# LOCAL GOVERNMENT LIABILITY FOR SUBSTANDARD BUILDING

MARK ARONSON*

## I. INTRODUCTION

When it comes to consumer protection in the building industry, it is fair to say that the local government authority building inspector[1] has never been seen as being in the front line of the maintenance or improvement of building standards. Theirs is the secondary role of supervising others in an attempt to keep them honest. Even so, there is room for difference of opinion as to the nature of their responsibilities. Some would argue that their power to control or stop building carries with it a heavy responsibility, whether they like it or not. A variation of the same theme would limit this responsibility, so that it is owed only to those 'reliant' or 'dependent' upon the government regulators doing their job properly. The material elements of reliance or dependence are themselves matters of debate.

Others would reject any notion of local government authority liability to the intended beneficiaries of their regulatory activities. The proponents of no

* Associate Professor of Law, University of New South Wales, and Consultant to Price Brent, Solicitors.

1 I use the term 'inspector' in this article to include all officials who have statutory power to inspect, check or certify any stage of the design and construction process and whose dissatisfaction (upon such inspection) can result in orders against the builder or owner or in the failure of the project to proceed.

liability have several concerns. They want to increase the self reliance of builders, owners and occupiers. They are concerned with the often massive disproportion between a local government authority's lack of expertise and resources and its extent of liability.[2] Finally, they argue that government should not be held responsible when essentially private activities or investments turn sour.

This article has been prompted by two recent developments which have highlighted the need to rethink the existence, basis and extent of local government authority liability for their careless inspectors. The first is the decision of the House of Lords in *Murphy v Brentwood District Council*,[3] overruling *Anns v Merton London Borough Council*.[4] Briefly, *Murphy* decided that a local government authority's power to control matters of siting, design and construction of a building does not carry with it a common law duty to execute the power carefully so as to guard against purely economic loss sustained by a subsequent purchaser. It also decided that the purchaser sustains purely economic loss even where the building's defects have resulted in actual damage to the building, let alone where the defects have at the time of claim merely created the need to expend money on repair work. Finally, the case decided that the nature of the loss (and, in consequence, the absence of any duty of care) is still purely economic, even if repair work or abandonnment are urgently indicated in order to avoid injury to person or property.

The second development is the release by an industry group[5] of a Report and draft Bill which propose significant limitations on the liability of local government authorities (and others) for defective structures.

Both developments question the very existence, let alone extent, of local government authority liability for the purely economic losses which might flow from the failure of an authority to detect and stop substandard building.

This article will start with a brief examination of the leading cases. It will not conduct an exhaustive examination of the huge number of reported cases, but will concentrate largely on the few relevant decisions of the High Court and the House of Lords. This will be followed by an examination of the draft Report and its proposal for a Bill. It is submitted that the following conclusions can be drawn from the analysis which follows:

1. A property owner sustains purely economic loss where the defects in their building are at least in part attributable to the carelessness of a

---

2 Most reform proposals coming from industry groups include the proposition that a local government authority should be liable only for its own share of the blame. This would depart from the current procedure on contribution actions, where the plaintiff can look to a local government authority for 100 per cent of the damages, leaving the local government authority to an often meaningless contribution action against others whose fault was greater.

3 [1991] 1 AC 398.

4 [1978] AC 728.

5 The Australian Uniform Building Regulations Co-ordinating Council.

local government authority, if those defects have not caused harm to other property or to any person.

2. The characterisation of that loss as 'purely economic' does not in Australia necessarily mean that the local government authority should never be liable for the loss in negligence. This is particularly so where people's health or safety could be jeopardised by the authority's carelessness. It is also the case where the authority has done nothing to dissaude people generally from their assumption that the correlative of the authority's legal power to control building activities carries with it an acceptance of legal responsibility for exercising that control carefully.
3. The common law recognises a 'policy' defence where the reason for the local government authority's carelessness flows from a conscious political or budgetary decision by the authority as to how much resources it should allocate to the exercise of its powers to control building activities.
4. The proposals for legislation recently submitted to the Local Government Ministers' Conference go too far in offering complete protection from liability to local government authorities and anyone acting officially and in good faith. There are good arguments for those proposals which seek to abolish shared liability for purely economic loss, and which seek to stipulate a fixed limitation period for such loss. Apart from those changes, the common law should be left undisturbed.

## II. COMMON LAW DUTIES SUPERIMPOSED UPON STATUTORY FUNCTIONS

The nature of a local government authority's statutory duties, powers, functions and objectives is a natural starting point in any examination of questions relating to the existence and extent of a common law duty to act carefully. Whether a local government authority should have acted, and what it should do when it does act, are clearly questions whose answers turn to some extent upon the statutory context. Take, for example, a regulatory scheme whose sole purpose is to ensure that only locally manufactured materials are used. In such a context, it would be pointless to complain that the local government authority approved unsafe plans. No-one could reasonably expect, and therefore rely upon, the local government authority being concerned with issues of safety.

The plaintiffs in *Curran v Northern Ireland Co-Ownership Housing Association Ltd*[6] had purchased a house which had been shoddily renovated by previous owners with financial assistance from a statutory authority charged

6 [1987] AC 718.

with the provision of public funds for new building and renovation projects. The purchase itself had been made with assistance from the authority. The plaintiffs' claim against the authority in an interlocutory appeal to the House of Lords was that it had negligently approved funding for seriously substandard renovations, and that the plaintiffs' purchase had been made in the belief that proper standards would have been maintained. A claim against the authority as mortgagee had been struck out, and was not pursued in the House of Lords. Their Lordships held that the authority was also not liable for having funded the renovations, even though the authority was statutorily obliged to withhold funds for substandard work. Essentially, the authority was a specialist banker, with no real powers or responsibilities over the construction process. The maintenance of safety standards[7] was no part of the authority's statutory brief.

It does not logically follow, however, that where statutory power has been conferred to promote safety standards, there is a co-extensive common law duty of care qualifying the exercise of that power. As a matter of principle, the statute should be seen as providing only part of the context for determining the existence and extent of the common law duty of care.

One facet of the principle that the statute is contextually relevant but rarely determinative, is the proposition that the common law duty of care can co-exist with the statutory statement of the local government authority's responsibilities. That proposition was made in *Anns v Merton London Borough Council*,[8] and re-stated in *Sutherland Shire Council v Heyman*[9] and in *Murphy*.[10]

There are several practical examples of the capacity of the common law duty of care to co-exist with statutory responsibilities. One category consists of those cases in which a statutory authority has exercised a statutory power carelessly, causing (or worsening) a plaintiff's physical injury or property loss. An authority which actually exercises its statutory powers and inflicts injury by positive and careless acts is clearly governed by the common law duty of care. In a sense, the precise content of its statutory responsibilities is barely relevant[11] in such a case, which is concerned almost wholly with the factual interractions between the parties.

However, in cases alleging local government authority carelessness in approving defective plans or in supervising defective construction works, it can

---

7 Or, indeed, building standards. Being decided before *Anns v Merton London Borough Council* note 4 *supra* was overruled, *Curran* was content to note that the authority had no statutory duty to help ensure health or safety.

8 *Ibid* at 755-8.

9 (1985) 157 CLR 424 at 436-7 per Gibbs CJ, 458-9 per Mason J, 483-6 per Brennan J and 498 per Deane J.

10 Note 3 *supra* at 457 per Lord Mackay. The point was simply assumed in most of the *Murphy* speeches.

11 Unless the defendant raises the defence that the act of which complaint is made was either authorised by statute or committed in the course of formulating, or solely in consequence of the formulation, of non-justiciable 'policies' or 'discretions'. See M Aronson and H Whitmore *Public Torts and Contracts* (1982) ch 2.

be difficult to establish that the authority worsened (let alone solely caused) the plaintiff's position. If the local government authority made no misrepresentation to the plaintiff, then his or her case boils down to a complaint that the authority failed to protect them against the incompetence of another.[12] In that sort of case, one of the plaintiff's biggest hurdles will be to persuade the court that the authority had a common law duty to provide such protection.[13] Here, the precise detail of the local government authority's statutory obligations and powers could be critical, as part of the material to which the plaintiff points in establishing the necessary relationship of proximity between the parties. Deane J made the point thus in *Sutherland*:[14]

> In the present case, the Council's active connexion with the erection of the house was limited to the exercise of some of its statutory powers and functions with respect to buildings within its local government area. Those statutory powers and functions and their partial exercise provide the context and the essential content of the only relevant relationship between the Council and the respondents with respect to the house.[15]

## III. CHARACTERISING THE LOSS

The classic cases on local government authority liability for defective structures have all been brought by owners or long lessees of buildings which either have to be abandonned or are in need of major repairs. The buildings have all deteriorated due to major mistakes in siting, design or construction. They might, for example, have been built on land once used as a refuse tip, or on land subject to slippage. Or the designs for the foundations might have been inadequate, either because of the load to be borne, or because of the characteristics of the soil involved. Finally, the deterioration could have been due to the builder's failure to adhere to perfectly good plans. In almost every case, the plaintiff can argue no more than that the local government authority is only a secondary tortfeasor. The builder or architect is the primary cause of the loss. The nub of the complaint against the local government authority has been its careless approval of the site or plans, or its careless supervision of those

---

12 A builder, for example.

13 In *Sutherland* note 9 *supra* at 483-4 Brennan J noted that the court cannot, for mere reasons of policy, "superimpose" or "conjure up" a common law duty to act upon a statutory power which (properly interpreted) gives no private cause of action for damages for its breach. His Honour's remarks also seemed to encompass the case of an authority actually exercising its powers. However, he subsequently acknowledged that there is little difficulty in subjecting an authority's positive acts to the common law duty of care where the act causes or worsens loss.

14 *Ibid* at 498.

15 See also *ibid* at 434 per Gibbs CJ: "The respondents' action is founded on negligence, and not on breach of statutory duty, and the statutory provisions to which reference has been made are relied on not as the source of the Council's obligations, but as the setting in which its acts and omissions have to be considered."

involved in the construction process. Whatever the cause, none[16] of the cases to date has involved personal injury to anyone. Furthermore, in only one local government authority case[17] has *another* building been damaged by the defective structure.

In *Anns v Merton London Borough Council*,[18] the plaintiffs were all long lessees of residential units in a building owned by the original builders. Only a minority of the plaintiffs were original tenants. The others had acquired their interests by assignments. At the time each of them had acquired their interests, none had known (or had any way of knowing) that the building's foundations were shallower than the minimum approved (and therefore permissible) by the Council. The Council had approved good plans, but the builders had failed to follow them. That breach went undetected by the Council. The Council's lapse may have been because it had not exercised its power to inspect the foundations, or because it had conducted an inspection carelessly. The House of Lords held on an interlocutory appeal that the Council could in theory be liable under either scenario.

One of the difficulties with the *Anns* decision was to know how to fit it in to the more general principle that compensation in negligence for purely economic loss unassociated with property damage or personal injury is exceptional, usually being confined to cases involving the negligent provision of misinformation. In *Anns* itself, however, the issue was considered in only a few lines, in a passage in which Lord Wilberforce seemed to indicate that it could not sway the outcome, however resolved:[19]

> To allow recovery for such damage to the house [itself] 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.

There are several noteworthy aspects of that statement. First, his Lordship was apparently unconcerned with the issue of how to characterise the loss suffered by the *Anns* plaintiffs. Second, the reason for that lack of concern seems in part to be attributable to his Lordship's view that even if the loss was characterised as purely economic, the plaintiffs' success would follow "from normal principle" - a reference to the undemanding test of reasonable

---

16 This article is not concerned with cases where the local government authority's regulatory functions are irrelevant.

17 Namely *Rothfield v Manolakos* (1989) 63 DLR (4th) 449. Part of the unsuccessful claim in *D & F Estates Ltd v Church Commissioners for England* [1989] 1 AC 177 had been for the "cost of cleaning carpets and other possessions damaged or dirtied by falling plaster; £50": at 207. This was rightly regarded as "a trivial sum" (at 208), incapable of inclusion with a claim for the cost of renewing the plaster. No local authority was involved in this case.

18 Note 4 *supra*.

19 *Ibid* at 759 emphasis added.

foreseeability in *Donoghue v Stevenson*.[20] Third, it seems as if the factor which was critical to his Lordship was the imminent threat to the safety of persons or property presented by the building's instability. That factor marked the outer boundaries of the duty of care imposed by his Lordship upon the authority, measured the extent of damages for breach of that duty, and in some unexplained way, transformed the plaintiffs' loss from 'purely economic' to 'material, physical damage'. That is not, at this point, to deny the significance of the endangerment factor,[21] but only to assert that the potentiality of danger must logically (and practically) be distinguished from the fact of 'material, physical damage'.

The *Anns* characterisation of the plaintiffs' loss as something other than purely economic has been rejected by a majority in the High Court and unanimously in the House of Lords.

The House of Lords first cast serious doubts on the characterisation of the *Anns* losses in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*.[22] However, their Lordships were there constrained by the fact that leave to challenge *Anns* directly had not been granted in that case. Lord Keith observed that the losses in *Anns*:[23]

> were not recoverable as economic loss pure and simple, but as representing expenditure necessary to avert injury to safety or health.

The High Court was not so constrained in *Sutherland Shire Council v Heyman*.[24] Only Gibbs CJ accepted without reservation the *Anns* reasoning on the issue.[25] Wilson J preferred to reserve the question, but noted that it was:[26]

> arguable that the source of the loss was the weakened foundations of the house in ignorance of which the respondents paid more for its purchase than they would otherwise have done.

Mason J noted the common law's general reluctance to grant damages in negligence for purely economic loss, but added that such diffidence was misplaced in those categories of cases where there need be no concern 'about endless indeterminate liability'.[27] Whilst *Anns* raised real questions as to how to calculate the damages it held to be recoverable, it was always clear that *quantum* was not open-ended.

---

20 [1932] AC 562.

21 I will argue below that if the cause of action in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 is justified on the basis that the relationship between the parties was one of 'almost contract' (a frequently offered explanation), then the 'imminent danger' cases can likewise be justified as being 'almost physical'.

22 [1985] AC 210.

23 *Ibid* at 242.

24 Note 9 *supra*.

25 *Ibid* at 446-7.

26 *Ibid* at 471.

27 *Ibid* at 465.

Brennan J also noted the common law reluctance to compensate for purely economic loss caused by negligence. His Honour tended towards rejecting the *Anns* classification, because it raised "significant conceptual"[28] and practical[29] difficulties. The conceptual difficulties flowed from having to wait for actual and endangering damage to occur before the cause of action could be said to be complete.[30] His Honour noted that this could lead to a number of separate causes of action arising with each visible (and endangering) decline in the fabric of the structure. This, he said, would be inconsistent with the common law principle of limiting a plaintiff to only one action for all past, present and future losses flowing from a single breach of duty.[31] The practical difficulties were said to lie in the capricious results of the *Anns* insistence[32] on a showing of imminent danger to the occupant. His Honour asked why, if that requirement were retained, one should compensate the owner who does not occupy the premises, or the owner who will move out rather than effect repairs.[33] Whilst his Honour said that his rejection of the plaintiffs' case was based on factors other than a rejection of the *Anns* classification,[34] it does seem as if that factor was important.

Deane J stated that compensation for pure economic loss is "special".[35] The loss in the instant case was purely economic, according to his Honour, for a number of reasons. First, loss solely attributable to a defect in the foundations which existed from the moment of construction could not be called damage *to* the property, "since the building never existed otherwise than with its foundations in that state".[36] Second, even if there was 'damage' at the time of construction, the future purchaser or occupant could have no relevant interest at that stage.[37] If, to avoid that difficulty, the view was taken that the damage occurred at a later time, that would either have to be at the time of the plaintiffs' purchase, or (even later) when the plaintiff discovered the structure's defect. If the cause of action accrues at the former time, his Honour reasoned that the plaintiffs' real complaint was that he or she paid too much. If it accrues at the later date, then the complaint is that the property's value dropped by virtue of

---

28 *Ibid* at 490.

29 *Ibid* at 491-3.

30 Of course, if the cause of action accrued no later than the plaintiff's acquisition of the defective structure, it would have been obvious that the loss was purely economic. The 'actual damage' requirement in *Anns* was said to be a consequence of the local authority's duty (consistent with its statutory charter) to protect against risks to health or property.

31 The 'once and for all' rule: note 9 *supra* at 491.

32 Apparently necessary to sustain the characterisation of the loss as 'physical'.

33 Note 9 *supra* at 492-3.

34 *Ibid* at 493.

35 *Ibid* at 503.

36 *Ibid* at 504.

37 *Id.*

the discovery of the defect. On either theory, his Honour said that the plaintiffs' loss was purely economic.[38]

The House of Lords has expressed its indebtedness to Justice Brennan's judgment, both as regards the issue of general negligence methodology, and as regards his Honour's classification of the *Anns* loss. On the latter issue, the House of Lords first signalled its willingness to overrule *Anns* in *Curran v Northern Ireland Co-Ownership Housing Association Ltd*,[39] where the judgment of Brennan J was described as "particularly impressive in its reasoning".[40] It took another three years before that obvious invitation to challenge *Anns* directly found a suitable vehicle, in the case of *Murphy v Brentwood District Council*.[41]

Building plans submitted to the Council for approval in *Murphy* were defective, in that the plans for the foundations did not take sufficiently into account the problems associated with building on 'fill'. The plans were approved,[42] and the house subsided differentially, sustaining substantial damage. Almost no repair work was done. Instead, the plaintiff sold at a greatly reduced price to a builder who knew about the problems, and who moved in with his family without at any time carrying out any repair work. Several reasons were given, separately and cumulatively, for concluding that the loss should be classified as purely economic.

First, Lord Keith adopted[43] Justice Deane's *Sutherland* analysis, which had stressed the fact that the building had been born defective, rather than being damaged by something else. Also adopted was Justice Deane's argument that from the plaintiff's perspective, the loss was purely economic whether one viewed the loss as accruing at the time of purchase or at the time the defect became known.

Second, their Lordships rejected as unrealistic the so-called 'complex structure' theory as a possible basis for characterising the loss as physical. Under that theory, one part of a building could be considered as distinct from another part of the same building. The result in cases involving defective foundations would have been that the foundations caused physical damage to 'other property' (namely, the rest of the building), thereby avoiding entirely the

---

38 *Ibid* at 504-5. In other words, the building was 'born defective'. His Honour preferred the view that the loss occurred when the resale value of the property dropped, which would be when the defect became known. One commentator has summed up by concluding that the plaintiff's complaint is not that there is a defective structure, but that he or she has lost money because of the defect; the physical damage is the reason for suing for the economic loss: N Mullany "Limitation of Actions and Latent Damage - An Australian Perspective" (1991) 54 *Modern Law Review* 216 at 229.

39 Note 6 *supra*.

40 *Ibid* at 726 per Lord Bridge with the concurrence of Lords Fraser, Griffiths, Ackner and Oliver.

41 Note 3 *supra*.

42 By contractors. Whether the Council could be liable for its contractor's negligence, if any, was not pursued in the House of Lords. But see *D & F Estates v Church Commissioners for England* note 17 *supra*, which held that a builder was not liable for the negligence of its sub-contractor.

43 Note 3 *supra* at 468-9.

problems associated with claims for purely economic loss.[44] Their Lordships left open the possibility of distinguishing between different parts of a structure or chattel where different contractors[45] were responsible, or where the different part is a "distinct item" or an "ancillary item".[46]

Third, their Lordships attempted to support their conclusion that the loss was purely economic by rejecting the relevance of the 'imminent danger' factor which had been so important in *Anns* itself.[47] Unfortunately, the reasoning here was not entirely persuasive, amounting to nothing more than a bare assertion that once a latent defect in a building or chattel becomes patent, the defective building or product no longer represents a threat to any person or to any property other than itself. The reasoning was that any realistic owner would either repair or abandon the product or structure upon discovering its defect. Either way, the danger would pass. Lord Bridge was the most explicit:[48]

> ... once a chattel is known to be dangerous it is simply unusable. If I buy a second-hand car and find it to be faulty, it can make no difference to the manufacturer's liability in tort whether the fault is in the brakes or in the engine, ie whether the car will not stop or will not start. In either case the car is useless until repaired. The manufacturer is no more liable in tort for the cost of the repairs in the one case than in the other.
>
> * * * * *
>
> [Where a building's foundations are defective], once the defect is known the situation of the building owner is analogous to that of the car owner who discovers that the car has faulty brakes. He may have a house which is unfit for habitation, but, subject to the reservation I have expressed with respect to ruinous buildings at or near the boundary of the owner's property, *the building no longer represents a source of danger* and as it deteriorates will only damage itself.

It is unconvincing to assert that no danger exists once it is discovered. That is not to dismiss the relevance of the distinction between latent and patent defects, or between plaintiffs who know of a particular danger and others who do not. Nor is it to deny the legitimacy of the general approach of the common law, which is usually to deny a manufacturer's liability for loss caused by a defect patent to the plaintiff. But it is to argue that as a matter of common experience, danger does not disappear when the defect appears.

Perhaps more importantly, it is confusing to treat the question of whether there is a danger to person or property as being relevant to the issue of classification of the plaintiff's loss. It would, for example, be entirely logical to classify a loss as purely economic *and yet* compensate it because of the presence of an imminent danger to health or property. Claims based on *Hedley*

---

44 The theory was first mooted in *D & F Estates Ltd v Church Commissioners for England* note 17 *supra*. It was clearly inapplicable to that case, in which the only claim of substance was for the cost of replacing the defective plaster work.

45 Note 3 *supra* at 470 and 497 per Lords Keith and Jauncey respectively.

46 *Ibid* at 478 and 497 per Lords Bridge and Jauncey respectively.

47 *Ibid* at 465, 470, 475, 477-9 and 485.

48 *Ibid* at 477-9 emphasis added.

*Byrne*[49] used sometimes to be characterised as being 'almost contractual'.[50] Claims regarding the economic losses flowing from dangerous buildings could logically be treated as 'almost physical'. The mistake in either case would be to try and ignore the real problems in awarding relief, by deleting the 'almost'. Mason J made the point thus in *Sutherland*:[51]

> In this case it matters not whether the damage sustained by the respondents is characterised as being economic loss or physical damage. It is how the affair stands, viewed from the appellant's perspective, that is important in relation to a duty of care. The foreseeable consequences of a failure to inspect were physical damage to a particular building resulting from faulty foundations and the incurring of expenditure by a subsequent owner in rectifying the defects. To deny the existence of a duty of care solely by reason of the legal characterisation of the respondents' loss as economic - because the structure was flawed before they acquired property in it - is to ignore the significance of other circumstances in which the loss was sustained, circumstances which the appellant could readily foresee. One of the circumstances is that the respondents' loss reflects expenditure which averts personal injury to those who occupy the building.

By contrast, Brennan J said that:[52]

> It would have made no difference, in my opinion, if the respondents had shown that they had incurred expenditure on remedial work in order to avert injury to safety or health.

Despite the clear indications in *Sutherland*, some State court decisions continue to treat the losses as being other than purely economic.[53]

## IV. PROXIMITY, DANGER, OMISSIONS AND RELIANCE

Whilst the presence of imminent danger to person or property is irrelevant to the characterisation of the plaintiff's loss as purely economic, there is a case for its inclusion in the calculus of proximity.

It has been seen that Justice Mason's judgment in *Sutherland* acknowledged the relevance of the factor of 'imminent danger', regardless of how one characterised the plaintiffs' loss. One alternative would be to ignore that factor

---

49 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* note 21 *supra*.

50 For example, Lord Bridge spoke in *Murphy* note 3 *supra* at 481, of the relationships underlying the reliance tort as being "akin to contract". The force of the 'almost contractual' view of *Hedley Byrne* has diminished since the decisions of the House of Lords in *Smith v Eric S Bush* [1990] 1 AC 831 at 862, and *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 623, 628 and 641. It was pointed out in those cases that a *Hedley Byrne* duty of care could be imposed at common law irrespective of the defendant's wishes; it is therefore inaccurate to talk of the defendant's 'voluntary assumption of risk'.

51 Note 9 *supra* at 466.

52 *Ibid* at 489.

53 See *Brumby v Pearton* (unreported, Tasmanian Supreme Court, Crawford J, 15 August 1991) which reviews many of the cases, most of them unreported. In New South Wales and Queensland, however, the losses are treated as purely economic. See *Pisano v Fairfield City Council* (1991) Aust Torts Reports 81-126; and *National Mutual Life Association of Australia Ltd v Coffey and Partners Pty Ltd* (1990) Aust Torts Reports 81-057.

entirely, whilst at the same time treating the characterisation of loss as controlling. Lord Keith did that in *Murphy*,[54] with the result that he found himself endorsing the majority position in *Rivtow Marine Ltd v Washington Iron Works*.[55] The plaintiff in *Rivtow* was a crane operator who was notified by its manufacturers, the defendants, at the height of the logging season that the crane was dangerously defective. A similar crane had collapsed, killing a man. The defendants were held liable for not notifying the operator as soon as they knew of the danger. The delay had meant that the crane's 'down time' occurred at what should have been the plaintiff's most profitable season. But over the dissent of Laskin and Hall JJ, the Canadian Supreme Court held that the plaintiff had no cause of action in negligence for the cost of repairing the crane. Lord Keith admitted that *Anns*, which was to a considerable extent based upon the dissenting view in *Rivtow*, "is capable of being regarded as affording a measure of justice", but he could see no way of constructing a coherent set of limits to the extent of liability for purely economic loss if the endangerment factor was acknowledged.[56]

In effect, Rivtow's lost profits ended up being more important than their expenditure to avert a second fatality. Even the lost profits would not have been compensated if Rivtow had been notified as soon as the danger came to light. This result could no doubt be justified by pointing to the incentive it provides for timely warning by manufacturers to their customers. But if a warning is delayed because the manufacturer fears the costs of acknowledging the defect, will not an operator be tempted to delay repairs for fear of losing money? The temptation to live with the danger is obvious. The best that can be said for the decision is that it transfers, but does not extinguish, legal liability. If the risk eventuates, legal liability has been transferred from the manufacturer to the customer from the moment of notification.

The tort system in the United States is beginning to recognise the relevance of exposure to contamination before any physical injury occurs.[57] It awards compensation to plaintiffs who are able to establish that through the fault of the defendant, they are at significant risk of developing a substantial disease or injury, and are emotionally distressed as a result. The compensation is for the distress and for the costs associated with having to submit to regular medical monitoring, where that is medically indicated. Such monitoring is appropriate where the chances of successful medical intervention improve if diagnosis is

---

54 Note 3 *supra* at 478.

55 (1973) 40 DLR (3d) 530.

56 Note 3 *supra* at 472.

57 See H Feldman "Chances as Protected Interests: Recovery for the Loss of a Chance and Increased Risk" (1987) 17 *Baltimore Law Review* 139; M Axline "Navigating the Toxic Bywaters of the Industrial Age" (1989) 25 *Idaho Law Review* 459 at 467-8; and T Gordon and R Westendorf "Liability Coverage for Toxic Tort, Hazardous Waste Disposal and Other Pollution Exposures" (1989) 25 *Idaho Law Review* 567 at 582-4.

made early. At the time the plaintiff submits to the tests, no physical injury has been established.

In stark contrast with these United States cases is the following criticism by Lord Oliver of the effect of the decision in *Anns* to compensate where some material damage and an imminent danger to health or property have been established:[58]

> Thus it has to be accepted either that the damage giving rise to the [*Anns*] 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 ... - 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.

Any challenge to his Lordship's reasoning must start with a rejection of the assertion regarding the limiting role of *Hedley Byrne*. He was in substance asserting that *Hedley Byrne* represents the only common law exception to the common law principle refusing to award damages in negligence where the loss is purely economic. A similar view was expressed by Lord Keith when he said in *Murphy* that there are only two exceptions to the general principle, namely the *Hedley Byrne* cause of action, and the exception "turning on specialities of maritime law concerned in the relationship of joint adventurers at sea."[59]

Lord Bridge made no general assertion in *Murphy* of the common law's incapacity for growth beyond *Hedley Byrne*. But he did say that a builder's or local government authority's liability in negligence for pure economic loss can only be on a *Hedley Byrne* basis.[60] In the same case, Lord Oliver himself was prepared to concede that *Hedley Byrne* was not the only exception to the general principle denying negligence liability for pure economic loss. His Lordship pointed by way of example to the isolated cases dealing with cargo loss at sea,[61] people excluded as beneficiaries under a will because of the negligence of the testator's solicitor,[62] and, perhaps, chargees who lose their claim or ranking due to the negligence of the authority in conducting a search of the statutory register.[63] He concluded that the essential issue is not the categorisation of the loss (although that is important), but the 'proximity' of the relationship between the parties.[64] He acknowledged that in cases of pure economic loss, the proximity issue is decided "pragmatically", applying "perhaps arbitrary limits".[65]

---

58 *D & F Estates Ltd v Church Commissioners for England* note 17 *supra* at 213.

59 Note 3 *supra* at 468, citing *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265.

60 Note 3 *supra* at 480-1.

61 *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* note 59 *supra*.

62 *Ross v Caunters* [1980] Ch 297.

63 *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

64 Note 3 *supra* at 485-6.

65 *Ibid* at 486.

The near total dominance in the English cases of *Hedley Byrne* in the field of pure economic loss is a matter for serious concern, particularly in light of the recent refusal by the House of Lords to offer a clear definition of the material elements of a *Hedley Byrne* claim.[66]

Turning from the House of Lords to the Australian High Court, the position is not so restricted. That court has left itself more room for manoeuvre. Brennan J is the only judge who has not embraced the language and methodology of 'proximity' of which Deane J is the leading proponent.[67] Brennan J prefers what he calls an 'incrementalist' approach, an approach now endorsed by the House of Lords.[68] For those who regard 'proximity' as a useful touchstone in difficult or new cases, a claim for pure economic loss against a local government authority for the deterioration of a substandard building is not necessarily doomed just because *Hedley Byrne* does not apply. Nevertheless, the greater flexibility allegedly afforded by the proximity doctrine is (at its highest)[69] a matter of degree. Whether or not the development has been coincidental, the High Court's increasing resort to the proximity doctrine has been accompanied by a search for subsidiary theories which might have a more fixed content. The grand theories which were subjected to some extensive examination in *Sutherland Shire Council v Heyman*[70] were 'reliance', 'undertaking' and 'dependence'.

The plaintiffs in *Sutherland* had been put to considerable expense in repairing damage to their house caused by subsidence. It had subsided because the foundations were too shallow. If the building inspector had checked the footings for those foundations at the time they were excavated, he would probably have ordered the builders[71] to dig further. It was found, however, that there was no council inspection of the house until the frame was up, by which time it was too late to expect the foundation's deficiency to have been detected.

As in *Anns* itself, the plaintiffs had not stopped to think about the Council's role in the construction process when they had bought their house. Indeed, they had not even bothered to seek from the Council a statutory certificate that the building complied with all relevant requirements, or that if it did not, the Council would not insist on rectification. In the hands of a purchaser for value, such a certificate would have precluded any Council action against the building.[72] The failure to seek such a certificate was significant, and would

66 See *Caparo Industries Plc v Dickman* note 50 *supra* at 628 and 637.

67 *San Sebastian Pty Ltd v Minister for Environmental Planning* (1986) 162 CLR 340 at 367-9; *Hawkins v Clayton* (1988) 164 CLR 539 at 555-6; and *Gala v Preston* (1991) 172 CLR 243 at 259-63.

68 See *Caparo Industries Plc v Dickman* note 50 *supra* at 618, 628, 633-4; and *Murphy v Brentwood District Council* note 3 *supra* at 461.

69 In *Gala v Preston* note 67 *supra* at 262-3, Brennan J denied that his rejection of the 'proximity' criterion involves rejecting "the desirability of developing the law of negligence".

70 Note 9 *supra*.

71 Retained by the plaintiffs' predecessors in title.

72 See s 317A *Local Government Act* 1919 (NSW).

probably be regarded by most conveyancing solicitors as highly imprudent. Imprudent or not, it certainly showed that the plaintiffs had not 'relied' on the Council inspector doing his job properly, unless the concept of reliance is gutted of any real meaning.

Gibbs CJ was in substantial agreement with almost all of the *Anns* reasoning. He even agreed with the *Anns* proposition that a local government authority could be liable for a failure to exercise its statutory discretion to inspect the foundations, if the authority had not properly[73] exercised its discretion when deciding[74] not to inspect. The plaintiffs lost in the eyes of the Chief Justice because they had produced no evidence that the Council's 'inaction option' had indeed been improperly exercised. His Honour's only point of departure from *Anns* was that he doubted that that case had given sufficient consideration to the problem of finding a causal link between the plaintiffs' loss and the defendant's non-feasance. The distinction, he said, between causing a loss and failing to prevent it is "basic".[75] Wilson J concurred with the Chief Justice, except on the issue of characterisation of the plaintiffs' loss, which he preferred to reserve for future consideration.

The remaining judgments were given by Mason, Brennan and Deane JJ. They all expressed fundamental disagreement with *Anns* on a number of points. They shall for that reason be called the 'majority' judgments, although, of course, all five judgments concurred in the result.

The majority rejected the *Anns* thesis that there could be liability for failing to inspect the footings simply by establishing that the authority's decision not to inspect had been "improperly: exercised.[76] The imposition of a common law duty to assist others was said to be exceptional. Deane J went further, by explicitly rejecting the proposition that there could have been liability based simply on proof that a careless inspection of the footings had taken place. His Honour would have regarded that situation as merely another variation of non-feasance, because what was critical, he said, was whether (having inspected and discovered a defect) the authority was under any duty to warn the builder or owner.[77] According to his Honour, if there was no duty to provide help by

---

73 His Honour was probably here using 'properly' as a synonym for 'validly'; that was the sense intended in *Anns* itself.

74 Either generally or in relation to the particular site in question.

75 Note 9 *supra* at 445.

76 *Ibid* at 465 per Mason J, 479-81 per Brennan J, and 502 per Deane J.

77 *Ibid* at 503. Brennan J seemed to advert to that possibility at 487-8 when he said (emphasis added): "The damage of which the respondents complain is structural damage to the house. Unless the risk of that damage was created or increased by some act done by the Council, the Council was under no duty to inspect the foundations, or to discover that the footings were constructed on unstable or insecure foundations *or to tell the builder on what foundations the footings should be constructed or to enforce the prohibition on occupation of the building*." Similarly, Mason J stated that proof only of a careless inspection would not suffice for the plaintiffs. They would have to show that that inspection was the cause of their loss, and this could be shown only by proof of their conscious ('specific') reliance on the results of the inspection; see at 467.

conducting an inspection, there could be no duty to follow the job through by reporting, just because an inspection is made, unless, of course, the authority's intervention had[78] worsened the situation. It will be argued below that the authority's intervention will often compound the problem from the owner's point of view.

Justice Deane's reasoning regarding omissions was similar to that of the majority in *East Suffolk Rivers Catchment Board v Kent*,[79] decided almost 45 years before *Sutherland*. An agency with no duty to render assistance had in that case botched its voluntarily assumed task of draining the plaintiff's flooded land. It had taken them 178 days to do a job which should have been finished within 14 days. The plaintiff's difficulty was that there was no evidence that the agency had materially worsened things, or that they had dissuaded the plaintiff from undertaking alternative operations. It is submitted that the decision in favour of the agency in that case is not a compelling precedent in cases against local government authorities if the plaintiff can actually establish that a careless inspection has taken place. An inspection is a very different procedure from an attempt to drain a farmer's land. Whether performed by a public or a private agency, one of the major outcomes of an inspection is the rendering of an opinion to those interested. The mere existence of an expert opinion can obviously influence people. It is therefore difficult to apply *East Suffolk* to the cases where a building inspection has taken place, because it is not easy to say of such cases that the inspection has not worsened the plaintiff's position.[80]

Whether Deane J was correct to treat the careless inspection as simply another variant of 'pure omission' is an important issue. In many of the cases in this area, the plaintiff can prove that an approval was carelessly given,[81] or a careless inspection was conducted. Whilst it might be unreasonable to expect a local government authority to inspect or check all sites or plans, it is not unreasonable to place some weight on an inspector's opinion where he or she has actually intervened.

The *Sutherland* majority held against the existence of a duty to inspect (or, in the case of Deane J, to warn) because the relationship between the parties lacked any ingredient of what was variously described as 'reliance', 'undertaking' or 'dependence'. Without at least one of these ingredients, they said, there could be no basis for imposing upon the defendant an affirmative duty to help prevent loss to the plaintiffs. Unless there were such an affirmative duty, the defendant's omission could not be said to be causally related to the

78 Whether by words or deed.

79 [1941] AC 74.

80 Mason J cast doubt on *East Suffolk's* reasons, apparently on the bases that it should not be seen as an authority on the issue of causation in 'omission' cases, and that it failed to take into account the possibility of basing liability on the relationship of 'dependence' between the plaintiff and the government agency. See especially note 9 *supra* at 469-70. Brennan J approved the result of and the reasoning in *East Suffolk* at 479-80.

81 As in *Murphy v Brentwood District Council* note 3 *supra*.

plaintiffs' loss. All three judges stressed that the duty to protect a person from the carelessness of that or a third person is exceptional, and is not triggered simply by a finding that without such protection, loss was reasonably foreseeable. According to Brennan J:[82]

> If foreseeability of injury were the exhaustive criterion of a duty to act to prevent injury occurring, the "neighbour" of the law would include not only the Biblical Samaritan but also the Priest and the Levite who passed by the injured man.

The *Sutherland* majority were at pains to confine their rejection of a common law duty to inspect to the typical case involving the local government building inspector. They pointed out that in other situations, there might be a common law duty to act to prevent loss to others. Mason J noted that when Parliament confers discretionary powers on agencies, there is generated "a public expectation having regard for the purpose for which they are granted that they will be exercised".[83] His Honour said that that expectation can, 'in appropriate circumstances', form the basis of a common law duty to act.[84] In a separate passage, his Honour pointed out that in some areas, a government agency can be liable for 'mere omissions' because the government has assumed general responsibility:[85]

> On the other hand, it has been recognised that where the government has supplanted private responsibility, as in the case of air traffic controllers, general, rather than specific, reliance may be sufficient to generate liability ... This approach was adopted in relation to the inspection and certification of civil aircraft ..., where the [United States Supreme Court] pointed out that the public generally depends on the government properly to inspect aircraft and that this justifies the imposition of a duty of care ...

His Honour concluded that this basis of liability would apply only to those situations beyond the capacity of private individuals:[86]

> ... there will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the authority) a realisation that there is a general reliance or dependence on its exercise of power ...

In his Honour's nomenclature, the above basis of liability could be described as 'general reliance', in which it is unnecessary to establish that the plaintiff has consciously considered or assumed anything regarding the performance by the

---

82 Note 9 *supra* at 478.

83 *Ibid* at 457.

84 *Ibid* at 457-8.

85 *Ibid* at 462.

86 *Ibid* at 464. See also *Hawkins v Clayton* note 67 *supra* at 576, where Deane J also spoke of 'dependence' as a possible basis of a duty of care in cases of pure economic loss.

defendant of its statutory functions. He held that the *Sutherland* plaintiffs had failed to establish liability on that basis:[87]

> Moreover, the respondents did not by evidence or argument at any stage of the proceedings advance a case of general reliance or dependence stemming from the existence of the legislative regime in Part XI of the Act. No doubt this approach reflected a recognition of the obstacles which such a case would encounter. An intending purchaser of a building can apply for a certificate under s 317A and make inquiries of a council for information concerning the erection of a building and the inspection of it which the council has made. He can, if he wishes, retain an expert to inspect the building and check its foundations - a task which I assume to be within the competence of an appropriate expert. These considerations would complicate the presentation by a person in the position of the respondents of a case based on general reliance or dependence.

If one puts to one side the judgments of Gibbs CJ and Wilson J, on the ground that they were based on an acceptance of *Anns* which did not find favour with the majority, Justice Mason's theory of 'general reliance' goes further than the other *Sutherland* judgments in postulating possible bases of local government authority liability for inaction.[88] It is worth noting that it was, to a considerable extent, based on the view that the public character of the defendant could at times be a good reason for imposing liability for omissions where none would be imposed upon a private defendant.[89] Brennan and Deane JJ, on the other hand, imposed no higher liability because of the defendant's public character, and stated that there could be no liability here for a mere omission.[90]

The New South Wales Court of Appeal has, by majority, adopted the theory of general reliance.[91]

Justice Mason's theory of 'general reliance' was directed to the plaintiffs' arguments that there had been a careless inspection, or that the authority was negligent for not inspecting. An alternative basis of liability would focus on what Mason J called 'specific reliance', a doctrine akin to the *Hedley Byrne* cause of action. In this area, the majority judgments were all alike, and were all more generous to potential plaintiffs than the *Murphy* judgments in the House of Lords.

It was obvious that the *Sutherland* plaintiffs could not establish that they or their predecessors in title had consciously relied on anything said or done by the local government authority. They might have assumed, in a hazy sort of way, that the authorities had exercised their powers diligently and properly, although there was no evidence on the point. However, any such assumption would have

---

87 Note 9 *supra* at 470-1.

88 Cf *Hawkins v Clayton* note 67 *supra* at 596-7, where Gaudron J preferred the term 'reasonable expectation' to 'reliance' because in her Honour's view, the former term encompasses the situation where "a reasonable expectation ... would arise if he turned his mind to the subject ..."

89 See for example note 9 *supra* at 468.

90 *Ibid* at 479-80 and 484 per Brennan J and 502 and 509-10 per Deane J.

91 *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, especially at 330-1 per McHugh JA (as he then was).

been insufficient to establish a case of conscious (or in Justice Mason's terms, 'specific') reliance. It would have been unreasonable to impose liability on the authority simply on the basis of a silent, uncommunicated assumption. Conscious reliance was necessary. Even then, there would be no liability for 'specific reliance' unless the defendant had done or said something to induce or encourage that attitude by the plaintiff. In other words, the duty based on specific reliance amounts (in this context, at least) to a duty not to mislead, usually in the course of an interactive relationship between the parties. The gist of the complaint is not that there was a careless inspection, but that the plaintiff acted reasonably on the contrary belief because of some positive act or statement of the authority.

The majority acknowledged that there might be several ways in which an actionable misunderstanding might be caused by the local government authority. The most obvious ways would involve direct communications between the parties, either in response to a request for information or by way of the provision of a statutory certificate.[92] Liability here is for direct misinformation.

The majority stated that specific reliance could also be established in the absence of a direct communication between the parties if the defendant had held itself out more generally as a reliable inspection agency. Justice Mason's reasoning was typical:[93]

> And then there are situations in which a public authority, not otherwise under a relevant duty, may place itself in such a position that others rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action. Such a relationship has been held to arise where a person, by practice or past conduct upon which other persons come to rely, creates a self-imposed duty to take positive action to protect the safety or interests of another or at least to warn him that he or his interests are at risk ...

Deane J reserved for future consideration the possibility that a local government authority could be liable where a plaintiff has consciously given weight to an internal report by an inspector to the authority.[94] His Honour also seemed to countenance a reliance duty to protect the plaintiff "where the defendant had induced or encouraged such reliance or (depending upon the particular combination of factors) was or should have been aware of it".[95]

The majority's recognition that the defendant can be liable for misleading the plaintiff in the absence of direct communication between the parties goes further than the House of Lords decision in *Murphy*, which had made no

---

92 Note 9 *supra* at 470 per Mason J, 486 and 494 per Brennan J and 509-10 per Deane J.

93 *Ibid* at 461. See also Brennan J at 486: "By inducing reliance on the continued performance of its statutory functions, a public authority may create or increase a risk of damage should the function be discontinued without notice".

94 *Ibid* at 499.

95 *Ibid* at 508. See also *Hawkins v Clayton* note 67 *supra* at 576, per Deane J: "[The elements in pure economic loss cases] will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two: ... *Sutherland* ..."

concession to the essentially different factors which can apply in the public arena.[96]

At the State level, there are several decisions finding the reliance element to be proved even though the local government authority communicated only with the plaintiff's predecessor in title.[97]

The *Murphy* judgments were driven in part by three related factors. First, a builder's liability for the purely economic loss flowing from a defective (even dangerous) building can sound only in contract or in *Hedley Byrne*.[98] Second, a local authority's liability could be no higher than that of a builder.[99] Third, it is important that the common law keep a tight restraint on tortious recovery for pure economic loss, for fear of opening a Pandora's box of product liability.[100] That is why their Lordships were concerned to limit reliance based liability to a restricted view of *Hedley Byrne*. It will be recalled that the plaintiff in *Murphy* had complained that the local government authority had carelessly approved bad plans, and that their Lordships stated that the approval process could not, on the facts in that case, have given rise to a *Hedley Byrne* claim. It seems that *Hedley Byrne* was held to be inapplicable because the plaintiff had not consciously relied on the inspector's opinion. The judgments provide no firm answer to the question whether the statement that there was no 'reliance' was thought to follow from the fact that all communications with the authority had been by the plaintiff's predecessor title.[101] However, it would seem to follow from the general denial of liability in the builder to an original owner that their Lordships would have reached the same conclusion whether or not the plaintiff was the original owner. It would appear that what prevented the case from being one of 'reliance' was that the plaintiff had not consciously considered the defendant's opinion.[102] The question still remains, however, whether the House of Lords would have viewed the matter differently if the plaintiff had given thought to the inspector's view. Would the answer then turn on whether the

---

96 See *Caparo Industries Plc v Dickman* note 50 *supra* especially at 642, where there was a clear statement that *Hedley Byrne*'s applicability to cases where the negligent misstatement was not made for and communicated directly to the plaintiff should be exceptional.

97 The cases are reviewed in *Brumby v Pearton* note 53 *supra*.

98 Their Lordships approved the results in *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1 and *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, but only on the basis that they were *Hedley Byrne* claims. See note 3 *supra* at 466 and 481. *Department of Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499, decided on the same day as *Murphy*, held that a builder cannot be liable in negligence for defective work unless *Hedley Byrne* applies, where there is no personal injury or damage to other property.

99 Note 3 *supra* at 469, 479, 483, 489-90 and 498.

100 *Ibid* at 469, 492 and 498.

101 *Ibid* at 481 and 483.

102 *Ibid* at 483, where Lord Oliver adopted the reasoning of Lord Salmon in *Anns*, to conclude that the case did not involve reliance. Lord Salmon in his turn had relied solely on the plaintiffs' failure to have thought about the Council's role.

inspector (or his employer) had actually communicated to the plaintiff, rather than to his predecessor in title?

It has been seen that the High Court was prepared to countenance a 'reliance' tort outside the confines of *Hedley Byrne*. That should leave room for liability flowing from careless approvals or inspections, although not usually from a failure to inspect. The big obstacle, however, to recognition of liability for careless inspections is Justice Deane's *Sutherland* statement (discussed above) that a careless inspection is no different from a complete omission to act. It will be recalled that his Honour's view was that the critical issue was whether, having noticed that the foundations were too shallow, the inspector should have warned the builders or the owner. It is submitted that his Honour would in principle be bound to reach a different conclusion if the evidence showed that an inspection was always followed by a warning (or other notice) if anything adverse was noticed, and showed a pattern of reliance by owners on the inspector's opinion. In such a case, the inspector's opinion would be tantamount to an approval.[103] Approvals consciously and reasonably relied on must surely create the potential for liability in Australia, if it is reasonable in the circumstances to expect the local government authority to be aware of the likelihood of such reliance.[104] That certainly seems to have been the view of Mason J in *Sutherland*. Indeed, his Honour said that where approval is confirmed by the provision of a certificate, *Hedley Byrne* itself applies.[105] It also seems to have been the view of Brennan J.[106]

The High Court's use of the proximity doctrine, therefore, has not only blunted the significance of the fact[107] that the plaintiff's complaint is of an omission to act. It has at the same time blunted the significance of the fact that in cases against local government authorities over defective buildings, the claimed losses have so far only been economic. Even claims for purely economic losses are dealt with under general negligence principles (particularly the proximity principle), recognising the importance of the nature of the loss, but refusing to be governed by a strict application of *Hedley Byrne*.[108] It now remains to look at how the proximity doctrine can cope with the presence of danger.

---

103 Cf *Shaddock & Co Pty Ltd v Parramatta City Council* [No 1] (1981) 150 CLR 225. See also *Hawkins v Clayton* note 67 *supra* at 593.

104 It is interesting to note the following statement of Deane J in *Hawkins v Clayton ibid* at 579, made in the context of a discussion as to when there is a positive duty to act to prevent pure economic loss: "*Apart from cases involving the exercise of statutory powers* or where the person under the duty has created the risk ..." the duty to act "commonly" follows from "an assumption of responsibility and reliance" (emphasis added).

105 Note 9 *supra* at 466-7.

106 *Ibid* at 485-6.

107 Where that is the case.

108 Deane J stated in *Sutherland* note 9 *supra* that general negligence principles govern cases of "pure omission" (at 501-2) and "pure economic loss" (at 507-8). See also *Hawkins v Clayton* note 67 *supra* at 594-5 per Gaudron J.

It has been seen that the nature of the plaintiff's loss cannot be said to be 'physical' or 'material' simply because the defendant has created the potential for danger. The ruling to the contrary in *Anns* was always regarded as the major Achilles heel of that case. In any event, the *Anns* requirement of imminent danger to person or property brought with it a host of other problems, quite apart from the issue of how to characterise the loss. The requirement could prove capricious, turning on how long the danger lasts, whether it can be said to exist when it is not manifest, and how serious a risk has to be before it can be called an imminent danger. In this last respect, it has to be said that one suspects that the endangerment element required by *Anns* had become a work of fiction. The same element created a host of limitations problems, as courts were forced to decide whether the plaintiff's cause of action accrued at the outset (if the structure was "doomed from the start"),[109] from the moment the property was purchased, from the moment the danger was discovered, or from the moment it was discoverable or reasonably discoverable.[110]

It is submitted, however, that it can still be relevant to take note of the fact (where that is the case) that the defendant has helped create a situation involving serious danger to person or property. It should not be viewed as a material element in the cause of action, because that brings so many problems with it. It could be legitimate, however, to say that the creation of serious risks to person or property should be viewed as a counterbalance to set against the law's traditional reluctance to compensate for purely economic loss. In the classical case of pure economic loss, the investor has taken a risk which has materialised, so that the investment has turned sour. Only money is at stake. But if the lives of third parties are at stake (as in *Rivtow*),[111] or their property, it does seem callous to disregard them and concentrate only on the plaintiff's interests. It is submitted that if this reasoning is considered acceptable, the proximity doctrine is broad enough to accomodate it.

It is submitted that in most cases, the danger pleaded by the plaintiff would be more accurately (if more dramatically) described as heart-break. The striking feature of most of the reported claims against local government authorities for defective buildings is the smallness of the amount claimed.[112] These are not usually cases where developers or investors have taken a worse risk than they thought. Nor are they cases where the recognition of one claim with respect to a building would usher in a range of claims by others with respect to the same structure, for an indeterminate amount.[113] They are cases where the plaintiffs would not view themselves primarily as investors. They are

---

109 See Gaudron J in *Hawkins v Clayton ibid* at 599-600.

110 See Mullany note 38 *supra*.

111 See above.

112 Writing in 1982, C Harlow *Compensation and Government Torts* p 50 reported that one leading insurer paid out £1.4m for 350 claims.

113 *Sutherland* note 9 *supra* at 465 per Mason J.

people most dependent on the help of others, who quite reasonably expect Councils to assist in an effort to cut back on conveyancing costs. None of that can easily be translated into a rule which limits the cause of action to the individual home owner, or to owners of dwellings.[114] But it does serve to gainsay the common law's natural reluctance to get involved. At the very least, it shows that it can be reasonable for the plaintiff to have placed great weight on the opinion of the inspector.

## V. THE PUBLIC CHARACTER OF THE DEFENDANT

I have argued elsewhere[115] that rule of law principles usually require the courts to disregard the fact that the defendant is a public agency, funded by the tax or rate payer. Suits against government are usually best dealt with by giving the government no special advantage. However, there will be some situations where the public character of the defendant or its functions are inescapable.

Negligence actions call upon the courts to imagine what a reasonable person in the defendant's position would have done. It is not appropriate for a court to make that judgment where the dispute concerns essentially political choices made by government. A court which second guesses those choices ignores the separation of powers, and thereby devalues its own currency. The courts will sometimes explain their refusal to review those choices by saying that the issue is non-justiciable. Used in that sense, the term can apply only where government is a party, because it is grounded upon the doctrine of the separation of powers.

There is a second sense of non-justiciability. It is inappropriate for a court to review large scale policy decisions regarding the allocation of scarce resources. The adversarial system is ill equipped to deal with such disputes, partly because of the sheer size and complexity of the issues at stake, and partly because they so often come down to a question of how to rank the competing claims of different groups in society. Once again, the judicial reluctance to get involved in these sorts of cases can be summed up by the term 'non-justiciable'. When used in this context, it should be noted that the term can apply to public and private defendants alike.[116] However, it is more likely to apply in the case of

---

114 Note, however, the House of Lords decisions which allow the house purchaser to recover compensation from the negligent surveyor who writes a report for the lender (*Smith v Eric S Bush* note 50 *supra*), and prevent the shareholder from recovering damages from the negligent auditor whose report to the audit subject misrepresented the value of the investment (*Caparo Industries Plc v Dickman* note 50 *supra*).

115 Aronson and Whitmore note 11 *supra*. See also P Hogg *Liability of the Crown* (2d ed, 1989) ch 6; and Ontario Law Reform Commission *Report on Liability of the Crown* (1989) pp 12-13.

116 See, for example, *E v Australian Red Cross Society* (1991) 99 ALR 601 at 665-6 and 671-2, where Wilcox J expressed the difficulty a court has in deciding whether a non-government blood bank was unreasonable in its decision not to adopt a screening process which would "overscreen", thereby diminishing the amount of safely usable blood by almost 5 per cent.

government defendants, because they are classically constrained by political decisions as to the allocation of scarce resources between many legitimate claimants for public protection or support.

An issue may be non-justiciable, therefore, either by reference to prudential judicial deference to the executive and political processes, or because of the relative incapacity of the courts to resolve the issue rationally and objectively. In government negligence cases, these senses of non-justiciability are often referred to as 'defences', variously called 'discretionary function', 'planning level' or 'policy level'. When a court uses that terminology instead of the term 'non-justiciable', the antitheses are usually said to be acts or omissions taken at the 'operational level'. This terminology has never been an entirely satisfactory substitute for the more general language of justiciability, because it tends to be taken too literally. There is no harm in the terminology, however, if it is taken only as expressing conclusions as to the justiciability of an issue.

The reference to the 'level' at which a decision, act or omission occurs can be misleading for two reasons. First, non-justiciable issues can occur at most levels of government. Second, it would be subversive of rule of law principles if an official's exalted status were to carry with it the suggestion of greater immunity from judicial oversight. The Supreme Courts of the United States[117] and Canada[118] have found it necessary recently to repeat that the 'discretionary function' or 'planning level' defence can apply even as regards lowly officials. What matters is the nature of the act or omission in question, not the rank of the government official. To be immune, their acts or omissions must be based on non-justiciable public policy criteria. As was said in *United States v Gaubert*:[119]

> Furthermore, even "assuming the challenged conduct involves an element of judgment", it remains to be decided "whether that judgment is of the kind that the discretionary function defence exception was designed to shield". *Berkovitz v United States* 486 US 531, at 536, 100 L Ed 2d 531, at 541, (1991). See *United States v SA Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* 467 US 797, at 813, 104 S Ct 2755, at 2764 (1984). Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort", *id*, at 814, 104 S Ct, at 2765, when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy'. *Berkovitz, supra*, at 537, 100 L Ed 2d 531, at 541.

The planning/operational dichotomy can also mislead by falsely suggesting that the courts can assess the reasonableness of everything done or omitted in the implementation of an immune non-justiciable decision. To the extent that there is no departure from the non-justiciable policy when it is put into

---

117 *Berkovitz v United States* 486 US 531 at 536, 100 L Ed 2d 531 at 540 (1988); and *United States v Gaubert* 111 S Ct 1267 at 1273 (1991).

118 *Just v British Columbia* (1989) 64 DLR (4th) 689 at 707-8.

119 Note 117 *supra* at 1273-4.

operation, no complaint can be entertained without in reality subverting the immunity accorded to the original decision.[120]

Perhaps the most common fallacy arising from an overly literal use of the terminology is the use of the terms 'policy' or 'discretionary function' as if they were simple equivalents of 'discretion' or 'judgment'. Used in this way, the terms embrace far too much, because they overlook the point of the inquiry, which is whether the impugned act or omission is justiciable. Most decisions, acts or omissions at issue in negligence cases involve an element of choice or judgment, with no component which can truly be said to be non-justiciable in either of the senses indicated above. In the United States, where the terminology of discretionary function, planning and operational levels originated, the terms are clearly not to be taken literally. They express conclusions reached after an explicit analysis of principles relating to the separation of powers.[121] Lord Keith used the terms in that sense when, in *Rowling v Takaro Properties Ltd*,[122] he acknowledged criticism of the distinction "between policy (or planning) decisions and operational decisions" as being "fine and confusing", but added:

> [Their Lordships] incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks: see especially the discussion in *Craig on Administrative Law* (1983), pp 534-8. If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.

Whilst his Lordship was in that passage adhering to United States usage, he was also making the point that whether government is to be subjected in a particular case to a duty of care can sometimes be decided on policy factors unrelated to issues of justiciability.

In other negligence cases, however, the debate as to whether an issue is justiciable has sometimes been framed in language which uses 'discretion' or 'policy' in a literal sense, thus overstating the reach of the terms.[123]

---

120 The split in *Just v British Columbia* note 118 *supra* (described below) was essentially over whether the majority had (as alleged by the dissentient) immunised only the policy decision, leaving actionable everything done to implement that decision.

121 It should be noted, however, that in determining the availability of the discretionary function defence, the United States Supreme Court looks first for a 'discretion' in the more literal sense of 'power to exercise a judgment'. Having found that, it then asks whether the discretion is 'grounded in social, economic and political policy'. See *Berkovitz v United States* note 117 *supra* at 536-7, 100 L Ed 2d 531 at 540-1 and *United States v Gaubert* note 117 *supra* at 1273.

122 [1988] 1 AC 473, at 500-1.

123 There are clear traces of this usage in *Anns* note 4 *supra* at 754-6, where Lord Wilberforce implied that decisions as to "the time and manner of inspection, and the techniques to be used" were 'discretionary'.

One natural consequence of this looser use of terminology has been to state that whether a duty of care is attached to a governmental function is all a question of degree - the more 'discretionary' a function, the less likely that its exercise will be subject to a common law duty of care.[124]

Another consequence (confined, so far, to the academic literature)[125] has been to doubt whether the existence of a discretionary or policy component to a government act or omission can ever be taken by itself as a basis for concluding that the relevant governmental function is immune from the common law duty of care. For these doubters, the policy/operational terminology is unnecessary, its concerns (to the extent that they are valid) being sufficiently addressed by 'normal' 'private law' principles.[126]

Professor Harlow seems to arrive at the same result via a different route.[127] She seems to argue that largely hidden political agendas[128] of torts and administrative law scholars explain why only the latter have taken seriously the problems associated with government torts.[129] Administrative lawyers, she says, have more socialists[130] within their ranks. They tend to marginalise reliance on court-based compensation systems, because of their greater concern with redistributive issues.[131] Harlow has long rejected deployment of the public/private dichotomy as a criterion for distinguishing between the applicability of different principles.[132] It seems that this is partly on the basis that the dichotomy serves to ignore the wider issues involved in many disputes, and partly because normal tort principles and practice can accommodate all 'policy' concerns. She therefore views the policy/operational terminology, as both unecessary and unduly restrictive.[133]

It must be pointed out, however, that all of the academic detractors of the terminology recognise the importance which should sometimes attach to the

---

124 This approach originated in *Anns ibid* at 754-5. See discussion in Aronson and Whitmore note 11 *supra* pp 69-73. It is endorsed by Gibbs CJ in note 9 *supra* at 438, 442 and 448

125 In *Rowling v Takaro Properties Ltd* note 122 *supra* at 500, Lord Keith expressed a greater need to examine the wealth of academic literature on the topic before offering any concluded judicial view. All cases adverting to the debate have expressed the difficulties in drawing the line between policy and operational matters. None, however, has rejected the exercise.

126 J Smillie "Liability of Public Authorities for Negligence" (1985) 23 *University of Western Ontario Law Review* 213; S Bailey and M Bowman "The Policy/Operational Dichotomy - A Cuckoo in the Nest" (1986) 45 *Cambridge Law Journal* 430.

127 Note 112 *supra.*

128 *Ibid* pp 10 and 33.

129 "Proceedings against the Crown merit about as many lines [in torts books] as do married women, and fewer than the subject of joint tortfeasors": *ibid* p 17.

130 Including herself: *ibid* p 38. According to Harlow, torts scholars are traditionally concerned only with the solution of issues of individual justice and are committed to doing that in a way which minimises state intrusion into the affairs of individuals: pp 12-13.

131 *Ibid* pp 12-13, 20 and 37-8.

132 C Harlow "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 *Modern Law Review* 241.

133 Note 112 *supra* pp 53-7.

fact that government is the defendant. Most would concede that it is an element relevant to a consideration of whether there is a duty of care, whilst two[134] would seem to confine it to a consideration of the standard of care.[135]

Whether one adheres to any particular terminology is unimportant, provided that there is a recognition that justiciability questions can sometimes arise when government is being sued for negligence. Whilst justiciability was not a problem in *Sutherland*, the judgments of Gibbs CJ,[136] Mason and Deane JJ gave ample recognition of the potential for these issues to arise in cases against local government authorities.[137] All three judgments used the planning/operational dichotomy and its associated language. Gibbs CJ adopted the reasoning of Lord Wilberforce in *Anns*, including its (at times) literal meaning of 'discretion', with the result that he endorsed his Lordship's proposition that acts or omissions can at the same time have both discretionary and operational characteristics, immunity attaching to the more discretionary acts or omissions.[138] Deane J referred to the immunity as protecting:[139]

> actions taken in the exercise of policy-making powers and functions of a quasi-legislative character ...

Mason J used slightly different language. His dichotomy was between 'policy making' or 'policy' decisions on the one hand, and 'operational' matters on the other. He said that 'discretionary' acts or omissions might fall within either category, and referred with apparent approval to the United States cases.[140]

Terminology aside, there were two issues in *Sutherland* on which those who discussed the problems of justiciability were divided.

First, Deane J indicated that whether a duty of care was negated by reference to what are here called criteria of non-justiciability was ultimately a question of statutory interpretation. That would be correct in the United States, where the abrogation of sovereign immunity[141] was statutory and partial, expressly excluding discretionary functions.[142] But in Australia, the matter has never before been regarded as a question of statutory interpretation. If it were, serious

---

134 Bailey and Bowman note 126 *supra* at 454-5.

135 The observation is made in W Keeton *et al Prosser and Keeton on the Law of Torts* (5th ed, 1984) p 1032, that the discretionary function defence is (in practice) undergoing a change. It is claimed that the defence has "come more and more to resemble the case of privilege or justification, so that many cases ostensibly decided on immunity may in fact be cases in which the defendant has not acted tortiously at all ...".

136 With Wilson J concurring as to this aspect.

137 Note 9 *supra* at 438-9, 442, and 447-8 per Gibbs CJ, 456-8 and 468-9 per Mason J and 500 per Deane J.

138 *Ibid* at 447-8, especially where his Honour stated that the Council inspector's failure to inspect the foundations at the same time as he inspected the frame "had an element of discretion".

139 *Ibid* at 500.

140 *Ibid* at 457-8 and 468-9.

141 28 USC s 1346(b).

142 28 USC s 2680(a).

problems might occur where the government contends that a non-statutory function is entitled to immunity as being non-justiciable.

The second division to emerge from *Sutherland* in this area involved the relevance (if any) of the *ultra vires* doctrine. *Anns* had insisted that the doctrine was relevant in two ways. First, the 'policy' or 'discretion' defence could not be available if it were shown[143] that the putatively negligent act or omission of the public authority was invalid according, it seems, to administrative law principles.[144] Second, it was said that the traditional common law reluctance to impose liability in negligence for complete inactivity could be avoided by showing that such inaction was due to a failure to exercise, properly[145] or at all, the discretion to do nothing.[146] Gibbs CJ adopted most of this reasoning in *Sutherland*, but expressed some difficulty with the causal link it assumed between the plaintiff's loss and the authority's complete inaction.[147] By contrast, Mason J stated bluntly:[148]

> And, despite possible indications to the contrary in *Anns v Merton London Borough Council* [1978] AC, at pp 755, 757-8, 760, there is no compelling reason for confining such a duty of care to situations in which a public authority or its officers are acting in excess of power or authority.

Speaking extra-judicially, Brennan J has stated:[149]

> Perhaps the significance of policy decisions taken in bad faith awaits further consideration.

The *Anns* linkage between invalidity and liability has always been troublesome.[150] Logically, most torts are governed by rules which are totally independent of any administrative law doctrine regarding the validity or invalidity of official acts. The central concerns of judicial review doctrine relate to fairness, participation, accountability, consistency, rationality and impartiality. These concerns are peripheral to tort law.

A doctor's liability for carelessly injuring a patient does not turn on the legality of his or her actions if, by chance, the doctor is acting in the service of the state. Natural justice, failing to consider all relevant factors, considering irrelevancies, error of law going to jurisdiction or appearing on the face of the record - there is simply no sense in referring to these doctrines. The same can be said of a local government authority's liability for negligent misstatement

---

143 The burden being on the plaintiff.

144 Note 4 *supra* at 755.

145 That is, validly.

146 Note 4 *supra* at 755.

147 Note 9 *supra* at 439 and 442 and 445-8.

148 *Ibid* at 458.

149 G Brennan "Liability in Negligence of Public Authorities: the Divergent Views" (1991) 7 *Australian Bar Review* 183 at 195.

150 Aronson and Whitmore note 11 *supra* pp 99-103. See also *Lonrho PLC v Tebbitt* [1991] 4 All ER 973 at 982 and 987, where Browne-Wilkinson V-C frankly confessed that although he was bound by authority to apply the ultra vires precondition to public authority liability in negligence, he could not understand why.

arising out of its certification functions. The only linkage between the two areas of law is more apparent than real. One ground of invalidity in judicial review doctrine is that the impugned official action was so unreasonable that the official must have misunderstood the nature or scope of his or her powers. Unreasonableness in that context, however, is a much stronger term than in the context of negligence law, where it is largely a question of fact. A court will not strike down an official act for unreasonableness unless there is no room for reasonable disagreement.

Government liability in negligence for the careless exercise of its statutory powers has never turned on first being able to establish that its act or omission was invalid. Even if one views[151] the 'planning' defence as a question of statutory interpretation, no valid point would be served by introducing the requirement now. Furthermore, there would be side effects on other interests if the requirement were to become established. How far would the finding of administrative invalidity affect the interests of strangers to the litigation? Would the assertion of invalidity have first to be determined in another court, or by a different procedure? Would different standing rules apply? Or different limitation principles? Would the court in a negligence action have as large a discretion as it would in a judicial review matter to decline to grant a remedy? Would all the grounds of judicial review be available to the plaintiff, even though they might not have affected him or her personally? Would the plaintiff's success in the negligence action mean that the house had to be pulled down, because it was not validly approved?

It has been said in some cases that the 'planning' defence is unavailable where the policy considerations upon which the defendant based the allegedly careless act or omission should not have been entertained at all. If the applicable rules leave prison officers, for example, no leeway as to the level of security they will adopt, then they cannot plead in aid of the planning defence that the security level which they in fact implemented was the outcome of their policy deliberations. Policy, or, at least, that policy, was not for them to consider.[152] Similarly, if the government defendant has taken action in bad faith, it would not be relevant to plead that the action could have been grounded on permissible policy considerations, giving rise to a good defence. These situations might at first look as if they are exceptions to the principle that it is irrelevant to consider the validity of the impugned act or omission. But they are not true exceptions. They amount to no more than the proposition that a defendant who pleads the 'policy' defence must have been allowed in law to consider and act on that 'policy'. The issue is then whether the policy was available to the defendant, not whether the defendant acted invalidly.[153]

---

151 With Deane J in *Sutherland.*

152 See *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

153 See also *Berkovitz v United States* note 117 *supra.*

It is frequently stated that the budgetary decisions of government, allocating scarce resources between competing claims, are quintessentially 'policy' issues immune from review in the negligence action. Gibbs CJ in *Sutherland*[154] seemed to indicate support for the proposition of Lord Wilberforce in *Anns*[155] that the following are all 'policy', at least if based on a consideration of where "to strike the balance between the claims of efficiency and thrift":[156]

> It is for the local authority ... to decide upon the scale of resources which it can make available in order to carry out its functions ... - how many inspectors, with what expert qualifications, it should recruit, how often inspections are to be made, what tests are to be carried out, must be for its decision.

His Lordship also indicated that if an inspection were made, questions as to its "time and manner, and the techniques to be used", are also 'policy' matters immune from challenge in the negligence action.[157] It is submitted that this is taking the 'planning' defence too far. It gives the governmental defendant an unfair advantage over a similarly placed private defendant. No private inspector would succeed in a defence, for example, that whether they inspected a building's foundations without leaving the car, or without bringing a measuring tape, were non-justiciable issues.[158] Mason J stressed that not all decisions were immune simply because they struck a "balance between the claims of efficiency and thrift".[159] He concluded:[160]

> The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.

That passage has been cited with approval by the Canadian Supreme Court in *Just v British Columbia*,[161] but applied in a way which seems to have aroused doubts, hinted at extra-judicially, for Brennan J.[162] The plaintiff in *Just* was seriously injured, and his daughter was killed, when an enormous boulder rolled down the snowy slopes above the adjacent highway and onto his car. It was alleged that a careful inspection would have detected the risk of such a thing

---

154 Note 9 *supra* at 438.

155 Note 4 *supra* at 754.

156 A puzzling antithesis.

157 Note 4 *supra* at 755.

158 In a subsequent passage in *Sutherland* note 9 *supra* at 447-8, Gibbs CJ gave his own example of the sort of considerations he thought would attract the 'planning' defence. They were all related to the local authority's overall budget planning.

159 *Ibid* at 468.

160 *Ibid* at 469.

161 Note 118 *supra* at 705-6.

162 Note 149 *supra* at 196-7.

happening, and that upon detection, the inspector would have sent in the rock scaling crew to remove the danger. There was no evidence of an inspection. There was only one rock scaling crew for the entire Province. The court rejected the government's argument that the court could not assess the wisdom of the system the government had devised for stretching its scarce resources, a system based to a considerable extent upon the efficacy of spot checks.[163] The court stated that the only decision which was immune as 'policy' was the decision to have a system. If that system was unreasonable, it could be reviewed in the court, albeit in the light of the limited staffing and resources available to the government. It is submitted that the effect of the decision is to downgrade 'policy' from a defence into a consideration for applying a more lenient standard of care.

## VI. REFORM PROPOSALS OF BUILDING INDUSTRY

A number of Reports have recently been produced under the auspices of the Australian Uniform Building Regulations Co-Ordinating Council. The Council is a body representing a number of interests in the Australian building industry, and has been reporting to the Local Government Ministers' Conference. The Conference is a standing committee of Commonwealth, State and Territorial Local Government Ministers, who have set themselves the daunting task of creating uniform standards, procedures and liability rules for the building industry around Australia. Whilst one of the Reports[164] speculates on the options for a legislative take-over by the Commonwealth Parliament of the whole field, that is an unlikely outcome. At the moment, the exercise seems to be proceeding on the basis that each jurisdiction will adopt mirror legislation.

Given the complexities of such a co-operative venture, the proposals which have been made so far cannot be viewed as having been finalised. This article, therefore, will canvass only the main features of the proposals so far as they relate to the liability of local government authorities for defective buildings. Furthermore, the examination will proceed on the basis that the draft *Building Bill* 1991 represents current official thinking more accurately than does an earlier publication called *The Model Building Act for Consideration by the States and Territories: Legislative Aims and Options.*[165]

Clauses 176 to 187 govern official liability. Their effect can be summarised as follows:

1. The Crown is bound by the legislation.[166]

---

163 As in *United States v SA Empresa De Viacao Aerea Rio Grandense (Varig Airlines)* 467 US 797, 104 S Ct 2755, (1984).

164 K Lovegrove (ed) *Constitutional Options for Uniform Legislation* (1991).

165 K Lovegrove (ed), 1991.

166 Cl 176.

2. The provisions cover four broad areas:

   (a) They limit liability.

   These provisions are described at points 3 and 4 below, and are not restricted. They offer protection from 'any action, liability, claim or demand'.

   (b) They abolish rights of contribution between co-defendants, and abolish the general right in tort law of a plaintiff to hold one co-tortfeasor liable for any part of the damages awarded against multiple tort-feasors.

   These provisions are described at point 5 below. They apply only to tort actions (including actions for damages for breach of statutory duty), and even then, only to the extent that the action is for "damages for economic loss and rectification costs resulting from defective construction of building work or other work carried out under this Act".[167] "Building work" and "construct" are widely defined,[168] but there are no definitions of "economic loss" and "rectification costs". The provisions "do not affect any right to recover damages for death or personal or bodily injury resulting from defective construction".[169]

   Having regard to the proposal[170] for mandatory insurance by building professionals, the net effect of the virtual abolition of contribution rights will be to introduce "project insurance". Each building would have a single policy, with the premium being divided between the building professionals according to a formula negotiated for each project.

   (c) They provide for a new limitation period.

   These provisions are described at point 6 below. They cover claims in contract, as well as in tort (which latter term includes an action for damages for breach of statutory duty). They also cover claims for the recovery of money recoverable by virtue of the Act.[171] Once again, the provisions do not apply to any right to recover damages for death or personal or bodily injury resulting from defective construction.[172]

---

167 Cl 179(1).
168 Schedule 4.
169 Cl 179(2).
170 See 2(d) below.
171 Cl 184, sub-cll (2) and (3).
172 Cl 184(3).

(d) They empower the making of Regulations for mandatory professional insurance for those in the building industry.[173]

3. Individuals acting officially[174] and in good faith are exempted from personal liability.[175] A person would be acting officially if their purpose was to execute "this or any other Act", or if they were exercising or intending to exercise their official functions.

4. Permit authorities, building certifiers,[176] and those exercising the functions of permit authorities are also to be protected from liability for their official acts if they act in good faith.[177] A body or certifier would be acting officially if they were exercising their official functions.

   This is a puzzling provision. There are good policy reasons for protecting staff from personal liability,[178] but it is rarely appropriate to offer a blanket immunity to the employing institution.

5. Those not acting in an official capacity are not offered the blanket immunities to be given to local government authorities, building certifiers and other statutory functionaries. But the provisions do confer substantial benefits upon them, provided they are all parties to the same action. Briefly, the plaintiff can look to each tortfeasor only to the extent of his or her share of the blame, whether the defendant is jointly or severally liable. Similarly, there are to be no rights of contribution between co-defendants.[179]

6. A 10 year limitation period is stipulated, "running from the date on which the cause of action first accrues". The accrual date is the date of issue of the "occupancy permit" or, if there is no such permit, "from the date of first occupation of the building concerned after completion of the work".[180]

   One is tempted to comment that with an eminently sensible clause such as this, the other protective provisions could be described as over-kill.

There are four general comments which should be made about the proposed scheme.

---

173 Cl 187.
174 My term.
175 Cl 177.
176 These are to be a form of privatised inspectorate.
177 Cl 178.
178 For New South Wales, see the *Law Reform (Vicarious Liability) Act* 1983 and the *Employees Liability Act* 1991.
179 Cll 180-182.
180 Cl 185.

First, one of the economic considerations articulated by the House of Lords in *Murphy*[181] is not yet applicable to Australia. Unlike the English practice, the typical Australian insurance policy for domestic dwellings does not cover subsidence damage.

Second, the complete exoneration to be given to officialdom goes much too far. No case has yet been advanced for reducing the exposure of local government authorities to actions for death, personal or bodily injury. The possibility was mooted in *Murphy*,[182] but it would be an enormous step. None of the concerns which have been articulated in the cases when discussing local government liability apply to claims for death or injury. The latter claims are not to compensate for an investment turning sour. The range of plaintiffs is not indeterminate. Most important, there is no guarantee that the plaintiffs in cases involving death or personal injury will be the same as those claiming for purely economic loss. The latter will be lessees or owners, who are better positioned to look after themselves. That cannot be said of those injured or killed.

Third, the effect of the proposal to immunise official bodies for anything done in good faith will be that individual building owners will have to bring pressure to bear on their own insurers to extend their coverage. That may be a welcome development, because first party insurance in this area is bound to be more efficient than a system based on tort liability. Nevertheless, one must question the ability of individuals to obtain the necessary cover. The capacity of local government authorities to obtain liability insurance, on the other hand, is well established.

Finally, it is bad policy to create a blanket exemption for government. One can sympathise with the view that the general tax or rate payer should not be called upon to underwrite the profits of developers and entrepreneurs. But it is difficult to give practical expression to that view without, at the same time, affecting 'little people'. In that term, I would include not only the owner-occupant of a dwelling, but the small time investor whose building represents an alternative to, or a hedge against, the sometimes doubtful performance of superannuation funds. In any event, the clause protecting official bodies from liability is not limited to claims for the recovery of purely economic losses.

It is therefore submitted that the proposal to offer virtually unlimited immunity to local government authorities should be dropped. Given the arbitrariness of drawing any lines around clauses protecting local government, it would be better to rely on the new limitation period combined with the greater flexibility of the common law. The common law can take individual circumstances into account when assessing the reasonableness of the plaintiff's reliance or dependence. Its 'policy' defence also allows authorities to design their overall regulatory activities and budgetary priorities without fear of being overruled by a court in a negligence action.

---

181 Note 3 *supra* at 472 per Lord Keith.

182 *Ibid* at 457, 463 and 492.