Tortious Liability For Defective Premises In English Law After Murphy v Brentwood: Learning From The Commonwealth

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I. Introduction

> "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."[1]

The issue of liability for defective premises lies at the heart of the battle for supremacy between tort and contract. What dictates chances of success in litigation over defective premises owes more to wider issues of politics and jurisprudence than to the practicality or justice of a remedy on the particular facts of the case.

Early in the development of law on defective premises contract ruled, and liability was limited by the strength of the doctrine of privity to contracting parties. In this context, only the employer of the builder/ architect, or the first owner of the property was protected against negligence in building work or design. Then in the 1970's and early 1980's in the heady days of the development of negligence, and, not without co-incidence, at a time when politics lay at the left wing end of the political spectrum, duties were extended beyond contractual relationships to subsequent purchasers of property. The result was to extend to persons outside privity the benefits of contract, and even, when it came to limitation issues, to benefits beyond contract.

A political and social backlash in England in the late 1980's and early

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1 Per Lord Lloyd of Berwick, *Invercargill v Hamlin* [1996] 2 WLR 367.

1990's constricted tort liability on all fronts, and in the context of defective premises stripped liability back almost entirely to contractual relationships. This backlash was not mirrored in commonwealth decisions on defective premises, or indeed in commonwealth approaches to other areas of tort law.[2] Rather the underlying policy of English decisions of the time was rejected and commonwealth courts have developed a diverging body of tort law. There is less commonality between English and commonwealth tort law than ever before.

Now, further into the 1990's, in an era of increasing liberalism in the House of Lords, we see a cautious re-emergence of tort liability. A significant influence on this development has been recognition of the strengths of judgments from Canadian, Australian and New Zealand courts, as well as a new knowledge and appreciation of European civil law[3].

This article will address the law on defective premises in England after the duty limiting case of *Murphy v Brentwood*[4] in 1990, and identify ways in which plaintiffs have, or might, circumvent the difficulties posed to the subsequent purchaser of a defective premise by that case. Some of the arguments discussed are mere devices and do not challenge the jurisprudential or policy premises of *Murphy*. Others however do reopen the question of liability for economic loss, and lead English law in the direction of the wider duties imposed by commonwealth courts. There is much to be learned from decisions across the common law courts, and it may not be long before another House of Lords is asked to reconsider the position in England in the light of relaxation of tests for duty both at home and abroad.

II. Tortious Duties of Care

While the law of contract plays an important role in construction law, much of the dispute about defective premises, particularly where foundations are defective, relates to parties who are not in a contractual relationship. Plaintiffs are frequently subsequent purchasers of premises, and defendants frequently subcontractors or third parties in a contractual chain. Even where parties are in a contractual relationship, in the context of latent damage contract, with its limitations on time (see below) may be inadequate in providing a remedy. Plaintiffs then need to look to tortious remedies. Recent case law (*Henderson v Merrett*[5] and *Holt v Payne*

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2 See for example the rejection of *Sidaway v Bethlem Royal Hospital* [1985] 1 All ER 643 in *Rogers v Whitaker* (1992) 109 ALR 625.

3 See *White v Jones* [1995] 1 All ER 691 where the House of Lords considered both commonwealth and German approaches in their decision to find a tortious duty of care.

4 [1990] 2 All ER 908.

5 [1994] 3 All ER 506.

Skillington[6]) recognises concurrent liability and plaintiffs may choose the remedy most favourable to them.

In addressing tort liability for defective premises, the problems inherent in such a claim will need to be examined.

1. Back to basics: the defect/damage distinction

Take as a starting point a commonplace defective premises situation. A builder negligently constructs a house with defective foundations (c.f. *Anns v Merton Borough Council*,[7] *Bryan v Maloney*,[8] *Invercargill v Hamlin*[9]). The first owner of the house, unaware of the defects, sells the house on to another. After a time the second purchaser notices cracks in the walls and calls in a surveyor. The surveyor identifies the cause of the cracks as the defective foundations. The second owner now owns a house worth considerably less than its purchase price. Unless the first owner provided the second purchaser with a warranty as to the quality of the house, or unless there was fraud or misrepresentation, the second owner will be subject to the *caveat emptor* rule of purchase and will have no remedy against the seller. The second purchaser may have tried to protect the purchase by taking out first party insurance, but where defects are the result of subsidence or settlement, or where the defect existed prior to the insurance arrangement, most insurance policies are unlikely to provide protection.

Can the purchaser sue the negligent builder who was responsible for the defects? The person in the street would probably ask, why not? If I buy a washing machine which is defective, and when I use it my clothes are ruined, I can sue the manufacturer with whom I have no contract. Why not here? The problem arises because of the legal perception of a house. The legal eye sees a house not as a set of foundations supporting a floor with walls and a roof, but as a single entity. To go back to the very beginning of negligence and *Donoghue v Stevenson*,[10] the defective house is the realty equivalent of the bottle of ginger beer with the snail in it. Ms Donoghue was able to sue for the damage done *by* the ginger beer *to* herself, but not for the replacement cost of the ginger beer itself. In other words, the ginger beer, and the house, constitute a *defect*. English law will compensate for a defect in contract but does not begin to recognise a tort until that defect causes *damage* to something "other" than the defective thing itself.

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6 The Times, 22 December 1995.
7 [1978] AC 728.
8 (1995) 128 ALR 163.
9 [1996] 1 All ER 756.
10 [1932] AC 562.

If tort fails to provide a remedy because there is no damage, and contract fails to provide a remedy because there is no contract, then a subsequent purchaser is left without a remedy. This means that an innocent purchaser who buys in good faith must bear the loss while the negligent builder escapes liability. If the purpose of tort is, in the words of Lord Atkin in *Donoghue v Stevenson*, to "provide a legal remedy whenever there is so obviously a social wrong" then we must be concerned at the failure of tort to protect subsequent purchasers.

2. Half way measures

Lord Denning, that great advocate of social justice as he perceived it, was determined in *Dutton v Bognor Regis UDC*[11] to extend tort to cover subsequent purchasers on the pragmatic grounds that the innocent purchaser was in no position to bear the loss, and justice demanded that persons responsible bear the financial consequences for their negligence.

This approach was approved by the House of Lords in *Anns v Merton LBC*,[12] again on the basis of social justice. How then did the House of Lords overcome the defect/damage distinction? They did so by moving back the line between a defect and a damage. A damage did not come into existence when it actually occurred but at the point of time when it could be seen as likely to occur. Under this legal fiction a damage could be said to come into existence when there was an imminent threat of its occurring. The plaintiff could then be said to have suffered a property damage, the value of which was the cost of preventing it. This moving back of the dividing line was justified by the "stitch in time saves nine" philosophy. As a question of policy house owners should be encouraged to repair before the "other" damage developed.

It is important to consider this case in its political context. This was the late 1970's, the time when the historic, but now completely inapplicable Pearson Report[13] recommended few changes to the English system of personal injury litigation because the social welfare protection then in place was sufficient to protect victims of accidents. This was an era of "community responsibility". Much of the rationale behind *Anns* was based on the assumption that it was the purpose, and the duty, of a local authority to protect the physical and economic welfare of its citizens. Hence in *Anns* not only the builder but the negligent local authority were held liable to the subsequent purchaser.

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[11] [1972] 1 QB 373.

[12] *Supra* n 7.

[13] Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054, 1978.

3. Mere defects recoverable too?

The social justice justification for expanded liability gained momentum and the reasoning in *Anns* was stretched to breaking point *in Junior Books v Veitchi*[14]. In that case defective but not dangerous flooring was the source of dispute between the building owner and the flooring subcontractor. The House of Lords took the "stitch in time saves nine" argument one stage further. It was better to repair premises even before they were allowed to become a threat to safety, and the law should encourage repair by compensating building owners for the repair costs. The House of Lords classified these repair costs of non dangerous premises as an economic loss, while still allowing that repair costs of dangerous premises, as in *Anns*, constituted physical damage. At this time the law allowed recovery in tort for pure economic loss, so the plaintiff in *Junior Books* recovered his repair costs.

The dissenting judgment of Lord Brandon in *Junior Books* was significant. Much of Lord Brandon's argument concerned the boundaries between tort and contract and inroads into privity. It was important that contract focus on issues of quality and tort on issues of damage. Given that the principle underpinning negligence was that of reasonableness, how could a concept of reasonable quality be determined for the purposes of breach of duty? Standards of quality depended on the price paid, the purpose of construction and agreement between the parties, all factors contained in the contractual agreement to build. There could be no objective test as to reaonableness of quality, and so tort was an inappropriate medium for determining defects in quality.

4. Change of mind: the defect/damage distinction reinstated

Junior Books was short-lived. A changing political and economic climate sat uncomfortably with the social justice assumptions of *Anns* and *Junior Books*. Much heed was paid to the jurisprudential concerns expressed by Lord Brandon in *Junior Books*.

In *D & F Estates v Church Commissioners*[15] the House of Lords decided that non-dangerous defects and the economic loss they represented were not recoverable. In 1990 in *Murphy v Brentwood*[16] the House of Lords went further and found the artificial determination of the defect/damage distinction in *Anns* unacceptable. A defect remained a defect no matter how dangerous, and could not be reclassified as damage. All defects, what-

[14] [1983] 1 AC 520.
[15] [1988] 2 All ER 992.
[16] [1990] 2 All ER 908.

ever degree of seriousness, represented a pure economic loss and as the law on economic loss had developed these losses were not recoverable.

The facts of *Anns* and *Murphy* were very similar. It was the social context which differed. The House of Lords in *Murphy* rejected the *Anns* reasoning that the purpose of a local authority was community responsibility for persons within it. Instead the local authority was perceived as a purely administrative body. *Murphy* recognised that 1990 was a time of "individual" responsibility where the onus was on each individual to protect him or herself against loss, where possible through the medium of insurance.

The practicability of this insurance option was not considered, and indeed, as discussed earlier, it is unlikely that first party insurance in its common form will provide protection. Other commonwealth courts have recognised their own lack of expertise on matters of economics[17] and were unprepared to make judicial decisions based on assumptions about insurance implications which they did not understand.

The result of the reasoning in *Murphy* was that not only could the subsequent purchaser not sue the local authority, but because the purchaser was seen as having suffered only an economic loss, the purchaser could not sue the negligent builder either. This left a subsequent purchaser without a remedy at all. The House of Lords were not unaware of the consequences of their decision but reasoned that it was the role of Parliament to decide questions of policy on issues of consumer protection. The question of whether to impose on the public, through local authorities, the burden of compensation for private financial losses was seen as a political rather than a legal question. This reasoning does not explain the reluctance to impose liability on the builder. But bound up with political issues of public burden were concerns about protection of the peculiarly English doctrine of privity of contract, economic burden on the professions, and the favouring of a principled rather than policy based approach to determination of issues such as duty of care, all of which encouraged restricted liability outside contract.

In 1997 Parliament has not taken up the challenge issued by the House of Lords in *Murphy* to legislate on the scope of liability for defective premises. *Murphy* remains good law in England, and subsequent purchasers have no recognised remedy against careless builders.

5. What has happened elsewhere?

Commonwealth courts have in many contexts rejected the conservatism of the late 1980's House of Lords and nowhere is this more apparent than in the context of tort liability for defective premises.

[17] For example the New Zealand Court of Appeal in *Invercargill v Hamlin* [1994] 3 NZLR 513 per Richardson J at 526.

The rejection of *Murphy* began in Canada in *Winnipeg Condominium Corp v Bird Construction.*[18] There the Supreme Court of Canada agreed with the House of Lords in *Murphy* that all building defects constitute an economic loss, but did not see why such losses could not be recoverable under the normal limitations of duty of care, namely foreseeability, proximity and just and reasonableness. The Canadian court saw the *Murphy* decision as overly concerned with the encroachment of contract by tort. To be fair, at the time when *Murphy* was heard English jurisprudence in the form of *Tai Hing Cotton Mills v Liu Chong Hing Bank*[19] took the line that where parties were in a contractual relationship tort had no part to play, and the court in *Murphy* was constrained by this decision. By 1995, when *Winnipeg Condominium* was heard, English courts had once again embraced concurrent liability (*Henderson v Merrett*[20] and *Holt v Payne Skillington*[21]).

In Australia in *Bryan v Maloney*[22] the Australian High Court also categorised all defects as economic loss, and as in Canada, found such losses to be potentially recoverable. The High Court could see no practical difference between the relationship of the first house purchaser to the builder, and the relationship of subsequent purchasers to the builder. The house was a permanent structure intended for indefinite use. It was the most significant purchase the owner would make in his/her lifetime. There was a high degree of foreseeability to the builder that negligence on his part would lead to loss by the subsequent purchaser. The causal relationship between the builder's negligence and the house damage was unaffected by time or change of ownership.[23]

Similarly in New Zealand in *Invercargill v Hamlin*[24] the Court of Appeal rejected *Murphy* and the policy behind it. Different social and political conditions in New Zealand, in particular the role of local councils, were used to differentiate *Murphy* reasoning and find a duty of care owed both by the council and the builder.

6. The Privy council in Invercargill

It was particularly interesting then when *Invercargill* went on appeal to the Privy Council. Traditionally the Privy Council has seen its role as one of unification of the common law throughout the commonwealth. In

[18] (1995) 121 DLR (4th) 193.
[19] [1986] AC 80.
[20] See n 5 *supra.*
[21] See n 6 *supra.*
[22] See n 8 *supra.*
[23] See commentary in Martin, "Defective Premises - the Empire Strikes Back" (1996) 59 *MLR* 116.
[24] See n 9 *supra.*

previous cases of appeal the Privy Council have been quick to bring commonwealth courts into line, even when such a decision might offend against developed law in that country (see for example *Tai Hing Cotton Mills*[25] and *Hart v O'Connor*[26]).

This put the Privy Council in a dilemma in *Invercargill*. Were they to impose *Murphy* onto New Zealand law, they would need to justify flying in the face of clear and conscious rejection of the reasoning in *Murphy* across the commonwealth and beyond.[27] It would have taken considerable arrogance to take this approach without very convincing jurisprudential argument, more especially since *Murphy* had not escaped fierce criticism at home.[28] However to fail to take the opportunity to overturn *Invercargill* when it so clearly contradicted *Murphy* could be seen as covert (or even overt) criticism of *Murphy*.

The Privy Council took an easy way out and decided on a changed role for itself. No longer was its role one of unification. Rather it was now time to recognise the importance of divergence in the common law, with each jurisdiction developing law appropriate to its own social setting. It may be that the Privy Council has in the process talked itself out of a job, at least in relation to appeals from outside the jurisdiction, but this approach allowed the acceptance of *Invercargill* without rejecting *Murphy*. The court accepted that different housing conditions in New Zealand from those in England supported different law, and the decision in *Invercargill* recognised those different conditions.[29]

III. Seven Ways to Get Around Murphy

Given that Parliament has not intervened to provide protection for subsequent purchasers in England, it is not surprising that legal arguments have developed to circumvent *Murphy*. Some of these arguments use the logic of commonwealth decisions as their basis. Recent English decisions suggest some sympathy with the claims of parties outside contract.

1. Changing circumstances

The decision in *Invercargill* opens the door to arguments which might allow plaintiffs to get round *Murphy*. The Privy Council in *Invercargill*

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[25] See n 19 *supra*.
[26] [1985] 3 WLR 214.
[27] See also *RSP Architects Planners and Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113.
[28] See for example Stapleton 107 *LQR* 249, Fleming 106 *LQR* 525, Howarth [1991] *CLJ* 58.
[29] For commentary on *Invercargill* see Martin, "Diverging Common Law - Invercargill Goes to the Privy Council" (1997) 60 *MLR* 94.

were forced to recognise that the decision on this issue must be policy based, despite protestations in *Murphy* that duties of care should be determined on a principled incremental approach.

But of course, if the issue is one of policy then different policy conditions even within England might dictate different duties of care. A change of government, a change of economic policy on mortgage rates and home insurance, a change of societal attitudes to home ownership might all lead to a rejection of *Murphy*. Even variation of housing expectations from one part of the country to another might justify a different finding on similar facts.

There has also been a significant change in the constitution of the House of Lords since *Murphy* was heard. The court which heard *Invercargill* (the members of which are after all the House of Lords wearing another hat) were more concerned with the policy of provision of social justice than with legal certainty and principle, a quite different approach to that in *Murphy*. This represents the more general softening of approach on issues of tort law evident in recent years.[30]

2. Complex structures arguments

Murphy was predicated on the notion of the house as a single entity. If we were to regard the house rather as a combination of separate parts forming a complex structure, then we could get around the problem of defect/damage distinction by arguing that a defect in one component part of the structure had caused damage to another component part. That damage would then be recoverable under the ordinary principles of negligence as laid down in *Donoghue v Stevenson*.

The reality of the law of negligence is that the courts operate a hierarchy of losses which attract differing priority when it comes to finding a remedy. The hierarchy can be represented, top down, as:

- defects which have injured (or in some cases are likely to injure) persons
- defects which have injured (or in some cases are likely to injure) property
- defects which cause actual damage to some other part of the product or premise
- defects which cause no harm but lower the economic value of the product or premise

Whatever the jurisprudential difficulties courts will bend over backwards to enable compensation for defects of the first kind. But as we go down the hierarchy it becomes increasingly difficult to establish duties of

[30] See for example *White v Jones* [1995] 1 All ER 691.

care. *Murphy* and cases of its time were prepared to recognise liability for the first two types of defects (including liability for defects which are likely to cause damage to property on or adjoining a highway or a neighbouring property, deriving from the laws of nuisance and non-delegable duty for independent contractors). *Junior Books* recognised liability for all four types of defect. The commonwealth cases on defective premises recognise liability for at least the first three, and New Zealand and Australia arguably for the fourth as well.

The point of the complex structures argument is to move perception of the cost of repair of the house from classification within the third or fourth (depending on seriousness) types of defect, which attract little judicial sympathy, to the second type, which does attract protection.

The possibility of seeing the house as a complex structure was raised by the House of Lords in *D & F Estates* as an explanation as to how the *Anns* decision might have come about. The practicalities of such an argument were not explained. How do we delineate component parts? How far can we go? Is the plastering on the walls separate from the walls themselves? Is the door frame separate from the door? Presumably criteria such as functional independence and separate manufacture or sourcing will allow us to distinguish some components from others.

The complex structures argument was raised in *Murphy* where it failed on the facts because the house in that case was provided by a single contractor and so had to be regarded as a single unit. But Lord Keith said that he would be prepared to accept such an argument where, for example, defective electrical wiring had been installed by one subcontractor and caused a fire which destroyed the building. Lord Bridge would be prepared to accept that a distinct item incorporated in a structure which because of its defect caused positive damage to the building structure might suffice. He gave the example of a defective central heating boiler exploding and causing damage to the building.

In 1991 in *Nitrigin Eireann Teoranat v Inco Alloys*[31] plaintiffs discovered cracking in a pipe supplied by the defendant which had been incorporated into the plaintiff's chemical plant. The pipe exploded and damaged the plant. The court allowed recovery for the plant, clearly regarding the plant as "other" property for the purposes of negligence. This was so even though the plaintiffs in this case had actually discovered the cracks and attempted to repair them some time before the explosion. The House of Lords had said in *Murphy* that once a dangerous defect had been discovered it was no longer actionable because of the "opportunity of intermediate inspection" limitation raised in *Donoghue v Stevenson.*

Similarly in *Jacobs v Morton*[32] the defendants had constructed a piled raft foundation to remedy defects in the original foundations, but the

[31] [1992] 1 All ER 854.
[32] (1994) 72 BLR 92.

new foundations were defective causing further damage to property. This was characterised as "other damage" within the complex structures argument.

So it seems the indicators of a successful complex structures argument are issues such as who supplied or fitted each component part, when were the parts fitted (at the same time?), what purpose does each part serve, how were the parts viewed by the users of the property, and how were the defects discovered. These cases suggest that there is scope for argument, especially in relation to the large commercial building which is more likely to be built by a combination of subcontractors over a longer period of time than a domestic dwelling.

3. Exceptional special relationship

It is significant that in *Murphy* the House of Lords were prepared to take advantage of the 1966 Practice Statement to depart from its decision in *Anns*, but they did not choose to do so with respect to the decision in *Junior Books*. Instead the House of Lords in *Murphy* distinguished *Junior Books* as a case involving unusually close proximity which may have justified the finding of a duty of care on its facts. In *Junior Books* a specialist subcontractor had voluntarily assumed responsibility for unusual flooring work, and the particular expertise of the subcontractor was particularly relied on by the building owner. If this relationship constitutes a special case then it is arguable that other peculiar special relationships might also give rise to duties of care. The scope of such arguments may have been limited by the comment of the court in *Lancashire Churches v Howard Seddon Partnership*[33] that it could see nothing particularly special about the relationship in *Junior Books*, and it would take very unusual facts to justify imposing a duty of care for a mere defect.

Developments since *Lancashire Churches* may however add new weight to the "special relationships" argument. Recent cases have introduced the criterion of reliance, formulated originally in *Hedley Byrne v Heller*[34] in the context of negligent statements, into tests for proximity for negligent acts. In *White v Jones*[35] for example the combined principles of assumption of responsibility by the defendant solicitor and indirect reliance by the proposed beneficiaries of the yet to be drawn up will, were sufficient to establish a duty of care. *Junior Books* might be regarded as exactly such a case, and arguments based on assumption of responsibility and reliance are ripe for development.

[33] [1993] 3 All ER 467.
[34] [1964] AC 465.
[35] [1995] 1 All ER 691.

4. Negligent advice as distinct from negligent work

The definition of "advice" for the purposes of professional negligence is unclear, but the meaning of advice has surely widened since the first recognition of liability for economic loss resulting from words in *Hedley Byrne*. In *Ross v Caunters*[36] a failure to check the witnessing of a will was interpreted as negligent advice. It seems that any professional acts or omissions, if advisory in nature, might give rise to negligence liability under this head.

The advantage of framing a case on liability for advice rather than for negligent work is that *Hedley Byrne*, and its modern version in *Caparo v Dickman*[37], recognise liability for pure economic loss, whereas the law on negligent acts has been more reluctant to do so.

One hurdle to be overcome on a negligent advice argument is the much contested question whether a duty of care with respect to such advice attaches only to persons whose profession it is to give this advice, or does anyone who satisfies the relationship test and chooses to give advice owe a duty? *Hedley Byrne* itself held that any person who voluntarily gave information and satisfied the special relationship requirement could be liable for a negligent statement. The Privy Council in *MLC v Evatt*[38] chose to limit liability to persons who gave such advice for a living or had a financial interest in the advice. In 1994 in *Spring v Guardian Assurance*[39] the House of Lords once again extended liability to anyone who satisfied the test for duty.

So does an architect, a consulting engineer or even a builder acting in their ordinary employment owe a duty of care with respect to advice? *London Congregational Union v Harriss*[40] suggests that they do not. Rather, the ordinary relationship of client and architect, or of client and consulting engineer, was said to be not such that liability for pure economic loss would arise from negligent design advice or supervision without damage to property resulting. The law of negligence was not, said the court, intended to afford owners of buildings rights equivalent to contract.

London Congregational Union was heard before both *Spring* and *Caparo*. It may now be the case that provided the *Caparo* requirements are satisfied, liability for negligent advice can be argued in this context. *Caparo* requires the advice to have been knowingly communicated by the defendant to the plaintiff, or to members of an easily ascertainable class of persons of whom the plaintiff was one. Design advice might fall into this category.

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[36] [1980] Ch 297.
[37] [1990] 1 All ER 568.
[38] [1971] AC 793.
[39] [1994] 3 All ER 129.
[40] [1988] 1 All ER 15.

Arguments based on advice will not be much use to plaintiffs such as those in *Anns* or *Murphy* who, while they indirectly relied on the advice of builders, architects and inspectors, did not have that advice communicated to them as members of an identifiable class. The class of future property owners would probably be too wide under *Caparo* as it stands. But this type of liability might prove useful in circumstances where, for example, a soils engineer presents a report which is to be communicated to tenderers. Of course property surveyors have for some time been caught by the negligent advice rubric and held to owe duties of care to purchasers of property.[41]

Hence the law on negligent advice might have some relevance to liability for defective premises and as such liability is cautiously expanded will no doubt provide some remedies for poor building advice.

5. Collateral warranties

In the late 1970's and early 1980's owners and tenants of buildings became accustomed to holding negligent builders liable for building defects. It is hard to put the genie back into the bottle, and with the receding tort protection of the late 1980's building owners and tenants looked for ways of retaining their remedy against the builder. These were developed in a variety of forms, but substantially they were intended either to create a contractual relationship with the builder, or create a special proximity relationship with the builder.

The end result of these devices is to increase the scope of liability of the builder, and the builder will understandably be reluctant to enter into arrangements such as these without good cause. The main inducement will of course be economic. It is not irrelevant that the *Murphy* and post *Murphy* years have been years of recession and builders have been hit particularly hard. In this climate builders have not been able to pick and choose contracts, and have been vulnerable when it comes to agreeing to expanded liability. Whether arrangements such as these would work in a market which is showing signs of improvement, with a marked increase in home movement, remains to be seen, but for the moment they are useful. Two such devices are assignments and duty of care letters.

a. Assignments

Assignments purport to transfer the rights of the original employer or client to the subsequent building owner or tenant. There are often problems with these assignments. The assignment must satisfy the requirements of

[41] See *Yianni v Edwin Evans* [1982] QB 438, and *Smith v Bush* [1989] 2 All ER 514.

s 36 of the *Law of Property Act* 1925. The assignment must be absolute (that is, an unqualified assignment of the whole of the rights concerned). The assignment must be in writing signed by the person making the assignment, and express notice of the assignment must be given to the contractor.

The assignee then stands in the shoes of the original employer, and is able to make the same claims, and only the same claims, as the original employer. If then the assignee has put the building to a different use than intended by the original building owner, any loss of business profits in the new activity may not be recoverable.

There is also the problem that where there has been such an assignment the insured contractor makes a particularly attractive defendant. There is a real risk that where there are a number of parties who might potentially be responsible for a particular design defect, it will be those under a contractual duty who will be sued first, and they will be left with the problem of trying to seek contribution from the others.

The existence of such collateral contracts can at times be counterproductive. In *Greater Nottingham Co-op v Cementation Piling and Foundations*[42] a building owner sued a subcontractor in respect of poor operation of piling equipment which caused delay in completion of the project. The plaintiff had entered into a collateral contract with the subcontractor which required the subcontractor to exercise reasonable care in designing the piling works and selection of materials, but the contract did not cover how the works were to be performed. The Court of Appeal held that the very existence of the collateral contract indicated that the parties had decided to define their relationship purely in contract and so denied any tortious remedy which might have been available. It may be that a more generous view of the relationship between tort and contract evidenced in *Henderson* and *Holt*, discussed above, would result in a different finding. The Court of Appeal in *Holt* held that not only could a tortious duty run concurrently with a contractual duty, but that the duties need not be coextensive. Consideration of the individual facts and circumstances of each case would determine if obligations were wider in tort. Tortious and contractual duties were found to be underpinned by separate philosophies, separate objectives and separate duties.

Any such assignments would need to be carefully drafted. The existence of a collateral contract may no longer exclude tort, but the wording of any such contract may in itself be taken to represent the sum total of legal obligations.

b. Duty of care letters

These do not purport to transfer contractual rights but rather to create additional direct responsibility from the contractor to the beneficiary. They

[42] [1988] 2 All ER 971.

might work in either of two ways. They may serve to create a special relationship between the contractor and subsequent owner, such that the subsequent purchaser can raise a *"Junior Books"* special relationship argument as discussed above. Or they might work to allow the original employer to recover for the benefit of the later owner.

The possibility that the original employer might recover for the benefit of the later owner was discussed in the combined case of *Linden Gardens Trust v Lenesta Sludge Disposals* and *St Martin's Property Corp v Sir Robert McAlpine.*[43] This involved interpretation of provisions of a JCT standard form contract but in the course of discussion the possibility of other remedies was considered. Lord Browne Wilkinson held that because the contract was for a large development of property which to the knowledge of the employer and the contractor was to be occupied by third parties and not the employer, it could be foreseen that damage would cause loss to the later owners. There was no vesting of contractual rights in the later owners, and indeed in this case the form of the contract prohibited such assignment. Lord Browne Wilkinson said:

> "In such a case it seems to me proper, ...to treat the parties as having entered into the contract on the footing that the (original employer) would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance....It is truly a case in which the rule provides a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it."

The words of Lord Browne Wilkinson could have been taken straight from the mouth of Lord Atkin in *Donoghue v Stevenson.* Whereas the House of Lords in *Murphy* regarded the provision of a remedy as a policy question within the domain of the legislature, with the role of the judiciary one of law interpretation rather than law making, once again an English House of Lords is recognising that it has a role in judicial legislation. This is a role that commonwealth courts have been prepared to confront, despite jurisprudential difficulties inherent in this area of law, and commonwealth courts have been able to provide a legal remedy without opening the floodgates of litigation for economic loss and without sacrificing judicial logic. It seems that Lord Browne Wilkinson for one would be prepared to consider doing the same for English law.

A later case, *Darlington Borough Council v Wiltshier Northern Ltd*[44] extended the *Linden Gardens* argument beyond cases where there had been a prohibition in the contract on assignment. It was enough that the employer contracted in circumstances where there would be no other remedy for the new owner's loss, and that the circumstances were known to the contractor.

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[43] [1993] 3 All ER 417.
[44] [1995] 3 All ER 895.

Such a remedy relies of course on the first owner's willingness to sue on behalf of the subsequent purchasers, hence the need to express such willingness in written form. This remedy will only be practical where the nature of the defect becomes obvious soon after completion. The passing of time, the dispersement of the parties, lack of written commitment and further sale of the property will weaken chances of success of such a remedy.

6. The Defective Premises Act 1972

This was once a practically useless piece of legislation. It covers only dwelling houses not covered by an approved scheme which itself confers a remedy, and until recently did not cover the NHBC's (National House Builder Council) schemes.[45] Liabilities in tort until the mid 1980's extended well beyond those imposed in the Act rendering the Act redundant. The limitation of six years imposed in the Act means that many defects are discovered too late to take advantage of its provisions.

Now that tortious duties have been much restricted it is worth looking again at the Act for a remedy. The Act imposes a duty on anyone, builder, architect, surveyor (though probably not a local council inspector) or subcontractor, taking on work (including construction, conversion or enlargement) in connection with a dwelling house (but not a commercial building) to see that the work is done in a workmanlike or professional manner, with proper materials, so that the building will be fit for habitation when completed. The duty is owed to employers and to anyone who subsequently obtains a legal or equitable interest in the dwelling. The duty applies not only to work badly carried out but to failure to do necessary work.[46]

Where someone takes on such work in accordance with the instructions of another, if he does the work in accordance with those instructions, he will have discharged his duty subject to an obligation to warn the person instructing him of any defects in the instructions.

The significance of this Act is that it provides a remedy not just for "other" damage resulting from the defect but for the cost of repair of the defect itself.

As with all legislated duties, questions arise as to interpretation. A question which arises in relation to this Act is whether the provision of work, materials and fitness for habitation are three separate, or one composite duty. This was the issue in *Thompson v Alexander.*[47] The plaintiffs owned property in London designed by the defendant architects and

[45] See Wallace (1991) 107 *LQR* 228, 243.
[46] *Andrews v Schooling* [1991] 3 All ER 723.
[47] (1992) 59 BLR 77.

engineers. Was it enough under the Act for the plaintiff to establish that the defendants failed to carry out their work professionally, or did the building also have to be uninhabitable as a result? It was held that it was necessary to show that the defects rendered the property uninhabitable, since habitability was a measure of the standard of professionalism required by the Act.

Thus a defect in quality in itself does not give rise to protection under the Act. It seems that protection under the Act is limited to defects of a major structural kind and not features which are decorative or for convenience, such that some danger results. Loss at the bottom of the loss hierarchy discussed earlier remains unprotected. This position differs little from the common law given the scope of the complex structures argument, and the six year limitation makes common law more attractive. The only real advantage to *Defective Premises Act* actions is that all attempts to contract out of duties imposed by the Act are void.[48] In tort the *Unfair Contract Terms Act* 1977 requires disclaimers of tortious liability in cases of property and economic damage to be reasonable (judged in part by the power balance between the parties) and in cases of personal injury prevents disclaimers of any kind.

7. Breach of statutory duty

Can there be an action for breach of statutory duty where there has been a failure to comply with, for example, Building Regulations or the *Public Health Act* 1936? If this were possible then the defect/damage distinction would become irrelevant because the tort of breach of statutory duty allows recovery for pure economic loss.[49] This might allow the subsequent purchaser to sue for the cost of repair, particularly where the defect poses a threat to health and safety.

The difficulty with bringing such an action lies in the requirement that the relevant statute be shown to create a statutory right in favour of individual owner/occupiers of premises[50] as distinct from a public right. The existence of the *Defective Premises Act* renders it unlikely that such a duty will be found to exist, as was pointed out by Lord Bridge in *Murphy*. The very fact that Parliament in the *Defective Premises Act* has legislated to impose such duties suggests they do not exist elsewhere in legislation.

However note should be taken of section 38 of the *Building Act* 1984, a section which has yet to come into force. Section 38 states that breach of a duty imposed by Building Regulations, so far as it causes damage, will be actionable as a breach of statutory duty. This does not help us in our

[48] Section 6(3).
[49] See for example *Lonrho v Shell* [1981] 2 All ER 456.
[50] *Cutler v Wandsworth Stadium* [1949] AC 398.

efforts to find a remedy for pure defects, but adds to the list of remedies for damage. It might however assist where one component task in construction causes damage to the building resulting from another component task.

IV. Standard of Care

One of the concerns of the courts in positing liability for a defect in tort, articulated by Lord Brandon in *Junior Books*, is the difficulty of determining issues of reasonableness in relation to quality. This problem seems to be more hypothetical than real, and there is no indication that other common law courts have had particular difficulties in determining breach of duty in this context. It might be worth addressing very briefly the general approach taken to breach in defective premises cases.

Principles of ordinary negligence apply to determination of standard in the building context, and the standard required is of the ordinary skilled person exercising and professing to have special professional skills.[51] In *Saif Ali v Sydney Mitchell*[52] Lord Diplock explained that:

> "...no matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turns out to have been errors of judgment, unless the error was such as no reasonable member of that profession could have made."

The reasonable professional must keep up to date with advances in knowledge and must have an awareness of deficiencies in his or her own knowledge and skills.

Contractual documents claiming particular expertise will not affect the standard in tort. In *Wimpey Construction v Poole*,[53] Wimpey argued that they had specifically obtained and paid for someone with especially high skills and that the tort standard should reflect this. This argument was rejected and the case confirms that the standard remains that of the reasonable competent practitioner. However the court in *Wimpey* was prepared to take into account the actual knowledge of the defendant, and the standard imposed was of the reasonable practitioner with that knowledge.

One indication of what the reasonable practitioner would do would be reference to the "state of the art" of knowledge at the time of the performance. What is relevant is what knowledge, skill and technology could have been expected. However where the defendant has used some

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51 *Bolam v Friern Hospital* [1957] 1 WLR 582.
52 [1980] AC 198.
53 [1984] 2 Lloyd's Rep 499.

previously untried technique or design, there may be an additional duty to justify the new procedure, monitor it, inspect it and review it.[54]

These tests appear to have worked perfectly adequately so far. It may be that a hard case will arise, but the case law on breach is, I suspect, expansive enough to develop a solution.

V. Limitation

Issues of limitation are vital to discussion of defective premises given that the most problematic cases tend to involve latent damage.

Under the *Limitation Act* 1980 the plaintiff must commence an action not involving personal injury within six years from the date of accrual of the action.

In contract this means six years from the relevant breach of contract (or 12 years where the contract is executed as a deed). When does the breach of contract occur? Probably the breach would be interpreted as continuing at least until completion of the contract, during which time the breach might still be remedied. The effective date of accrual is likely to be on completion. Contractual limitations might also be affected by contractual indemnities, where the right to sue on the indemnity accrues only when the loss indemnified has been established.

In tort the situation is further governed by the *Latent Damage Act* 1986, an Act which purports to overcome the problems of limitation raised in *Pirelli General Cable Works v Oscar Faber & Partners*.[55] The *Latent Damage Act* gives an alternative to the six year period of three years from the date of discoverability of the damage, with a 15 year longstop. Liability may well continue belong the longstop where there are issues of contribution (see below). The *Latent Damage Act* appears on its wording not to apply to contract, although the philosophy behind it applies equally to contract and tort. Despite difficulties in interpretation of the *Latent Damage Act*, the Act gives a distinct advantage to the claimant in tort over contract in cases of slow developing damage.

The concept of discoverability has caused problems. Discoverability in the Act is defined in terms of the plaintiff's knowledge of the damage and its relationship with the defendant's negligence. Would a reasonable person with this knowledge have considered the situation sufficiently serious to have instituted proceedings? Case law governing discoverability indicates that interpretation is far from generous to plaintiffs. In *Horbury v Craig Hall Rutley*[56] for example the plaintiff became aware of a minor structural defect, which cost £132 to repair, and which she did not think

[54] *Victoria University, Manchester v Lewis Womersley* [1984] CILL 126.
[55] [1983] 2 AC 1.
[56] (1991) 7 PN 206.

worth suing for. She later found a more major structural defect, but time was found to run from the first defect and she was found to be out of time. Such restrictive reading of the legislation may make tort a less favourable option.

VI. Contribution

Related to issues of limitation are rights of contribution. It is important to note that the provisions of the *Limitation Act* bar the remedy but not the right itself. This distinction is important in relation to contribution proceedings. A defendant who is sued within the statutory period may seek a contribution from a third party even though an action by the plaintiff against the third party would be statute barred. This may leave a defendant vulnerable to litigation after the 15 year longstop.

The *Limitation Act* sets out time limits with respect to contribution proceedings[57] and allows an action for contribution within two years of the accrual of the right of contribution. That right will accrue on the date of the judgment or arbitration award or agreement against the party seeking the contribution.

The *Civil Liability (Contribution) Act* 1978 allows a right of contribution when two parties are liable in respect of the same damage. A breach by one party may take place many years after the breach by the other. A sub-designer, for example, may be negligent early in a construction project, and the project architect's negligence in failing to spot and rectify that error in design may continue for several years to completion of the project. If proceedings are brought against the architect within the 15 year longstop, and those proceedings take another three or four years, and then the architect has a further two years to seek contribution against the sub-designer, then the sub-designer will be vulnerable to litigation for twenty or twenty five years after his or her task is completed.

This can have significant implications for insurance. The possibility that liability might be imposed so long after the event might also influence a decision on imposition of liability. Courts would be hesitant to impose a virtually indefinite duty of care. This should not negative the principle of a duty of care in such cases but would go to the determination of proximity on the facts of the case.

[57] Section 10.

VII. Conclusion

If the House of Lords in *Murphy* intended to restrict liability for defective premises to issues of contract and statute, then it has been unsuccessful. "Murphy's Law" as it has become known, has little to commend it in terms of justice or practicability, although it may have been a true reflection of political and economic values of the time. The response to *Murphy* of the senior commonwealth courts, the academic criticism of its internal theory, and its circumvention by the Privy Council in *Invercargill* suggest that there will be cautious reintroduction of tort liability as well as recognition of alternative, parallel duties of care.

Whether these alternative duties are constructed in terms of negligent advice, complex structure arguments, duties based on especially proximate relationships or breach of statutory duty remains to be seen. It may well be that sophisticated practice of collateral warranties will make tortious duties unnecessary. It is unlikely however that English law will be able to hold out long against the force of reason in the commonwealth judgments, and given the nature of judgments of the House of Lords in tort cases in the last two or so years it seems likely that a more policy based approach would be considered in England now. Liability in tort for defective premises is far from dead and buried and I suspect there will be a plethora of case law on this topic in the coming years.