



Peter D Aeberli
Barrister - Arbitrator - Mediator – Adjudicator



KINGS COLLEGE LONDON
CENTRE OF CONSTRUCTION LAW AND MANAGEMENT
PART B

TORT IN CONSTRUCTION

Peter Aeberli
RIBA ARIAS FCI Arb
Barrister, Chartered Arbitrator, Adjudicator, CEDR Registered Mediator

PART A: NEGLIGENCE AND DEFECTIVE CONSTRUCTION WORKS AFTER D&F ESTATES V. CHURCH COMMISSIONERS AND MURPHY V. BRENTWOOD

Introduction

1. Difficulties in this area concern the circumstances in which a duty of care in negligence will be imposed, and are due to:

Multiparty involvement in construction projects;

Interrelationship between obligations in contract or statute and duty of care in negligence;

Persistence of *caveat emptor* rule in real property transactions and preference for full repairing leases;

Discontinuities in contractual networks or assignment problems, consider Linden Garden Trust v. Lenesta Sludge Disposals [1994] 1 AC 85, Darlington BC v. Wiltshire Northern Ltd (1994) 69 Build LR 1.¹ For a recent application see #Alfred McAlpine v. Panatown [2000] BLR 331 (HL).² See also #The Contracts (Rights of Third Parties) Act 1999.

Various types of conduct that can cause damage and conceptual difficulties in categorising such damage;

Limitation problems due to latency of defects, Société Commercial de Réassurance v.

¹ Linden Garden Contractual bar on assignment without consent, valid, assignment void as between original contract parties. In the McAlpine case, damage occurred after its employer, St Martin, sold the property and purported to give assignment. Held St Martin could recover real damages, even though no property interest at date of breach since knew at time of contract formation was going to be occupied, possibly purchased by third parties, not by St Martin, and no automatic acquisition of rights against purchaser on acquisition, the Albazero [1977] AC 744, principle. Darlington. Assess damages recoverable by assignee on basis that assignment not made and building not transferred.

² Panatown: Employer did not own land on which building to be constructed and no interest in that land. Building alleged to be defective, could employer recover substantial damages. Discussion of the narrow ground of liability (Albazero principle). Also a broad grounds of liability identified that person who engaged person to provide work and materials and did not receive the contracted for performance suffered a loss, at least where intended to pay for the remedial works. Consideration of whether the duty of care agreement by contractor to the land owner affected these principles. Yes, because neither principle applied where the parties contemplated a direct claim between landowner and contractor.

ERAS (International) Ltd [1992] 2 All ER 82.³

Attempts by defendants to find a concurrent duty in negligence so can raise issues of contributory negligence, such as in Raflatac Ltd v. Eade [1999] 1 Lloyd's Rep 506. Contrast the position in contract, W Lamb v. Jarvis (1998) 60 Con LR 1, applying Tenant Radiant Heat v. Warrington (1988) 11 EG 71 (CA).⁴

Generalists and incrementalists

2. These difficulties are compounded by the competing principles used by the courts to determine the existence of a duty of care. The generalist verses the incrementalist approach.

2.1 Generalists.

Lord Atkin, #Donoghue v. Stevenson [1932] AC 562:

"... there ... is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances ...".

Lord Wilberforce, Anns v. London Borough of Merton [1978] AC 728 (subsequently overruled):

"Through the trilogy of cases in this House, Donoghue v. Stevenson, Hedley Byrne & Co Ltd v. Heller & Partners Ltd and Home Office v. Dorset Yacht Co Ltd the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist."

2.2 Incrementalists.

Lord Bridge in #Caparo Industries Plc v. Dickman [1990] 2 AC 605:

"While recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as a guide to the existence, the scope and limits of the varied duties of care which the law imposes."

Lord Oliver, #Murphy v. Brentwood [1991] 1 AC 398, 484. The categorisation of the damage is useful:

"in identifying those cases in which it is necessary to search for and find something more than mere reasonable foreseeability of damage which has occurred as providing the degree of "proximity" necessary to support the action."

A three stage duty test (generalists)

3. The generalists appear to be somewhat in the ascendant (a three stage rather than a two stage test):

Savill LJ (in the Court of Appeal), approved by Lord Styne, #Marc Rich & Co v. Bishop

³ **ERAS**: LDA 1986, s. 14A applies only where duty arises in tort of negligence (not contractual negligence).

⁴ **Raflatac**: 1st D, main contractor, unsuccessfully argued that it was concurrently liable in negligence for 2nd D's (P selected sub-contractor's) failure to consult with P before altering sprinklers (caused flood). Thus, could not raise contributory negligence. Nor did the **Tenant** principle (see **Lamb**) apply because no suggestion of a breach of legal duty owned by P to 1st D. (if was court could, applying **Tenant**, apportion responsibility for the damage between the parties).

Rock Marine Co [1996] 1 AC 211.⁵

"... whatever the nature of the harm sustained by the plaintiff, it is necessary to consider the matter not only by enquiring about foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course ... these three matters overlap with each other and are really facets of the same thing. For example, the relationship between the parties may be such that it is obvious that a lack of care will create a risk of harm and that as a matter of common sense and justice a duty should be imposed. ... Again in most cases of the direct infliction of physical loss or injury through carelessness, it is self-evident that a civilised system of law should hold that a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem. Thus the three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements but rather as convenient and helpful approaches to the pragmatic question of whether a duty of care should be imposed in any given case."

The categories of actionable harm (incrementalists)

4. The categorisation of actionable harm (as opposed to the consequential damage, consider Spartan Steel Alloys Ltd v. Martin & Co [1973] 1 QB 27 or London Waste Ltd v. Amec (1997) 83 Build LR 136),⁶ particularly the distinction between economic injury and injury to person and property, remains relevant to identifying the different ambit of #Donoghue v. Stevenson [1932] AC 562 (negligence) and #Hedley Byrne & Co Ltd v. Heller & Partners [1964] AC 465 (negligent misstatement?).
5. The distinction between injury to property and economic injury (financial harm/pure economic loss) is maintained by restricting the tort of negligence to claims in respect of "other property": That in which (a) the plaintiff has some proprietary interest but which (b) was not supplied by the tortfeasor. But loss of economic utility can be regarded as physical damage, #Barclays Bank Plc. v. Fairclough Building Ltd (1993) CILL 848 (reversed on the contributory negligence point, (1995) 76 Build LR 1 (CA)).⁷
 - 5.1 A proprietary interest involves more than a contractual right, see for example Delaware Mansions v. Westminster CC (1998) 88 Build LR 99 (but note The Times, 25th August 1999 (CA), and now [2001] 3 WLR 1007 (HL), reversed on the continuing nuisance issue).⁸
 - 5.2 The concept of other property is difficult to apply to construction projects and has led to the development of the complex structure theory. But is it simply a case of choosing your defendant: A complex builder theory?

#Murphy v. Brentwood, Lord Bridge, 478/9:

⁵ **Mark Rich:** Hague Rules (international convention) limited ship owner's liability to cargo owner. Surveyor allowed unseaworthy ship to sail, sank. Surveyor not in charge of cargo, no dealings with cargo owners who relied on the ship owners to take care. Proximity relevant despite a physical injury case (no proximity, not a direct infliction of physical harm case). Not fair and reasonable to allow negligence claims to outflank contract between cargo owners and ship owners governed by Hague Rules.

⁶ **Spartan Steel:** No claim for loss of profit on melts not damaged, no damage to furnace itself. **Amec:** Damage to cables to P's premises (waste incinerator), damaged generators. It was conceded such damages were recoverable in negligence. But no claim was allowed for the financial costs of having to dispose of waste elsewhere and consequent loss of profit on sale of electricity.

⁷ **Barclays Bank:** Was asbestos contamination of office files physical damage to property or pure economic loss, raised, not decided by CA.

⁸ **Delaware:** No action in negligence or nuisance by management company as had no property interest in the block damaged by the tree roots. Owners acquired interest after first damage, thus their claim failed as well. The HL held that the owners could recover in nuisance as nuisance a continuing wrong. Delaware, the management company, did not have sufficient interest in nuisance (or negligence, Leigh and Sullivan v. Aliakmon [1986] 1 AC 785); Canary Warf Ltd v Hunter [1997] 2 WLR 684 applied.

"A critical distinction must be drawn here between some part of a complex structure which is said to be a "danger" only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor on the other, can recover damages in tort on Donoghue v. Stevenson [1932] AC 562 principles. But the position in law is entirely different where, by reason of the inadequacy of the foundations of the building to support the weight of the superstructure, differential settlement and consequent cracking occurs. Here, once the first cracks appear, the structure as a whole is seen to be defective and the nature of the defect is known. Even if, contrary to my view the initial damage could be regarded as damage to other property caused by a latent defect, once the defect is known the situation of the building owner is analogous to that of the car owner who discovers that the car has faulty breaks. He may have a house which, until repairs are effected, is unfit for habitation, but ... the building no longer represents a source of danger and as it deteriorates will only damage itself."

See also Lord Keith, p 470 and Lord Jauncey, p 497:

"It seems to me that the only context for the complex structure theory in the case of a building would be where one integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure, eg. a steel frame erected by a specialist contractor which failed to give adequate support to floors or walls. Defects in such ancillary equipment as central heating boilers or electrical installations would be subject to the normal Donoghue v. Stevenson principle if such defects gave rise to damage to other parts of the building."

Applied in Jacobs v. Morton & Partners (1994) 72 Build LR 92,⁹ but not in Tunnel Refineries Ltd v. Donkin & Co Ltd (1998) CILL 1392.¹⁰ For a recent discussion of the issues see Bellefield Computer v. E Turner & Sons Ltd [2000] BLR 97 (CA)¹¹ and Payne v. John Setchell [2002] BLR 489.¹²

5.3 Does discovery of the defect before damage occurs preclude a claim?

See Target v. Torfaen BC [1992] 3 All ER 27 (CA), contrast Midland Bank v.

⁹ **Jacobs:** Negligently constructed underpinning to existing house. Scope of complex structure theory considered. (i) Was the item constructed by someone other than the main contractor responsible for the works. (ii) Had the item retained its separate identify (like a boiler). (iii) Did the item positively inflict damage on the rest of the building (ie faulty electrics – fire) or did it merely fail to perform a function permitting damage to occur? (iv) Also relevant is whether defective item constructed at a different time.

Here the defective raft inflicted positive harm, it made matters worse (house now had to be demolished), it had also retained separate identity to some extent.

¹⁰ **Tunnel:** D engaged to provide 2 compressors, 8 tons each, included an essential component (a fan, defective) which was provided by sub-contractor, Alsthom. All one item, when damage occurred not other property. So no liability.

¹¹ **Bellefield:** Builder constructed industrial building. Fire Separating wall between two parts of building negligently constructed and did not extend full height. Purchaser of building suffered damage when fire spread from one side of building to the other, both to building and contents. Held: Fact that one side of building used for different purpose from other, did not make other property from other side of building, but could recover loss caused by fire damage to contents, not building itself as no duty owed in respect of pure economic loss. Other property rule a policy issue.

¹² **Payne:** at page 508ff. Artificial to regard part of foundation slab running under one terraced property as separate from that part under the adjacent property.

Bardgrove Properties (1992) 60 Build LR 1.¹³

What if the defect ought reasonably to have been discovered, but was not until after it caused damage to something else? See Nitrogin Eireann Teoranta v. Inco Alloys Ltd [1992] 1 WLR 498.¹⁴

5.4 Buildings on boundaries (the health and safety exception).

#Murphy v. Brentwood, Lord Bridge, p 475:

"If the defect becomes apparent before any injury or damage has been caused, the loss sustained by the building owner is purely economic. ... The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repairing or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties."

Applied in Morse v. Barratt (Leeds) Limited (1992) 9 Const LJ 158, but not, in George Fisher v. Multi Design (1998) CILL 1362.¹⁵

5.5 Can the owner of a defective building claim an indemnity/contribution if he incurs liability to third parties? Apart from **the Civil Liability (Contribution) Act 1978** consider: Lambert v. Lewis [1982] AC 225, Lord Diplock:

"... where the economic loss suffered by a distributor in the chain between the manufacturer and the ultimate consumer consists of a liability to pay damages to the ultimate consumer for physical injuries sustained by him, or consists of a liability to indemnify a distributor lower in the chain of distribution for his liability to the ultimate consumer for damages for physical injuries, such economic loss is recoverable under the Donoghue v. Stevenson principle from the manufacturer.

Hirst J, Virgo Steamship v. Skaarup Shipping Co [1988] 1 Lloyd's Rep 352:

"Where the case is hall-marked by a physical damage claim somewhere up the chain there is a strong ground for not applying the general principle [that only a person with a proprietary or possessory interest in the damaged property can sue]; indeed it seems .. that the passing down the chain of a claim for physical damage in a case like Lambert's case ... may well not be properly regarded as a purely economic loss claim at all."

¹³ **Target:** Defective outside stair to house (no light/rails) caused injury. Complaints to D. Knowledge of plaintiff of defect did not negate duty or break chain of causation. Depended on whether reasonable to expect P to remove or avoid damage and whether, known of it, unreasonable to run risk of injury (contributory negligence 25%). **Midland Bank** Defective retaining wall constructed by D on its land. Would cause loss of support in due course, P took matter into own hands, repaired. No physical damage. No recovery. Should have applied for *qui timet* injunction.

¹⁴ **Nitrogin:** Defective pipe supplied by D. P knew defective, tried to repair. Subsequent explosion. Quality of repair went to contributory negligence. No action before damage to other property.

¹⁵ **Morse:** Building works – earth piled up behind site boundary wall, by D. After sale of properties, dangerous structure notice served by LA. £30,000 to repair (wall not other property). Present owner recovered as damage from D. **Multi Design** Claim that sub-contractor owed duty of care in negligence to avoid pure economic loss in respect of design and supervision rejected. Claim that an exception to the general principle where a danger caused to third parties (persons on the warehouse premises), rejected. Morse not followed. Could not recover for costs of protecting persons from danger.

Applying the three stage test to the different duty of care categories

6. Foreseeability.

The first element of the three stage test, reasonable foreseeability, sets a relatively low threshold, thus proximity and just and reasonableness are the principal controls on the "floodgates".

7. Proximity of relationship.

This is the principal controlling factor in all duty of care categories, Sutherland Shire Council v. Haeman (1985) 60 ALR 1:

"It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship ... of professional man and client and what might (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular course of conduct and the loss or injury sustained."

7.1 Injury to persons or other property.

The requirement for proximity of relationship is relevant whatever the category of harm, but in cases of directly inflicted injury (more usual where a wrongful act causes injury to person or other property), it is often taken for granted.

If harm is indirectly inflicted other evidence of proximity will be required, #Marc Rich & Co v. Bishop Rock Marine Co Ltd [1995] 3 WLR 227 (HL); Topp v. London County Bus [1993] WLR 976 (CA), but note Perrett v. Collins, [1998] 2 Lloyd's Rep 255 (CA).¹⁶ What were the proximity requirements in Donoghue v. Stevenson (putting into circulation a defective product without the possibility of intermediate inspection, proximity with those who come into context with that product)?

Negligent acts or negligent statements. Does it matter where there is injury to persons or other property?¹⁷

Clay v. Crump & Sons [1964] 1 QB 533, Ephriam v. Newham LBC (1992) 91 LGR 413.¹⁸

#Baxhall Securities Ltd v. Sheard Walshaw [2001] BLR 36 (physical damage);¹⁹

¹⁶ **Perrett:** Court suggested that Marc Rich did not apply to physical injury cases and that it was an economic loss case? A passenger was injured in light aircraft crash. 2nd D inspected aircraft and certified fit to flight under CAA 1982. Passenger entitled to assume those involved in assessing the aeroplane against the applicable safety requirements, had taken appropriate care. The court considered that this was established category of liability (surely not). In Topp (Bus, with key left in ignition, stolen. Pedestrian injured, sued bus company in negligence, failed. One issue the court discussed was whether a proximate relationship between company and pedestrian. No suggestion, not relevant.

¹⁷ It seems clear that once a duty is imposed by applying the relevant tests, breach of that duty by failing to exercise reasonable skill and care, can occur by act, omission or statement.

¹⁸ **Clay:** Building worker within class of person that must have been in contemplation of architect when furnished plan, made decisions to allow wall (on demolition site) to remain (thought was safe). One of the first persons on site when demolition contractor left. Physical control not decisive. **Ephriam:** List of accommodation given. Included dangerous premises. Occupied, fire, personal injury. Clear reliance on statement, but not just and reasonable to impose higher duty than owed by statute. Might be different if knew of danger.

¹⁹ **Baxhall v. Sheard:** Defective design/supervision of roof drainage by defendant, Architect – two faults, should have noticed overflows omitted, system undersized. Claimant takes lease after having property surveyed. Subsequent flood due to lack of overflows and blockage. Second flood due to undersized system and no overflows. Liable for damage to premises due to second flood because of undersized system (latent defect) a material cause. Not liable for first flood because a reasonable possibility of discovery of defect on inspection. No liability for works necessary to correct defects in the roof system itself. The CA, although while accepting the legal analysis applied by the judge, concluded that the second flood was also caused by the patent defect therefore no liability for that flood either.

see [2002] BLR 100 (CA) (CA differed from the judge on cause of the second flood). Contrast with #Bellefield Computer v. E Turner & Sons Ltd [2000] BLR 97 (CA).²⁰

7.2 Financial harm (pure economic loss)

There are two strands to the proximity test, reliance on advice and voluntary assumption of responsibility.

Reliance on advice

Financial harm often occurs as a result of wrongful advice. In consequence, the proximity requirement has usually been considered in terms of reliance on a statement.

Lord Oliver #Caparo Industries v. Dickman [1990] 2 AC 605, 645:

"... it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced. The damage which may be occasioned by the spoken or written word is not inherent. It lies always in the reliance by somebody on the accuracy of that which the word communicates and the loss or damage consequential on that person having adopted a course of action on the faith of it."

This proximity requirement (reliance on advice) coupled with the categorisation of this tort as "negligent misstatement" and the "other property" restriction on the tort of negligence suggests that there cannot be liability for financial harm caused by a wrongful act since there is no reliance on acts or omissions. But where does this leave Pirelli General Cable Works Ltd v. Oscar Faber & Partners [1993] 2 AC 1 and #Junior Books v. Vetchi [1983] 1 AC 520, Lord Roskill.²¹

"... I therefore ask first whether there was the requisite degree of proximity so as to give rise to the relevant duty of care relied on by the respondents. I regard the following facts as of crucial importance in requiring an affirmative answer to that question. (1) The appellants were nominated sub-contractors. (2) The appellants were specialists in flooring. (3) The appellants knew what products were required by the respondents and their main contractors and specialised in the production of those products. (4) The appellants alone were responsible for the composition and construction of the flooring. (5) The respondents relied upon the appellants' skill and experience. (6) The appellants as nominated sub-contractors must have known that the respondents relied upon their skill and experience. (7) The relationship between the parties was as close as it could be short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently ... the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss."

The problem was addressed by Lord Keith in #Murphy v. Brentwood, 446 (but are Pirelli

²⁰ **Bellefield:** Builder constructed industrial building. Fire separating wall between two parts of building negligently constructed and did not extend full height. Purchaser of building suffered damage when fire spread from one side of building to the other, both to building and contents. Held: Fact that one side of building used for different purpose from other, did not make other property from other side of building, but could recover loss caused by fire damage to contents, not building itself as no duty owed in respect of pure economic loss. Other property rule a policy issue.

²¹ **Pirelli:** Defective design by consultant, incorrect construction by sub-contractor but consultant said it was all right, and thereby accepted responsibility. Treated as a physical damage case. But was either the act of designing or advice, reliance on approval. Cause of action when damage occurred, not when reasonably ought to have been discovered. Lord Keith, in Murphy, saw this case as advice causing economic loss not an act causing physical damage. In Junior Books there was no reliance on advice, just on doing job competently.

and Junior Books really reliance on advice cases?):

"In Pirelli ... it was held that the cause of action in tort against consulting engineers who had negligently approved a defective design for a chimney arose when damage to the chimney caused by the defective design first occurred, not when the damage was discovered or with reasonable diligence might have been discovered. The defendants there had in relation to the design been in contractual relations with the plaintiffs, but it was common ground that a claim in contract was time-barred. If the plaintiffs had happened to discover the defect before any damage had occurred there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage, without having to wait until some damage had occurred. They would have suffered economic loss through having a defective chimney upon which they required to expend money for the purpose of removing the defect. It would seem that in a case such as Pirelli, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take reasonable care not to cause economic loss to the client by the advice given. The plaintiffs built the chimney as they did in reliance on that advice. The case would accordingly fall within the principle of Hedley Byrne ... I regard Junior Books ... as being an application of that principle."

A similar "reliance on advice" approach to proximity can be seen in Preston v. Torfean BC (1993) 56 Build LR 1 (CA) and in Machin v. Adams (1987) 84 Build LR 79,²² note also #Payne v. John Setchell [2002] BLR 489, 513ff.²³

Taken to extremes, this reasoning leads to the conclusion that negligent misstatement is a separate tort, in which liability for pure economic loss can only be founded on the making of statements (advice), not on acts or omissions.²⁴ Consider cases such as Hydrocarbons Great Britain Ltd v. Cammell Laird Shipbuilders Ltd (1991) 58 Build LR 123 (not followed in Wessex Regional Health Authority v. HLM Design (1995) 40 Con LR 1).²⁵ Note the difficulties caused by the separate tort theory in Lancashire and Cheshire Association of Baptist Churches v. Howard & Seddon Partnership [1993] 3 All ER 467

²² **Preston:** Company employed council do to do soil survey, negligent. Subsequent purchaser of house on land discovered house defective because of ground conditions. No reliance by purchaser as it never saw report. At time of negligent act no complainant could be identified so not a M of LG v. Sharp (or White v. Jones) case. **Machin** Claimant agreed to purchase property being extended, contract provided for the issue of a final certificate by the architect. The architect knew that property to be sold, and that his client needed a letter indicating the extent of the works, he knew or must have known would be shown to someone else. Letter said works satisfactory standard to date, two weeks left to complete. Did he owe duty of care in negligence to purchaser shown letter. Held, no reliance by Machin, and did not owe duty of care because ignorant of purpose for which advice in letter required by Ms Machin, thus no assumption of responsibility and because anticipated would return to site to certify completion, could not anticipate that Machin would rely on letter to take irrevocable step. Need for a connecting thread between purpose for which advice given and the action which an advisee who relies on it takes, and therefore with the damages the advisee suffers. Here no such thread, could not say from what harm the architect was to be regarded as having undertaken to guard the purchaser.

²³ **Payne:** Architect engaged to provide designs for terraced properties including foundations. At end of work provided letter to client, Mr Wright, dated October 1998, certifying that work was carried out to its satisfaction, letter was written. Held, the purpose of providing the letter was to provide the then owner with a document that could be used to satisfy a prospective purchaser that the foundations could be treated as having been soundly build to a satisfactory design (Defendant accepted this in evidence). The document was intended to be seen and relied on by a prospective purchaser who might come on the scene at any time after 1998. Thus defendant had duty in law not only to Mr Wright but to subsequent purchasers and those likely to lend money secured on the house to take care that the statements were reliable. The judge remarked obiter that the duty was indefinite in time, could be regarded as 10 years, since the certificate was to be treated as tantamount to NHBC cover.

²⁴ Such a distinction may also underlie the judge's reasoning in Payne v. John Setchell [2002] BLR 489, on the scope of concurrent liability in negligence, since he followed the reasoning in negligent act cases such as Murphy v. Brentwood.

²⁵ **Hydrocarbons:** Allegation that Lloyd's Registrar negligent in inspection and in issuing certificate, regarded as a different cause of action from alleging that certificates contained negligent statements. Latter is HB v. H, former D v. S, negligence. So no leave to amend out of time. Contrast Wessex where the court held that a concurrent duty did exist in tort in the case of those contracted to exercise professional skills, and that duty extended to taking reasonable skill and care to avoid or prevent economic loss under the principles in Hedley Byrne. Nothing unreasonable or unfair in this giving rise to liability for a longer period than would have been the case under the contract.

(contrast Edgeworth Construction v. ND Lea Associates Ltd (1993) 66 Build LR 56).²⁶

Voluntary assumption of responsibility

There was, however, another strand of reasoning in Hedley Byrne v. Heller [1964] AC 465, proximity based on a voluntary assumption of responsibility. From this perspective distinctions between negligence by word and by deed are unworkable, Lord Devlin at p. 516:

"A simple distinction between negligence in word and negligence in deed ... would be unworkable. A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver drove the car and for which he could recover. In this type of case where, if there were a contract there would undoubtedly be a duty of service, it is not practicable to distinguish between the inspection or examination, the acts done or omitted to be done, and the advice or information given."

In Smith v. Eric Bush [1990] 1 AC 851 it was suggested that concept of voluntary assumption of responsibility was unhelpful but it was revived in White v. Jones [1995] 2 AC 207 (HL), and in Henderson v. Merrett Syndicates [1994] 3 WLR 761²⁷ by Lord Goff:

"if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages (to) that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the Hedley Byrne principle, there should be no need to embark on any further enquiry whether it is "fair, just and reasonable" to impose liability for economic loss ... The concept indicates too that, in some circumstances, for example where the undertaking to furnish the relevant service is given on an informal occasion, there may be no assumption of responsibility and, likewise, that an assumption of responsibility may be negated by an appropriate disclaimer. I wish to add in parenthesis that ... an assumption of responsibility by, for example, a professional man may give rise to liability in respect of negligent omissions as much as negligent acts of commission."

Lord Goff considered this reasoning did not apply to construction projects, but could it

²⁶ **Lancashire:** Could be concurrent duties in contract and tort and in such a case tort claim could be maintained even where, for limitation reasons contract claim barred. But here no duty to avoid economic loss under HB as, in submitting designs, architects made no express statements about technical qualities of building and it was artificial to treat submission of drawings and designs and implied statements (But, see now Henderson v. Merret Syndicates). **Edgeworth** Tender documents were accepted to be a statement and since contractor had lost money because of errors in them had prima facie case in HB negligence.

²⁷ **White:** Had solicitor assumed responsibility to beneficiary of will. Since no reliance, HB no help unless assumption of responsibility principle extended by law to beneficiary who otherwise would have no remedy because testator dead. Voluntary assumption test means omissions may be actionable, but will be restricted by any relevant contract terms. Also needs to be reasonable foreseeability, as here. (a M of LG v. Sharp case, justice required a remedy). Dissent. Why would not the reasoning apply in all cases were A promises B for reward to perform benefit for C. **Henderson:** Two relationships: Direct names employ managing agent (but limitation problems). Indirect names are members of a syndicate (employ members' agent). The members' agent employs a managing agent. No contract between managing agent (negligent) and names. Existence of contractual right not inconsistent with co-existence of right in tort, but agreement of parties can modify shape of duties in tort which, in absence of contact would be available. Managing agents owed duty of care to names, had voluntarily assumed responsibility for provision of underwriting services (under this head the just and reasonableness requirement less important) and there was concomitant reliance. But have to ask whether assumption of responsibility is consistent with the contractual matrix. Not usually in the case of building contract works.

herald the revival of #Junior Books Ltd v. Vetchi Co Ltd. Consider cases such as #Barclays Bank Plc. v. Fairclough Building Ltd (1995) 76 Build LR 1 (CA); Plant Construction v. Adam (1997) 86 Build LR 119.²⁸

In other types of commercial transaction, this principle can lead to the imposition of a duty of care on a sub-contractor to the person to whom that sub-contractor's services are ultimately provided, consider Bailey v. HSS Alarms, The Times 20th June 2000 (CA).²⁹

8. Imposition of the duty must be just and reasonable.

This requirement seems to become important where the claim in tort would disrupt well established and/or commercially negotiated or statutorily imposed structures of risk and liability, consider #Marc Rich v. & Co Bishop Rock Marine. It may not be relevant at all where the test for proximity is "voluntary assumption of responsibility", Henderson v. Merrett Syndicates [1994] 3 WLR 761; although it is difficult to see why not!

Thus, a duty of care in negligence may be negated where this would short circuit a contractual network, Pacific Associates Inc. v. Baxter [1990] 1 QB 993 (CA), or statutory regime, #Marc Rich & Co v. Bishop Rock Marine,³⁰ but contrast #Henderson v. Merrett Syndicates, Plant Construction v. Adam (1997) 86 Build LR 119.³¹ Consider also RM Turton v. Kerlake & Partners [2000] L Rep PN 267 (CA NZ)³² and contrast J Jarvis & Sons v. Castle Wharf Developments [2002] EWCA Civ 19 (CA).³³

Other considerations in applying the three stage test

9. The problem of omissions

Stovin v. Wise [1996] AC 923 Lord Hoffman, page 943ff:

"It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others, it is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent

²⁸ **Barclays:** Contract chain. Barclays (employer) – Main contractor – sub-contractor (C) – Sub-subcontractor (T). Held T owed C a duty of care in tort to avoid causing economic loss, ie. Liability up the line. Note, this was a negligent service (cleaning roof of asbestos), not advice. Or was it actually a physical damage case. See Lambert v. Lewis. **Plant Construction:** Contact chain: Ford – Plant – Adam (engineer contracted to Plant) – JMH (sub-contractor to Plant). Roof collapse. Contract stated that Plant responsible for damages to works caused by its negligence and that of Ford. Plant responsible for acts and omissions of its sub-contractors. Assistance given by Ford did not relieve Plant of its obligations. Plant sued by Ford, sued Adam and JMH. JMH issued 3rd party proceedings against Ford saying Ford had directed how works to be done so Ford owed it a duty of care, struck out, not a proximate relationship.

²⁹ **Bailey:** Bailey engaged HSS to provide alarms and monitor premises. D sub-contracted monitoring to Defendant. Defendant failed to monitor adequately, and burglary caused loss to Bailey. HSS in liquidation. If HSS still in business, Defendant would have been liable through the contractual chain, under indemnity in the sub-contract. Defendant must have known B were relying on it to monitor and just and reasonable to impose duty. Liability was for damage and loss of profit resulting from the burglary.

³⁰ **Pacific Associates:** Fact that employer in contract with builder as well as engineer relevant to finding that no duty of care owed by engineer to builder. Builder's claim is against the employer. Note two articles on this case in the Construction Law Journal (2003) 19 Const LJ 303 (Duncan Wallace), 311 (Nicholas Lane). **Marc Rich**, claim in negligence should not be allowed to circumvent the contractual structure or the limitations in the Hague rules.

³¹ Why was the tort claim allowed to short-circuit the indirect names - members agent - managing agent relationship in Henderson? Could different circumstances have created a proximate relationship between JMH and Ford in Plant Construction.

³² **Turton:** Claim by contractor against mechanical engineer engaged by Employer's architect. The mechanical specification did not work and contractor had paid to remedy fault. Because of the contractual relationship not just and reasonable to impose a duty of care on engineer as regards allegedly negligently prepared specification that caused the contractor's loss. Engineer had not assumed responsibility to the contractor and Contractor had relied on its mechanical sub-contractor.

³³ **Jarvis:** Professional agent of employer could be liable to contractor for negligent misstatement made by that agent with aim of inducing it to enter into contract. But duty depended on facts, particularly what was said to contractor. Here an experienced design and build contractor, no reliance on any misrepresentations made (about the scheme being compatible with existing consents).

another from suffering harm from the acts of third parties for natural causes.

Of course it is true that the conditions necessary to bring about an event always consists of a combination of acts and omissions. But this does not mean that the distinction between acts and omissions is meaningless or illogical. One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity."

#Bellefield Computer v. Turner [2000] BLR 96 (CA), Schiemann LJ, page 100ff:

"There are arguments against imposing liability on reluctant rescuers. There are arguments against holding public authorities liable for not doing something which they are under no statutory duty to do. But in the present case, absent any possible exclusion clause in the liability of the builders to their contractual partners, the imposition of liability on the builders to subsequent owners only has the effect of substituting a different beneficiary for the original beneficiary of the builders' potential liability. In those circumstances, to hold that, although they would have been liable if the wall had been built of combustible materials, they are not liable because the wall was not built high enough would have been quite unjustifiable on any policy ground and the judge was right not to do so. I would dismiss the Builders' appeal. "

See also, in the context of economic loss claims, the passages from #Hedley Byrne v. Heller [1964] AC 465, Lord Devlin, and #Henderson v. Merrett Syndicates [1994] 3 WLR 761 Lord Goff, cited, above.

10. The relationship between contract and tort.

Concurrent liability in tort and contract. Does the existence of the contract qualify or preclude a duty of care in tort?

Lord Bridge, #Caparo Industries Plc v. Dickman [1990] 2 AC 605, 619:

"In advising the client who employs him the professional man owes a duty to exercise that standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty."

Lord Goff, #Henderson v. Merrett Syndicates [1994] 3 WLR 761:

"... given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

10.1 Where does this leave Lancashire & Cheshire Association of Baptist Churches v. Howard and Seddon Partnership, Hiron v. Pynford South Ltd (1991) 60 Build LR 78, Edgeworth Construction v. ND Lea Associates Ltd.³⁴

³⁴ **Lancashire:** Is probably right on the concurrent duties point, wrong in suggesting that since drawings are not advice a claim based on defective drawings is not actionable in the tort of HB. **Hiron** Cause of action whether for personal injury, physical damage or financial loss accrued when damage suffered. Here suffered damage when funded the useless remedial works. So statute barred. Also, since the limitation period in contract expired, not just and reasonable to impose duty in tort to give greater period (now wrong). **Edgeworth** Is issue of tender documents a statement (or voluntary assumption of responsibility)?

- 10.2 Presumably this reasoning applies both to negligent acts/omissions and statements causing financial harm. But if building professionals are concurrently liable in tort and contract for defects in property due to careless design, should not builders also be concurrently liable in contract and tort for defects due to careless construction? The CA assumed this was the case in #Bellefield Computer v. E Turner & Sons Ltd [2000] BLR 97, see also Storey v. Charles Church (1997) 13 Const LJ 206³⁵ (TCC). For the opposite view, see #Payne v. John Setchell [2002] BLR 489 (TCC),³⁶ considered, but not followed in Tesco v Costain Construction [2003] EWHC 1487; [2004] CILL 2062.³⁷ See also A Pigott, *Economic loss, Transmitted warranties ...* (2005) 21(2) Cost LJ 95.
- 10.3 Although the contractual relationship is relevant in determining the scope of any duty in tort, the duty in tort is not necessarily co-extensive with the duty in contract, Holt v. Payne Skillinton (1996) 77 Build LR 51 (CA).³⁸ Contrast Nordic Hotels v. Mott McDonald [2001] 77 Const LR 88 (TCC).³⁹

11. Damage caused to third parties through negligent performance of contractual undertakings.

A duty of care in tort owed by one party in a contractual network to a third party elsewhere in the network may be qualified or negated by provisions in the latter's contract although the former is not privity to it; Norwich City Council v Harvey [1989] 1 WLR 828 (CA), Ossory Road (Skelmersdale) Ltd v. Balfour Beatty Building Ltd (1993) CILL 882,⁴⁰ but contrast National Trust v. Haden Young Ltd (1994) 77 Build LR 1 (CA), British Telecommunications Plc v. James Thompson (1999) BLR 35 (HL).⁴¹

Can provisions of a contract to which the defendant, but not the plaintiff, is a party qualify or negate a duty of care in negligence? Consider #White v. Jones, Rumbelows v. AMK (1980) 25 Build LR 25.⁴²

But what of Midland Silicones Ltd v. Scruttons [1962] AC 446 and Smith v. Eric Bush [1990] 1 AC 831?⁴³

³⁵ **Storey:** Scope of duty in contract and negligence coterminous unless reshaped by the contract. Thus design and build contractor owed duties of skill and care in contract and negligence in respect of economic losses due to defects in the building itself.

³⁶ **Payne:** (note date of case March 2001). A designer's concurrent duty in negligence, to its client, was held to extend only to avoiding damage to persons or other property, not to defects in the property designed. There was no sustainable difference between builders and designers in this respect and, in Murphy v. Brentwood it had been decided that, as a matter of policy, builders should not be liable in negligence for defects in the things they constructed.

³⁷ **Tesco:** Contractor's concurrent duty in tort to employer extended to avoiding causing economic loss. But note Judge's comments on the restricted nature of the duty and loss suffered by it. The duty was concerned with the provision of fire barriers, thus the loss was the diminution in value of the property resulting from the absence of the barriers, not the cost of repairing the building after it suffered (more extensive) fire damage because they were not installed.

³⁸ **Holt:** Duty of care in tort may not be co-extensive with duty of care in contract. I.e. when volunteered a greater service than provided for under the contract (unless contract excludes it?)

³⁹ **Nordic:** Could not establish the scope of the duty without looking at terms of retainer. Not engaged to do a full review of the design.

⁴⁰ **Norwich:** The subcontractor (sued in tort by employer) was able to rely on clause of main contract (JCT 63) which allocated risk to employer (?). **Ossory** Followed **Norwich**, revised insurance provision in JCT 80, clause 20.2 allocated risk to employer so could not sue sub-contractor.

⁴¹ **National Trust:** insurance provisions in MW80 did not allocate risk so could sue sub-contractor (fire). **British Telecommunications** (Employer sought to sue domestic sub-contractor) The Scottish Court concluded, having regard to the JCT terms used, that it was not just and reasonable to allow employer to sue domestic subcontractor if employer had insurance obligation for harm suffered, under main contract. Reversed by HL.

⁴² **White:** Suggested that contract between solicitor and testator could qualify duty to beneficiary. **Rumbelows** If plaintiff (employer) knows of exclusion clause in sub-contract might be relevant to qualifying sub-contractor's duty, if employer assented to it. The duty of party in contract with plaintiff (in respect of the sub-contract works) might also be qualified.

⁴³ **Midland Silicones:** Goods damaged in unloading. D (stevedore) could not rely on an exclusion clause in P's contract with ship owner (D not a party), to restrict liability to P (not an allocation of risk clause – not party of a matrix set up by P?). **Smith** Reliance by P on D's (valuer to Mortgage Company) expertise despite exclusion clause in D's contract with Mortgage Company and Mortgage Company not being liable to P. Despite clause, reliance and reasonableness of reliance, so proximate relationship and a duty of care owed.

12. Damage caused through negligent exercise of statutory powers or duties.

- 12.1 Claims against Local Authorities and statutory undertakers for negligent performance of powers or duties performed under statute.

See, the Building Act 1984, s.1(1):

"The Secretary of State may, for any of the purposes of –

(a) securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings

...

make regulations with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings."

The Building Act 1984, s. 91(2):

"It is the function of local authorities to enforce building regulations in their areas ..."

The Building Regulations 1985, reg. 8:

"No obligation imposed by these regulations to comply with any requirement in Parts A to K of Schedule 1 or by regulation 7 shall require anything to be done beyond what is necessary to secure reasonable standards of health and safety for persons in or about the building and others who may be affected by any failure to comply with that requirement."

- 12.2 For an illustration of the general principles that apply, although in a different context, consider Glidewell LJ, Ephriam v. Newham LBC 423:

"The Secretary of State had decided the limits within which the power to enforce the provisions of [part XI] the Act should become a duty to do so. 233 Browning Road was outside those limits. Thus the alleged duty to inspect was a duty, at common law, added to and outside the limits of the statutory duty. Why should such a duty be added? The Secretary of State and local housing authorities susceptible to directions made by him are, in our judgement, better equipped than are the courts to know at what point to turn the power given by these provisions of the statute into a duty.

We would therefore hold that Newham were not, and that other local housing authorities were not, under such a duty as was held by the judge in this case in relation to two-storied houses in multiple occupation. We appreciate that so to hold may well deprive this plaintiff of compensation for her grievous injuries. Nevertheless in our judgement, in all the circumstances, it is fair, just and reasonable that local housing authorities should be under no higher duty than that imposed by the Act of 1985 in Part XI when seeking to give advice to the homeless under Part III."

- 12.3 This approach was applied in respect of the Building Regulations in Tesco v. Wards Construction (1995) 76 Build LR 94⁴⁴ and by Ralph Gibson LJ, Warner v. Basildon Development Corporation (1991) 7 Const LJ 146, 156:

"The extension of such liability and the proper extent of it is in my view, better left to legislation. The great importance of the topic in the public interest is such that it is reasonable to expect that any legislation which is judged to be necessary will be prepared and presented to Parliament without extensive delay."

- 12.4 The court is resistant to allowing the law of tort to impose duties or liabilities beyond

⁴⁴ Tesco: Building Regulations concerned with Health and Safety and welfare. Breach of local authority's obligations under those regulations did not give rise to a common law duty of care to avoid physical damage (did not notice absence of fire barriers in roofs, fire destroyed building).

the scope of the statute. See, in connection with the Building Regulations, Tesco v. Wards Construction.⁴⁵ See in connection with claims in nuisance against water authorities, Marcic v. Thames Water Utilities Ltd [2003] 3 WLR 1063 (HL).

Lord Nicholls, p 1613: "the public sewers are vested in Thames Water pursuant to the provisions of the 1991 Act . Thames Water's obligations regarding these sewers cannot sensibly be considered without regard to the elaborate statutory scheme ... The common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme. To do so would run counter to the intention of Parliament as expressed in the Water Industry Act 1991."

The House of Lords also concluded that the statutory scheme, by providing a statutory remedy for persons in Mr Marcic's position, was compliant with the Human Rights Act 1998. Thus, the claim for a remedy under that Act failed.

- 12.5 In exceptional circumstances, where the public authority acts so unreasonably so that it acts outside its discretion, or it creates an expectation that its powers will be used, it may be subject to common law duties of care, see X v. Bedfordshire CC [1995] 2 AC 633, Stovin v. Wise [1996] 3 All ER 801.⁴⁶
- 12.6 Do similar principles apply in regard to the duties imposed on designers and contractors towards those constructing and, to a lesser extent, maintaining, buildings under the **Construction (Design and Management) Regulations 1994**? What will be the position under the 2007 regulations?

Remoteness problems

13. A duty of care is owed in respect of particular types of harm. There is no recovery for kinds of harm not within the scope of the duty owed, #Bank Bruxelles v. Eagle Star [1996] 3 WLR 87 (HL).⁴⁷

South Australia Asset Management v. York Montague [1997] AC 191 (HL) Lord Hoffman, at pages 211ff:

"A duty of care ... does not however exist in the abstract. A plaintiff who sues for breach of a duty imposed by the law (whether in contractor tort or under statute) must do more than prove that the defendant has failed to comply, He must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered. Both of these requirements are illustrated by Caparo Industries Plc v. Dickman [1990] 2 AC 605. As Lord Bridge of Harwich said, at p.627:

⁴⁵ **Tesco**: The purpose of the regulations is principally to protect health and safety of persons. The purpose is not to avoid physical damage to property, or economic loss. No duty of care owed in negligence which would have the effect of extending the scope of this duty to protecting property interests.

⁴⁶ **Bedfordshire**: Where a statutory discretion conferred on a public authority nothing done by the authority within the ambit of the discretion was actionable at common law. But where the decision complained of was so unreasonable that it fell outside the statutory discretion it could give rise to common law liability. **Stovin** Obiter, p 828: If a public body represents that it will act in a certain way to as to create particular reliance in the Plaintiff or class of Plaintiffs a duty of care may arise. Such a duty causes no problems because it does not depend on authority's statutory powers.

⁴⁷ **Bruxelles**: Duty, on the facts of the case, was to provide the plaintiff with a correct valuation of the property. If negligent was responsible, not for all the consequence of the course of action decided on, but only for the foreseeable consequence of the information being wrong. The measure of damage was the loss attributable to the inaccuracy of the information suffered by the plaintiff though embarking on a course of action on the assumption that the information was correct. Not entitled to all losses incurred by entering into that course of action, including subsequent market falls, on the basis that would not have entered into it at all if proper valuation given. In one of the cases the consequence of the negligence was the plaintiff had £10 million less security than thought. Property subsequently sold at a loss of less than £10 million. Would not have suffered this at all had the anticipated security, thus whole sum recoverable in damages. In other cases the damages were limited to a difference in value measure, not the actual loss on sale.

'It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.'

...

How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute: Gorris v. Scott (1874) LR 9 Ex 125. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty.

...

What therefore should be the extent of the valuer's liability? The Court of Appeal said that he should be liable for the loss which would not have occurred if he had given the correct advice. The lender having, in reliance on the valuation, embarked upon a transaction which he would not otherwise have undertaken, the valuer should bear all the risks of that transaction, subject only to the limitation that the damage should have been within the reasonable contemplation of the parties.

...

But that is not the normal rule. ...

...

Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.

I can illustrate the difference between the ordinary principle and that adopted by the Court of Appeal by an example. A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.

On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury has not been caused by the doctor's bad advice because it would have occurred even if the advice had been correct.

...

Your Lordships might, I would suggest, think that there was something wrong with a principle which, in the example which I have given, produced the result that the doctor was liable. What is the reason for this feeling? I think that the Court of Appeal's principle offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.

I think that one can to some extent generalise the principle upon which this response depends. It is that a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for losses which would

have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.

The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong."

The applicable principles were considered in Tesco v Costain Construction [2003] EWHC 1487; [2004] CILL 2062.⁴⁸ where, having held that the contractor and consultant did own concurrent duties in tort to their employer to avoid causing economic loss commented, *obiter*, that since the scope of the duty was concerned with economic loss resulting from the omission of fire barriers the recoverable loss would be diminution in value of the property resulting from the absence of the barriers, not the cost of repairing the building after it suffered (more extensive) fire damage because they were not installed.

Limitation problems

14. Negligent acts or negligent statements, physical damage or economic loss Does it matter?

14.1 In respect of damage to property when physical damage occurs, even if unnoticed, not when the defective work which later causes such damage, carried out: Dove v. Banham's Patent Locks [1983] 2 All ER 833, Pirelli v. Oscar Faber [1983] 2 AC 1: But consider #Invercargill CC v. Hamlin [1996] 2 WLR 367 (PC),⁴⁹ for example, Lord Lloyd at page 648ff:

"Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, 'he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide. ...

This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of the Pirelli decision [1983] 2 AC 1 by the Supreme Court of

⁴⁸ Tesco: There must be some doubt as to whether the judge correctly applied the principles in South Australia, as distilled in the last two paragraphs quoted from Lord Hoffman's speech.

⁴⁹ Dove: Held that breach of duty of care owed to plaintiff, a subsequent purchaser, occurred when the security gate was installed. Cause of action did not accrue when faulty work completed but when gate gave way after burglar applied force to it. Pirelli: (Note first instance judge's finding that appellants had been negligent in passing the design of the chimney was not challenged). Cause of action in tort for negligence design or construction of a building accrues when damage came into existence, here when cracking occurred in the chimney, not when it was discovered or should with reasonable diligence have been discovered (but what if a pure economic loss claim, as suggested in Murphy. Invercargill: (note PC accepted that in NZ local authorities did have a duty to take reasonable care during their inspection of new dwellings. In the particular context of latent damage to a building, the plaintiff's claim was for economic loss, not physical damage, Such loss only occurred when the market value of the house was depreciated by reason of the defective foundation having been discovered. The measure of loss being cost of repair, if reasonable to repair, or depreciation in market value, if not. Pirelli was doubted.

Canada in the Kamloops case, 10 DLR (4th) 641. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the judge applied the right test in law. ...

It is regrettable that there should be a divergence between English and New Zealand law on a point of fundamental principle. Whether the Pirelli case [1983] 2AC 1 should still be regarded as good law in England is not for their Lordships to say. What is clear is that it is not good law in New Zealand."

- 14.2 In respect of financial harm when the actionable economic harm occurs: Foster v. Outred & Co [1982] 1 WLR 86, Hiron v. Pynford South Ltd (1991) 60 Build LR 78, First National Commercial Bank v. Humberts [1995] 2 All ER 673 (CA).⁵⁰
- 14.3 Does it matter whether the claim is characterised as one in respect of physical damage or pure economic loss? Does damage occur when the defect occurs (physical damage) or when the defective thing is acquired or when the defect is discovered or ought to have been discovered (this is, surely, when financial loss occurs. If so, can the Latent Damage Act 1986, eg. s. 3, ever apply to such claims)? Consider New Islington & Hackney HA v. Pollard Thomas [2001] BLR 74 (TCC).⁵¹ Lewisham v. MR Limited [2003] BLR 504;⁵² See #Abott v. Will Gannon [2005] BLR 195 (CA)⁵³ (Pirelli followed with

⁵⁰ **Foster:** Negligent advice by solicitors to client executing a mortgage on her home to secure son's borrowings, in failing to advise that it covered all his present and future liabilities. Son defaulted, had to pay up. Plaintiff said would never have entered into the transaction had implications been advised to her. Held: cause of action accrued when entered into transaction, since suffered actual damage at that time by her property being encumbered with a legal charge and being subject to a liability that might mature into a financial loss. Did not accrue when she actually became liable for repayment of the loan on a demand being made. **Humberts:** Plaintiff bank agreed to finance development by advances secured on the lease of that land. £2.6m advanced in reliance on a valuation of £4.4. Proper valuation was alleged to be only £2.7m, developers insolvent. Held no damage occurred when entered into the loan transaction (since if had known of the true value would not have entered into the transaction at all). Actual, as opposed to potential, damage occurred when the bank's outlay, together with the cost of borrowing or the notional profit they could have obtained elsewhere exceeded the security held in respect of the advance. **Hiron** Cause of action whether for personal injury, physical damage or financial loss accrued when damage suffered. Here suffered damage when funded the useless remedial works. So statute barred. Also, since the limitation period in contract expired, not just and reasonable to impose duty in tort to give greater period (now wrong).

⁵¹ **New Islington:** (Invercargill not followed) Alleged lack of sound insulating in properties designed by Defendant. Found on the facts and under RIBA Form there was a continuing duty to review design up to Practical Completion or date services performed, if earlier, not thereafter. Cause of action in negligence accrued not on knowledge of defect but when defect existed, this was when properties handed over on Practical Completion, since the sound insulation was never capable of being fit for purpose. This was unlike London Congregational v. Harris [1988] 1 All ER 15, where the drains functioned for a while after practical completion, damage only occurred when they no longer did. If the building suffers from a defect this completes the cause of action. Claimant had knowledge more than 3 years before proceedings commenced so s. 14A Limitation Act 1980 did not assist. Note, also the more restricted nature of the continuing duty to review, arises if something occurs to make it necessary or prudent to review, or knows or ought to know of earlier negligence. See also, in this respect, Payne v. John Setchell [2002] BLR 489, 502.

⁵² **Lewisham:** (note Invercargill not followed). Alleged duty of care on manufacturer of overcladding (defendant) in relation to the supervision and inspection of the cladding works so as to avoid causing economic loss to claimant. Court concluded, as a preliminary issue, that cause of action accrued when defendant failed to ensure that the sub-contractor carried out the work properly. Once the sub-contractor ceased work, the defendant's duties came to and end, unlike those of the sub-contractor or contract administrator, which continued to practical completion.

⁵³ **Abott:** Although concerned with whether Pirelli was correct, CA regarded it as binding, and did not have to consider whether the claim was a physical damage or an pure economic loss claim. Thus, held that the cause of action accrued, in regard to negligent structural advice and design, when cracks occurred in the bay window built in accordance with that advice/design. CA said, *obiter*, that even if Invercargill was applied, "and the claimants' cause of action accrued at the time they suffered economic loss, I do not accept Mr Holwill's submission that this occurred in March 1997. The defective design had not caused any loss at that time. It would only do so when it manifested itself in some way which would affect the value of the building, measured either by the cost of repairs or depreciation in market value."

reluctance). See J Murdoch, *A judicial roller coaster* [2005] EG 0513, page 133 (02/04/2005).

14.4 Does one simply ask when the claimant first sustains damage of the type which the defendant had a duty to avoid, Nykredit Mortgage Bank v. Erdman Group [1997] 1 WLR 1627 (HL)?⁵⁴

15. Statutory transfer or causes of action in negligence

Under s. 3 of the Latent Damage Act 1986⁵⁵ where a cause of action has accrued to a person in respect of negligence to which damage to any property in which it has an interest is attributable and another person acquires an interest in that property after the original cause of action accrued, but before the material facts about the damage have become known, then a fresh cause of action in respect of the negligence, accrues to the other person from the date he acquires that interest. Is a defect in property causing economic loss, damage to property within the meaning of these words, consider the discussion in #Payne v. John Setchell [2002] BLR 489, 512ff.⁵⁶

PART B: MISCELLANEOUS DEVELOPMENTS

16. A duty to warn.

Is there a duty to warn about dangers in previously completed work?

Bingham LJ, Eckersley v. Binnie (1988) 18 Con LR 1, 146:

"It has never, to my knowledge, been held that a professional man who advises on a tax scheme or on draft trading conditions, is thereafter bound to advise his client if, within a period of years, the statutory provisions or the relevant authorities change. Nor has it ever to my knowledge been suggested that a retired practitioner is bound, during his retirement, to keep in touch with developments in his profession in this way. These would be novel and burdensome obligations. On the other hand, counsel for the plaintiffs was able to advance persuasive examples involving dangers to life and health, where some response by a professional man may well be called for."

Hobbs (Farms) v. Baxenden Chemicals [1992] 1 Lloyd's Rep. 54, 65:

"A manufacturer's duty does not end when the goods are sold. A manufacturer who realises that omitting to warn past customers about something which might result in injury to them must take reasonable steps to attempt to warn them, however lacking in negligence he may have been at the time of manufacture."

The difference is, probably, that the court is more willing to impose such a duty where the damage to be avoided is physical injury or injury to other property caused by the property put

⁵⁴ **Nikredit:** Lord Hoffman: In order to decide when the cause of action arises it is first necessary to recall precisely what the cause of action was. Where purchaser buy a house negligently valued or subject to a charge overlooked by its solicitor, the cause of action is complete when purchase the property, as actionable damage occurs when lays out money on something that is of less than the valued promised. In the case of a duty of care owed by a valuer to lender, where the duty was in respect of any loss which the lender might suffer by reason of the security being valued being worth less than the sum advised by the valuer, the claimant must show that he is worse off as a lender than would have been had the security been worth what the valuer said. Since the valuer owes no duty to the lender in respect of entering into the transaction, the mere fact it did so is insufficient to establish a loss. May be difficult to show a loss at all where the lender's covenant appear good and interest payments are being made. Will be easily demonstrable if a default so that the lender's recovery has become dependant on the realisation of the security, and it is inadequate. Note Lord Nicholls. Where a purchaser buys a negligently overvalued house and had he known the true position, would not have bought (at that price?), suffers actual damage when competes the purchase.

⁵⁵ **LDA86:** A further difficulty with this provision is that it was drafted in the light of Pirelli. But if Pirelli is an economic loss case, and in such a case damage occurs when the defect is manifest, since only then is there diminution in value, the cause of action for pure economic loss can never have accrued before the material facts about the damage are known.

⁵⁶ **Payne:** Doubts expressed about whether a pure economic loss claim based on defects in property supplied by the tortfeasor can run under s. 3 of the LDA 1986.

into circulation. It requires something more in the way of proximity were the only loss is financial harm. Consider Hamble Fisheries v. Gardner & Sons [1999] 2 Lloyd's Rep 1 (CA).⁵⁷

17. Is there a duty to warn about the failings of other members of the consultant team, Chesham Properties v. Bucknall Austin [1996] 82 Build LR 92?⁵⁸ Note also the duty on designers, which would include design and build contractors, to see that design assumptions on which the design is based are verified; Ove Arup v Mirant Asia-Pacific {2006} BLR 187 (CA).
18. Does a contractor have a duty to warn about defects in the design it is asked to construct. If so, is the duty limited to known defects and how can the duty be discharged? Consider the contract case, Plant Construction v. Clive Adams Associates [2000] BLR 1375 (CA).⁵⁹ Consider Goldstein v. Cathkin Park [2004] BLR 369 (South Africa).⁶⁰
19. The duty to review earlier work.
The duty to review earlier work throughout the period of a retainer may be a way of extending the limitation period for claims against designers, New Islington & Hackney HA v. Pollard Thomas [2001] BLR 74 (TCC).⁶¹ But note the restricted nature of the duty to review; see also Payne v. John Setchell [2002] BLR 489, 502ff.
20. The economic torts.
Are these a way around Pacific Associates v. Baxter?

Actionable interference with a contract. The requirements are: knowledge of the existence of the contract; an intention to interfere with its performance; the doing of unlawful acts with such knowledge and intention; causing, in consequence, a breach of the contract or the non performance of a primary obligation of it.

John Mowlem & Co v. Eagle Star Insurance Co (1992) 33 Con LR 131; HHJ John Lloyd QC at 145:

"The facts pleaded would if proved, establish an interference by [the architect] with full knowledge of the existence of the contract and with an intention to interfere with its performance. It is certainly arguable that [the architect] in issuing the certificates of deduction deliberately misapplied the provisions of the contract and thereby directly caused [the employer's] non performance of the contract in relation to payment of the interim certificates. In reaching this conclusion I bear in mind the fact that the management contract itself does provide remedies to the management contractor both by way of arbitration and under cl. 18 referred to above. I do not consider that these

⁵⁷ **Hamble:** Pistons supplied as part of ship, by sub-contractor to manufacture, who subsequently transferred business to defendant. Then became aware of problem with pistons. Did not warn. Ship broke down, damaged engine and loss of profit. Owner alleged duty to warn. Held no duty to warn in respect of pure economic loss, because insufficient proximity, no contact between the parties at all. Might be different if physical damage or injury to person.

⁵⁸ **Chesham:** (preliminary issues on assumed facts, concurrent duties in contract and tort alleged). No duty to report one's own breaches, but having regard to terms of contract, project manager had a duty to advise and/or inform client of actual or potential deficiencies in performance of other consultants. Architect had such a duty in relation to the quantity surveyor and engineer. Engineer had no such duty.

⁵⁹ **Plant:** Duty was to warn of known defects in design of temporary works. Contractor should have protested more vehemently than it did. Some suggestion should even have refused to do the work, as instructed. It is not clear if this duty extends to a duty to warn of defects that ought to have been identified by a reasonably competent contractor.

⁶⁰ **Goldstein:** SA court held that a builder had a duty to owner and third parties in delict (tort) not to build something that was manifestly unsafe. But owner could not sue, if built to owner's (or his architect's) designs. The implication was that this duty applied even though it was the design that was unsafe.

⁶¹ **New Islington:** Alleged lack of sound insulating in properties designed by Defendant. Found on the facts and under RIBA Form there was a continuing duty to review design up to Practical Completion or date services performed, if earlier, not thereafter. But this duty only arises if something occurs to make it necessary or prudent to review, or knows or ought to know of earlier negligence. See also, in this respect, Payne v. John Setchell [2002] BLR 489, 502, where it was noted that a claim under the continuing duty was not the same as a claim for defective design, and had not been pleaded or proved.

provisions in any way affect the wrongful interference which is pleaded."

For an example of a case where such a claim failed because there was not the requisite intent, see OBG Ltd v. Ian John Allen [2005] BLR 245 (CA).

21. Nuisance

Can the mere presence of a building constitute a nuisance, consider Hunter v. Canary Warf Ltd (1997) 84 Build LR 1 (HL)?⁶²

PART C: STATUTORY TORTS AND RELATED PROVISIONS

22. **#The Defective Premises Act 1972**

The duty is to see that work taken on is done in a workmanlike manner or a professional manner, as appropriate, so that as regards that work the building is fit for habitation when completed.

The duty is owed by a person who takes on work for or in connection with the provision of a dwelling (including conversion) such as developers, suppliers of goods, local authorities, possibly DIY enthusiasts.

But "provision of a dwelling" does not encompass rectification works to an existing dwelling. Also the gist of the action is unfitness for habitation at date of completion.

Thompson v. Clive Alexander and Partners (1992) 59 Build LR 77, Jacobs v. Morton (1994) 72 Build LR 92.⁶³ Anderson v. Beetham Organisation Ltd [2003] BLR 217 (CA).⁶⁴

There is a limited defence for those who follow instructions.

23. **The Consumer Protection Act 1987**

This Act provides for "strict" liability following proof of damage caused by a defect in a product.

Liabilities are imposed on producers, branders, importers and (secondarily) suppliers.

"Product" includes things attached to the land

A "supplier" includes a person who sells, hires, lends or furnishes goods and services or incorporates things into a building except if he transfers the product and the building.

The existence of a "Defect" is assessed by reference to expectations as to safety.

"Damage" means personal injury or damage to other property provided the product ordinarily intended for private use and is intended by the person suffering the loss mainly for his private use.

⁶² **Hunter:** Canary Wharf tower caused interference with television reception. Lord Goff: Subject to planning restrictions one can, subject to easements (and the like) build on one's own land, and this is not restricted by the fact that the presence of the building may of itself interfere with the neighbour's enjoyment of his land. For there to be an actionable nuisance, there must be something emanating from the land.

⁶³ **Thompson:** Necessary for the plaintiff to prove that the defect rendered the dwelling unfit for habitation since fitness for habitation was a measure of the standard required in the performance of the duty imposed by s. 1(1) of the Act. **Jacobs:** Provision of a dwelling connoted the creation of a new dwelling, not works of rectification to an existing dwelling.

⁶⁴ **Anderson:** Proviso in s. 1(5) of the Act (concerning accrual of cause of action in respect of further work) applies to all further work carried out to rectify a failure to adopt workmanlike practices or to use proper material or both. Thus, claimant had a fresh cause of action in respect of the breach of duty under the Act when the further work did not rectify the original works as intended, which was to make the dwelling fit for habitation.

Defences include that damage is due to "misuse" of product and, to a limited extent, state of the art.

PART D: BREACH OF STATUTORY DUTY

24. General Principles. Where a statute creates a duty but imposes no method of enforcement, there is a presumption that those injured by a breach of that duty may bring a civil claim for breach of statutory duty where injury of a kind intended to be prevented by the statute is suffered. But:

If a method of enforcement is provided than, generally, no other method of enforcement is possible;

Exceptionally, if the only method of enforcement is a criminal sanction, than a civil claim may lie where the obligation was imposed for the benefit of a particular class of individuals or, in respect of a statute creating a public right, substantial relevant damage different from that suffered by the rest of the public was sustained.

The operation of this doctrine is notoriously unpredictable and subject to policy considerations. There are four categories to consider X v. Bedfordshire CC [1995] 2 AC 633 (HL);

(i) An action for breach of statutory duty *simpliciter* (in accordance with the above principles).

(ii) An action based solely on the careless performance of a statutory duty (or power), in the absence of any other common law right. Such an action cannot be maintained unless it can be brought under (i) or (iii).

(iii) An action based on a common law duty of care arising either from the imposition of the statutory duty or from its performance. But does the statute exclude such a duty? For instance, such a common law duty will not be imposed if it is inconsistent with, or would tend to discourage the performance of the statutory duty.

(iv) Misfeasance in public office.

See also cases, such as Lonhro Ltd v. Shell Petroleum [1982] AC 173, West Wiltshire DC v. Garland [1993] 3 WLR 626 and Stovin v. Wise [1996] 3 All ER 801. It is (iii) that raises the most conceptual difficulties; Garrainge v. Calderdale BC [2004] 2 All ER 326 (HL).⁶⁵

24.1 Claims for breach of statutory duty for failure to comply with the building regulations?

Claims against Developers, designers and builders.

Health and Safety at Work Act 1974, s.71, Building Act 1984, s. 38 (not in force):

"Civil liability

⁶⁵ **Garrainge:** The mere existence of the statutory duty does not generate a common law duty of care, for instance for failure by the authority to provide a benefit which it had a power or duty to provide. But it is possible for the authority to do acts or enter into relationships or undertake responsibility that do give rise to a common law duty of care. Thus Hospitals provide medial treatment pursuant to a statutory duty. But this does not prevent a common law duty of care arising out of the professional relationship they enter into with patients.

- (1) Subject to this section -
 - (a) breach of duty imposed by building regulations, so far as it causes damage, is actionable, except in so far as the regulations provide otherwise, and
 - (b) as regards such a duty, building regulations may provide for a prescribed defence to be available in an action for breach of that duty brought by virtue of this subsection...
- (3) This section does not affect the extent (if any) to which breach of:
 - (a) a duty imposed by or arising in connection with this Part of this Act or any other enactment relating to building regulations, or
 - (b) a duty imposed by building regulations in a case to which subsection (1) above does not apply, is actionable, or prejudice a right of action that exists apart from the enactments relating to building regulations
- (4) In this section, 'damage' includes the death of, or injury to, any person (including any disease and any impairment of a person's physical or mental conditions).

24.2 Claims arising out of health and safety legislation. What are the duties, to whom are they owed. The principal statutes are:

The Factories Act 1961
The Health and Safety at Work etc. Act 1974

Many regulations have been promulgated under these statutes, many of which are relevant to the construction industry. They are too numerous to consider here. Breach of certain, but not all of such regulations, may give rise to a cause of action for breach of statutory duty.
