

AN END TO THE SHORT REIGN OF ANNS: THE CONTRACTED LIABILITY OF LOCAL AUTHORITIES IN AUSTRALIA FOR DEFECTIVE STRUCTURES

D.G. Gardiner*

1. Introduction

The activities of local authorities are diverse and many involve those in respect of which such authorities may be considered by their conduct to expose themselves to duties of care in negligence in ways no different from other individuals and bodies, notwithstanding the statutory settings for the existence of such bodies.

Thus local authorities owe duties of care as employers to their employees;¹ duties of care as occupiers to entrants² (and today as neighbours who happen to be occupiers³); duties of care as suppliers of information;⁴ duties as controllers or owners of property;⁵ or simply because a duty is created from their conduct.⁶

The assimilation of duties owed by such bodies with those of ordinary individuals reflected much wider developments in the field of public law a century ago, including the abandonment of the immunity of the Crown. As Lord Blackburn said in 1878:

For I take it, without citing cases that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by the statute to the promoters, or which they have at common law, the damage could be prevented it is within this rule, 'negligence' not to make such reasonable exercise of their powers.⁷

However, the character of local authorities as bodies entrusted by statute with functions to be performed for public purposes and in the public interest necessitated a balancing between the application of the law of negligence and the necessary freedom from liability in some circumstances because of the different public nature of such bodies.

The issue of liability in respect of negligent building control, approval and inspection has provided an area of particular concern because it raises important and difficult questions. Firstly, whether in giving approval to construction the authority owes a duty of reasonable care to ensure construction is in conformity with the approval and secondly, whether it owes a duty to decide whether to make inspections. These questions go to the very misfeasance/non-feasance dichotomy and the general rule was thought to be that an

* B.A., LL.M. (Syd), Barrister-at-Law, Principal Lecturer in Law, Queensland Institute of Technology.

1. *Anderson v. City of Enfield* (1984) 54 L.G.R.A. 69.

2. *Thompson v. Bankstown Corporation* (1953) 87 C.L.R. 619; *Voli v. Inglewood Shire Council* (1963) 110 C.L.R. 74; *Gericke v. Municipality of Peterborough* [1984] 36 S.A.S.R. 499.

3. *Hackshaw v. Shaw* (1985) 59 A.L.J.R. 156 and *Papantonakis v. The Australian Telecommunications Commission* (1985) 59 A.L.J.R. 201, discussed in P. Gerber, "Occupiers' Liability — New Developments" (1985) 59 ALJ 250; D.G. and S.J. Gardiner, "Occupiers as Neighbours — The Final Step?", (1985) 15 Q.L.S.J. 91.

4. Treated as a separate body of rules in respect of economic loss suffered as a result of the negligent supply of advice or information:

Hull v. Canterbury Municipal Council [1974] 1 N.S.W.L.R. 300; *G.J. Knight Holdings Pty. Ltd. v. Warringah Shire Council* [1975] 2 N.S.W.L.R. 795; *L. Shaddock and Associates Pty. Ltd. v. Parramatta City Council* (1981) 150 C.L.R. 225; *Smith v. Shire of Murray* (1985) 54 L.G.R.A. 246.

5. *Aiken v. Kingborough Corporation* (1939) 62 C.L.R. 179.

6. *Knight v. Sheffield Corporation* [1942] 2 All E.R. 411.

7. *Geddis v. The Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430 at 455-456.

authority could be liable for misfeasance (e.g. if it actually carried out an inspection negligently) but not for non-feasance.⁸ Thirdly, they may raise the problem of classification of damage as pure economic loss which involves a separate set of problems within the evolving law of negligence.⁹

A line of English authorities in the 1970's appeared to herald in the framework for an expanded liability of local authorities in respect of building approval and inspection. They commenced with the encouragement provided in *Home Office v. Dorset Yacht Co. Ltd*¹⁰ to the recognition of duties in respect of the supervisory functions of public authorities. The impetus was accelerated in *Dutton v. Bognor Regis Urban District Council*¹¹ and culminated in the decision of the House of Lords in *Anns v. Merton London Borough Council*,¹² which was taken as having settled not only the parameters for the liability of local authorities in respect of building control and inspection, but the fundamental approach to the existence of duties of care in any negligence action.

The influence of *Anns* was short lived and came to an end, for Australian purposes, with the High Court's decision in *Sutherland Shire Council v. Heyman*.¹³ As part of the High Court's current reworking of the fundamentals of negligence, the case not only put an apparent end to the influence of *Anns* in respect of the proper approach to duties of care, but reduced significantly the extent of the liability of local authorities so readily found by the House of Lords just seven years previously.

The purpose of this article is to consider *Anns* and its impact and the reasoning of the High Court in *Heyman* which brought about its demise.

2. *Anns v. London Borough of Merton*

(a) The Facts

Building work on a block of eight flats was completed in 1962 and they were leased out on long term leases by the owner/builder. Some eight years after completion there were structural movements resulting in a variety of defects ranging from cracked walls and sloping floors to sticking doors. In 1972 lessees of seven of the flats sued the builders and the local authority, alleging in the case of the latter, that its predecessor had approved plans requiring foundations with a minimum depth of three feet whereas those used were only two feet six inches, and that the authority was negligent in either omitting to inspect or failing to discover the inadequacy of the foundations during such inspections as were carried out. Two of the plaintiffs were original lessees, the other five having had the original leases assigned to them.

(b) Establishment of the General Approach to Duty

In a landmark decision, Lord Wilberforce¹⁴ adopted a two stage approach to the question of the existence of a duty of care. He said:

Through the trilogy of cases in this House — *Donoghue v. Stevenson* [1932] AC 562, *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465, and *Dorset Yacht Co. Ltd v. Home Office* [1970] AC 1004, the position has now been reached that in order

8. *East Suffolk Rivers Catchment Board v. Kent* [1941] A.C. 74 per Lord Romer at 102. That is assuming also the authority is acting *intra vires*, although it is clear that simply because it acts *ultra vires* that will not necessarily mean negligence: *Dunlop v. Woollahra Municipal Council (No. 2)* (1981) 33 A.L.R. 621.

9. See P. Craig, 'Negligent Mis-statements, Negligent Acts and Economic Loss', (1976) 92 L.Q.R. 213; R. Hayes, 'Duty of Care and Liability for Pure Economic Loss', (1979) 12 Melb. U.L.R. 79; D. Partlett, 'Recovery of Economic Loss for Negligence in Australia', (1980) 9 Syd. L.R. 121; J.A. Smillie, 'Negligence and Economic Loss', (1982) 32 U. Toronto L.J. 231; D. Partlett, 'Economic Loss and the Limits of Negligence', (1986) 60 A.L.J. 64.

10. [1970] A.C. 1004.

11. [1972] 1 Q.B. 373 refusing to follow *Bottomley v. Bannister* [1932] 1 K.B. 458 and overruling *Otto v. Bolton and Norris* [1936] 2 K.B. 46.

12. [1978] A.C. 728; hereafter '*Anns*'.

13. (1985) 59 A.L.J.R. 564; (1985) 60 A.L.R. 1; hereafter '*Heyman*' and references are to 60 A.L.R.

14. A speech concurred in by Lords Diplock, Simon and Russell.

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. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] AC 1004, per Lord Reid at p.1027¹⁵

The approach was of importance for two reasons. Firstly it re-emphasised the primary role of the foreseeability question¹⁶ and secondly, it confirmed the over recognition of policy considerations as qualifying its application.

(c) The Statutory Setting

Lord Wilberforce confirmed that the relationship between the council and owners and occupiers of new dwellings constructed in their area must be considered in the relevant statutory setting. This he summarized as follows:

The Public Health Act 1936, in particular Pt II, was enacted in order to provide for the health and safety of owners and occupiers of buildings, including dwelling houses, by, inter alia, setting standards to be complied with in construction, and by enabling local authorities, through building by-laws, to supervise and control the operations of builders. One of the particular matters within the area of local authority supervision is the foundations of buildings, clearly a matter of vital importance, particularly because this part of the building comes to be covered up as building proceeds. Thus any weakness or inadequacy will create a hidden defect which whoever acquires the building has no means of discovering: in legal parlance there is no opportunity for intermediate inspection. So, by the by-laws, a definite standard is set for foundation work (see by-law 18(1)(b) referred to above); the builder is under a statutory (see by-law) duty to notify the local authority before covering up the foundations; the local authority has at this stage the right to inspect and to insist on any correction necessary to bring the work into conformity with the by-laws. It must be in the reasonable contemplation not only of the builder but also of the local authority that failure to comply with the by-laws' requirement as to foundations may give rise to a hidden defect which in the future may cause damage to the building affecting the safety and health of owners and occupiers. And as the building is intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction.¹⁷

That same statutory setting had been considered in *Dutton*¹⁸ where Lord Denning M.R. had denied that such setting required an analysis of the question whether there was a power or a duty in the authority to ensure compliance, resting liability instead upon the wider basis of control over building work. Lord Wilberforce viewed this as putting the duty 'too high'.¹⁹

15. *Supra* n.12 at 751-752.

16. A re-emphasis that may have been needed to counter the apparent primacy accorded to policy in *Dutton v. Bognor Regis Urban District Council* *supra* n.11 at 397. It is apparent that Lord Wilberforce meant to test the sufficiency of proximity at the first stage merely by reasonable foresight of the harm and in that respect the interpretation of Deane J. (*infra* n.74) is to be preferred to that of Gibbs C.J. (*infra* n.64).

17. *Supra* n.12 at 753.

18. *Supra* n.11 at 391-2.

19. *Supra* n.12 at 758.

(d) Planning (or Policy) Powers and Duties Distinguished from Operational Ones

As a means of limiting duty situations Lord Wilberforce recognised a distinction between policy and operational functions dependent upon the terms of the relevant legislation:

Most, indeed probably all statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this "discretion" meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes, also, prescribe or at least presuppose the practical execution of policy decisions. A convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area²⁰

The distinction is not a new one²¹ and was borrowed largely from the American defence of discretionary function.²² Courts are, or should be, unwilling to regard as justiciable, in terms of assessing reasonableness on the merits, matters involving economics and the allocation of resources to obtain maximum results because they are beyond the resources of this forum to assess properly.

It was recognised that there is no precise means of distinguishing between policy and operational decisions:

Although the distinction between the policy area and the operational area is convenient and illuminating, it is probably a distinction of degree . . . It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose on it a common law duty of care²³

There have been other attempts to suggest factors which might aid the distinction but none seem particularly helpful other than as factors of non-definitive relevance. One suggestion has been based upon a classification of what is 'inherently' policy or governmental²⁴ but that assumes there is some means of determining what is inherently policy, by tests of historical recognition or otherwise, an assumption which is not justified. Again, suggestions have been made that the level of functionary may be determinative of the distinction²⁵ but that also seems of little use other than as one of the relevant factors.

One of the problems arising from Lord Wilberforce's formulation of the policy/operational distinction is the ambiguous use he makes of the term 'discretion'. Although in the passage quoted above²⁶ he appears to use the term as synonymous with policy, he confused matters by employing it subsequently in another sense of a power to select a course of action, for he says that 'many "operational powers" or duties have in them some element of "discretion"'.²⁷ In the later sense, its relevance in determining the limits of duty situations is less certain and could not be relied upon by local authorities with the same confidence in excluding liability.

Lord Wilberforce held that in respect of the duty concerning inspection, if made, it was clearly 'operational':

On principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed — namely, to ensure compliance with the by-laws . . . But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise — discretionary as to the time and manner of inspection, and the techniques to be used.²⁸

20. *Ibid.* at 754.

21. *East Suffolk Rivers Catchment Board v. Kent* *supra* n.8 at 103.

22. M. Aronson and H. Whitmore, *Public Torts and Contracts*, (1982) at 36-60; P. Craig, 'Negligence in the Exercise of a Statutory Power', (1978) 94 *L.Q.R.* 428.

23. *Supra* n.12 at 754.

24. E.g. suggested by Lord Diplock in the *Dorset Yacht* case *supra* n.10 at 1066-1067.

25. *Takaro Properties Ltd v. Rowling* [1978] 2 *N.Z.L.R.* 314.

26. *Supra* n.20.

27. *Supra* n.12 at 758.

28. *Ibid.* at 755.

The conclusion, that if an inspection was made and there was a failure by the inspector to discover the breach of by-laws, then the authority would be vicariously liable, is unobjectionable. But the reasoning that even in the absence of inspection the authority owed a duty to exercise reasonable care to ensure by-laws were enforced because such failure was a breach and *ultra vires*²⁹ broke new ground, for it recognised that a local authority exercising statutory powers might be liable for non-feasance as distinct from the clear case of misfeasance in the operational functions of actual inspection.

Lord Salmon,³⁰ alone in dissent on that issue, held that the authority was under no obligation to inspect the foundations of all buildings and if there was no inspection before foundations were covered up, the plaintiffs would fail. This view was consistent with the misfeasance/non-feasance dichotomy in the context of powers.

(e) To Whom was the Duty Owed?

Lord Wilberforce held that ‘. . . if the foundations are covered in without adequate depth or strength as required by the by-laws, injury to safety or health may be suffered by owners or occupiers of the house. The duty is owed to them, not of course to a negligent building owner, the source of his own loss . . . A right of action can only be conferred on an owner or occupier who is such when the damage occurs . . . This disposes of the possible objection that an endless, indeterminate class of potential plaintiffs may be called into existence’.³¹

The cause of action was said to arise not upon delivery or conveyance of the defective structure but when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it.³²

(f) The Standard of Care

Lord Wilberforce recognised³³ that the nature of the duty and standard of care required is closely related to the purpose for which powers of inspection are granted, in this case to secure compliance with the by-laws.

Accordingly, the duty was to take reasonable care, no more, and no less, to secure that the builder does not cover in foundations which do not comply with by-law requirements.³⁴

(g) Causation

Although Lord Wilberforce did not deal with causation explicitly, it was implicit that failure by the local authority to take reasonable care to secure compliance with the by-laws was a cause of the damage.

Lord Salmon in dissent said:

In the present case, however, the loss is caused not by any reliance placed by the plaintiffs on the council or the building inspector but by the fact that if the inspection had been carefully made the defects in the foundations would have been rectified before the erection of the building was begun . . .³⁵

29. *Ibid.* at 755, 760.

30. *Ibid.* at 762.

31. *Ibid.* at 758. Interpreted correctly as excluding a duty to subsequent purchases: B. Conrick, *infra* n.106 at 84.

32. Agreeing with the Court of Appeal decision in *Sparham-Souter v. Town and Country Development (Essex) Ltd* [1976] Q.B. 858.

Subsequently in *Pirelli General Cable Works Ltd v. Oscar Faber and Partners* [1983] 2 A.C. 1, the House of Lords disagreed with the reasoning in *Sparham-Souter* and held that the cause of action did accrue when damage occurred, whether it was discovered or discoverable or not. Lord Fraser whose speech was agreed in by the other Lords, held also that the duty of the builder and of the local authority was owed to owners of the property as a class, and that if time runs against one owner it also runs against all his successors in title. The attempt to reconcile Lord Wilberforce’s views in *Anns* by restricting it to the *particular* duty resting upon the defendants as the local authority as being different from the duty resting upon the builders is unconvincing for, without necessarily agreeing in substance, but consistent with the particular ratiocination, the damage will arise and time run against the first and all successors in title, consistent with Lord Fraser’s principal holding. See *infra* n.106.

33. *Supra* n.12 at 758.

34. *Ibid.* To the extent that the pleadings were based upon non-compliance with the plans, they were misconceived.

35. *Ibid.* at 769.

(h) **The Nature of the Damage and Recoverable Damages**

The relevant damage was classified as 'material, physical damage'³⁶ and the recoverable damages were the 'amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacements'.³⁷

3. The Impact of *Anns*

Both the decision and Lord Wilberforce's reasoning provoked a degree of criticism in academic writings.³⁸ To some, the width of the first stage in the general approach to duty would import through the concept of foreseeability an easily satisfied *prima facie* duty, a test which might not be appropriate in the context of some duty situations.³⁹ It has been criticised also as 'artificial and unrealistic'.⁴⁰

The case was open to criticism also on the basis of its overturning of what was thought to be a general rule that local authorities were liable for misfeasance but not for failure to exercise a mere power entrusted to them i.e. for non-feasance. The conversion of the statutory power in the case itself into a common law duty seems not to have been based convincingly upon the very approach to duty which Lord Wilberforce advocated.

Notwithstanding such criticism, the influence of the decision was considerable, for it provided an advantageous flexibility for judges at a time when there was a judicial trend towards general principle and away from categorised formal rules.⁴¹

In Canada, the general approach was adopted in a number of cases⁴² as was the actual decision in respect of liability for inaction or non-feasance, at least so far as based upon failure to consider properly whether to act to prevent completion.⁴³

In New Zealand, *Anns* was applied⁴⁴ often without much discussion, and sometimes to do away with special rules developed for particular category situations such as negligent advice.⁴⁵

In England, the two stage approach was employed in a number of important cases⁴⁶ and the decision and reasoning in *Anns* applied in a number of local authority contexts.⁴⁷ Of special note is the subsequent treatment accorded *Anns* in *Governors of*

36. *Ibid.* at 759. This classification remains the accepted one: *Wollongong County Council v. Fregnan* [1982] 1 N.S.W.L.R. 244; *Tate and Lyle Industries Ltd v. Greater London Council* [1983] 2 A.C. 504.

37. *Ibid.*

38. R. Bruxton, 'Built Upon Sand', (1978) 41 *M.L.R.* 85; I Duncan Wallace, 'Tort Demolishes Contract in New Construction (1978) 72 *L.Q.R.* 60; E. Banakas, 'Defective Premises — Shall the Ratepayer Foot the Bill?' [1977] *Camb L.J.* 245.

39. D. Partlett, 'Professional Negligence', (1985), at 388.

40. J. Smillie, 'Principle, Policy and Negligence', (1984) 11 *N.Z.U.L.R.* 111 at 141.

41. *Allied Finance and Investments Ltd v. Haddow and Co.* [1983] *N.Z.L.R.* 22 at 34 per McMullin J.

42. *Bowen v. City of Edmonton* (1977) 80 *D.L.R.* (3d) 501; *Ordog v. District of Mission* (1980) 110 *D.L.R.* (3d) 718; *Barratt v. District of North Vancouver* (1980) 114 *D.L.R.* (3d) 577; *Diversfield Holdings Ltd v. The Queen in Right of the Province of British Columbia* (1982) 143 *D.L.R.* (3d) 529.

43. *Nielsen v. City of Kamloops* (1984) 10 *D.L.R.* (4th) 641 affirming by majority (1981) 129 *D.L.R.* (3d) 111.

44. *Takaro Properties Ltd v. Rowling supra* n. 25; *Mount Albert Borough Council v. Johnson* [1979] 2 *N.Z.L.R.* 234; *Port Underwood Forests Ltd v. Marlborough County Council* [1982] 1 *N.Z.L.R.* 343; *Morton v. Douglas Homes Ltd* [1984] 2 *N.Z.L.R.* 548.

45. *Meates v. Attorney-General* [1983] *N.Z.L.R.* 308.

46. By Lord Wilberforce himself in *McLoughlin v. O'Brian* [1983] 1 *A.C.* 410 at 420; and in *Junior Books Ltd v. Veitchi Co. Ltd* [1983] 1 *A.C.* 520 in the leading speech of Lord Roskill.

47. *Dennis v. Charnwood Borough Council* [1983] *Q.B.* 409 (passing plans for concrete raft foundations); *Acrecrest Ltd v. W.S. Hattrell and Partners* [1983] *Q.B.* 260 (specification by inspector of inadequate corrections to foundations) and see *Fellowes v. Rother District Council* [1983] 1 *All E.R.* 573; *Rimmer v. Liverpool City Council* [1985] 1 *Q.B.* 1.

*the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*⁴⁸ There the local authority approved plans for flexible drainage for a housing development. The plans were departed from by the use of rigid design drainage which proved unsatisfactory and had to be replaced. The departure was known of by the authority's inspector but not acted upon.

In the Court of Appeal, Lawton L.J. asked simply '... can Peabody rightly claim, as they have done, that Lambeth owed them a duty to require them to do that which they ought to have done anyway?'⁴⁹ His answer was clearly 'No', although he did contemplate that if the drainage had not been put right, an occupier of the houses when completed who suffered injury to health could have sued the authority for breach of duty in failing to require compliance with the deposited plans. Fox L.J. expressly adopted the *Anns* two stage approach and negated the duty at the second policy stage.⁵⁰ The judgment of Slade L.J. was to like effect.⁵¹

The decision of the House of Lords was delivered by Lord Keith⁵² and showed a disinclination to accept Lord Wilberforce's two stage approach as definitive. Indeed, the temptation to do so was to be resisted.⁵³ The true question in each case 'is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances.'⁵⁴

In determining whether or not a duty of care of particular scope was incumbent upon a defendant it was 'material to take into consideration whether it is just and reasonable that it should be so.'⁵⁵ It was not just and reasonable in this case 'because the purpose of avoiding such loss was not one of the purposes for which these powers were vested in them.'⁵⁶

These views represent a movement away from what had become an almost automatic application of Lord Wilberforce's two stage approach. They represent the culmination of more recent growing concern at the width of the liability established by that process, together with changes in the composition of the Court permitting majority expression of the concerns.⁵⁷

48. (a) [1985] 1 A.C. 210 (C.A.); (b) [1985] 1 A.C. 228 (H.L.).

49. *Ibid.* at 220.

50. *Ibid.* at 222 in taking up Lord Wilberforce's dicta in *Anns supra* n.12 at 758 that it is not the purpose of the statute to protect owners who act negligently or irresponsibly and so cause themselves harm.

51. *Ibid.* at 226-227 'This particular power exists for the protection of other persons — not for the person in default.'

52. Agreed in by Lords Scarman, Bridge, Brandon and Templeman.

53. *Supra* n.48(b) at 240.

54. *Ibid.*

55. *Ibid.* at 241.

56. *Ibid.* at 242.

57. The narrowing of liability finds expression in other areas, including in particular those involving the contract/tort interplay. In *Donoghue v. Stevenson* [1932] A.C. 562 Lord McMillan stated at 609: '... two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well established doctrine that negligence apart from contract gives a right of action to the party injured by the negligence.' And at 610-611: 'The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties ... so much depends upon the avenue of approach to the question.' The current approach to the question in England is to set the clock back fifty-three years, at least in some circumstances, by denying liability in tort where the parties are in a contractual relationship: *Candlewood Navigation Corporation Ltd v. Mitsui Osk Lines Ltd* (1985) 60 A.L.R. 163; *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1985] 3 W.L.R. 317 esp. at 330.

In Australia, Lord Wilberforce's general approach and its application in the context specifically of local authority building control was applied generally with the same acceptance as it had been in other jurisdictions,⁵⁸ at least until the decision in *Heyman*.

4. Sutherland Shire Council v. Heyman

(a) The Facts

The facts in *Heyman* are very similar to those in *Anns*.⁵⁹ Owners of land made application to the local authority to erect a dwelling house and a permit was issued giving approval to build, subject to conditions. These included notice to be given of various building stages being reached and there was a prohibition of occupation without the completed building being inspected and passed. A subsequent letter imposed a requirement to submit a check survey when brick footings were commenced. The specifications required excavations for footings to 'a depth necessary to secure solid bottoms and even bearing throughout.'

The land was very steep, sloping towards the back. The dwelling was constructed between 1968 and 1970 and the house was supported by nine brick piers and three steel columns and the brick walls of the underneath laundry. Some fill had been used on the site and the ground in which the piers and columns stood consisted of unstable rock and soil.

The only record in the possession of the authority concerning the construction and inspection was a single endorsement on an inspection card 'Frame OK — 3.12.69' with the initials of a Mr. Pollard who had been a building inspector but who had retired and was not called to give evidence.

In 1975 the house was sold to the plaintiffs. In January, 1976, the inadequacy of the footings caused cracks and leaks. The plaintiffs had to jack up the house and construct sound footings and repair the superstructure. They sued the local authority for negligence.

(b) The Statutory Setting

Section 305(1) of the *Local Government Act*, 1919 (NSW) confers general power upon the local authority to control and regulate the erection of buildings within its municipality and s.306 provides that a building shall not be erected or used in contravention of the provisions made by or or under the Act.

Section 310 provides that every building shall be erected to the satisfaction of the council (a) in conformity with the Act and ordinances; and (b) in conformity with the application, plans, and specifications in respect of which the council has given its approval for the erection of the building.

Section 311 requires the approval of the council before a building is erected and ss.312-314 deal with applications for approval and with the functions of the council in considering such applications.

Section 316(1) empowers the Council to prohibit the use or occupation of any building, until completed, without its permission, and s.317 makes it an offence to do or cause work to be done in connexion with the erection of a building without the approval of the council or not in conformity with such approval.

The provisions of s.317A as they stood at the relevant time, provided for application to be made for a certificate to the effect that in the opinion of the council a building

58. *Minister Administering the Environmental Planning and Assessment Act, 1979 v. San Sebastian Pty. Ltd.* [1983] 2 N.S.W.L.R. 268; *Clarke v. The President Councillors and Ratepayers of the Shire of Gisborne* [1984] V.R. 971; *Travis v. Vanderloos* (1984) 54 L.G.R.A. 268 at 272 per Derrington J.

59. One difference arising out of a consideration of the statutory setting under 3(b) *infra*, is that the legislative scheme in *Anns* did not impose any duty to ensure conformity with approved plans, only with the by-laws, whereas in *Heyman* the scheme (particularly s.310) required conformity with the plans and specifications as well as the ordinances. Such difference was of no effect in respect of the outcome.

in all respects complied with the Act, the ordinances, the plans, and specifications, if any, approved by the council or if a contravention or departure had occurred, that it was not such as need be rectified. The production of such certificate was deemed conclusive evidence in favour of a bona fide purchaser for value that at the date of the certificate the building complied with the requirements of the Act and Ordinances.

Clause 83 of Ordinance 71 imposed a duty upon the authority to inspect and report but only upon notice of completion being given to it.

There was no evidence that notice was ever given to the council upon completion or that the building was ever finally passed and inspected or that the plaintiffs or their predecessors had ever applied for a certificate under s.317A.

(c) **The Courts Below**

The trial judge, Robson D.C.J., found the authority liable, not because the authority had been negligent in approving the plans and specifications submitted to it,⁶⁰ but because he inferred there had been a negligent inspection by an employee of the authority other than that recorded on the inspection card. He based his inference upon the conditions in the approval, the normal practice of the authority in making site inspections, and the failure of the authority to call Mr. Pollard to give evidence. He assessed damages at \$5,625.75 with interest of \$2,297.18.

The Court of Appeal⁶¹ held that the finding of carelessness from the inspection inferred by the trial judge was not justified on the evidence. Nevertheless, there had been negligence in respect of the recorded inspection of 3 December, 1969. Hope J.A. expressly applied *Anns* in respect of the exercise of powers and placed the authority upon the horns of an unavoidable dilemma for if there had been an inspection on the date in question it had to have been carried out without reasonable care because the state of the footings was obvious. On the other hand, if it had not been carried out, there had been a failure to exercise reasonable care to ensure the footings were in accordance with the approval given. Reynolds J.A. was prepared to infer a lack of inspection on the date.

The Court of Appeal took the view that the damage claimed was economic but consequential upon physical damage and therefore recoverable outside the limited exception of recovery for pure economic loss of the kind discussed in *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"*.⁶²

To this point there had been a classic application of the principles enunciated in *Anns* to the very similar facts in *Heyman*.

(d) **The High Court's Approach**

(i) **General Approach to Duty**

It is regrettable that the enthusiastic re-examination of the fundamentals of negligence currently being engaged in by the High Court has produced such a lack of agreement and consequential uncertainty for those who are called upon to apply principle on a daily basis.⁶³

Gibbs C.J. analysed the first of the two stages in *Anns* and found that Lord Wilberforce did not mean to say that foreseeability alone is sufficient to establish proximity or neighbourhood, and consequently to establish the existence of a duty of care, subject to any considerations which might negative, reduce or limit the duty at

60. The finding of the trial judge that there had been no negligence in approving the plans was not pursued on appeal.

61. [1982] 2 N.S.W.L.R. 618, Hope and Reynolds J.J.A. giving separate judgments and Mahoney J.A. merely agreeing with the orders.

62. (1976) 136 C.L.R. 529.

63. (1986) 60 A.L.J. 4 at 6.

the second stage of the inquiry.⁶⁴ Support for the antecedent stage of proximity was found in the *Peabody* case⁶⁵ and in the judgment of Lord Roskill in *Junior Books*.⁶⁶ The antecedent test of proximity is applicable only to those situations which have not already been recognised by the authorities as attracting a duty of care and the scope of which is unsettled:

No trial judge need inquire for himself whether one motorist on the highway owes a duty to another to avoid causing injury to the person or property of the latter or what is the scope of that duty.⁶⁷

With the exception of one question not presently relevant, Wilson J. agreed with the reasons of Gibbs C.J.⁶⁸

Deane J. also confirmed his commitment⁶⁹ to an antecedent requirement of proximity found in the original words of Lord Atkin in *Donoghue v. Stevenson*:⁷⁰

... it differed in nature from the test of reasonable foreseeability in that it involved both an evaluation of the closeness of the relationship and a judgment of the legal consequences of the evaluation.⁷¹

Deane J. confirmed also the meaning of proximity as involving '... the notion of nearness or closeness and embraces physical proximity (in the sense of time and space) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (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 act or course of conduct and the loss or injury sustained.'⁷²

The identity and relative importance of the factors which are determinative of an issue of proximity are recognised as being likely to vary in different categories of case. But the requirement of proximity is not a question of fact, though based on fact, for it involves also an *evaluation* of legal consequences, thereby serving as a control of the *categories* of case in which the common law will adjudge that a duty of care is owed. It is a question of law which will include notions of what is fair and reasonable and considerations of public policy.⁷³

Notwithstanding problems associated with duplication of consideration of the same factual material, perhaps for purposes of proximity, foresight and causation, this approach has the dual attraction of providing a process by which limitations on the existence of duty may be explained in a uniform way in new and developing areas rather than by disparate and independent formal rules. It is important also because it overtly addresses and explains policy factors involved in the process.

Unlike Gibbs C.J. who interpreted *Anns* as recognising an antecedent proximity requirement, Deane J. found the approach in *Anns* did not contemplate such a requirement

64. *Supra* n.13 at 14 referring to his similar approach in *Jaensch v. Coffey* (1984) 54 A.L.R. 417 at 419-20 and to the similar approach adopted by Rush J. in a 'clear and persuasive' judgment in *Seale v. Perry* [1982] V.R. 193 at 193-8; but contrast McGarvie J. in the same case at 227. For analysis of *Jaensch v. Coffey* see (1985) 1 *Q.I.T.L.J.* 69-78; (1985) 59 *A.L.J.* 45.

65. *Supra* n.48(b).

66. *Supra* n.46.

67. *Supra* n.13 at 14.

68. *Ibid.* at 36.

69. *Jaensch v. Coffey* *Supra* n.64 at 439 and repeated in *Hackshaw v. Shaw* *Supra* n.3.

70. *Supra* n.57 at 582, 599.

71. *Supra* n.13 at 54. Deane J. cogently demolished the criticism levelled at the concept of 'proximity' by Robert Goff L.J. in *Leigh and Sullivan Ltd v. Aliakmon Shipping Co. Ltd* [1985] 2 W.L.R. 289 at 326-7, that it does not provide a 'criterion of liability' or that it lacks 'ascertainable meaning', by emphasizing its importance as the unifying rationale of particular propositions of law which might otherwise appear to be disparate, and more importantly, because such criticism disregards its substance and true function.

72. *Ibid.* at 55 repeating his description in *Jaensch v. Coffey* *supra* n.64 at 441.

73. *Ibid.*

and was accordingly, inappropriate in cases in the less developed areas of the law of negligence, such as where what is alleged is a negligent omission or of failure to act or where the damage has been purely economic in nature.⁷⁴

Mason J. approached the duty question from the position of the authorities, identifying the general rule as being that a public authority is under no statutory obligation to exercise a power and comes under no common law duty to do so.⁷⁵ The circumstances under which such authorities were found to be liable in negligence were based upon foreseeability but foreseeability of the plaintiff's reasonable reliance.⁷⁶ Mason J. too was unable to accept much of what was said by Lord Wilberforce in *Anns*.⁷⁷

Brennan J. approached the question of duty by emphasizing that foreseeability of injury was not the exhaustive criterion of duty, for otherwise the legal duty would be coterminous with moral obligation and the 'neighbour' of the law would include not only the biblical samaritan but also the priest and levite who passed by the injured man.⁷⁸ He also returned to Lord Atkin's seminal statement and found that my 'neighbour' in law was there restricted to a person who is affected 'by my *act*, not by my omission'.⁷⁹ Brennan J. rejected foreseeability as sufficient to impose a duty to all to prevent injury:

Some broader foundation than mere foreseeability must appear before a common law duty to act arises. There must also be either the undertaking of some task which leads another to rely on its being performed, or the ownership, occupation or use of land or chattels to found the duty.⁸⁰

Accordingly, Lord Wilberforce's first stage in *Anns* was rejected for cases of non-feasance. Nor was Brennan J. any more impressed by the concept of proximity.⁸¹

It may have been open still for Brennan J. to apply *Anns* by holding that the broader foundation be introduced at the second qualification stage of *Anns*, but he appeared to reject that also:

It is preferable, in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by undefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed"⁸²

Although subsequently he explains the role of the second stage as embracing no more than the further elements which confine the duty of care within narrower limits than those which would be defined by an unqualified application of the neighbour principle.⁸³

(ii) **The Liability of Local Authorities in the Exercise of Duties and Powers**

Gibbs C.J. found the distinction between the area of policy and the operational area to be both logical and convenient.⁸⁴ However, his Honour also found that as a general rule a failure to act is not negligent unless there is a duty to act.⁸⁵ The decision in *Anns*

74. *Ibid.* at 62-3.

75. *Ibid.* at 28.

76. *Ibid.* at 30; supported by the American experience but also by its use in such contexts as negligent mis-statement in *Shaddock v. Parramatta City Council supra* n. 4. Brennan J. (at 42), referred to reliance as a factor necessary for duty beyond mere reasonable foresight and Deane J. (at 59), regarded it as a factor going to the necessary proximity. Gibbs C.J. referred to it (at 17), in the context of causation.

77. *Ibid.*

78. *Ibid.* at 41.

79. *Ibid.*

80. *Ibid.* at 42.

81. *Ibid.* at 43.

82. *Ibid.* at 43-44.

83. *Ibid.* at 44, repeating the explanation given in *Jaensch v. Coffey supra* n.64 at 437.

84. *Ibid.* at 14.

85. *Ibid.* at 16.

could be reconciled only if it could be understood as recognising a duty arising from the statutory provisions to give proper consideration to the question whether it should exercise the powers. The plaintiffs failed in *Heyman* only because they failed to discharge the onus, which is not a light one, that the authority was negligent in failing to consider the exercise of the power.⁸⁶

Mason J. held that there was no reason why a public authority should not be subject to a common law duty of care in appropriate circumstances in relation to failing to perform its functions except in so far as its policy making and perhaps, its discretionary decisions are concerned.⁸⁷ However, his Honour did not accept the decision in *Anns* in so far as it imposed a duty for failure to give proper consideration to the question whether the power of inspection should be exercised or not.

... although a public authority may be under a public duty enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.⁸⁸

Brennan J. expressed a similar opinion in distinguishing a statutory power from a statutory duty, the former giving rise to a duty only where the statute imposes a duty to exercise the power and confer a private right of action. A consideration of the legislative materials indicated that Parliament did not intend to impose any relevant duty other than that in respect of s.317A. Further reflecting classical orthodoxy, it was:

... not open to the court to remedy a supposed deficiency by superimposing a general common law duty on the council to prevent any damage that future purchasers of property might suffer in the event of a non exercise or a careless exercise of the statutory powers. To superimpose such a general common law duty on a statutory power would be to "conjure up" the duty in order to give effect to judicial ideas of policy.⁸⁹

Finally, Deane J. also classified the relevant powers and functions as of a routine administrative or operational nature.⁹⁰ But there was not the requisite proximity sufficient to give rise to a duty because the relevant provisions did not contemplate among their purposes protection from the kind of damage⁹¹ nor was there any other reason in principle, policy or justice why the general body of rate payers should bear the loss.⁹²

(iii) Causation and the Failure to Avert the Damage

Gibb C.J. found it unnecessary to address the question of causation in detail but he did comment upon one aspect of causation which may pose practical problems for prospective plaintiffs. His Honour was disposed to recognise a basic difference between causing something and failing to prevent it happening. When the damage has resulted from negligent failure to act, there may be additional difficulties associated with proof of causation.⁹³ But as Mason J. commented, the fact that breach of the duty takes the form of a negligent

86. *Ibid.* at 19.

87. *Ibid.* at 34. Whilst the distinction was recognised as being difficult to formulate, decisions which involve or are dictated by financial, economic, social or political factors or constraints were held to be beyond the scope of a duty. It is important to note also that Mason J. recognised the second meaning of 'discretion' accorded by Wilberforce L.J. (*supra* n.27) as potentially exclusionary of a duty.

88. *Ibid.* at 31.

89. *Ibid.* at 45.

90. *Ibid.* at 57.

91. *Ibid.* at 64.

92. *Ibid.* at 65-6.

93. *Ibid.* at 17.

omission is no reason for denying that it is a cause which materially contributes to the ensuing injury.⁹⁴

(iv) Recognition of the Kind of Damage

Gibbs C.J. held that the house suffered physical damage.⁹⁵ For Mason J. it mattered not whether the damage sustained was to be characterized as economic or physical, because there was no duty.⁹⁶ Wilson J. on the only point at variance with the Chief Justice, expressly reserved the question whether the nature of the damage suffered was economic rather than physical.⁹⁷ Brennan J. agreed with the Chief Justice that the damage was physical.⁹⁸

Only Deane J. was prepared to break with orthodoxy on this point to find that the plaintiffs' claim, as crystalized, was not in respect of damage to the fabric of the house or to other property, but was for the loss represented by the actual inadequacy of the foundations i.e. the cost of remedying the structural defect in the property which existed at the time of acquisition. To that extent, the judgment on this point is in total disagreement with *Anns*.⁹⁹

(v) Duty to Whom?

A sharp contrast is thrown up between the limits imposed by Brennan J. arising from classification of the damage as physical, and the extended range of persons to whom a duty may be owed recognised by Deane J. arising from his classification of the damage as economic.

Brennan J, expressing once again orthodox principle, limited the liability of the wrongdoer to each person whose interest is adversely affected by the physical damage, but falling short of giving rise to successive causes of action as each new manifestation of the original damage appears.¹⁰⁰ Only those with an interest in the property at the beginning, when the initial damage is done, could sue. Subsequent purchasers have no cause of action.¹⁰¹

Deane J. took the view that even if classified as physical damage, it could not be sustained by an individual until after acquisition of an interest and so any loss would be sustained at the earliest at the time of acquisition. The alternative view which was preferred, was that damage is sustained only when the inadequacy is known or manifest. It is only then that diminution in the market value occurs. Any loss to a subsequent purchaser is necessarily economic in nature.¹⁰²

What is perhaps of equal importance is that neither Gibbs C.J., with whom Wilson J. agreed, nor Mason J., were prepared to exclude a duty simply because the plaintiffs were subsequent purchasers. It was implicit in each of these judgments, and particularly that of Gibbs C.J., that a duty could be owed to such persons.

(vi) Limitations Problems

The grant of special leave by the High Court was so limited as to prevent the question regarding the limitation period in an action of this kind being raised.¹⁰³ Nevertheless, the contrast in the approaches of Brennan and Deane JJ. to classification of the damage and to whom the duty is owed, also reflects a divergence concerning the accrual of the cause of action.

94. *Ibid.* at 34.

95. *Ibid.* at 18.

96. *Ibid.* at 32.

97. *Ibid.* at 36.

98. *Ibid.* at 39, 48, 50-51.

99. *Ibid.* at 60.

100. *Ibid.* at 50.

101. *Ibid.* at 51.

102. *Ibid.* at 61.

103. *Ibid.* at 5.

In *Anns*, Lord Wilberforce limited the right of action to an owner or occupier at the time when the damaged occurred,¹⁰⁴ a view apparently endorsed by Lord Salmon.¹⁰⁵ Those views were confirmed, reluctantly, in *Pirelli General Cableworks Ltd. v. Oscar Faber and Partners*.¹⁰⁶ That view has been followed in Australia¹⁰⁷ and is the view endorsed by Brennan J.

The approach of Deane J. provides a rational means of ameliorating the harshness of *Pirelli*, since the cause of action would not arise until acquisition of an interest or when the inadequacy is first known or manifest, an outcome to be preferred whether achieved by judicial determination or legislative imposition.

5. Summary and Conclusion

The members of the High Court were unanimous in allowing the appeal. For Gibbs C.J. and Wilson J. there was a duty of care but absence of proof of negligence; for Mason J. there was no duty in the absence of foreseeability of reasonable reliance; for Brennan J. there was no duty under the existing formalised rules; and for Deane J there was no duty in the absence of the necessary 'proximity'.

The case is evidence that notwithstanding the different approaches, the result will, in many cases, lead to the same result.¹⁰⁸

What then is left of *Anns* and what is the basis of liability of local authorities following *Heyman*? The following summarises the position:

1. Ordinary principles of negligence still apply to local authorities.¹⁰⁹
2. The test of reasonable foresight to establish a *prima facie* duty of care under the first stage in *Anns* is limited to simple cases of foreseeable physical damage of person or property.¹¹⁰
3. In cases in difficult and developing areas, including those involving non-feasance and economic loss, special rules will continue to be developed with a more limited class of potential plaintiffs but without the advantage of a *prima facie* assumption of duty accorded by the first stage of *Anns*.
4. 'Proximity' may be used as an antecedent limitation upon foresight.¹¹¹
5. 'Reliance' is a relevant feature of the analysis and is expected to play a more prominent role as a means of limiting the class of potential plaintiffs as the course of rationalisation continues in the developing areas.¹¹²
6. Cases of non-feasance as well as misfeasance fall within the rule in *Donoghue v. Stephenson*.¹¹³
7. In the case of non-feasance by a local authority, subject to the relevant statutory

104. *Supra* n.12 at 758.

105. *Ibid.* at 770, notwithstanding the misinterpretation of the effect of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.* [1976] Q.B. 858 at 868.

106. [1983] 2 A.C. 1. For a consideration of the case and its ramifications see: G. Robertson, 'Defective Premises and Subsequent Purchasers', (1983) 99 *L.Q.R.* 559; S. Todd, 'Latent Defects in Property and the Limitation Act: A Defence of the "Discoverability" Test' (1983) 10 *N.Z.U.L.R.* 311; M. Jones, 'Limitation: On Shaky Ground Again', (1985) 101 *L.Q.R.* 23; B. Conrick, 'Defective Construction: Claims Against Builders and Local Authorities' (1985) *Q.I.T.L.J.* 79; D. Partlett, *Professional Negligence* (1985) at 350-357.

107. See e.g. *Burghard v. Holroyd Municipal Council* (1984) 53 *L.G.R.A.* 346.

108. As occurred in *Jaensch v. Coffey* *supra* n.64.

109. *Sutherland Shire Council v. Heyman* *supra* n.13, per Gibbs C.J. at 17; Mason J. at 26; Deane J. at 57.

110. The position now reached in England: *Tate and Lyle Industries v. Greater London Council* [1983] 2 A.C. 504 at 530.

111. Accepted in *Heyman* by Gibbs C.J., with whom Wilson J. agreed, and in its more developed state by its re-discoverer, Deane J.

112. *Supra* n.76.

113. Per Gibbs C.J. at 15; Mason J. at 26; and Deane J. with some reservations at 58; *contra* Brennan J. at 419-422.

setting, liability has been curtailed considerably in respect of failure to exercise a mere power following *Heyman*.

8. In such circumstances, plaintiffs should have the builder in sight as the primary litigation target.
9. The position is different in respect of liability for misfeasance e.g. if an inspection is carried out or certificate of compliance is issued negligently.
10. The traditional classification of the damage as physical in the circumstances of *Anns* is now open to review and the possibility of it being recognised as economic loss is a real one.¹¹⁴
11. Subsequent purchasers are clearly within the class of persons entitled to recover in appropriate circumstances.¹¹⁵
12. A way has been left open for the review of the unfair but accepted rule in *Anns*, confirmed in *Pirelli*, concerning accrual of the cause of action for limitations purposes.

In the end, there is little left of the influence of *Anns* for Australian purposes. Its dethroning in both England and Australia has been influenced by the inevitable swing back of the evolutionary pendulum in favour of a more limited duty. Its demise in Australia has been a consequence also of the High Court's quest for its own unique jurisprudence and in England it has been aided and abetted by a more conservative approach of the currently prevailing majority in an appellate court significantly reconstituted from that in *Anns*.

114. *Supra* n.102. One Justice having rejected the traditional classification; two expressly reserving the question; and two confirming the orthodoxy.

115. To challenge such a conclusion as 'fundamentally unsound' because it relies upon an implied warranty as to quality (B. Conrick, *supra* n.106 at 83) imports unnecessarily into this area an approach limited in its outlook by a singularly contractual perspective. The same might have been said of *Donoghue v. Stephenson* itself and its successors.