

in the policy that all payments either to or by the insurance company were to be made by banker's demand drafts on Toronto, Canada for Canadian dollars indicated that the principal place of payment was not in Hong Kong. Accordingly no estate duty was payable by virtue of s 10(b). If the policy had been executed as a deed, the debt would have been a specialty debt, and located for estate duty purposes wherever the policy was physically kept as at the date of death.

Thus it is possible to structure an insurance policy in such a way that the proceeds will not be subject to estate duty. The end result is an arrangement that avoids any estate duty liability to both the surviving partners and the deceased partner's estate but still provides for funds to go to the estate.

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## Commonwealth Courts and the Move Away from English Authority in Tort Law

### Introduction

A recent case in the Privy Council on appeal from New Zealand, *Invercargill City Council v Noel Gordon Hamlin*<sup>1</sup> (*Invercargill*), has moved away from leading English authorities in the area of tort law. The *Invercargill* case, and two other cases that have also lately come before the highest appellate courts in Canada and Australia, *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd*<sup>2</sup> (*Bird Construction*) and *Allan Bryan v Judith Maloney*<sup>3</sup> (*Maloney*), have underscored a dramatic division at the highest levels of the judiciary between these three jurisdictions and that of England and Hong Kong. It may be noted at the outset that the mere fact that the Privy Council and other Commonwealth jurisdictions have made this move is not itself remarkable. However, some of their reasons for so doing, and in particular the courts' emphasis on policy rather than doctrine to decide these cases, as well as their philosophy in determining duty of care issues, are novel. These factors, and their potential implications for the future position of English authority in Hong Kong, are the subject of this article.

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<sup>1</sup> [1996] 2 WLR 367, (1996) 78 BLR 78 (PC). Lord Lloyd delivered the advice of the Board, dismissed the appeal, and imposed liability upon the city council for negligent approval of defective foundations. The Court of Appeal decision is reported at [1994] 3 NZLR 513. The case has already attracted some comment: see Kavita Deobhakta at (1995) 7 Auckland UL Rev 1103 and Ian N Duncan Wallace, 'No Surprises in the Privy Council' (1996) 112 LQR 369.

<sup>2</sup> (1995) 121 DLR (4th) 193, (1995) 11 Const LJ 306, (1995) 74 BLR 1 (SCC).

<sup>3</sup> (1995) 69 ALJR 375, (1995) 11 Const LJ 274 (HC Aust).

## Background to the changes

The last half dozen or so years have seen some of the most dramatic changes in the area of negligence liability since the beginning of the modern era of tort law in 1932 with *Donoghue v Stevenson*.<sup>4</sup> The modern era began with the recognition in *Donoghue v Stevenson* of the 'neighbour principle' that is used by courts to determine when a duty of care exists. In that case, a duty of care was imposed upon a manufacturer in respect of personal injury arising through a defect in its manufactured product. Defects in the product were considered purely economic loss and not recoverable in negligence on traditional grounds. Later judgments expanded the principle by implication; in particular it was extended to include cases where the product inflicted injury on a person or caused damage to property *other than to the product itself*, and in which case, the manufacturer would be liable in negligence.<sup>5</sup> This distinction came to be referred to as that between *physical damage*, where compensation would be recoverable in tort, and *pure economic loss*, where no recovery would be allowed, as a general rule.

The only firmly established exception to the above general rule and when recovery would be allowed arises in the area of liability for negligent misstatement. The exception was formulated in the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*<sup>6</sup> where the House of Lords would have imposed liability for pure economic loss consequent upon reliance on negligently given professional advice *but for an exclusion clause*, provided a relationship of proximity existed between the person giving the advice and the recipient of it.<sup>7</sup>

Apart from the exception in the area of negligent misstatement, *for a time* it was thought that a further exception had been created regarding pure economic loss. That view developed from cases including *Dutton v Bogner Regis Urban District Council*,<sup>8</sup> *Anns v Merton London Borough Council*,<sup>9</sup> and later, *Junior Books Ltd v Veitchi Co Ltd*.<sup>10</sup> According to *Anns*,<sup>11</sup> decided by the House

<sup>4</sup> [1932] AC 562.

<sup>5</sup> *SCM United Kingdom Ltd v WG Whittall & Sons Ltd* [1970] 1 QB 337 and *Spartan Steel & Alloys Ltd v Martin & Co Contractors Ltd* [1972] 3 All ER 557.

<sup>6</sup> [1964] AC 465 (HL).

<sup>7</sup> The fact that recovery on this basis is clearly exceptional can be seen from the case of *Preston v Torfaen Borough Council* (1993) 65 BLR 1 (CA).

<sup>8</sup> [1972] 1 QB 273. In the *Dutton* case, the plaintiff sought compensation in the tort of negligence against the builder of a house and the local authority which had approved the plans for and inspection of it. The house was constructed but eventually cracks began to appear. The claim was framed in terms of costs of repair and diminution in value. While the case against the builder was settled out of court, the proceedings were continued against the local authority and ultimately resolved in the plaintiff's favour.

<sup>9</sup> [1978] AC 728.

<sup>10</sup> [1983] AC 520.

<sup>11</sup> The *Anns* case is well-known for having introduced a new test for determining when a duty of care would arise in place of the 'neighbour principle' developed in *Donoghue v Stevenson*. The test, commonly known as the 'two-stage test', operated in this way. During the first stage, a court would decide whether there was sufficient proximity between the parties such that it would be reasonable to contemplate that one's actions might cause damage to the other. If the answer to this first stage is in the affirmative, a *prima facie* duty of care would arise. At the second stage of inquiry, a court would ask whether there are any considerations which ought either to negative or to reduce the scope of that duty. This could be viewed as a public policy qualification.

of Lords, a local council could be found liable in negligence for failing to carry out building inspection functions properly. Councils were held to owe duties of care to future owners and occupiers of buildings to see that no dangers were posed to their health or safety, or to their property. In cases where councils failed in that duty, they would be liable in damages. *Anns* increased the risk of liability being imposed for negligent construction in that it supported the view taken by Lord Denning in *Dutton* that the neighbour principle applied to buildings and, accordingly, that contractors would be liable in tort for their negligence.<sup>12</sup> In summary, it appeared the courts had removed the requirement for personal injury or physical damage under the neighbour principle formulation.

The high point in the *Anns* doctrine is generally agreed to be the case of *Junior Books Ltd v Veitchi Co Ltd*,<sup>13</sup> and although the latter case has been strenuously questioned, it has the indubitable honour of not yet having been overruled,<sup>14</sup> unlike *Anns*, and in fact has been indirectly endorsed in the latest judicial comments on *Junior Books* by Lord Goff in the House of Lords in *Henderson v Merrett Syndicates Ltd*.<sup>15</sup> The *Junior Books* case, notwithstanding the dissent of Lord Brandon, effectively allowed a claim for purely economic loss in a construction context.

Following these decisions, a retreat began from *Anns*<sup>16</sup> and other cases refused to follow *Junior Books*<sup>17</sup> in the United Kingdom. Of the various forms of retreat from *Anns* and *Junior Books*, the case of *D & F Estates Ltd v Church Comrs of England Ltd* stands out.<sup>18</sup> The House of Lords held in that case that the plaintiffs' claims for remedial work, as well as other consequential losses, were

<sup>12</sup> See generally Duncan Wallace, 'Tort Demolishes Contract in New Construction' (1978) 94 LQR 60, and John A Smillie, 'The Foundation of the Duty of Care in Negligence' (1989) Monash UL Rev 302. [1983] AC 520.

<sup>13</sup> Commentators have long been expecting it though: see eg James G Logie, 'The Final Demise of *Junior Books*' (1989) Juridical Review 5 and I S Stephenson, 'Goodbye *Junior Books*' (1988) 138 NLJ 483.

<sup>14</sup> [1994] 3 WLR 761; see generally on the case Simon Whittaker, 'Privity of Contract and the Tort of Negligence: Future Directions' (1996) 16 Oxford JL Stud 191 and J D Heydon, 'The Negligent Fiduciary' (1995) 111 LQR 1.

<sup>15</sup> See generally on the retreat Richard Kidner, 'Resiling from *Anns*' (1987) 7 Legal Stud 319; M Giles and E Szyszczak, 'Negligence and Defective Buildings: Demolishing the Foundations of *Anns*' (1991) 11 Legal Stud 85; W S Schlosser, 'What has Become of *Anns*?' (1991) 29 Alberta Law Rev 673; Earl A Cherniak and Kirk F Stevens, 'Two Steps Forward or One Step Back? *Anns* at the Crossroads in Canada' (1992) 20 Can Bus LJ 164.

<sup>16</sup> See eg *Muirhead v Industrial Tank Specialities Ltd* [1986] QB 507; *Simaan General Contracting Co v Pilkington Glass Ltd* [1987] 1 WLR 516 (OR); (1988) 40 BLR 28 (CA); *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] 1 QB 71; and *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 WLR 498; (1992) 60 BLR 65.

<sup>17</sup> [1988] 3 WLR 368 (HL). *D & F Estates* involved a claim by the plaintiffs (*D & F Estates*) and its controlling owners, Mr and Mrs Tillman, for damages in negligence in relation to defective plasterwork. There were three defendants. The first was the Church Commissioners of England who owned land on which a block of flats was built between 1963 and 1965. The second defendants were a property development company in liquidation, but which took no part in the action. The third defendant, *Wates Ltd*, was the plastering subcontractor. In fact, *Wates Ltd* subcontracted this work out but the sub-subcontractor took no part in the proceedings. *D & F Estates* acquired the block of flats from the Church Commissioners and leased one unit to the Tillmans. Unfortunately for all concerned, the sub-subcontractor failed to follow the manufacturer's instructions in applying the plaster. By 1980, some of the plaster was falling off and remedial work was required. See on the case Peter Cane, 'Economic Loss in Tort: Is the Pendulum Out of Control?' (1989) 52 MLR 200.

not recoverable as economic loss under *Donoghue v Stevenson*.<sup>19</sup> The loss was classified as merely a defect in quality. There was neither a risk to the health or safety of the occupants nor a risk of damage to property other than affected plaster. The plaintiffs were, accordingly, debarred from recovery.

The *D & F Estates* case is important because of the comments on economic loss by Lord Bridge and Lord Oliver and because the Law Lords opined on the status of past authorities, notably *Anns, Batty*,<sup>20</sup> and *Junior Books*, as well as the future requirements to recover under this head. The *Anns* case was referred to as authority for the recovery of damages to repair defective work which posed an *imminent risk of injury or damage to property* or, in essence, recovery for preventive damages. Lord Oliver, in *D & F Estates*,<sup>21</sup> conceded that *Anns* seemed to stand for the proposition that a builder was liable in tort at common law for damage occurring through his negligence to the very thing which he has constructed, although such liability was limited to cases where the defect was one which threatened the health or safety of occupants or of third parties and (possibly) other property. His Lordship would not extend recovery to pure economic loss. However, both Lord Oliver and Lord Bridge emphasised that in *Anns* the only defendant was the local authority, so the scope of the builder's duty of care and liability was not in issue anyway. Further, the Lords stressed the importance of a breach of statutory duty as a precondition to allowing such damages for a threat to health or safety.<sup>22</sup> It is actually *Anns* that was cited in *D & F Estates* for the proposition that a builder owed a duty to see that a statute is complied with, although the courts moved away from this such that it could not unequivocally be said that a local authority owed any like duty.

Lord Bridge said of *Junior Books*: 'The consensus of judicial opinion, with which I concur, seems to be that the decision of the majority is so far dependent upon the unique, albeit non-contractual, relationship between the pursuer and the defendant in that case and the unique scope of the duty of care owed by the defender to the pursuer arising from that relationship that the decision cannot be regarded as laying down any principle of general application in the law of tort or delict.'<sup>23</sup> Lord Oliver saw *Junior Books* as being a case of so close and unique a relationship that it was of no use as authority on the general duty of care but turned on the *Hedley Byrne* doctrine of reliance.<sup>24</sup> With reference to *Anns*, Lord Oliver said that the case could not properly be adopted to support recovery of

<sup>19</sup> [1932] AC 562.

<sup>20</sup> The case of *Batty v Metropolitan Property Realisations Ltd* [1978] IB 554 was problematic for the House of Lords in *D & F Estates* as Lord Bridge was a party to the decision. In a word, Lord Bridge questioned his extempore judgment and called it 'unsound': note 18 above, p 381; Lord Oliver simply said he shared Lord Bridge's view on 'whether it was correctly decided': p 395. For a critique of the *Batty* case see Duncan Wallace, 'Negligence v Economic Loss' (1978) 94 LQR 331.

<sup>21</sup> Note 18 above, p 395.

<sup>22</sup> *Ibid*, Lord Bridge at p 380, and Lord Oliver at p 392.

<sup>23</sup> *Ibid*, p 381.

<sup>24</sup> *Ibid*, p 394.

damages for pure economic loss unless it, too, could be brought within the principle of reliance established by *Hedley Byrne*.<sup>25</sup> This principle of reliance and the voluntary assumption of responsibility is the foundation of recovery according to *Hedley Byrne*.<sup>26</sup>

In summary, after *D & F Estates*, but prior to *Murphy v Brentwood District Council*,<sup>27</sup> it was once again left open for the courts to determine exactly how much weight should be given to *Anns*, *Batty*, and *Junior Books* as well as some of the principles that derive from them.<sup>28</sup> The status of the *Anns* case in particular remained at large<sup>29</sup> until *Murphy*. The House of Lords, in the widest possible application of their ruling, held that English councils, as well as builders (whose liabilities are often viewed co-extensively), would no longer be liable in tort for the costs of repairing defective or negligently constructed buildings. In so finding, Lord Keith said: 'I think it must now be recognised that it [*Anns*] did not proceed on any basis of principle at all, but constituted a remarkable example of judicial legislation.'<sup>30</sup> The House of Lords were, in fact, not only expressly to overrule *Anns* and *Dutton* but all cases subsequent to *Anns*

<sup>25</sup> *Ibid*, p 395.

<sup>26</sup> This followed from the decisions in both *Muirhead v Industrial Tank Specialities Ltd* [1985] 3 WLR 993, in which Goff LJ also participated, and *Simaan General Contracting Co v Pilkington Glass Ltd* [1987] 1 WLR 516 which adopted this reasoning from *Muirhead*. However, if there was any certainty in this respect it was short-lived, with the reconsideration of the importance of reliance and voluntary assumption of liability by the Court of Appeal in *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228. The *Reid* case involved the issue of whether a defendant employer was under a duty of care to insure its plaintiff employee against third party negligence when posted overseas. The short answer to this question was 'no.' Gibson LJ, on his way to this result, remarked on the above passage of Lord Oliver in *D & F Estates*, at p 395, that the recovery of economic loss must be, according to *Hedley Byrne*, in this way (p 238): 'I think it is clear that their Lordships were not, as I understand their speeches, dealing with the tort of negligence in all its forms and it does not seem to me that they were intending to lay down a rule that in no case can damages for economic loss be recovered except under the principles established by the *Hedley Byrne* case. I take Lord Oliver's statement, namely, that damages for pure economic loss cannot be recovered unless the case can be brought within the principle of reliance established by the *Hedley Byrne* case, to apply only to the sort of case under consideration in *D & F Estates v Church Commissioners for England*.'

<sup>27</sup> [1990] 3 WLR 414 (HL). The facts may be shortly stated. In 1969, a contractor built 160 houses in an estate in Brentwood. The houses were to be constructed over concrete raft foundations. The plans for the houses were submitted by the local council to independent consultants for vetting. Ultimately, in reliance upon the consultants' advice, the local council approved the plans. Regrettably, the consultants had overlooked a fundamental calculation error in the design of the foundations. The end result was that the houses were defective. Some eleven years later, Mr Murphy, who had purchased two of the 160 houses, was already in a predicament. By 1986, the foundations of his houses had begun cracking, and there was damage to walls and pipes to such an extent that he would have either been forced to move out or sell at a significant loss. Although he ultimately settled with his insurers, the insurers themselves remained unhappy and sued in his name, alleging that the local council was liable for the consultants' negligence. For comments on the *Murphy* case see J A McInnis, 'Judicial Gerrymandering from *Merton* to *Brentwood*,' *The New Gazette*, November 1990, p 30; J A McInnis, 'Setting Back the Clock in Defective Building Claims,' *Building Journal*, October 1990, p 78; Chris Willett and Dlova Vuyisile, 'Economic Loss in the United Kingdom after *Murphy*' (1991) 42 *N Ireland LQ* 26; N Rafferty 'Tortious Liability for Purely Economic Loss' (1993) 9 *Professional Negligence*, No 2, 87; and Duncan Wallace, '*Anns* Beyond Repair' (1991) 107 *LQR* 228.

<sup>28</sup> Eg such as allowing recovery for preventative damages.

<sup>29</sup> So too had the status of *Batty* remained at large and whether it was still good law: see eg Nicholls LJ in *Department of the Environment v Thomas Bates and Son Ltd* [1989] 1 All ER 1075, the first case to follow *Murphy* and in which case his Lordship tiptoed around *Batty* by simply noting, at p 1085, that 'this court is not required to decide what is the present status of *Batty*'s case.' See generally Elizabeth Jones, '*Bates* and *Murphy*: A Return to the Snail in the Bottle' (1990) 134 *Sol J* 1094.

<sup>30</sup> Note 27 above, p 432.

which purported either to follow or to rely upon it. It should not be surprising with the various retreats that a point would be reached where the recovery for economic loss would be significantly restricted. As Lord Keith said: 'in my opinion it must now be recognised that, although the damage in *Anns* was characterised as physical damage by Lord Wilberforce, it was purely economic loss.'<sup>31</sup> Indeed, it may have been Lord Wilberforce's use of the term 'physical damage' that had precipitated much of the confusion in the cases that followed *Anns*.<sup>32</sup> Thus, generally, the cost of remedying a defect after its discovery so as to avert a danger was once again pure economic loss. For the majority in the *Murphy* case, any right to recover economic loss that did not flow from either personal injury or physical damage to other property — once again *Donoghue v Stevenson* — would be limited to contractual claims and the *Hedley Byrne* reliance or misstatement types of cases. Thus, the famed two-stage test of Lord Wilberforce from *Anns* was spent for the moment. *Neighbours*, in the judicial sense of the word, would no longer be presumed to be just anyone.<sup>33</sup> According to Lord Keith, the 'incremental approach ... by Brennan J ... is to be preferred to the two-stage test.'<sup>34</sup> However, even though there had been this reformulation, the solution in borderline cases, as was later conceded by Lord Oliver, would remain a matter of policy.<sup>35</sup> It is this discussion of the role that policy should play in subsequent Commonwealth cases that presents one of the most interesting questions for the Hong Kong courts.

### The Commonwealth<sup>36</sup> cases: *Invercargill*, *Bird*, and *Maloney*

It has been seen above how the English courts first distanced themselves from and later overruled the *Anns* line of authority. However, in marked contrast to these developments Commonwealth courts have continued to follow *Anns* or expressly not follow the recent English trends in other cases.<sup>37</sup> This divergence

<sup>31</sup> *Ibid*, p 428.

<sup>32</sup> See B S Markesinis and S Deakin, 'The Random Element of their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*' (1992) 55 MLR 619, 633.

<sup>33</sup> Per Lord Keith [1990] 3 WLR 414, 422, quoting Brennan J in *Shire of Sutherland v Heyman* [1985] 157 CLR 424, 481: 'it is preferable ... that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'

<sup>34</sup> Note 27 above, p 423.

<sup>35</sup> *Ibid*, p 446: 'The solution ... has so far been achieved pragmatically ... not by the application of logic but by the perceived necessity as a matter of policy to place some limits ... to what would be an endless cumulative causative chain bounded only by theoretical foreseeability.' See generally Duncan Wallace, 'The Shire of Sutherland Case in Australia' (1986) 3 ICL Rev 157.

<sup>36</sup> The Commonwealth perspective is not new: see Michael F James, 'Tortious Liability for Defective Buildings — A Commonwealth Perspective' (1995) 11 Professional Negligence No 4, 132; Duncan Wallace, 'No Somersault after *Murphy*: New Zealand Follows Canada' (1995) 111 LQR 285; and Duncan Wallace's guest editorial '*Murphy* Rejected: Three Commonwealth Landmarks' (1995) 11 Const LJ 249.

<sup>37</sup> See eg *Canadian National Railway Co v Norsk Pacific Steamship Co* (1992) 91 DLR (4th) 289, where the Canadian Supreme Court rejected the narrow approach to tort liability in *Murphy*, with McLachlin J and Stevenson J stating a preference for the views of Lord Wilberforce in *Anns*.

has been brought to a head with the Privy Council's decision in *Invercargill*. The facts in *Invercargill* may be given briefly. The plaintiff's house was built in 1972. It suffered from some minor defects but it was not until 1989 that a report was sought and which recommended that the foundations be replaced. Proceedings were commenced against the local council which had inspected the foundations when the plaintiff's house was originally built. At trial, the council was held to be negligent and the facts as reported concerned the appeal from that holding. The correctness of *Murphy* was placed squarely in issue on the appeal before the Court of Appeal. A special bench of five judges was convened for the hearing. Leaving aside a limitation issue which also arose on the appeal,<sup>38</sup> with regard to the issue of duty, Cooke P emphasised in particular the unique context of housing construction and the market in New Zealand as well as the absence of any limitation in the building legislation upon bringing claims in tort or for damages for negligent inspection in coming to his conclusion to find the city council liable toward Hamlin.

The touchstone in *Invercargill* for the New Zealand Court of Appeal was *Bowen v Paramount Builders (Hamilton) Ltd.*<sup>39</sup> Cooke P: 'The upheavals in high level precedent in the United Kingdom which I have outlined have had no counterpart in New Zealand. The case law has been at least reasonably constant. Since *Bowen* in 1976, it has been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities.'<sup>40</sup> Before the Privy Council, it was argued that as the *Bowen* case had been explicitly based on *Dutton v Bogner Regis Urban District Council*<sup>41</sup> and *Anns*, and as both *Anns* and *Dutton* were viewed as wrongly decided in England, the same result should now be said to follow vis-à-vis New Zealand. In response to this argument Lord Lloyd reasoned that it was not a case of the New Zealand court incorrectly applying the principles from these impugned cases, but of consciously departing from them. '[I]n the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that the conditions in New Zealand are different. Were they entitled to do so? The answer must surely be "Yes." The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.'<sup>42</sup> For Lord Lloyd the issue was not one which was amenable to only one solution but many solutions in the unique context of each jurisdiction.<sup>43</sup>

<sup>38</sup> See on this aspect Christopher Chapman, 'Limitation of Actions' [1996] NZLJ 161.

<sup>39</sup> [1977] 1 NZLR 394 (NZCA).

<sup>40</sup> (1995) 11 Const LJ 285, 291.

<sup>41</sup> [1972] 1 QB 273.

<sup>42</sup> [1996] 2 WLR 367, 376 per Lord Lloyd.

<sup>43</sup> These different paths had been alluded to earlier by the President in the Court of Appeal, Casey J, who said: 'While the disharmony may be regrettable, it is inevitable now that the Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting

On this point and once again returning to Justice Casey in the Court of Appeal his Lordship very simply summed up why *Murphy* would not be followed: '[w]ith respect, the circumstances of home buyers in New Zealand include factors going well beyond those described by his Lordship [Lord Bridge] and support a conclusion of reliance on the local body's inspectors doing their job properly. As well, other matters in local house-building practice can establish the degree of proximity appropriate to satisfy the criteria ... in determining whether a duty of care exists.'<sup>44</sup> Thus, the key issue then taken to the Privy Council was whether the Court of Appeal was right in finding that a duty of care existed on this basis. In the result, and notwithstanding *Murphy*, the Board of the Judicial Committee of the Privy Council held that it could impose liability. Lord Lloyd's reasons in part sanctioned the independent route that had been taken: 'the Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand (nor the Board from affirming their decisions) by the consideration that the House of Lords in *D & F Estates v Church Commissioners for England* and *Murphy v Brentwood District Council* have not regarded an identical development as appropriate in the English setting.'<sup>45</sup>

Apart from *Invercargill* the highest appellate courts in both Canada and Australia have also moved significantly away from English authority in favour of much of the earlier jurisprudence. The dispute in *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd*<sup>46</sup> arose out of the construction of a fifteen-storey apartment building in the city of Winnipeg in 1972.<sup>47</sup> An action was eventually brought in negligence for the cost of repairs for allegedly defective construction against the contractor (Bird Construction), the cladding subcontractor, and the architects. An application to strike out the statement of claim was rejected at first instance and Bird Construction alone successfully appealed to the Court of Appeal. The issue before the Supreme Court of Canada was whether the Manitoba Court of Appeal was correct in so holding.

point. The ideal of a uniform common law has proved as unattainable as any ideal of a uniform civil law. It could not survive the independence of the United States; constitutional evolution in the Commonwealth has done the rest. What of course is both desirable and feasible, with the limits of judicial and professional time, is to take into account and learn from decisions in other jurisdictions' (note 40 above, pp 292-3).

<sup>44</sup> Note 40 above, p 298.

<sup>45</sup> *Ibid*, p 376, citations omitted. The factors for Lord Lloyd which were material included in particular differing community standards and expectations and differing statutory backgrounds between New Zealand and England.

<sup>46</sup> (1995) 121 DLR (4th) 193, (1995) 11 Const LJ 306, (1995) 74 BLR 1 (SCC).

<sup>47</sup> The facts were very much the same as in *Invercargill* and apart from changes in the years involved, the jurisdiction, and the fact it was the cladding and not foundations which was cracking, not much else differed. The project was completed in 1974 and was converted into condominiums in 1978. It was at that time that the plaintiff acquired its interest in the property. Cracks began to appear in 1982 and the owner undertook investigations. It was assured at the time that the building remained structurally sound and only minor repairs were undertaken. However, some years later a large piece of cladding fell from the building. The plaintiff surveyed the building again and, based upon the report, had extensive repairs done to it. For notes on the case see Robyn Martin, 'Defective Premises — The Empire Strikes Back' (1996) 59 MLR 116; Laura C H Hoyano, 'Dangerous Defects Revisited by Bold Spirits' (1995) 58 MLR 887; and Arnie Herschorn, 'Damages for Economic Loss in Tort: *Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd*' (1996) 18 Advocates Quarterly 109.



The Court of Appeal had followed the *D & F Estates* case and, thus, the applicability of that decision was directly in issue in the Supreme Court.

The judgment of the Supreme Court was given by LaForest J. He rejected the English authority and underscored a Canadian approach to the duty of care issue which remains firmly rooted in the *Anns* tradition, notwithstanding that it had been rejected in *Murphy*. This approach should come as no surprise as the Supreme Court had previously indicated its preference for *Anns* in *City of Kamloops v Nielsen*<sup>48</sup> and *Canadian National Railway Co v Norsk Pacific Steamship Co*.<sup>49</sup> The basis for refusing to follow *D & F Estates* itself was that the negligence posed a *real and substantial danger* to the occupants of the building and that the cost of putting the building in a non-dangerous state was recoverable. Two clear reasons were given by LaForest J for not following *D & F Estate*: the continued and growing support for *Anns*' two-stage test in Canadian law, and the now general acceptance of concurrent duties in tort and contract. It was clear to the judge that *D & F Estates* had rested in part on the premise that the law of tort should not intrude too much in contractual relations. However, that premise changed in Canada with a host of recent cases.<sup>50</sup> What makes it all the more interesting is that it has also now changed in England.<sup>51</sup> Another interesting aspect of LaForest J's reasoning is how he has moved the whole process full circle — that is, the Canadian Supreme Court endorsing the dissent of Laskin CJ in *Rivtow Marine Ltd v Washington Ironworks*<sup>52</sup> and which critically served as the basis for Lord Wilberforce's judgment in *Anns*. *Rivtow Marine* was one of three main sources that LaForest J drew upon for policy grounds to support his reasons for judgment. The other two sources drawn upon were an analysis of economic loss put forward by a Canadian academic, Professor Bruce Feldthusen, and an American decision *Lempke v Dagenais*.<sup>53</sup> Feldthusen's approach outlined five different categories of cases involving economic loss.<sup>54</sup> The issues and the policy arguments for or against liability could thus be specific to a particular category of case. The *Lempke* case itself yielded five policy grounds that militated against the rigid application of the doctrine of caveat emptor (buyer beware) in the area of tort claims for construction defects. From the *Norsk* case LaForest J emphasised that the issue of recovery of economic loss should be approached with reference to the distinct policy issues in each of these categories.

The facts of *Bird Construction* were placed in the fourth category with one important caveat. That is, the case concerned not just shoddy construction but

<sup>48</sup> (1984) 10 DLR (4th) 461, (1984) 2 SCR 2 (SCC).

<sup>49</sup> (1992) 91 DLR (4th) 289 (SCC).

<sup>50</sup> See notably *Central Trust v Rafuse* [1986] 2 SCR 147 (SCC); *Edgeworth Construction Ltd v ND Lea & Associates* [1993] 3 SCR 206, (1993) 66 BLR 56 (SCC); and *BG Checo International Ltd v British Columbia Hydro and Power Authority* (1993) 99 DLR (4th) 577 (SCC).

<sup>51</sup> See *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761, [1994] 3 All ER 506 (HL).

<sup>52</sup> [1974] SCR 1189 (SCC).

<sup>53</sup> 547 A 2d 290 (1984).

<sup>54</sup> (1) The independent liability of statutory authorities; (2) negligent misrepresentation; (3) negligent performance of a service; (4) negligent supply of shoddy goods or structures; and (5) relational economic loss: 'Economic Loss in the Supreme Court of Canada' (1991) 17 Can Bus LJ 356, 357.

*dangerous construction*.<sup>55</sup> For LaForest J, clearly articulated policy reasons weighed heavily in favour of imposing liability. To support a policy in favour of imposing liability for construction defects, framed as whether the caveat emptor rule should limit the liability of contractors in tort, La Forest J cited *Lempke*. While this reference to American authority is somewhat unusual, the *Lempke* case was also cited in *Maloney*.<sup>56</sup> Thus, the Supreme Court of Canada has not only moved toward more discussion of policy issues but also to more discrete policy issues depending upon the category of economic loss involved in the case. The explicit references to the policy grounds by the court as the true basis for the holding are both candid and welcome. In the past, many of the tests which have been put forward have at times served to obscure rather than clarify the reasons underlying the holdings. The reasons for LaForest J's judgment in *Bird Construction* will serve to shift some of the emphasis from traditional tests to matters of policy in other jurisdictions, including Hong Kong.<sup>57</sup>

The last of the three Commonwealth cases to be referred to and which also marks the move away from English authority is the Australian case of *Allan Bryan v Judith Maloney*.<sup>58</sup> Very briefly, the only issue on appeal was whether a contractor, Bryan, owed a duty of care in tort to a subsequent purchaser, Maloney. The Australian High Court held that a duty of care did exist in the circumstances and declined to follow both *D & F Estates* and *Murphy*, preferring instead the *Anns* approach as elaborated in the relevant Australian case law, particularly as regards economic loss. Setting out the basis for an

<sup>55</sup> 'I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that would pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to person or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state': La Forest J (1995) 11 Const LJ 306, 309. On the subsequent purchasers aspect of the decision see Duncan Miller, 'Builder's Negligence Liability to Subsequent Purchaser' (1995) LMCLQ 326 and Nicholas Rafferty, '*Winnipeg Condominium v Bird Construction* — Recovery of Purely Economic Loss in the Tort of Negligence: Liability of Builders to Subsequent Purchaser for Construction Defects' (1996) 34 Alberta LR 472.

<sup>56</sup> See again *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 273, the case which played such a large role in the arguments before the Privy Council in *Invercargill*.

<sup>57</sup> Even though policy is definitely playing a larger role in judgments in the 1990s, it must be noted that it has been around as an explicit consideration for much longer and, in this area of the law, has often figured prominently in Lord Denning's judgments in particular (see again the *Dutton* case), and which played such an important role in the arguments before the Privy Council in *Invercargill*.

<sup>58</sup> (1995) 69 ALJR 375 (1995) 11 Const LJ 274; (1995) 74 BLR 35 (HC Aust). The appellant in the case, Bryan, was a contractor who built a house in 1979. At that time, it showed no signs of defects. Subsequently, the house was resold and then resold again in 1986 to Maloney. A cursory non-professional inspection by the purchaser at that time revealed no apparent defects. Six months later, cracks began to appear. The reason for the cracks (it was later revealed) was the use of inadequate foundations when the house was built. At trial, the plaintiff was successful and damages to remedy the defects were awarded. An appeal by the contractor was unanimously dismissed and then taken again to the High Court. It is the report of this appeal which is of particular interest in this discussion. The appeal was argued on the basis of the contractor's negligence; that the loss of the plaintiff was the decrease in value of the house as a result; that the damage incurred was the cracking itself; and that it was foreseeable as a result of the negligence in question. It was agreed for the appeal that the case was one of economic loss and that it would be quantified by reference to the cost of remedying the defects.

Australian approach in the context of their own policy considerations Mason CJ and Deane and Gaudron JJ noted how the field of liability for economic loss was one which was relatively new. The question of whether the requisite degree of proximity in a particular category of cases existed was less likely to be answered by existing case law than in other areas of the law. This left the court free to consider the policy issues that were involved and the community standards before ruling on whether a duty would or should, for that matter, be found. After noting that under Australian law the existence of a contract would not necessarily preclude the existence of either a relationship of proximity or a duty of care itself, the court listed several factors to be considered. In considering them, it was noted that nothing turned on Maloney's status as a subsequent purchaser; that houses were the most significant purchases that most individuals will make; and that loss in such circumstances was foreseeable. One policy factor militated against the imposition of a duty of care; that is, from Cardozo J's oft-repeated dictum that the law must seek to avoid the imposition of liability 'in an indeterminate amount for an indeterminate time to an indeterminate time';<sup>59</sup> however, the court felt that while Maloney's class was large, it was not indeterminate. As for the English authority, *Murphy* and *D & F Estates*, these cases were said to rest upon too narrow a view of the law of negligence for Australian law. Notwithstanding a strong dissent by Brennan J who, interestingly, authored the leading opinion in the *Shire of Sutherland v Heyman*<sup>60</sup> case, the appeal was dismissed.

## Conclusion

In summary, while the *Invercargill*, *Bird Construction*, and *Maloney* cases confirm a deliberate move away from English authority, in particular *D & F Estates* and *Murphy*, all three jurisdictions which the cases represent ultimately strike their own balance on where the line for recovery will be drawn and the policy reasons upon which those limitations will be based. The extent of recovery increases from one jurisdiction to another. In Canada recovery will be allowed against a negligent contractor for removal of dangerous work but not the cost of remedial work or repair of defects alone. In Australia, one may recover both the costs of removal of the dangerous work and the repair of the defective work as well. In New Zealand, both sets of costs may be recovered and whether against the contractor or a negligent inspecting local authority. It would seem that a Hong Kong standard should permit greater recovery than is allowed under the traditional English approach as well. Many of the policy arguments that were

<sup>59</sup> (1995) 11 Const LJ 274, 277 referring to *Ultramares Corp v Touche* (1931) 174 NE 441, 444. Cf the dicta of Lord Mustill in *White v Jones* [1995] 2 AC 207, 290 that the law must seek to avoid 'the attractions of a solution which could repair the consequences of the ... fault, without in practice opening the way to liabilities so broad as to be socially harmful.'

<sup>60</sup> [1985] 157 CLR 429, see above.

articulated in favour of greater recovery would be supportable in Hong Kong. It is interesting to note that all of the judgments are framed in policy terms and all of them are concerned with imposing some limits on recovery. These issues have not featured in local cases, even though in much of the most recent academic writing on the subject commentators have noted that the latter issue at least has become one of the most debated topics in the law of tort today. That is, how can recovery in tort be limited? Should it be through exclusory rules, strict application of the traditional tests, proximity, reliance, policy, the duty of care, or otherwise?<sup>61</sup> Hong Kong has limited recovery under the more traditional tests as opposed to policy choices.

The cases are, of course, of interest to the construction industry but they will certainly have ramifications well beyond it, particularly in manufacturing. The extent to which the decisions will apply to other matters, such as consequential damage, is an open question. Although the *Maloney* decision, in particular, took steps to try and limit the ambit of the rule in the case, it will likely also be referred to in other legal subject areas and across some of the other categories of economic loss which were canvassed. Much will also be made of the decisions in terms of the doctrinal issues surrounding tort and contract, issues such as concurrency, privity, third parties, and subsequent purchasers. All of these are of course also current topics locally. Whether or not and to what extent, if at all, contractual outcomes can be preferred to those in tort will also be subject to much speculation.<sup>62</sup> From the reasoning in all three cases it can be seen that policy considerations will play a larger and more explicit role than in the past. In Hong Kong there will be more policy questions to consider than just which of two competing lines of authority should be followed. It almost goes without saying that the end of both British rule in Hong Kong and appeals to the Privy Council will significantly impact upon how decisions from other jurisdictions will be viewed. In short, decisions of the Privy Council will presumably no longer be binding,<sup>63</sup> but it goes well beyond that as the Hong Kong courts will seek to redefine local law not just in relation to this former source of law but also that of China. There will, it seems, be much in the way of policy to motivate these decisions as well.<sup>64</sup>

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<sup>61</sup> See eg J Stapleton, 'In Restraint of Tort' in P Birks (ed), *The Frontiers of Liability* (Oxford: Oxford University Press, 1994) vol 2, p 83; J Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301; Justice C S C Sheller, 'Pride and Precedent: Economic Loss — The Search for a New Bright Line' [1995] LMCLQ 203.

<sup>62</sup> Professor Feldthusen, while pointing out that he did not wish to criticise the holding of *Bird Construction* as patently incorrect, did express a legitimate fear when he wrote: 'I am concerned that the court will take contractual allocation of risk more seriously in negligence actions for pure economic loss, not as a matter of doctrine, but as a matter of sound policy-making': 'Winnipeg Condominium Corp No 36 v Bird Construction Co: Who Needs Contract Anymore?' (1995) 25 Can Bus LJ 143.

<sup>63</sup> The subject of precedent in Hong Kong law after 1 July 1997 would itself make an interesting article.

<sup>64</sup> The Malaysian approach post British rule may be noted on this point lately in Carol G S Tan, 'Pure Economic Loss in Malaysia: Following English Law by Default' (1995) 44 ICLQ 192.

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