the plaintiff. The plaintiff sued the builders for negligence in failing to provide adequate foundations. The building had settled and cracked. Remedial work was proposed to be undertaken to prevent further subsidence and to restore the building as far as possible, but it was impossible to eliminate the sag in the building so as to restore it fully to its original condition. Speight J. had dismissed the action, saying [1975] 2 N.Z.L.R. 546, 555-556: *"It is a claim for the diminished value of the article, as for example, if the lady in **Donoghue v. Stevenson** had sued for damages for inferior quality ginger beer. The claim for such a defect in the quality of an article purchased is an action in contract not in tort and privity of contract still remains an essential part of that concept."*

21. The Court of Appeal took a different view. Richmond P., although dissenting on the facts, expressed an opinion on the applicable law with which both Woodhouse and Cooke JJ. agreed. He said, at pp. 410-411:

"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** 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**, 4th ed., p. 665, s. 101, and **Quackenbush v. Ford Motor Co.** (1915) 167 App.Div. 433; 153 N.Y.S. 131. 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.*

What is the correct measure of damages in the present case? *As earlier explained, it has not been feasible in the present case to raise the building in such a way as to get rid of the sag which has occurred in the structure, and at the same time to strengthen the subfoundations. The proposed alterations are designed: (a) to reduce the risk of further subsidence by getting rid of the weight of the concrete block wall dividing the two units; (b) to restore the appearance of the house as far as possible; and (c) to put doors and windows into proper working condition. As to (a), when a defect has actually caused structural damage to a building it must be proper for the owner not only to repair the damage but also to take reasonable steps to prevent further damage, rather than wait for that damage to occur. In some cases this may give rise to the question whether some credit ought not to be given to the builder for betterment but no such question arises in the present case. As to (b), I can see no reason why the Bowens should not be able to claim for the cost of alterations carried out to improve the appearance of the building in circumstances where it is not feasible to raise the building in such a way as to eliminate the sag in the structure. Finally, there can, I think, be no question as to (c). These repairs are obviously necessary. . . . Apart from the actual cost of the alterations, there is a sum of $2,000 claimed as depreciation or diminution in value. This sum represents the difference between the market value of the property after all repairs are done and the market value had there been no subsidence. This claim, in my opinion, should be allowed. In one sense it can be described as economic loss, but it is economic loss directly and immediately connected with the structural damage to the building and as such is properly recoverable."*

22. ***Anns v. Merton London Borough Council*** [1978] A.C. 728 was again a case of defective foundations, but, like Dutton's case, one in which the only defendant was the local authority so that the scope of the builder's duty of care and the measure of damages for any breach of that duty were not directly in issue. Lord Wilberforce, with whose speech Lord Diplock, Lord Simon of Glaisdale and Lord Russell of Killowen agreed, dealt with the position of the builder and the damages recoverable in the following passage, at pp. 758-760:

> ***"The position of the builder.*** *I agree with the majority in the Court of Appeal in thinking 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 liabilty. So it is necessary to consider this point, although it does not directly arise in the present appeal. If there was at one time a supposed rule that the doctrine of* ***Donoghue v. Stevenson*** *[1932] A.C. 562 did not apply to realty, there is no doubt under modern authority that a builder of defective premises may be liable in negligence to persons who thereby suffer injury: see* ***Gallagher v. N. McDowell Ltd.*** *[1961] N.I. 26 per Lord MacDermott C.J. - a case of personal injury. Similar decisions have been given in regard to architects - (****Clayton v. Woodman & Son (Builders) Ltd.*** *[1962] 2 Q.B. 533 and Clay v. A. J. Crump & Sons Ltd. [1964] 1 Q.B. 533). ****Gallagher's*** *case expressly leaves open the question whether the immunity against action of builder owners, established by older authorities (e.g.* ***Bottomley v. Bannister*** *[1932] 1 K.B. 458) still survives. That immunity, as I understand it, rests partly upon a distinction being made between chattels and real property, partly upon the principle of 'caveat emptor' or, in the case where the owner leases the property, on the proposition 'for, fraud apart, there is no law against letting a tumbledown house': see* ***Robbins v. Jones*** *(1863) 15 C.B.N.S. 221, 240 per Erie C.J. But leaving aside such cases as arise between contracting parties, when the terms of the contract have to be considered (see* ***Voli v. Inglewood Shire Council*** *(1963) 110 C.L.R. 74, 85 per Windeyer J.), I am unable to understand why this principle or proposition should prevent recovery in a suitable case by a person, who has subsequently acquired the house, upon the principle of* ***Donoghue v. Stevenson****: the same rules should apply to ail careless acts of a builder: whether he happens also to own the land or not. I agree generally with the conclusions of Lord Denning M.R. on this point in* ***Dutton v. Bognor Regis Urban District Council*** *[1972] 1 Q.B. 373, 392- 394. In the alternative, since it is the duty of the builder (owner or not) to comply with the byelaws, I would be of opinion that an action could be brought against him, in effect, for breach of statutory duty by any person for whose benefit or protection the byelaw was made. So I do not think that there is any basis here for arguing from a supposed immunity of the builder to immunity of the council.*
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> ***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. 5*6.*
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> ***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."*

23. It is particularly to be noted that Lord Wilberforce founded his view of the builder's liability on the alternative grounds of negligence and breach of statutory duty and that his opinion as to the nature of the damages recoverable is strictly applicable to the liability of the local authority, and perhaps also to the liability of the builder for breach of duty under the byelaws, but is obiter in relation to the builder's liability for the common law tort of negligence. It is, moreover, difficult to understand how a builder's liability, whatever its scope, in respect of a dangerous defect in a building can arise only when there is imminent danger to the health and safety of occupiers. In any event the last sentence in the passage quoted leaves open the critical question as to the measure of damages in relation to remedial action.

24. ***Batty v. Metropolitan Property Realisations Ltd.*** [1978] Q.B. 554, to which I was a party, is a decision with unusual features. A house had been built on a site negligently selected by developers and builders acting together which was so inherently unsafe that, following a predictable landslide, the house was liable to fall down and was a continuing danger to its occupants and others. The house had become valueless and represented a danger which

could effectively only be removed by demolition. But the liability in tort of the developers was held to arise from breach of a duty corresponding to that which they had assumed to the plaintiffs in contract. This I regard as of no present relevance. Liability of the builders in tort, however, for the plaintiffs' loss of the value of the house is one which I would now question for reasons I will later explain. My own short extemporary judgment, which treats the issue of the builder's liability in damages and the fundamental question raised by Stamp L.J. in ***Dutton v. Bognor Regis Urban District Council*** [1972] 1 Q.B. 373, 414-415 as settled by the speech of Lord Wilberforce in ***Anns v. Merton London Borough Council*** [1978] A.C. 728, 758-760 was, I now think, unsound.

25. My Lords, I do not intend to embark on the daunting task of reviewing the wealth of other, mostly later, authority which bears, directly or indirectly, on the question whether the cost of making good defective plaster in the instant case is irrecoverable as economic loss, which seems to me to be the most important question for determination in the present appeal. My abstention may seem pusillanimous, but it stems from a recognition that the authorities, as it seems to me, speak with such an uncertain voice that, no matter how searching the analysis to which they are subject, they yield no clear and conclusive answer. It is more profitable, I believe, to examine the issue in the light of first principles.

26. However, certain authorities are of prime importance and must be considered. The decision of your Lordships' House in ***Junior Books Ltd, v. Veitchi Co. Ltd.*** [1983] A.C. 520 has been analysed in many subsequent decisions of the Court of Appeal. I do not intend to embark on a further such analysis. The consensus of judicial opinion, with which I concur, seems to be that the decision of the majority is so far dependent upon the unique, albeit non-contractual, relationship between the pursuer and the defender in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict. The dissenting speech of Lord Brandon of Oakbrook on the other hand enunciates with cogency and clarity principles of fundamental importance which are clearly applicable to determine the scope of the duty of care owed by one party to another in the absence, as in the instant case, of either any contractual relationship or any such uniquely proximate relationship as that on which the decision of the majority in Junior Books was founded. Lord Brandon said, at p. 549: *"My Lords, it appears to me clear beyond doubt that, there being no contractual relationship between the respondents and the appellants in the present case, the foundation, and the only foundation, for the existence of a duty of care owed by the defendants to the pursuers is the principle laid down in the decision of your Lordships' House in* ***Donoghue v. Stevenson*** *[1932] A.C 562. The actual decision in that case related only to the duty owed by a manufacturer of goods to their ultimate user or consumer, and can be summarised in this way: a person who manufactures goods which he intends to be used or consumed by others is under a duty to exercise such reasonable care in their manufacture as to ensure that they can be used or consumed in the manner intended without causing physical damage to persons or their property. While that was the actual decision in* ***Donoghue v. Stevenson,*** *it was based on a much wider principle embodied in passages in the speech of Lord Atkin, which have been quoted so often that I do not find it necessary to quote them again here. Put shortly, that wider principle is that, when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission. It is, however, of fundamental importance to observe that the duty of care laid down in* ***Donoghue v. Stevenson*** *was based on the existence of a danger of physical injury to persons or their property. That this is so is clear from the observations made by Lord Atkin at pp. 581-582 with regard to the statements of law of Brett M.R. in* ***Heaven v. Pender*** *(1883) 11 Q.B.D. 503, 509. It has further, until the present case, never been doubted, so far as I know, that the relevant property for the purpose of the wider principle on which the decision in* ***Donoghue v. Stevenson*** *was based was property other than the very property which gave rise to the danger of physical damage concerned."*

27. Later, at pp. 550-551, Lord Brandon, having referred to the well known two-stage test of the existence of a duty of care propounded by Lord Wilberforce in ***Anns'*** case, at pp. 751-752, asked himself, at the second stage, the question *"whether there are any considerations which ought, inter alia, to limit the scope of the duty which exists."* He continued, at pp..551-552: *"To that second question I would answer that there are two important considerations which ought to limit the scope of the duty of care which it is common ground was owed by the appellants to the respondents on the assumed facts of the present case. The first consideration is that, in* ***Donoghue v. Stevenson*** *itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat of danger, arises. To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority. The second consideration is that there is no sound policy reason for substituting the wider scope of the duty of care put forward for the respondents for the more restricted scope of such duty put forward by the appellants. The effect of accepting the respondents' contention with regard to the scope of the duty of care involved would be, in substance, to create, as between two persons who are not in any contractual relationship with each other, obligations of one of those two persons to the other which are only really appropriate as between persons who do have such a relationship between them. In the case of a manufacturer or distributor of goods, the position would be that he warranted to the ultimate user or consumer of such goods that they were as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them. In the case of sub-contractors such as those concerned in the present case, the position would be that they warranted to the building owner that the flooring, when laid, would be as well designed, as free from defects of any kind and as fit for its contemplated purpose as the exercise of*

reasonable care could make it. In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement. It is, I think, just worth while to consider the difficulties which would arise if the wider scope of the duty of care put forward by the respondents were accepted. In any case where complaint was made by an ultimate consumer that a product made by some persons with whom he himself had no contract was defective, by what standard or standards of quality would the question of defectiveness fall to be decided? In the case of goods bought from a retailer, it could hardly be the standard prescribed by the contract between the retailer and the wholesaler, or between the wholesaler and the distributor, or between the distributor and the manufacturer, for the terms of such contracts would not even be known to the ultimate buyer. In the case of subcontractors such as the appellants in the present case, it could hardly be the standard prescribed by the contract between the subcontractors and the main contractors, for, although the building owner would probably be aware of those terms, he could not, since he was not a party to such contract, rely on any standard or standards prescribed in it. It follows that the question by what standard or standards alleged defects in a product complained of by its ultimate user or consumer are to be judged remains entirely at large and cannot be given any just or satisfactory answer."

28. The reasoning in these passages receives powerful support from the unanimous decision of the Supreme Court of the United States of America in ***East River Steamship Corporation v. Transamerica Delaval Inc.*** (1986) 106 S.Ct. 2295. Charterers of supertankers claimed damages from turbine manufacturers resulting from alleged design and manufacturing defects which caused the supertankers to malfunction while on the high seas. The court held, inter alia, that "whether stated in negligence or strict liability, no products- liability claim lies in admiralty when a commercial party alleges injury only to the product itself resulting in purely economic loss."

29. Blackmun J., delivering the judgment of the court said, at p. 2300- 2302: *"The intriguing question whether injury to a product itself may be brought in tort has spawned a variety of answers. At one end of the spectrum, the case that created the majority land-based approach, **Seely v. White Motor Co.,** (1965) 63 Cal.2d 9; 45 Cal.Rptr. 17; 403 P.2d 145 (defective truck), held that preserving a proper role for the law of warranty precludes imposing tort liability if a defective product causes purely monetary harm. See also **Jones & Laughlin Steel Corporation v. Johns-Manville Sales Corporation**, 626 F.2d 280, 287 and n. 13 (CA3 1980) (citing cases). At the other end of the spectrum is the minority land-based approach, whose progenitor, Santor v. A. and M. Karagheusian, Inc. (1965) M N.J. 52, 66-67; 207 A.2d 305, 312-313 (marred carpeting), held that a manufacturer's duty to make nondefective products encompassed injury to the product itself, whether or not the defect created an unreasonable risk of harm. See also **LaCrosse v. Schubert**, (1976) 72 Wis.2d 38, 44-45; 240 N.W.2d 124, 127-128. The courts adopting this approach, including the majority of the Courts of Appeals sitting in admiralty that have considered the issue, e.g., **Emerson G. M. Diesel Inc. v. Alaskan Enterprise**, 732 F.2d 1468 (CA9 1984), find that the safety and insurance rationales behind strict liability apply equally where the losses are purely economic. These courts reject the Seely approach because they find it arbitrary that economic losses are recoverable if a plaintiff suffers bodily injury or property damage, but not if a product injures itself. They also find no inherent difference between economic loss and personal injury or property damage, because all are proximately caused by the defendant's conduct. Further, they believe recovery for economic loss would not lead to unlimited liability because they think a manufacturer can predict and insure against product failure. See **Emerson G. M. Diesel Inc. v. Alaskan Enterprise**, at p. 1474. Between the two poles fall a number of cases that would permit a products-liability action under certain circumstances when a product injures only itself. These cases attempt to differentiate between 'the disappointed uers . . . and the endangered ones,' **Russell v. Ford Motor Co.** (1978) 281 Or. 587, 595; 575 P.2d 1383, 1387, and permit only the latter to sue in tort. The determination has been said to turn on the nature of the defect, the type of risk, and the manner in which the injury arose. See **Pennsylvania Glass Sand Corporation v. Caterpillar Tractor Co.,** 652 F.2d 1165, 1173 (CA3 1981) (relied on by the Court of Appeals in this case). The Alaska Supreme Court allows a tort action if the defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a proximate result of that danger and under dangerous circumstances. **Northern Power & Engineering Corporation v. Caterpillar Tractor Co.** (1981) 623 P.2d 324, 329.*

*We find the intermediate and minority land-based positions unsatisfactory. The intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behaviour. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. **Compare Morrow v. New Moon Homes Inc.**, 548 P.2d 279 (Alaska 1976), with **Cloud v. Kit Manufacturing Co.**, 563 P.2d 248, 251 (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when 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. See E._ Farnsworth, Contracts (1982), para. 12.8, pp. 839-840. We also decline to adopt the minority land-based view espoused by Santor and Emerson. Such cases raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages."*

30. This appears to undermine the earlier American authorities referred to by Richmond P. in the New Zealand case of **Bowen v. Paramount Builders (Hamilton) Ltd.** (1977) 1 N.Z.L.R. 394, 410. The opinion of Lord Brandon of Oakbrook in ***Junior Books Ltd, v. Veitchi Co. Ltd.*** [1983] 1 A.C. 520 and that expressed by the Supreme Court of

the United States of America are entirely in line with the majority decision of the Supreme Court of Canada in Rivtow Marine Ltd, v. Washington Iron Works [1973] 6 W.W.R. 692 that the damages recoverable from the manufacturer by the hirers of a crane which was found to have a defect which made it unsafe to use did not include the cost of repairing the defect.

31. These principles are easy enough to comprehend and probably not difficult to apply when the defect complained of is in a chattel supplied complete by a single manufacturer. If the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable. But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the ***Donoghue v. Stevenson*** [1932] A.C. 562 principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.

32. 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. Thus, if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused. All that has happened is that the defect in the wall has been discovered in time to prevent damage occurring. I do not find it necessary for the purpose of deciding the present appeal to express any concluded view as to how far, if at all, the ratio decidendi of ***Anns v. Merton London Borough Council*** [1978] A.C. 728 involves a departure from this principle establishing a new cause of action in negligence against a builder when the only damage alleged to have been suffered by the plaintiff is the discovery of a defect in the very structure which the builder erected.

33. My example of the garden wall, however, is that of a very simple structure. I can see that more difficult questions may arise in relation to a more complex structure like a dwelling- house. One view would be that such a structure should be treated in law as a single indivisible unit. On this basis, if the unit becomes a potential source of danger when a hitherto hidden defect in construction manifests itself, the builder, as in the case of the garden wall, should not in principle be liable for the cost of remedying the defect. It is for this reason that I now question the result, as against the builder, of the decision in ***Batty v. Metropolitan Property Realisations Ltd*** [1978] Q.B. 554.

34. However, ! can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property," and whether the argument should prevail may depend on the circumstances of the case. It would be unwise and it is unnecessary for the purpose of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract. I should wish to hear fuller argument before reaching any conclusion as to how far the decision of the New Zealand Court of Appeal in ***Bowen v. Paramount Builders (Hamilton) Ltd,*** should be followed as a matter of English law. I do not regard ***Anns v. Merton London Borough Council*** as resolving that issue.

35. In the instant case the only hidden defect was in the plaster. The only item pleaded as damage to other property was "*cost of cleaning carpets and other possessions damaged or dirtied by falling plaster; £50.*" Once it appeared that the plaster was loose, any danger of personal injury or of further injury to other property could have been simply avoided by the timely removal of the defective plaster. The only function of plaster on walls and ceilings, unless it is itself elaborately decorative, is to serve as a smooth surface on which to place decorative paper or paint. Whatever case there may be for treating a defect in some part of the structure of a building as causing damage to "*other property*" when some other part of the building is injuriously affected, as for example cracking in walls caused by defective foundations, it would seem to me entirely artificial to treat the plaster as distinct from the decorative surface placed upon it. Even if it were so treated, the only damage to "*other property*" caused by the defective plaster would be the loss of value of the existing decorations occasioned by the necessity to remove loose plaster which was in danger of falling. When the loose plaster in flat 37 was first discovered in 1980, the flat was in any event being redecorated.

36. It seems to me clear that the cost of replacing the defective plaster itself, either as carried out in 1980 or as intended to be carried out in future, was not an item of damage for which the builder of Chelwood House could possibly be made liable in negligence under the principle of ***Donoghue v. Stevenson*** or any legitimate development of that principle. To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose. I am glad to reach the conclusion that this is not the law, if only for the reason that a conclusion to the opposite effect would mean that the courts, in developing the common law, had gone much farther than the legislature were prepared to go in 1972, after comprehensive examination of the subject by the Law Commission, in making builders liable for defects in the quality of their work to all who subsequently acquire interests in buildings they have erected. The statutory duty imposed by the Act of 1972 was confined to dwelling-houses and limited to defects appearing within six years. The common law

duty, if it existed, could not be so confined or so limited. I cannot help feeling that consumer protection is an area of law where legislation is much better left to the legislators.

37. It follows from these conclusions that, even if Wates themselves had been responsible for the plaster-work in flat 37, the damages recoverable from them by D. & F. Estates would have been a trivial sum and Mr. and Mrs. Tillman could have established no claim for damages for disturbance. But, as already indicated, the Court of Appeal's primary ground for allowing Wates' appeal was that they had properly employed competent sub-contractors to do the plaster work for whose negligence they were not liable, and it is to this issue that I must now turn. The submission in support of the appeal was put in three ways which amount, as it seems to me, to three alternative formulations of what is, in essence, the same proposition of law. Expressed in summary form the three formulations are: (i) that Wates were vicariously liable for the negligence of their sub-contractor; (ii) that Wates as main contractors responsible for building Chelwood House owed a duty to future lessees and occupiers of flats to take reasonable care that the building should contain no hidden defects of the kind which might cause injury to persons or property and that this duty could not be delegated; (iii) that Wates as main contractors owed a duty of care to future lessees and occupiers of flats to supervise their sub-contractors to ensure that the sub- contracted work was not negligently performed so as to cause such defects.

38. It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. To this general rule there are certain well- established exceptions or apparent exceptions. Without enumerating them it is sufficient to say that it was accepted by Mr. Fernyhough Q.C. on behalf of the present appellants that the instant case could not be accommodated within any of the recognised and established categories by which the exceptions are classified. But it has been rightly said that the so-called exceptions *"are not true exceptions (at least so far as the theoretical nature of the employer's liability is concerned) for they are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to the plaintiff. The liability is thus not truly a vicarious liability and is to be distinguished from the vicarious liability of a master for his servant."* (see Clerk & Lindsell on Torts, 15th ed. (1982), para. 3-37, p. 185).

39. Herein lies Mr. Fernyhough's real difficulty. If Wates are to be held liable for the negligent workmanship of their sub-contractors (assumed for this purpose to result in dangerously defective work) it must first be shown that in the circumstances they had assumed a personal duty to all the world to ensure that Chelwood House should be free of dangerous effects. This was the assumption upon which the judge proceeded when he said: 'The duty of care itself is of course not delegable." Whence does this non-delegable duty arise? Mr. Fernyhough submits that it is a duty undertaken by any main contractor in the building industry who contracts to erect an entire building. I cannot agree because I cannot recognise any legal principle to which such an assumption of duty can be related. Just as I may employ a building contractor to build me a house, so may the building contractor, subject to the terms of my contract with him, in turn employ another to undertake part of the work. If the mere fact of employing a contractor to undertake building work automatically involved the assumption by the employer of a duty of care to any person who may be injured by a dangerous defect in the work caused by the negligence of the contractor, this would obviously lead to absurd results. If the fact of employing a contractor does not involve the assumption of any such duty by the employer, then one who has himself contracted to erect a building assumes no such liability when he employs an apparently competent independent sub- contractor to carry out part of the work for him. The main contractor may, in the interests of the proper discharge for his own contractual obligations, exercise a greater or lesser degree of supervision over the work done by the sub-contractor. If in the course of supervision the main contractor in fact comes to know that the sub-contractor's work is being done in a defective and foreseeably dangerous way and if he condones that negligence on the part of the sub-contractor, he will no doubt make himself potentially liable for the consequences as a joint tortfeasor. But the judge made no finding against Wates of actual knowledge and his finding that they *"ought to have known"* what the manufacturer's instructions were depended upon and was vitiated by his earlier misdirection that Wates owed a duty of care to future lessees of Chelwood House flats in relation to their sub- contractor's work.

40. Mr. Fernyhough relied on an unreported decision of Judge Edgar Fay Q.C. ***in Queensway Discount Warehouses v. Graylaw Properties Ltd.,*** 19 February 1982 and upon the decision of Judge Sir William Stabb Q.C. in ***Cynat Products Ltd, v. Landbuild (Investment and Property) Ltd.*** [1984] 3 All E.R. 513. In so far as the former decision relied on any general principle of law that a main contractor is liable to a third party who suffers damage from the negligently defective work done by his sub-contractor, I can only say, as already indicated, that I can find no basis in law to support any such principle. The relevant issue in the latter case, as in ***Batty v. Metropolitan Property Realisations Ltd.*** [1978] Q.B. 554 in relation to the liability of the developer defendants, was whether the defendants' admitted contractual liability was matched by a parallel liability in tort. In both cases the issue was of importance only as bearing upon the liability of insurers to indemnify the defendants. I do not find authorities directed to that question of any assistance in determining the scope of the duty of care which one person owes to another entirely independently of any contractual relationship on the basis of the ***Donoghue v. Stevenson [***1932] A.C. 562 principle.

41. More important is the decision of the New Zealand Court of Appeal in ***Mount Albert Borough Council v. Johnson*** [1979] 2 N.Z.L.R. 234. This was another case of the purchaser of a flat suffering damage due to the subsidence of a building erected on inadequate foundations. One of the issues was whether the plaintiff was entitled to recover damages against the development company which had employed independent contractors to erect the building. Delivering the judgment of Somers J. and himself, Cooke J. said, at pp. 240 241: *"In the instant type of*

case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially - as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in ***Anns*** *may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."*

42. As a matter of social policy this conclusion may be entirely admirable. Indeed, it corresponds almost precisely to the policy underlying the Law Commission's recommendations in paragraph 26 of the report (Law Commission No. 40) to which I have already referred and which was implemented by section 1(1) and (4) of the Act of 1972. As a matter of legal principle, however, I can discover no basis on which it is open to the court to embody this policy in the law without the assistance of the legislature and it is again, in my opinion, a dangerous course for the common law to embark upon the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations.

43. The conclusion I reach is that Wates were under no liability to the plaintiffs for damage attributable to the negligence of their plastering sub-contractor in failing to follow the instructions of the manufacturer of the plaster they were using, but that in any event such damage could not have included the cost of renewing the plaster. Accordingly I would dismiss the appeal with costs.

LORD TEMPLEMAN : My Lords,

44. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich and Lord Oliver of Aylmerton. I agree with them, and I too would dismiss this appeal.

LORD ACKNER : My Lords,

45. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich and Lord Oliver of Aylmerton. I agree with them, and I too would dismiss this appeal.

LORD OLIVER OF AYLMERTON : My Lords,

46. I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich, and I agree that the appeal should be dismissed for the reasons which he has given. In particular, I agree with his conclusion that, quite apart from the question of Wates' liability for the negligent performance by their sub-contractors of the duties under the plastering sub-contract, the cost of replacing the defective plaster would, in any event, be irrecoverable.

47. It is, I think, clear that the decision of this House in ***Anns v. Merton London Borough Council*** [1978] A.C. 728 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. What is not clear is the extent of the liability under this new principle. In the context of the instant appeal, the key passage from the speech of Lord Wilberforce in that case is that which commences at p. 759, and which has already been quoted by my noble and learned friend.

48. A number of points emerge from this:

1. The damage which gives rise to the action may be damage to the person or to property on the ordinary ***Donoghue v. Stevenson*** principle. But it may be damage to the defective structure itself which has, as yet, caused no injury either to person or to other property, but has merely given rise to a risk of injury.
2. There may not even be "damage" to the structure. It may have been inherently defective and dangerous ab initio without any deterioration between the original construction and the perception of risk.
3. The damage to or defect in the structure, if it is to give rise to a cause of action, must be damage of a particular kind, i.e. damage or defect likely to cause injury to health or – possibly - injury to other property (an extension arising only by implication from the approval by this House of the decision of the Court of Appeal ***in Dutton v. Bognor Regis Urban District Council*** [1972] 1 Q.B. 373). "
4. The cause of action so arising does not arise on delivery of the defective building or on the occurrence of the damage but upon the damage becoming a "*present or imminent risk*" to health or (semble) to property and it is for that risk that compensation is to be awarded.
5. The measure of damage is at large but, by implication from the approval of the dissenting judgment in the Canadian case referred to (***Rivtow Marine Ltd, v. Washington Iron Works*** [1973] 6 W.W.R. 692), it must at least include the cost of averting the danger.

49. These propositions involve a number of entirely novel concepts. In the first place, in no other context has it previously been suggested that a cause of action in tort arises in English law for the defective manufacture of an article which causes no injury other than injury to the defective article itself. If I buy a secondhand car to which there has been fitted a pneumatic tyre which, as a result of carelessness in manufacture, is dangerously defective and which bursts, causing injury to me or to the car, no doubt the negligent manufacturer is liable in tort on the ordinary application of ***Donoghue v. Stevenson***. But if the tyre bursts without causing any injury other than to itself or if I discover the defect before a burst occurs, I know of no principle upon which I can claim to recover from the manufacturer in tort the cost of making good the defect which, in practice, could only be the cost of supplying and fitting a new tyre. That would be, in effect, to attach to goods a non-contractual warranty of fitness which would follow the goods into whosoever hands they came. Such a concept was suggested, obiter, by Lord Denning M.R. in

Dutton's case, at p. 396, but it was entirely unsupported by any authority and is, in my opinion, contrary to principle.

50. 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.

51. But even so there are anomalies. If that were the correct analysis, then any damage sustained by the building should ground an action in tort from the moment when it occurs. But ***Anns*** tells us - and, at any rate so far as the local authority was concerned, this was a ground of decision and not merely obiter - that the cause of action does not arise until the damage becomes a present or imminent danger to the safety or health of the occupants and the damages recoverable are to be measured, not by the cost of repairing the damage which has been actually caused by the negligence of the builder, but by the (possibly much more limited) cost of putting the building into a state in which it is no longer a danger to the health or safety of the occupants.

52. It has, therefore, to be recognised that ***Anns*** introduced not only a new principle of a parallel common law duty in a local authority stemming from but existing alongside its statutory duties and conditioned by the purpose of those statutory duties, but also an entirely new concept of the tort of negligence in cases relating to the construction of buildings. The negligent builder is not answerable for all the reasonably foreseeable consequences of his negligence, but only for consequences of a particular type. Moreover, the consequence which triggers the liability is not, in truth, the damage to the building, qua damage, but the creation of the risk of apprehended damage to the safety of person or property. Take, for instance, the case of a building carelessly constructed in a manner which makes it inherently defective ab initio but where the defect comes to light only as a result, say, of a structural survey carried out several years later at the instance of a subsequent owner. What gives rise to the action is then not "damage" in any accepted sense of the word but the perception of possible but avoidable damage in the future. The logic of according the owner a remedy at that stage is illustrated by the dissenting judgment of Laskin J. in the Canadian case referred to and it is this: if the plaintiff had been injured the negligent builder would undoubtedly have been liable on ***Donoghue v. Stevenson*** principles. He has not been injured, but he has been put on notice to an extent sufficient to deprive himself of any remedy if he is now injured and he therefore suffers, and suffers only, the immediate economic loss entailed in preventing or avoiding the injury and the concomitant liability for it of the negligent builder which his own perception has brought to his attention. It is fair therefore that he should recover this loss, which is as much due to the fault of the builder as would have been the injury if it had occurred. Thus it has to be accepted either that the damage giving rise to the cause of action is pure economic loss not consequential upon injury to person or property - a concept not so far accepted into English law outside the Hedley Byrne type of liability (***Hedley Byrne & Co. Ltd, v. Heller & Partners Ltd.*** [1964] A.C. 465) - or that there is a new species of the tort of negligence in which the occurrence of actual damage is no longer the gist of the action but is replaced by the perception of the risk of damage.

53. I think that it has to be accepted that this involves an entirely new concept of the common law tort of negligence in relation to building cases. Its ambit remains, however, uncertain. So far as Anns' case was concerned with liability arising from breach of statutory duty, the liability of the builder was a matter of direct decision. No argument was advanced on behalf of the builder in that case, but it was an essential part of the rationale of the decision in relation to the liability of the local authority that there was a precisely parallel and co-existing liability in the builder. Moreover, it is, I think, now entirely clear that the vendor of a defective building who is also the builder enjoys no immunity from the ordinary consequences of his negligence in the course of constructing the building, but beyond this and so far as the case was concerned with the extent of or limitations on his liability for common law negligence divorced from statutory duty, Lord Wilberforce's observations were, I think, strictly obiter. My Lords, so far as they concern such liability in respect of damage which has actually been caused by the defective structure other than by direct physical damage to persons or to other property, I am bound to say that, with the greatest respect to their source, I find them difficult to reconcile with any conventional analysis of the underlying basis of liability in tort for negligence. A cause of action in negligence at common law which arises only when the sole damage is the mere existence of the defect giving rise to the possibility of damage in the future, which crystallizes only when that damage is imminent, and the damages for which are measured, not by the full amount of the loss attributable to the defect but by the cost of remedying it only to the extent necessary to avert a risk of physical injury, is a novel concept. Regarded as a cause of action arising not from common law negligence but from breach of a statutory duty, there is a logic in so limiting it as to conform with the purpose for which the statutory duty was imposed, that is to say, the protection of the public from injury to health or safety. But there is, on that footing, no logic in extending liability for a breach of statutory duty to cases where the risk of injury is a risk of injury to property only, nor, as it seems to me, is there any logic in importing into a pure common law claim in negligence against a builder the limitations which are directly related only to breach of a particular statutory duty. For my part, therefore, I think the correct analysis, in principle, to be simply that, in a case where no question

of breach of statutory duty arises, the builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or to property, results in carelessness on his part in the course of construction. That the liability should embrace damage to the defective article itself is, of course, an anomaly which distinguishes it from liability for the manufacture of a defective chattel but it can, I think, be accounted for on the basis which my noble and learned friend, Lord Bridge of Harwich, suggested, namely that, in the case of a complex structure such as a building, individual parts of the building fall to be treated as separate and distinct items of property. On that footing, damage caused to other parts of the building from, for instance, defective foundations or defective steel-work would ground an action but not damage to the defective part itself except in so far as that part caused other damage, when the damages would include the cost of repair to that part so far as necessary to remedy damage caused to other parts. Thus, to remedy cracking in walls and ceilings caused by defective foundations necessarily involves repairing or replacing the foundations themselves. But, as in the instant case, damage to plaster caused simply by defective fixing of the plaster itself would ground no cause of action apart from contract or under the Defective Premises Act 1972. On what basis and apart from statute is a builder, in contradistinction to the manufacturer of a chattel, to be made liable beyond this? There is, so far as I am aware, and apart from ***Dutton v. Bognor Regis Urban District Council*** [1972] 1 Q.B. 373 no English authority prior to ***Anns v. Merton London Borough Council*** [1978] A.C. 728 supporting or even suggesting such a liability. Dutton's case was followed by the Court of Appeal in New Zealand in Bowen v. Paramount Builders (Hamilton) Ltd. [1977] 1 N.Z.L.R. 394 where Richmond P., at p. 410, defined the builder's duty as *"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."*

54. He could see no reason why "*if the latent defect causes actual physical damage to the structure of the house*" such damage should not give rise to a cause of action. In so holding, the court was clearly influenced by certain United States decisions whose authority has now been much reduced if not destroyed by the Supreme Court decision in ***East River Steamship Corporation v. Transamerica Delaval Inc.***, 106 S.Ct. 2295 referred to by my noble and learned friend. The measure of damage in ***Bowen's*** case went a great deal beyond that suggested in Anns, for it not only covered the cost of putting the building into a state in which it was no longer dangerous to health or safety but extended to the restoration of its aesthetic appearance and depreciation in value. This really suggests what is, in effect, a transmissible warranty of fitness and, for the reasons already mentioned, I do not for my part think that Bowen's case can be supported as an accurate reflection of the law of England. **Rivtow Marine Ltd, v. Washington Ironworks** (1973) 6 W.W.R. 692, the dissenting judgment in which was, to some extent, relied upon by Lord Wilberforce in ***Anns,*** does not, I think, really assist very much. It is true that it was there held by the majority of the Supreme Court of Canada that the manufacturers and the supplier of defective equipment were liable for the economic loss suffered by the plaintiff as a result of the defective equipment having to be taken out of service, but the basis for the decision was the doctrine of reliance established by ***Hedley Byrne*** which placed upon the defendants a duty to warn of defects of which they were aware. Even on this basis, however, the damages did not extend to the cost of repairing the defective article itself.

55. Since ***Anns'*** case there have, of course, been the decision of the Court of Appeal in ***Batty v. Metropolitan Realisations Ltd.*** [1978] 1 Q.B. 554 and the decision of this House in ***Junior Books Ltd, v. Veitchi Co. Ltd.*** [1983] A.C. 520. I do not, for my part, think that the latter is of any help in the present context. As my noble and learned friend, Lord Bridge of Harwich, has mentioned it depends upon so close and unique a relationship with the plaintiff that it is really of no use as an authority on the general duty of care and it rests, in any event, upon the ***Hedley Byrne*** doctrine of reliance. So far as the general limits of the general duty of care in negligence are concerned, I, too, respectfully adopt what is said in the dissenting speech in that case of Lord Brandon of Oakbrook.

56. ***Batty v. Metropolitan Realisations Ltd.,*** however, is directly in point and it needs to be carefully considered because it is, in my opinion, equally difficult to reconcile with any previously accepted concept of the tort of negligence. The defendant builder in that case had previously owned the land on which the plaintiff's house was built and was working in close conjunction with the plaintiff's vendor, who had bought the land from him. Thus the plaintiffs had a contractual relationship with the vendor, but none with the builder. There was no negligence in the construction of the house as such, nor was there any breach of statutory duty, nor had any damage yet occurred to the house. The negligence consisted solely in not appreciating what the builder ought reasonably to have appreciated, that is to say, that the immediately adjacent land was in such a condition that it would ultimately bring about the subsidence of the plaintiff's land and the consequent destruction of anything built upon it. At the date of the action and of the hearing no actual damage had been occasioned to the house. Ail that had happened was that a part of the garden had subsided, that being the event which alerted the plaintiffs to the danger which threatened the house. That, however, was not an event in any way attributable to fault on anyone's part but merely to the natural condition of the adjoining land. So that although there had been physical damage to the garden, it was not physical damage caused by any neglect on the part of the builders. The case is thus, on analysis, one in which the claim was for damages for pure economic loss caused by the putting onto the market of a product which, because defective, would become a danger to health and safety and thus of less value than it was supposed to be. It is not specified in the report of the case how the damages of £13,000 were calculated, but it seems that that sum must have been based on the difference between the market value of the house (which was doomed to destruction and therefore valueless) and the value of an equivalent house built on land not subject to landslips. Thus what the plaintiffs obtained from the builders by way of damages in tort was the sum for which the builders would have been liable if they had given an express contractual warranty of fitness - a sum related directly not

to averting the danger created by the builders' negligence but to the replacement of an asset which, by reason of the danger, had lost its value. The decision in ***Batty's*** case was based upon ***Anns'*** case, but in fact went one step further because there was not in fact any physical damage resulting from the builders' negligence, although Megaw L.J., at p. 571, appears to have considered that what mattered was the occurrence of physical damage to some property of the plaintiff, however caused. As in ***Anns,*** the cause of action was related not to damage actually caused by the negligent act but to the creation of the danger of damage, and the case is therefore direct authority for the recovery of damages in negligence for pure economic loss – a proposition now firmly established in New Zealand (see ***Mount Albert Borough Council v. Johnson*** [1979] 2 N.Z.L.R. 234).

57. My Lords, I confess to the greatest difficulty in reconciling this with any previously accepted concept of the tort of negligence at common law and I share the doubt expressed by my noble and learned friend, Lord Bridge of Harwich, whether it was correctly decided, at any rate so far as the liability of the builder was concerned. The case was, however, one in which the builder and the developer, with whom the plaintiffs had directly contractual relationship, were, throughout, acting closely in concert and it may be that the actual decision, although not argued on this ground, can be justified by reference to the principle of reliance established by the decision of this House in ***Hedley Byrne & Co. Ltd, v. Heller & Partners Ltd.*** [1964] A.C. 465

58. My Lords, I have to confess that the underlying logical basis for and the boundaries of the doctrine emerging from ***Anns v. Merton London Borough Council*** [1978] A.C. 728 are not entirely clear to me and it is in any event unnecessary for the purposes of the instant appeal to attempt a definitive exposition. This much at least seems clear: that in so far as the case is authority for the proposition that a builder responsible for the construction of the building is liable in tort at common law for damage occurring through his negligence to the very thing which he has constructed, such liability is limited directly to cases where the defect is one which threatens the health or safety of occupants or of third parties and (possibly) other property. In such a case, however, the damages recoverable are limited to expenses necessarily incurred in averting that danger. The case cannot, in my opinion, properly be adapted to support the recovery of damages for pure economic loss going beyond that, and for the reasons given by my noble and learned friend, with whose analysis I respectfully agree, such loss is not in principle recoverable in tort unless the case can be brought within the principle of reliance established by Hedley Byrne. In the instant case the defective plaster caused no damage to the remainder of the building and in so far as it presented a risk of damage to other property or to the person of any occupant that was remediable simply by the process of removal. I agree, accordingly, for the reasons which my noble and learned friend has given, that the cost of replacing the defective plaster is not an item for which the builder can be held liable in negligence. I too would dismiss the appeal.

LORD JAUNCEY OF TULLICHETTLE : My Lords,

59. I have had the advantage of reading in draft the speeches prepared by my noble and learned friends Lord Bridge of Harwich and Lord Oliver of Aylmerton. I agree with them, and would dismiss this appeal.