CASE LAW

THE LIABILITY OF BUILDERS AND SURVEYORS FOR NEGLIGENCE

DUTTON v. *BOGNOR REGIS UNITED BUILDING CO. LTD.*

The recent case of *Dutton* v. *Bognor Regis United Building Co. Ltd.*[1] involved a novel fact situation which gave counsel an opportunity to canvass a wide range of arguments for and against the creation of a new duty of care and also gave the Court of Appeal an opportunity of rendering greater definition to the principles which underlie judicial development of the tort of negligence.

In 1958 a builder, Holroyd, sought approval for the development of an area of land which included a lot on the site of a reclaimed rubbish tip. He submitted plans of a house to be built on the lot and received approval of the plans under the Public Health Act, 1936, and the council by-laws made thereunder. The printed notice of approval contained a footnote which provided that, before being covered up, all foundations and drains had to be examined by the council surveyor and approved as meeting the requirements of the by-laws.

When building commenced the builder found the remains of the old rubbish tip about two feet underground, and so decided to make the outer trench of the foundations considerably deeper than usual and to reinforce the concrete floor with steel mesh. But he took no special precautions in relation to the inner walls. The council surveyor inspected the excavations for the foundations, and at a later stage inspected the work at the damp-proof course level. As a result of these inspections the surveyor approved the works for the purposes of the building by-laws.

In fact the works did not comply with the by-laws and ought not to have been approved; according to the evidence of an expert surveyor, it would have been obvious at that stage that the house was being built on a rubbish tip, and a competent inspection would have revealed that the inner foundations were inadequate.

Early in 1960 Holroyd sold the completed house to a Mr. Clark who later in the year resold it to Mrs. Dutton, the plaintiff. Even at that stage cracking was apparent but the real estate agent assured Mrs. Dutton that it was only the result of normal settlement. In 1961 the condition of the house deteriorated. The staircase shifted, the walls and ceilings cracked and the doors no longer fitted.

In 1964 Mrs. Dutton issued a writ against the builder and the council claiming £2,740 made up of £2,240 for cost of repairs and £500 for diminution in value. The action against the builder was settled for £625 on the basis of the decisions in *Bottomley* v. *Bannister*[2] and *Otto* v. *Bolton & Norris*.[3]

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[1] (1972) 1 All E.R. 462 (C.A.). *Sub nomine Dutton* v. *Bognor Regis U.D.C.* (1972) 1 Q.B. 373; (1972) 2 W.L.R. 299.

[2] (1932) 1 K.B. 458 (C.A.).

[3] (1936) 2 K.B. 46.

At the trial[4] the council called no evidence. Cusack, J. decided that the council owed a duty of care to Mrs. Dutton and awarded her damages of £2,115[5] for breach of the duty. He based his decision on an application of *Donoghue* v. *Stevenson*[6] citing several authorities for the proposition that the decision in that case extended not only to chattels but also to land and structures on the land.[7] The trial judge compared the building surveyor to the architect in *Clay* v. *Crump*[8] and defined the surveyor's duty of care by reference to the policy behind the legislation. "The purpose of the building by-laws . . . is the protection of the public. . . . In my view it must be in the contemplation of those who gave approval to building works that such approval will affect subsequent owners of the house. The council, through its building inspector, owed a duty to the plaintiff."[9]

In the Court of Appeal a number of issues were raised preliminary to the consideration of the main question as to whether a duty situation existed. These legal, as opposed to policy, issues are worthy of individual examination and for convenience may be grouped according to the three traditional elements of the tort of negligence, duty, breach and damage.

Preliminaries Relating to the Existence of a Duty of Care

1. *East Suffolk Rivers Catchment Board* v. *Kent*

The first argument of the council was that, on the basis of *East Suffolk Rivers Catchment Board* v. *Kent*,[10] "if the local authority had a mere power they were not liable for not exercising that power".[11] In that case the Board had a statutory power to enter Kent's land to repair breaches in a wall built to protect low-lying lands from flooding by a tidal river but they were under no duty to do so. The repairs effected were inadequate and although the works carried out did not increase the flood damage or increase the period during which the land was flooded, if properly done they could have stopped the flooding much earlier than it was stopped. It was held that the Board could only be made liable for failure to exercise their power efficiently if by so doing they had increased the damage which would have been suffered if they had done nothing.[12]

Lord Denning's answer to this contention was that the legislation and the by-laws made thereunder requiring building work to be approved by the council did not impose on the council either a duty or a mere power but rather invested it with *control* over building work. This control imported a duty to take "reasonable care so as to ensure that the by-laws are complied with".[13]

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[4] (1971) 2 All E.R. 1003.

[5] Being the full sum of £2,740 less £625 recovered from the builder.

[6] (1932) A.C. 502 (H.L.) on the basis that the instant case was a case of a negligent act not of negligent words.

[7] (1971) 2 All E.R. 1003 at 1008.

[8] (1963) 3 All E.R. 687; (1964) 1 Q.B. 533 (C.A.). In that case an architect was held liable for negligent failure to properly examine the stability of a wall left standing on a demolition site. The wall subsequently collapsed and injured the plaintiff, a workman on the site. *Cf. Voli* v. *Inglewood Shire Council* (1963) 110 C.L.R. 74.

[9] (1971) 2 All E.R. 1003 at 1009.

[10] (1941) A.C. 74.

[11] Lord Denning (1972) 1 All E.R. 462 at 470.

[12] See Lord Simon, L.C. (1941) A.C. 74 at 83-5. In other words, action lies only for misfeasance, not for non-feasance.

[13] (1972) 1 All E.R. 462 at 470. This approach, with respect, is a difficult one. Could it not be said with equal force that the Board in the *East Suffolk Case* had extensive control over the regulation of water use in its area? The approach also multiplies the problems of statutory interpretation. Not only does one have to decide whether the words of the statute confer a mere power, or a duty, each category having its own different legal consequences, but also whether they entail the new legal concept called "control". His Lordship gives no guidance in this matter of interpretation.

Sachs, L.J. distinguished the *East Suffolk Case* on the facts—that was a case of non-feasance, whereas this was a case of misfeasance.[14] Thus it made no difference whether the council was invested with a duty or a mere power because in either case they would be liable under the principle formulated in *Geddis* v. *Bann Reservoir Proprietors*, namely, "that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently".[15]

Stamp, L.J. distinguished the *East Suffolk Case* on the ground that while it concerned a failure to remedy a damaging situation which had already occurred, *Dutton's Case* involved a failure to prevent the coming into existence of a damaging situation.[16] This, it is submitted, is the most satisfactory approach. The plaintiff in this case suffered positive loss as a result of the careless exercise of the power, whereas in the *East Suffolk Case* the positive damage had already occurred before the power was exercised and the damage resulting from its inefficient exercise was merely negative, consisting in the fact that the property owner did not receive a benefit to which, in any event, he was not entitled in the absence of a positive duty to abate the flood damage.

2. *The Position of the Builder*[17]

The rule that the vendor of a house (like the builder in this case) is not liable, in the absence of a contract, for damage resulting from faulty workmanship, was clearly enunciated in *Bottomley* v. *Bannister*[18] and affirmed and protected from any encroachment by *Donoghue* v. *Stevenson* in *Otto* v. *Bolton & Norris*.[19] Nield, J. in *Sharpe* v. *Sweeting*[20] stated the rule, as it applies to builders, as follows: ". . . the fact that the owner is also the builder does not remove the owner's immunity, but when the builder is not the owner he enjoys no such immunity."

This distinction[21] between an owner-builder and a contract builder is anomalous and would, if applied to the builder in the instant case, have deprived Mrs. Dutton of a remedy for two reasons, firstly because the builder was also the owner of the land and the building, and secondly because, even if the builder had been a contract builder, Mrs. Dutton was a subsequent purchaser and hence in no contractual relationship with the builder.

Lord Denning, M. R. summarily overruled *Bottomley* v. *Bannister* and *Otto* v. *Bolton & Norris* by applying four simple propositions:[22]
(i) *Bottomley* v. *Bannister* was based on nineteenth century notions of no liability outside contract, (ii) *Donoghue* v. *Stevenson* overthrew this doctrine in relation to chattels, (iii) the distinction between chattels and real property is not maintainable as was recognized in *Sharpe* v. *Sweeting* in relation to a

[14] *Id.* at 480. The distinction is often, as in this and the *East Suffolk Case*, a difficult and nice one.
[15] (1878) 3 App. Cas. 430 *per* Lord Blackburn at 455.
[16] (1972) 1 All E.R. 462 at 487-8.
[17] This aspect of the judgments is *obiter*. The nexus between the builder and the surveyor found by Denning, L.J. (at 471) and Sachs, L.J. (at 478) has no logical force and is rejected by Stamp, L.J. who found the surveyor liable while expressly refusing to make the builder liable. Nevertheless the opinion that the builder is also liable is to be welcomed and ought to be followed.
[18] (1932) 1 K.B. 458 (C.A.). See esp. Scrutton, L.J. at 468.
[19] (1936) 2 K.B. 46.
[20] (1963) 1 W.L.R. 665 at 675.
[21] Fleming describes it as "indefensibly esoteric", *Law of Torts*, 4 ed. 418. Clerk & Lindsell on *Torts*, 13 ed., §867 p. 473 finds the only justification for not applying *Donoghue* v. *Stevenson* generally in this area in the fact that *Bottomley* v. *Bannister* was decided before *Donoghue* v. *Stevenson*.
[22] (1972) 1 All E.R. 462 at 471-2.

contract builder but not in relation to an owner builder,[23] (iv) there is no sense in maintaining a distinction between a building contractor and an owner-builder.

Sachs, L.J. was more cautious in stating that *Bottomley* v. *Bannister* had to be read in the light of *Donoghue* v. *Stevenson*, and that *Otto* v. *Bolton & Norris*, being a decision at first instance, was not binding.[24] Stamp, L.J. felt that it was not open to him to question the authorities establishing the rule, but at the same time considered that the matter did not have to be decided.[25] In the light of their Lordships' comments, it would probably be now unwise to rely on *Bottomley* v. *Bannister*, *Otto* v. *Bolton & Norris* or *Sharpe* v. *Sweeting*.

The situation in New South Wales has however to be considered in the light of the Builders Licensing Act, 1971.[25a]

3. *Professional Adviser*

It was also argued that as a result of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[26] reliance by the plaintiff on the defendant's advice was a prerequisite to the existence of a duty of care in the defendant since the defendant was in the same position as any other professional man qualified by training and experience to give advice to others on how they should act. Since Mrs. Dutton had not relied on the surveyor's report in deciding to buy the house, the defendant owed no duty of care to her.[27]

Sachs, L.J. said simply that *Hedley Byrne* was an exceptional case and in the normal run of cases reliance is not needed.[28] According to Stamp, L.J. reliance is required only where "there could be no damage suffered except by a person who relied on what was done and said by the defendant, and the defendant could only have had in contemplation as someone who might be injured by his carelessness, a person who might rely on his statement".[29] Lord Denning, M. R. distinguished between those who give advice on property or financial matters, like bankers, lawyers or accountants, and those who give advice on the safety of buildings, machines or materials.[30] In the latter case the adviser is liable to those whom he ought to realize will be injured if his advice is faulty. In the former case he is liable to those who rely on him.

The question of professional advice and the distinction between negligent acts and negligent mis-statements is very much tied up with the distinction between physical and financial loss. The law on these points tends to become confused and for the sake of clarity both here and in the discussion below of the distinction between financial and physical damage it will be useful to set out in tabular form the possible combinations of factors.[31]
It is possible to have
(a) acts resulting in physical damage—the most common case;
(b) acts resulting in financial damage, e.g., loss of profits in an *S.C.M.* v.

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[23] (1963) 1 W.L.R. 665 at 675-6.
[24] (1972) 1 All E.R. 462 at 478-9.
[25] *Id.* at 489.
[25a] This Act establishes a scheme of statutory insurance and implied warranties to protect purchasers against loss due to building defects.
[26] (1964) A.C. 465.
[27] As already noted, Cusack, J. at first instance (1971) 2 All E.R. 1003 at 1008, thought that the principles in *Hedley Byrne* were of no relevance here since this was a case not of negligent mis-statement but of a negligent act.
[28] (1972) 1 All E.R. 462 at 482.
[29] *Id.* at 489. This statement neatly relates reliance and foreseeability.
[30] *Id.* at 473.
[31] See C. S. Phegan, "*Hedley Byrne* v. *Heller* in the Privy Council—The Continuing Story" 45 *A.L.J.* 20 at 23-4.

Whittall[32] type situation;

(c) words resulting in physical damage—the *Dutton* v. *Bognor Regis*-type situation;

(d) words resulting in financial damage—the *Hedley Byrne* v. *Heller*-type situation.

Lord Denning appears to be pointing out the distinction bewteen (c) and (d)[33] even though the emphasis in his words lies on the subject of the advice rather than on its results. It is difficult to imagine a case in which advice on the safety of buildings, machines or materials would result in purely financial loss without any injury to persons or any damage to the building, machine or material the subject of the advice. And, as Lord Denning pointed out in *Dutton's Case*, physical loss is not restricted to bodily injury.

Lord Denning distinguishes between different classes of advisers and, wishing to restrict liability in certain cases, uses the requirement of reliance as the means of doing it. Stamp, L.J., however, in the passage quoted above,[34] goes one step further in that he explains the use of the concept of reliance in terms of traditional negligence doctrine. His statement really has two limbs. The first stresses the fact of causation—that in certain cases, like that of investment advice, the plaintiff's loss is not causally attributable to the defendant's advice unless the plaintiff relies on that advice. The second stresses the foresight of the defendant—that in certain cases the defendant cannot really be expected to foresee injury to the plaintiff as a result of his act except where the plaintiff relies on that advice.

In fact, both limbs concern causation because what the defendant is expected to foresee is the causal chain ensuing from his negligence. And one identifies the "certain cases" in which the defendant cannot be expected to foresee the injury as those in which the loss suffered by the particular person in view cannot, as a matter of causation, be attributed to the other's negligence unless the person relied on that other's negligent advice.

Preliminary Objections Relating to the Element of Breach of Duty

It was not disputed that if the council and its building surveyor were under a duty of care they had committed a breach of that duty.[35]

Preliminary Objections Relating to the Element of Damage Not Too Remote in Law

It was argued that even if liability existed in relation to the original purchaser, no liability ought to exist in relation to subsequent purchasers. Lord Denning recognized the force of such an argument in a case where there was opportunity for intermediate inspection.[36] But intermediate inspection could not have revealed the defect in this case since the foundations had been covered up. Sachs, L.J. expressly confined his decision to latent defects.[37]

It was also argued that the damage was too remote in law because it was purely economic. Lord Denning took the view that the damage was not purely economic but included physical damage to the house.[38] Sachs, L.J. agreed that there was physical damage but rejected the distinction between

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[32] *S.C.M. (United Kingdom) Limited* v. *W. J. Whittall & Son Limited* (1971) 1 Q.B. 337.

[33] (1972) 1 All E.R. 462 at 474.

[34] *Supra*, n. 29.

[35] See Lord Denning (1972) 1 All E.R. 462 at 469, Sachs, L.J. *id.* at 476, Stamp, L.J. *id.* at 485.

[36] Applying Lord Atkin's principle in *Donoghue* v. *Stevenson* (1932) A.C. 562 at 599.

[37] (1972) 1 All E.R. 462 at 478.

[38] *Id.* at 474.

physical and economic loss as no longer tenable.[39] Stamp, L.J. applied *Hedley Byrne* v. *Heller* as authority for the proposition that both physical and economic damage are recoverable.[40]

In one sense, of course, all loss is economic since courts redress all loss whether physical or financial in monetary terms. But, as Lord Denning said in *S.C.M.* v. *Whittall* in reference to the distinction between physical and financial loss, "there may be no difference in logic but I think there is a great deal of difference in common sense".[41] He stated the applicable rule in simple terms: "In actions of negligence, when the plaintiff has suffered *no* damage to his person or property, but has only sustained *economic loss* the law does not usually permit him to recover that loss. The reason lies in public policy".[42] The public policy is that to allow recovery for purely financial loss would be to place too heavy a burden on the shoulders of one individual which ought to be borne by a wider section of the community. As Fleming points out, the strength of this argument varies with the facts.[43] Its strength is clear in the example posed by Lord Denning in *S.C.M.* v. *Whittall*;[44] where a mine is flooded, should the party responsible for the flooding have to pay damages for loss of wages to all the mine workers affected? Nor is there any controversy in cases where financial loss is accompanied by physical loss. In such cases economic loss is recoverable "as it were parasitically".[45] The real area of difficulty is where financial loss stands alone and where *Hedley Byrne* is inapplicable.

It is suggested that as a matter of logic the courts are faced with a dilemma if they wish to preserve the distinction between physical and financial loss and also allow recovery for some financial loss standing alone. Lord Denning in *S.C.M.* v. *Whittall* made financial loss standing alone recoverable only if it is the immediate consequence of a negligent act or omission. This introduces a question of remoteness of damage and echoes the *Re Polemis*[46] heresy. On the other hand, if the test for deciding whether financial loss is recoverable or not is to be foreseeability then the distinction between physical and financial loss is destroyed. But the distinction is not worthless. It seems just to allow an action for purely financial loss in a case where for example, undamaged goods have to be unloaded from a transport contractor's lorry, damaged by the negligence of the driver, and placed on alternative transport at the expense of time and money. But it seems clearly unjust to allow such an action in the flooded mine case. Nor does foreseeability distinguish these two cases.

The way forward lies perhaps in a resort to policy. The relevant question is the weight of the burden which awards of damages to all who have suffered loss would place on the plaintiff. The law of torts is becoming gradually more policy oriented and it may be desirable for the courts to say without equivocation that when a large section of the public suffers pecuniary loss then generally it will be unjust to place the whole burden on the shoulders of one person merely because his negligence, which may be inherently no more blameworthy than any other, happens to have wide repercussions.

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[39] *Id.* at 480-1.

[40] *Id.* at 490. This is an unjustified extension of *Hedley Byrne*. To recover financial loss resulting from words there must be a special relationship.

[41] (1971) 1 Q.B. 337 at 344.

[42] *Ibid.* The chief exception being a *Hedley Byrne* situation.

[43] *Law of Torts*, 4 ed., 164.

[44] (1971) 1 Q.B. 337 at 344 citing Blackburn, J. in *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453 at 457.

[45] Fleming, *supra* n. 43 at 165 ff. Thus Mrs. Dutton could recover damages for diminution of value of her house.

[46] *Re Polemis, Furness, Withy & Co.* (1921) 3 K.B. 560, (1921) All E.R. 40 (C.A.).

Policy

The main question posed by the case was whether the council, through its surveyor, owed a duty of care to the plaintiff to ensure that the building by-laws were complied with so that if through negligent inspection it allowed work to be passed that did not comply with those by-laws it would be liable in damages for any loss suffered by the plaintiff due to this non-compliance. Lord Denning stated a simple principle: "It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when in cases of new import, we should decide them according to the reason of the thing. . . . In short, we look at the relationships of the parties; and then say, as a matter of policy, on whom the loss should fall."[47]

Lord Denning refers to several of the judgments in *Home Office* v. *Dorset Yacht Co. Ltd.*[48] where the House of Lords was similarly faced with a novel situation. Their Lordships discussed at some length and to various effect the proper approach to such cases. In that case Lord Reid, whom Lord Pearson generally followed, made this statement:

> In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should not ask whether it is covered by authority but whether recognized principles apply to it. *Donoghue* v. *Stevenson* may be regarded as a milestone, and the well known passage in Lord Atkin's speech should, I think, be regarded as a statement of "principle". It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can say and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.[49]

This liberal approach treats Lord Atkin's neighbour principle not as an authority in its terms but as a broad principle of policy. Lord Reid's starting point was a presumption that a *Donoghue* v. *Stevenson* duty exists.

At the other extreme stands Lord Dilhorne. His approach is fairly summarised by the following passages:

> No doubt very powerful arguments can be advanced that there should be a duty. . . . However this may be, we are concerned not with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one that is, in my view, a matter for the legislature and not for the courts.[50]
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> I of course recognise that the common law develops by the application of well established principles to new circumstances but I cannot accept that the application of Lord Atkin's words . . . suffices to impose a new duty. . . .[51]

Lord Diplock compromised between authority and policy by constructing a logical framework with three basic steps:[52]

(1) Inductive analysis of authorities to discover the characteristics A, B, C, D etc. which are present in cases where a duty of care has been found and absent where it has not.

(2) Deductive analysis which converts the results of (1) into the proposition that "In all cases where the conduct and relationship possess each of the characteristics A, B, C, D etc. a duty of care arises".

(3) A policy decision, where a fact situation lacks one or more of the charac-

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[47] (1971) 1 All E.R. 462 at 475.
[48] (1970) A.C. 1004.
[49] *Id.* at 1026-7.
[50] *Id.* at 1045.
[51] *Ibid.*
[52] *Id.* at 1058-9.

teristics A, B, C, D etc. either wholly or partly, whether to allow a duty to arise by redefining an existing duty in terms wide enough to include the case under consideration.

His Lordship sounded a warning that in analysing earlier authorities care should be taken against extracting principles wider than necessary for the decision of the case under consideration. Thus in *Donoghue* v. *Stevenson* Lord Atkin's neighbour principle is not a universal authority but an aphorism. The case is authority only for a narrower proposition concerning manufacturer's liability.

Lord Denning's approach in *Dutton* v. *Bognor Regis* is similar to his approach in *Dorset Yacht Co. Ltd.* v. *Home Office*.[53] As stated in *Dutton's Case* it seems slightly different from that of Lord Reid in the *Dorset Case*. For Lord Denning the only question appears to be one of policy, his starting point being not a rebuttable presumption that *Donoghue* v. *Stevenson* applies, but rather the question on whom, as a matter of policy, the loss should fall. Lord Reid's principle seems to work automatically in favour of the plaintiff while for Lord Denning the question of duty is an open one to be decided purely on policy considerations. In result, of course, the two approaches differ little; both answer the question whether a duty falls on the defendant by considering the weight of legal and political arguments against such a duty.

Lord Reid's approach has the advantage over Lord Denning's, that its starting point is a legal principle capable of reasonably precise statement. Lord Denning's starting point is each judge's subjective interpretation of public policy, "that unruly horse". On the other hand, Lord Reid's approach saddles the defendant with the difficult task of convincing the court of the validity in the circumstances of the negative proposition that *Donoghue* v. *Stevenson* ought not to apply, rather than requiring the plaintiff to establish that it ought to apply.

Lord Denning's formula for deciding the present case was that those responsible should bear the loss. Thus a duty is owed by the council, its inspector and the builder. "Their shoulders are broad enough to bear the loss",[54] in the case of the Council, because they are given public funds for the purposes of the legislation, and in the case of the builder because he will generally be insured against such liability. But how could it be said that the shoulders of the surveyor are broad enough? As a private individual he will be usually by-passed by plaintiffs in favour of more economically stable defendants. However, if the council is found vicariously liable for his tort then he will be a joint tortfeasor and liable to indemnify the council to the full extent of its liability.[55] It may be arguable, on the basis that the council has a special statutory power and is specifically equipped to protect the interests of purchasers and is given funds for that purpose, that the council's liability is not purely vicarious and that it ought not to be able to recover an indemnity from the surveyor if it is found liable for the acts of the surveyor. The council put forward several policy arguments against liability. Firstly it argued that to impose liability would be to hinder the council's work. Lord Denning thought the opposite was true. It was also argued that councils could not bear the economic burden if numerous claims were brought against them. Lord Denning answered that usually the builder, who would be insured against such liability, would be primarily liable and the council would rarely be sued or found liable, and even if it was its share of responsibility would be small. Thirdly, the council argued that to impose liability in this case would be to open the gate to a flood of cases with which neither the council nor the courts could cope.

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[53] (1969) 2 Q.B. 412 at 426 (C.A.).

[54] (1972) 1 All E.R. 462 at 475-6.

[55] *Lister* v. *Romford Ice Co.* (1957) A.C. 555. This rule has received vigorous criticism, see e.g., Fleming, *supra* n. 43 at 641-2.

Lord Denning's answer is that usually the injured person will sue the builder and will rarely allege and still less be able to prove a case against the council.

Sachs, L.J. approved the approach of Lord Pearson in *Dorset Yacht Co. Ltd.* v. *Home Office*. The council is under a duty to those whom the legislation is designed to protect unless there are countervailing policy considerations.[56] He rejects the argument that the liability of the builder provides a sufficient remedy. The common law does not limit the injured person to a remedy against one of two culpable persons. The builder might be a company formed for the particular project and since dissolved. As to the "flood of cases" argument, Sachs, L.J. pointed to the difficulty of proving negligence as opposed to a mere error of judgment. Furthermore, not all statutory powers involve cases like this where intermediate examination is impossible.

Stamp, L.J. took an approach similar to that of Lord Diplock in the *Dorset Case*. He declined to question the *Bottomley* v. *Bannister* line of authority, adhering to the traditional contractual analysis.[57] He could see no justification or need for extending the principle that makes the manufacturer of a dangerous thing liable to a consumer in tort in the absence of a contract so that the principle would include the manufacturer or builder of an inferior product when the inferiority amounts only to a breach of warranty and would found a cause of action only if there was a contract. This was not to say, however, that the plaintiff had no remedy. As far as Stamp, L.J. was concerned the position of the builder was irrelevant. For his Lordship the all important factor was the distinction pointed out by Sachs, L.J.[58] between a statutory body and a private body. Because the council is a statutory body with statutory powers designed to protect, *inter alia*, subsequent purchasers like Mrs. Dutton, it is under a higher duty than a private builder whose main aim is to make a profit. But might one not equally argue that since the builder is more interested in his own profit he ought to be under a higher duty to do a workmanlike job?

Which of the approaches in *Dorset Yacht Co. Ltd.* v. *Home Office* discussed above is preferable is a difficult question involving consideration of the doctrine of precedent, of the proper function of the judiciary and of the place of the law of torts in a social context. Lord Dilhorne's approach seems to reflect neither theory nor practice.[59] As far as the approaches of the other Law Lords are concerned the important question is to what extent policy considerations should be paramount.

It is unrealistic to draw too sharp a substantive distinction between "legal" arguments and "policy" arguments. In the end all legal formulae reflect some policy whether or not they are mere masks of respectability to cover up the reality underlying them. More important is clarity, certainty and predictability in the law. To give no other reason for a decision than a bald assertion of "public policy" seems to open the way for uncertainty and lack of clarity and predictability.

From this point of view the best approach would be one which preserves some balance between respect for precedent on the one hand and policy considerations clearly enunciated and reduced to logical and easily applied propositions on the other. A proposition is none the less "legal" because it is openly

[56] At 483, Sachs, L.J. draws a distinction between statutory bodies whose prime concern is to protect certain classes of persons, and private individuals or bodies whose prime interest is their own pecuniary advantage. The implication seems to be that it is easier to find a duty in the former case than in the latter.

[57] (1972) 1 All E.R. 462 at 489-90.

[58] *Id.* at 483.

[59] Witness *Donoghue* v. *Stevenson* and *Hedley Byrne* v. *Heller*, to name the most obvious examples.

admitted to be based on community standards. Law is normative, policy is not; the difference lies in the effect, not in the substance. An appeal to law is an appeal to norms already established; and appeal to policy is a norm-creating process and provided the courts are allowed this norm-creating function the vital requirement is clarity, certainty and predictability in its exercise.

The potential effect of *Dutton's Case* is enormous. One can imagine its being used to found liability against designers of bridges, cars and buildings, and against inspectors of all types exercising statutory or contractual powers. But even if its scope is not extended, it will remain a leading case in the law of torts.

P. F. CANE, B.A., LL.B. (Sydney), Solicitor.

THE LIABILITY IN TORT FOR NEGLIGENT MISSTATEMENT: A TOOTHLESS LION?

The decision of the N.S.W. Court of Appeal (Asprey, J. A., Mason, J. A., and Taylor, A. J. A.) in *Presser* v. *Caldwell Estates Pty. Ltd., Southern Estates (Wollongong) Pty. Ltd., (Third Party)*[1] is another chapter in the chequered story of the application of *Hedley Byrne and Co. Ltd.* v. *Heller and Partners Ltd.*,[2] since that case was decided by the House of Lords in 1964.

The facts of the *Presser* case were these: In 1960 the firm of Caldwell Estates began to develop a fifty-acre lot owned by it at Balgownie, near Wollongong. The development required a certain amount of re-contouring and construction of roads, drains, kerbs and gutters. This work was basically under the control of a licensed surveyor, but Southern Estates, a real estate agent acting for Caldwell, had a certain amount of responsibility for it. Southern's duties included the obtaining of the Council's approval for the sub-division, the procurement of finance for the development, securing provision by the Water Board and sewerage, paying accounts, and deciding upon the number of allotments to be included for sale in each particular section, for which Southern was paid a $20 "management fee" in respect of each block sold, in addition to its ordinary commission.

In August, 1965, the plaintiff, Mr. Presser, commenced negotiations with Southern for the purchase of lot 46, Margaret Street. During the course of the negotiations, the plaintiff's wife telephoned one Abbott, a salesman employed by Southern, and asked him whether lot 46 had been filled.[3] Abbott did not know, but said that he would ask J. L. Robinson, a director of Southern. There was a conflict of evidence as to whether Abbott actually put this question to Robinson in so many words, but the trial judge found that the end result was that Abbott conveyed to the plaintiff's wife the answer, purportedly given by Robinson, that there was no filling on lot 46. The trial judge further found that, because of the information acquired from Abbott as to the absence of filling, the plaintiff elected to proceed with the purchase, for the purpose of erecting a dwelling on lot 46, and signed the contract on 7th October, 1965.

After the plaintiff's house was built, cracks started to appear in it. It transpired that lot 46 had been filled. Consequently, late in 1968 Presser sued

[1] (1971) 2 N.S.W.L.R. 471.
[2] (1964) A.C. 465.
[3] Meaning that soil had been artificially brought onto the lot to raise its level or to make it more level.