

JUDICIAL LEGISLATION: RETREAT FROM ANNS*

This is, I believe, the third of the Sultan Azlan Shah Law Lectures and I need hardly say how honoured I feel at having been invited by His Royal Highness to deliver it.

I am, at the same time, filled with apprehension that in comparison with the wisdom and erudition of my predecessors on this rostrum, what I have to say may seem so trite and elementary as to constitute an altogether unworthy return for the more than generous hospitality of my host, who has accorded to my wife and myself the rare privilege of visiting your beautiful country.

I am the more honoured and the more apprehensive first because this lecture is given under the auspices of the University - and may therefore be expected to display a measure of academic learning - but, secondly, and perhaps even more importantly because my host, His Royal Highness Sultan Azlan Shah both is a distinguished jurist and was formerly a judge whose reputation for learning extends beyond the confines of this country. He is, therefore, in a better position than most to exercise those critical faculties which a lecturer would prefer to find absent in his audience and - as a fellow Bencher of Lincoln's Inn - in a better position than most to express them to me afterwards.

I should, perhaps, start with a word of warning - rather like those little notices on packets of cigarettes, 'Listening to Oliver may endanger your health'. I do want to emphasize that in what follows, I am expressing my own personal and idiosyncratic views with which some or all of my colleagues may well disagree. I am, in other words, speaking as an observer, not as a Law Lord and it must not be thought that any view which I express represents the received wisdom of the House of Lords. If I were to select a more appropriate title for this talk, I would, I think, borrow it from Jerome K

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Jerome: 'The idle thoughts of an idle fellow'.

One of the by-products of the welfare state, with its underlying concept of corporate responsibility for every misfortune of the citizen from the cradle to the grave, has been to engender in the public mind the notion that there is no such thing as uncompensatable misfortune, even if self-induced. If you suffer loss, you look around for someone solvent to sue. If he has not actually caused the injury, you can at least get him for having failed to prevent someone else from causing it. This is a state of mind in which defendants tend to be selected primarily for their solvency and only secondarily for their actual responsibility.

Now that is a notion which, to some extent, has communicated itself to the British judiciary, though not happily to quite the same extent as it has in the United States. I have just read in my latest copy of the *New Law Journal* that in the United States a lady has successfully sued the manufacturer of a microwave oven for having failed to warn her that if she put her poodle in it to dry after a shampoo, the animal would never be quite the same again. Again, the victim of a drunken driver has, I gather, successfully sued the driver's hostess for allowing him to drive away from her home in an intoxicated condition.

Now we have not gone that far in the United Kingdom but, on one view, the decision of the House of Lords in *Anns v Merton Borough Council*¹ in 1978 may be said to have been at least a tentative first step along that road. To justify itself, it was necessary to invent a duty of care which the law had not contemplated before and it is that invention which - as I think at any rate - can properly be categorised as a legislative rather than a judicial exercise.

The English poet, Shelley, once observed - rather pompously, I think - that 'poets are the unacknowledged legislators of the world'. It was a remark the truth of which, perhaps, few would have recognised or even suspected, for the compulsive influence on conduct of, for instance, Shelley's own *Ode to a Skylark* would not, I think, have been obvious to anyone but him. If, however, in launching this aphorism upon an astonished world, he had substituted 'judges' for 'poets' he might have struck a more responsive cord.

¹[1978] AC 728.

In common law systems, the judiciary has traditionally tended to be remarkably shy about its legislative role in the development of the law. It operates, and has always operated, behind a comfortable theory that the law is simply 'there' like an amorphous mineral deposit that has only to be mined and brought to the surface. The judges find the law. They declare it to be what it always has been, although no one knew it before. They do not make it. They are essentially explorers, not inventors. They develop the law incrementally by a process of logical deduction from established principle, building only upon the sure foundation of what has been declared already. Thus development is essentially an interpretative process and not one involving innovation. According to this theory there is a visible, although possibly flexible, demarcation of function. Interpretation, exposition and application are functions for the judge. Reform, innovation and policy are functions of the legislature.

Now this is a comfortable theory which does very little harm if it is kept within proper bounds, although it has to be confessed that it begins to look a little threadbare when one generation of judges discovers that a principle confidently expounded by the preceding generation - possibly since the time of Blackstone - is not (and therefore never was) the law and that some new principle, never previously suspected, is. Indeed, judiciously as well as judicially interpreted, the theory is positively beneficial because it enables the law to adapt sensibly to changing social and economic conditions without the delays inherent in the legislative process and without adding to the congestion and complication of a mass of statutory and regulatory material which has already become unwieldy and, frequently, so obscure as to be well-nigh undiscoverable. Where it becomes dangerous is the point at which even the pretence of incremental development is abandoned and the judge becomes, whether avowedly or by inadvertence, an instrument for expounding and applying a policy which he himself has invented. This is, in truth, judicial legislation and it is dangerous for several reasons. It is dangerous constitutionally, both because it involves the judge, who is not an elected representative, in trespassing upon those areas of policy which are properly to be decided only after full consideration and parliamentary debate and because

autogenous invention is difficult, if not impossible, to combine with a non-partisan determination of the issues which are before him. It is dangerous practically, because the judge is simply a lawyer, without access to expert opinion on wider matters of policy or on the practical repercussions of his decision and without the benefits which accrue from open discussion and parliamentary debate. It is dangerous jurisprudentially, because it introduces uncertainty into an area where certainty is of paramount importance, for it is of critical importance to the citizen that he should, so far as possible, know what the law is. It is by that knowledge alone that he can properly regulate his affairs and an unheralded shifting of the goal-posts can only create confusion and lessen his respect for the law. Finally, - although it may provide a quick method of reforming the law - it is dangerous judicially, because by entangling the judge in the toils of social, economic and political considerations in which he has no necessary expertise or skill, it calls in question the validity of the method of and the qualifications for his appointment and the value of what is - or should be - an absolutely essential attribute of his function, - his independence from the legislative and executive arms of government.

Even the most cursory survey of the history of the common law, however, will show that, within the limits of the incremental method, there is nothing novel or revolutionary in the notion of an inventive judge. Indeed, without him, the law would never have developed. The incremental method of legal development and the limits of judicial invention were perhaps best described by Mr Justice James Parke in 1833 in his opinion in the case of *Mirehouse v Rennell*² where he said this:

The precise facts stated by Your Lordships have never, so far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our Judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it

²(1833) 1 Clark and Finelly 527; 6 ER 1015.

for ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.³

That is, I think, the only correct approach. There has, however, been a tendency in recent years, I think, for the courts - and, I have to say, I think particularly the House of Lords - to go a little further than merely applying and adapting established principle and to indulge a taste for innovation to an extent where its constitutional propriety becomes seriously open to question. It is for this reason that I have chosen what I call 'judicial legislation', in particular in relation to the duty of care in tort, as the theme for this talk.

Now in the past decade we have seen a number of examples of what I have styled 'judicial legislation' in several different spheres. We have seen it in the law of copyright and we have seen it in an acute form in the law relating to taxation. But it is, I think, in the development of the tort of negligence and its extension to embrace cases of pure economic loss unconnected with physical damage to the person or property of the plaintiff that judicial legislation has been most noticeable and its effects most direct and most widespread not only in the United Kingdom but in other countries of the Commonwealth whose legal systems derive from the common law. I refer, of course, particularly to the decision of the House of Lords in the *Anns* case which, whilst rightly considered a seminal decision, is also one of the most controversial of the past two decades.

What I would like to do, therefore, is to say a few words

³At page 546; 6 ER 1015 at page 1022.

about the history of the development of the duty of care in tortious negligence up to the *Anns* case, to outline some of the uncertainties and the difficulties that have been created by that decision, and finally to attempt an evaluation of the pros and cons of the process which is exemplified by *Anns*, and, so far as I can, to predict the future course to which *Anns* has pointed the way.

Before starting on that perambulation, however, we should note what was, to my mind, perhaps the most startling example of pure judicial legislation in the United Kingdom in recent years. It occurred in 1966 and it did not even pretend to be an incremental development from the existing law. In the first half of the nineteenth century conflicting individual views had been expressed about whether the House of Lords was bound by its own previous decisions. The view of Lord Campbell, which conflicted with that of Lord St Leonards⁴ was that it quite clearly was.

That view was adopted by the House itself in 1861 in *Beamish v Beamish*,⁵ where the House held as a matter of decision that its decision bound all the subjects of the realm, including the Law Lords, and could be altered only by Act of Parliament. And it was reiterated quite unequivocally by Lord Halsbury, Lord MacNaghten, Lord Morris and Lord James in *London Street Tramways Co v London County Council*⁶ in 1898.

Thus, until the legislature was persuaded to intervene, English and Scottish law was saddled with the unloved and much criticised doctrine of common employment: see *Radcliffe v Ribble Motor Services*⁷. Similarly, in *Nash v Tamplin & Sons Brewery Brighton Ltd*,⁸ Lord Reid lamented 'The fact that this House has debarred itself from ever reconsidering any of its own decisions.'

Now that may have been illogical. It may have been - indeed it undoubtedly was - sometimes inconvenient. But it did have the advantage of certainty and it did undoubtedly represent the common law of England. On 26th July 1966,

⁴(1852) 3 HLC 388, 391; 10 ER 152 and 153.

⁵(1861) 9 HL Cas 274; 11 ER 735, 761.

⁶(1898) AC 375.

⁷[1939] AC 215.

⁸[1952] AC 231, 250.

however, and without, so far as is known, any prior parliamentary or judicial consultation beyond the Judicial Lords themselves, the then Lord Chancellor, Lord Gardiner, announced on behalf of the Law Lords that what was described as their previous *practice* was to be reversed and that the House would no longer consider itself bound by its own decisions.

The constitutional basis for this is at least open to question, but it has passed without protest beyond a few academic mutterings. It was however, undoubtedly judicial legislation which must, I think, have caused Lord Campbell and Lord Halsbury to spin in their graves like tops and it may be taken as a fitting overture to the subject-matter of this talk.

Now the *Anns* case did not purport to be an exercise of the new found liberty with which the House had endowed itself, but it certainly involved ignoring at least one principle of law firmly enshrined in the law established by their Lordships' House. It also involved the adoption of a new and unorthodox concept of tortious liability which was reconcilable neither with accepted principle nor with previous historical development. And it involved - although it pretended not to - the imposition of a peculiar and novel form of product liability in an area in which the legislature had already intervened in the very recent past and had thus demonstrated unequivocally the limits to which, after full Parliamentary debate and consideration, it considered that such liability should extend. So if ever there was a case which constituted judicial legislation in its most clearly recognisable form, *Anns* may be said to be that case.

Now just to make that good, let us just take a brief and necessarily not too detailed look at the development of the common law tort of negligence up to *Anns*. I think that we can best do this by identifying the main strands of principle that came to be united in *Anns*. I say 'main' strands, because there are numerous subsidiary concepts which were, as it were, tributary streams to the main river of development; but the three principal ones may be identified as, first, the concept of foreseeable damage, secondly, the exclusion of pure pecuniary loss as an ingredient in the tort of negligence, and, finally, the parallel liability for breach of statutory duty. I have entitled this talk The Retreat from *Anns* but I

suppose that this part of it could properly be called *The Advance to Anns*. First, then, foreseeable damage. Historically and procedurally, the tort of negligence developed through the action of trespass on the case. We do not have the time nor is this the occasion for an historical discursus.

It is sufficient for present purposes to note only this, that the historical and procedural origins of the action involved the consequence that actual damage had, by definition, become established as an essential ingredient of the action for negligence. One needs only a homely example to illustrate that. You can drive down a main street in Kuala Lumpur as carelessly as you like and at a reckless speed and you may be in very severe trouble with the police. But you will not be liable civilly unless and until you injure somebody and it is only when the injury actually occurs that the cause of action arises.

At the same time it is not all injury which makes you liable but only that which you, as a reasonable person, can foresee. That is not a result of the procedural origin of the tort but of the developed policy of the law. The important point is that by the time negligence has developed as an identifiable separate tort, proof of actual foreseeable damage to the plaintiff is an essential ingredient of the action. That sounds so elementary as to be a truism, but it assumes a major importance when we come to *Anns* so we have to keep an eye on it. Secondly, we need to keep an eye on the further limitation which the law had come to put on liability for tortious negligence. 'Damage' in the context of negligence meant originally physical damage to person or to property. Once that was established the law did not restrict the damages recoverable to compensation simply for the physical injury. In a sense all damage is pecuniary because money is the only medium through which the law is capable of providing compensation and it has never stopped short of making compensation for consequential loss resulting from physical injury in person or property.

What it has done is to stop short of recognising pecuniary loss not resulting from physical injury as itself constituting the essential damage necessary to ground the action. The most obvious occasion on which that is likely to arise is where a professional man makes a careless mistake which

causes pecuniary loss to his client. After some initial uncertainty in the earlier part of the nineteenth century it came to be recognized that the appropriate form of action here was 'assumpsit' and not 'case' and such liability as there was became established as contractual only - a situation which endured up to the case of *Hedley Byrne v Heller*⁹ in 1964 and for a few years beyond. Thus there came to be established the principle, of which the classical exposition was in *Derry v Peek*¹⁰ in 1889, that there was no liability in tort for a careless (as opposed to a fraudulent) statement. But that was not in fact ever universally true, because there always was liability for a careless statement causing physical damage - for instance a misdiagnosis by a doctor. The so-called rule in *Derry v Peek* was in fact no more than a facet of the wider principle that pure pecuniary loss not resulting from physical damage to the plaintiff or his property did not constitute such damage as was the essential ingredient for the action for negligence. So, if you damaged A or A's property in such a way that A was unable to perform his contract with B, resulting in pecuniary loss to B, B had no remedy against you in negligence. That was firmly established in *Cattle v Stockton Waterworks*¹¹ and it received the blessing of the House of Lords - a position which has since been affirmed by the House in the case of *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd*.¹² Again, this is a principle upon which we have to keep an eye, both because it indicates the limits for the operation of the principle enunciated by the House of Lords in *Donoghue v Stevenson*¹³ in 1932 and because it is given a new and curious dimension in *Anns*.

The third factor which we have to consider is that of the parallel and alternative claim which frequently arises in actions for negligence, that of damages for breach of statutory duty. The Industrial Revolution and the consequent use of increasingly sophisticated and increasingly dangerous machinery, causing horrific injuries if it was not carefully

⁹[1964] AC 465.

¹⁰(1889) 14 App Cas 337.

¹¹(1875) LR 10 QB 453.

¹²[1986] AC 785.

¹³[1932] AC 562.

operated, produced a spate of primary and subsidiary legislation for regulating safety at work. The action of negligence involved a breach by the defendant of a duty of care which came to depend upon the foreseeability of damage. In the case of a statutory regulation, however you didn't have to look for a duty of care. The duty was there already by the statute and foreseeability of harm did not enter into the picture as an ingredient. But, inevitably, questions arose in relation to each particular statutory duty whether it was one which would entitle a person claiming to have been injured by the breach to sue the person or body on whom or on which the duty was imposed. And so there came to be evolved the test of whether (*inter alia*) the duty is one which is imposed not for the protection of the public generally but for the protection of the particular class of persons of whom the plaintiff is a member - a test expounded by Lord Kinnear in *Black v Fife Coal Co Ltd*¹⁴ in 1912 and approved and applied by the House of Lords definitively in *Cutler v Wandsworth Stadium*¹⁵ in 1949.

So much for the background. The incremental development of the law of negligence prior to *Anns* is so familiar to lawyers from their student days that it hardly calls for repetition. Originally the courts made no attempt to expound any common principle for the establishment of a duty of care, deciding cases on a case-by-case basis and classifying the duty by reference to particular relationships or situations in which it had been held to arise or not to arise in the past. Lord Esher attempted in *Heaven v Pender*¹⁶ to provide a wide general principle but that did not meet with universal acceptance and was, as expressed, manifestly too wide. Subject, however, to a qualification expressed in the notion of 'proximity' it was adopted and reformulated in the classic 'neighbour' test expounded by Lord Atkin in *Donoghue v Stevenson* in 1932. Now what has always to be remembered about Lord Atkin's classical statement, is that it was made in the context of physical injury. Read without that limitation

¹⁴[1912] AC 149.

¹⁵[1949] AC 398.

¹⁶(1883) 11 QBD 503.

it is manifestly so wide as to be absurd. Just consider it for a moment.

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure ... persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

If, for 'injure', you substitute 'inflict pecuniary loss upon' you necessarily arrive at a conclusion which strikes at the very root of any free economy. Business competition, if successful, necessarily involves the infliction of damage of a pecuniary nature upon other traders in the same market. When I set up a competing business, have I to take care that it does not take away custom from other existing businesses? To state the question is to answer it. So you have always to read *Donoghue v Stevenson* in the context of the state of the law in which it was decided.

The two other major developments which occurred prior to the *Anns* case are again so well known as hardly to call for mention. First, there was the inroad upon the principle that the essential ingredient of damage in the tort of negligence was not satisfied in the absence of physical injury to or interference with person or property. That occurred in *Hedley Byrne Co Ltd v Heller & Partners Ltd*¹⁷ in 1964 where the principle of recovery in tort for pure economic loss was recognised, but, be it noted, only in a very limited context. We have already seen that there was some early uncertainty on the question whether a professional man's liability for the negligent performance of his contractual duty lay in case (or tort) or in assumpsit (or contract). Lord Campbell, indeed, in *Brown v Boorman*¹⁸ in 1844, had said that the two causes of action were interchangeable. What, I think, tipped the scale in favour of the contractual basis for liability was simply ease of analysis. Once the contract was established there was, as in the case of statutory duty, no need to look for a duty of care elsewhere. The contract supplied it and the damage suffered arose from client's reliance

¹⁷[1964] AC 465.

¹⁸(1844) 11 Cl & Fin 1; 8 ER 1003 HL.

upon the proper performance of the duty which the defendant had assumed. What *Hedley Byrne* did, in effect, was to put the clock back by asking the question, appropriate to the action of *assumpsit*, whether the defendant had assumed a duty of care to the plaintiff. It did not establish a general common law duty to make truthful or accurate statements. What it did establish was that, in circumstances where the defendant knew that the plaintiff was likely to rely upon the accuracy of his statement because of some special skill or knowledge which he, the defendant, possessed, he must be treated as if he had assumed the obligation of taking care to be accurate. If in these circumstances the plaintiff did rely upon the statement or advice and suffered pecuniary loss as a result, then he could recover that loss in an action for the tort of negligence. But it must be borne in mind that although this opened the door to a claim in negligence based upon pure economic damage with no physical injury to person or property, the opening was a very narrow one. In its inception - indeed in its conception - the action rested necessarily on, first, the knowledge of the defendant that he was being relied upon and his tacit assumption, from such knowledge, of a duty to be careful and, secondly, upon the actual reliance of the plaintiff on the advice given or the statement made.

The second major step was in the area of responsibility for the acts of third parties, and I refer, of course, to the case of *Home Office v Dorset Yacht Co*¹⁹ in 1970. In the present context, the importance of that case lies not so much in its impact upon cases where damage is inflicted by third persons but in the broad statement of Lord Reid that the general neighbourhood principle 'ought to apply unless there is some justification or valid explanation for its exclusion'.

There is a third point which, I think, tends frequently to be overlooked and it is one to which I ventured to draw attention in the Court of Appeal in the *Aliakmon*. It is this: The common law has always spoken with a somewhat uncertain voice on the topic of remoteness of damage (which I think was what the concept of proximity was all about) and it

¹⁹[1970] AC 1004.

became fashionable to rely upon somewhat obscure metaphysical distinctions between *causa causans* and *causa sine qua non*. In the *Wagon Mound No 1*²⁰ in 1961, however, the Judicial Committee of the Privy Council pronounced in convincing terms that there were not two tests, one for culpability (based on foreseeability) and one for damage (or proximity) (based on causation). There was but one test and that was the foreseeability of the damage which had occurred. Now this makes very good sense, but it does have this side effect, that if foreseeability is now to be the universal test for liability there is then no logical intermediate point at which the law can say that liability determines; no point, that is, unless the law itself intervenes to establish one - and that it can only do by reference to something called 'policy' (which is another name for judicial legislation). Now that does not matter a lot when you are talking about physical injury and its consequences, because the legal prohibition on causing physical injury is, for all practical purposes, universal. But it begins to matter a great deal when you begin to contemplate liability for pure and simple economic damage. I have already adverted to the absurdity of applying Lord Atkin's 'neighbourhood' formula across the board to pure pecuniary loss. If you are going to apply that formula, then you have to keep it within bounds by laying down what sort of economic loss can be recovered - or, to be more accurate, in what circumstances is the infliction of economic loss lawful and in what circumstances it is not. You cannot rest that on foreseeability alone and that becomes of critical importance when we come to consider the implications of *Anns*.

Finally, in this run-up to *Anns* we have to mention the case which was really the curtain raiser and which, if it had gone to the House of Lords, would certainly have pre-empted *Anns*. That case was, of course, *Dutton v Bognor Regis Urban District Council*²¹ in 1972 of which, in a sense, *Anns* was a carbon copy. It was a case in which the plaintiff had purchased from the previous owner a house which had been

²⁰[1961] AC 388.

²¹[1972] 1 QB 373.

built two years earlier. The Bognor Council, in exercise of its statutory powers under the Public Health Act, had, through its surveyor, passed the foundations as adequate. In fact, the house had been built on the site of an old rubbish tip. As a result of that the foundations proved inadequate and the plaintiff had to spend a lot of money on repairs and underpinning. She successfully sued that Council for negligence, claiming that the public duty cast on the Council by statute imported also a private law duty to protect individual members of the public against loss which would not have occurred if the powers conferred by the statute had been properly performed.

There is not a great deal that one needs to say about this case that cannot equally well be said of *Anns* itself, but there are two important points by way of, as it were, clearing the ground. The first was that the Court of Appeal firmly reversed (by a bit of judicial legislation of its own) the rule, which had been established for over a century by the Court of Appeal itself, that there was no liability for letting or selling a tumble-down house. The previous rule had always been *caveat emptor* and, in the absence of a contractual warranty, the purchaser of premises which proved defective had no remedy. The second was that the case anticipated by only a few months action by the legislature based upon this perceived defect in the law which had been occupying the Law Commission for some time. In the year following that in which *Dutton's* case was decided, there was passed the Defective Premises Act 1972 which was specifically designed to meet the sort of circumstances with which the plaintiff in that case was confronted.

It is important in the context of judicial legislation in this area, to see what limits Parliament itself, after consideration of a report specifically directed to the question and after full enquiry and debate, had thought fit to put upon the builder's liability. What that Act did, in broad terms, was to impose upon a person taking on the work of providing a dwelling (whether by original building or by conversion) a duty to every subsequent owner to take reasonable care to ensure that the work is carried out in a proper and workmanlike manner. There is thus imposed a sort of statutory warranty that ensures for the benefit of every person who is, for the

time being, the owner of the property. But - and this is a very big but - it is provided expressly that the cause of action for the breach of duty is deemed to arise for purposes of the Limitation Act on the date on which the building was completed. So the same Act which imposed the liability limited it to a period of six years from the date of completion.

If the Act had been in force when the plaintiff in *Dutton* had issued her writ it would have given her a clear cause of action against the builder, for the action was commenced in due time. In actual fact, she did sue the builder, but because she was advised that, as the law stood, she was unlikely to succeed, she had settled for a small sum and proceeded to try to recover the balance of her loss from the local authority whose surveyor had passed the defective work. It was held that she could recover because the Council could reasonably foresee that if it exercised its statutory power of inspection of the building without due care some subsequent owner of the property might suffer damage by having to pay to prevent the house from falling down.

The case broke entirely new ground and it did so in a number of important respects. First and foremost, it was as clear a case of judicial legislation as one could hope to see. Lord Denning was content to put it as a pure question of policy to be decided by judges from time to time whether a remedy should be accorded or not. Because the plaintiff had suffered a loss without fault on her part, someone ought to pay and as a matter of policy that someone ought to be the Council who had carelessly passed the original work as satisfactory. Secondly, the claim against the Council, although in essence a claim for breach of statutory duty, was not made to depend upon the scope of that duty as a matter of construction of the statute, but simply upon the foreseeability of loss to someone in the future if the duty was badly performed. It was put simply on the ground of the negligent exercise of a statutory power. Indeed *Cutler v Wandsworth Stadium*²² was not even referred to.

²²[1949] AC 398.

Thirdly, although Lord Denning put the claim on the basis of physical injury to the building - which was, of course, the very thing which was inherently defective and had therefore, in a sense, inflicted the pecuniary injury of which the plaintiff was complaining - the loss was in fact (as Lord Denning himself subsequently informally admitted) pure economic loss. The plaintiff had had the misfortune to buy an inherently defective building and she needed to spend money if she was to put it in order.

Fourthly, and importantly, the liability had nothing whatever to do with the principle of reliance established by *Hedley Byrne*, for it could not be argued that the plaintiff had relied upon the Council in buying the house.

And so we come to *Anns* case. Again, the case is so familiar to lawyers working in legal systems based on the common law that the underlying facts hardly need to be stated. The plaintiffs were purchasers, some original, some derivative, of flats in a block which had been built with defective foundations and which had begun to show signs of cracking. None had suffered any physical injury nor was there any injury to anyone's property except to the block of flats itself. The defect in the foundations was one which ought to have been seen by the defendant Council's surveyor but he had either failed to inspect them before they were covered in or he had inspected them but failed to spot the defect. The case differed from *Dutton's* case, however, to this extent, that the defect did not become apparent until some eight years after the building had been completed. Thus the plaintiffs were not helped by the Defective Premises Act 1972. Furthermore, the builder had in fact gone bankrupt. So the Council was the only defendant in the action.

Well, as you know, the House of Lords upheld the plaintiff's claim and affirmed the correctness of *Dutton's* case. To that extent, there was nothing new, but it was an endorsement by the final appellate court of Lord Denning's frankly legislative approach and the case has had a profounder effect than *Dutton's* case in three important respects. First, there was the critically important statement of general principle in the speech of Lord Wilberforce to which I will revert in a moment. Secondly, there was the definition of the limits on the liability of a public authority in cases to which the

general principle was applied. Thirdly, and of an importance which is seldom stressed outside the specialised field of building cases, there is the equiparation of the liability of the builder for negligence in construction with that of the local authority in failing to inspect - a liability that is additional to, independent of and much wider than any statutory liability created by the Defective Premises Act. This introduced an entirely novel and unorthodox concept of the tort of negligence in building cases and, so far as builders of dwelling-houses are concerned, may be said to have rendered the Act largely otiose.

Now in describing *Anns* case as an exercise in judicial legislation, I intend no disrespect to or criticism of the Committee of the House which decided the case, much less of Lord Wilberforce who was the author of the leading speech and in comparison with whom I, and, indeed, most of us, are intellectual pygmies. It is simply that as a matter of analysis, it can, I think, now be seen that the decision went a little over the border of deduction from or extension of established principle and may be said to have trespassed on the field of legislative inventiveness, because, however it was expressed, it opened the door to unrestricted claims in negligence for pure pecuniary loss - a door which the courts in the United Kingdom at least have recently been seeking to close or at least keep only just on the jar. It can be read - and indeed should, I think, be read - as a decision which was, to some extent, in advance of its time and as an attempt to find a basis for advancing beyond the illogical distinction between physical and economic damage by establishing a rational basis for drawing the line between lawful and unlawful infliction of damage. The difficulty, I think, is that the solution to that dilemma was found - and it may be that it can only be found in this way - by investing the judge with the power to legislate (by reference to what is called 'policy') where the line is to be drawn, but without at the same time establishing any criteria by reference to which that power is to be exercised. It is an interesting reflection of the controversial nature of the decision that it has been received so differently in the United Kingdom, in Australia, in Canada, and in New Zealand.

First, then, the general principle of liability emerging from *Anns* which is enshrined in the passage from Lord Wilberforce's

speech which has now been quoted so frequently that I am almost ashamed to repeat it and which established what has been referred to as 'the two-stage approach'.

'Rather' he said:

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.²³

So on the face of it you have to ask yourself two questions only-first was the damage which has occurred foreseeable and then if it was, you go on to ask the negative question-by some entirely unidentified criterion, is there any reason for denying liability?

There is, I think, a two-fold permissible criticism of this, if I may say so with respect to its author. First, as Lord Wilberforce himself appreciated subsequently, it is open to misinterpretation, because it can be read as suggesting-and, indeed, literally read does, I think, suggest-that the first step has one ingredient only, namely foreseeability of harm which, on the face of it, appears to be treated as synonymous with something described as a relationship of proximity. In fact, as has since been stressed by the House, it involves two things, the foreseeability of damage and, in addition, a relationship of an undefined nature between the plaintiff and the defendant which is expressed in the word 'proximity' or 'neighbourhood' and which is not in itself comprehended simply in foreseeability. So the two-stage test is actually a three-stage test. Secondly, the dictum was I think intended only, as one writer has suggested, to be descriptive of the development which had taken place and not, as it seems if read literally, prescriptive for

²³[1978] AC 728 at pages 751-752.

the future. What was in essence an historical analysis has come, because of the novelty of the context in which it appeared, and, I think, the way in which it was expressed, to be construed as an inventive formula.

Now if you treat what Lord Wilberforce said as eliding any difference between proximity and foreseeability and take this literally as a comprehensive and exhaustive test of liability for negligence there is simply no limit to tortious liability for injury of whatsoever kind, save that it must be such as foreseeably may occur. If I set up legitimately a business competing with yours and thus cause your profits to fall, I shall be *prima facie* liable to you unless I can persuade the court that there is some good policy reason why I should not be. Thus what has been seen as a principle of *prima facie* liability has been prayed in aid in subsequent cases to justify claims for damages which have become progressively more divorced from common sense and as placing on the defendant a burden, sometimes virtually insurmountable, of showing some good reason in 'policy' why he should not be held liable. It is from that principle of *prima facie* liability that the courts in the United Kingdom have been steadily retreating ever since.

The exposition of general principle, however, far reaching though its results have been, did not, if treated (as I believe it was intended to be) as descriptive rather than prescriptive and as embracing an ingredient of proximity distinct from mere foreseeability, transcend the bounds of what may be described as permissible incremental law-making. The trouble is that it has been treated as if it did. But it was, in my opinion, in two other respects that *Anns* crossed the boundary into what I have styled judicial legislation. The first was the massive extension of private law liability on public authorities for failure to perform their public statutory functions with due care. A public authority was, of course, always liable for physical injury carelessly caused by its servants and it was no defence to say that the carelessness occurred in the carrying out of a statutory duty. It would similarly be liable for breach of its statutory duty if the statute was one which, on its true construction, gave rise to a civil remedy to a member of the class of whose protection it was passed, in accordance with the principle in *Cutler v Wandsworth Stadium*. It could,

again, be liable under the reliance principle of *Hedley Byrne* if, in exercising its statutory powers, it carelessly made some inaccurate statement upon which the plaintiff had relied. *Ministry of Housing v Sharp*²⁴ in 1969 (where the authority was held liable for failing to carry out its statutory duty of registering an incumbrance on land) was, I think, on analysis, such a case. What was entirely new until *Dutton's* case (which, of course, was adopted and approved in *Anns*) was the notion that, without any element at all of reliance by the plaintiff, a public body exercising its public statutory powers (without any obligation to exercise them) would become responsible for economic loss not caused by its lack of care but which could be foreseen as capable of occurring if the power was not exercised with due care. It is a mis-description to say that the Council's failure caused the injury to the plaintiff. Its omission to inspect properly merely failed to prevent the injury being caused by the negligent builder. One has, therefore, to look for the source of a private law duty owed to the plaintiff to prevent such injury. The novelty of the claim was that the duty was found in a common law duty of care rather than, as the existing authorities indicated, in the construction of the statute and the answer to the question whether that statute, properly construed, conferred a private right upon the person for whose protection it was passed. It is, indeed, difficult to see from what established principles a common law duty of care in the exercise of a statutory power of this sort could be deduced. Lord Denning himself asserted that it rested simply on 'policy'. Lord Wilberforce expressed the view that 'in principle' the local authority must be liable. And both in *Dutton* and in *Anns* an attempt was made to bring the case within *Donoghue v Stevenson* by reference to the fact that the building had suffered physical damage. The suggestion implicit in that of course was that it brought the case within the framework of the law in which Lord Atkin had pronounced his general test. But the physical damage of course was not damage caused, as in *Donoghue's* case, by the defective product. The damage was the very defect in the product itself. So what

²⁴[1970] 2 QB 223.

was in contemplation here was not damage caused by defective manufacture but, in effect, a warranty of quality - the very thing which the legislature had already provided for in the Act of 1972.

The other aspect of *Anns*, which has until recently, received perhaps less attention than it merits is the liability which the decision imposed on the builder (albeit strictly by way of dictum rather than decision - but it has been treated as decision), a liability imposed in addition to and alongside his liability under the Defective Premises Act 1972 and amounting, in effect, to a non-contractual warranty of fitness to each successive owner without limit of time. And a very curious animal it is, when it is examined. It is a liability which arises without any actual damage to person or property, apart from the defective structure itself; it arises not on the delivery of the defective building or on the occurrence of the damage, but only when there is 'a present or imminent risk' to health or (possibly) to property; and the damage is to be measured not by the deterioration in value of the building but by reference to the cost of putting it into a state in which it is no longer a risk to health or safety. So that, in effect, there has been created a new and peculiar tort of negligence restricted to building cases where actual damage, which has always been the gist of the action in negligence, is no longer so but is replaced by the perception of the risk of future physical injury, as creating the cause of action. I know of no basis in the pre-existing law from which this could legitimately be deduced and it raises some fascinating jurisprudential questions which it would take far too long to pursue here. I mention it only as explaining why I have presumed to regard *Anns* as essentially an exercise in judicial legislation.

Now the effects of the decision have been far-reaching and this, I think, illustrates the danger of the process. Its first practical effects were to produce a significant increase in public authority insurance premiums but also, and more importantly, in building costs. Local authorities up and down the country became so alarmed at the prospects of incurring liability for carelessly passing building plans that they took to imposing more and more stringent, and in many cases excessive, requirements for foundations of buildings, strengthening of roof-ties and so on, the cost of which, in the

end, was inevitably passed on to the consumer. The principal beneficiary has been the ready-mixed concrete industry. In this way, the case may be said to be a good illustration of the dangers which attend law reform without prior consultation and debate. *Dutton's* case, which really arose from an unwillingness on the part of the court to accept the hardship that the plaintiff had only an inadequate remedy against the builder, may therefore be said, perhaps, to illustrate the old adage that 'hard cases make bad law'. And, of course, *Anns* case involves the additional curiosity that it imposed on the building industry a liability well beyond that which the legislature itself had contemplated as being appropriate.

Its juristic effects were equally far-reaching and resulted in a spate of claims which would never previously have been considered as giving rise to any liability. There was inevitably an initial tendency, by building upon the statement of the general principle in *Anns*, to seek to extend the bounds of tortious liability even further. One notable example was the decision of the Court of Appeal in *Batty v Metropolitan Realisations*²⁵ in 1978 (a case of pure economic loss) where the plaintiff recovered the costs of an entire new house, although I heard recently that the defective house, which, it was said in 1978, was about to fall down, is still standing undamaged and happily occupied. Another was the House of Lords' decision in *Junior Books Ltd v Veitchi*²⁶ in 1983 (which has been much criticised as, in effect, abolishing the distinction between contract and tort in building cases).

In New Zealand, where *Anns* was in fact anticipated so far as the builder's liability was concerned by a decision of the Court of Appeal in *Bowen v Paramount Builders*,²⁷ the decision has been consistently applied in imposing more and more stringent liability on public authorities, first in *Mount Albert Borough Council v Johnson*²⁸ in 1979, then in 1986 in *Brown v Heathcote County Council*,²⁹ *Stieller v Porirua City*

²⁵[1978] QB 554.

²⁶[1983] AC 520.

²⁷[1977] 1 NZLR 394.

²⁸[1979] 2 NZLR 234.

²⁹[1986] 1 NZLR 76 (affirmed by the Privy Council, [1987] 1 NZLR 720).

*Council*³⁰ and *Craig v East Coast Bays City Council*³¹ and, finally, in *Rowling Ltd v Takaro Properties*,³² the decision which was reversed by the Privy Council in 1987.³³ It has been followed in Canada in *City of Kamloops v Nielsen*³⁴ in 1984 but was rejected by the High Court of Australia in *Sutherland Shire Council v Heyman*³⁵ in 1985.

In the United Kingdom, the decade following *Anns* has witnessed a significant modification of the general principle expounded in the speech of Lord Wilberforce. The retreat may be said to have begun in 1983 in *McLoughlin v O'Brian*³⁶ and to have been led to some extent by Lord Wilberforce himself. In *Peabody Donation Fund v Sir Lindsay Parkinson*³⁷ in 1985 an attempt to invoke the principle at the suit of a plaintiff who had himself been responsible for the defective construction which had been passed by the council failed, Lord Keith issuing a warning that the two-stage test expounded by Lord Wilberforce must not be treated as of a definitive character and that it was essential to the existence of a duty of care that there should be 'in addition to foreseeability' 'a relation of proximity' between plaintiff and defendant. In seeking to find a basis for this relation, Lord Keith abandoned altogether the negative second stage question, which put the burden on the defendant of showing some reason why he should not be liable, and substituted a positive test of asking whether it is reasonable that he should be held liable. This may not be wholly satisfactory but it does at least provide some identifiable point of reference. In *McLoughlin v O'Brian* in 1983, indeed, Lord Wilberforce himself had gone out of his way to stress that the mere foreseeability of harm in itself was not a sufficient test of liability. Again in *Leigh and Silavan Ltd v Aliakmon Shipping Co*³⁸ in 1986 Lord Brandon, giving the leading speech, reiterated that the *Anns* test was

³⁰[1986] 1 NZLR 84.

³¹[1986] 1 NZLR 99.

³²[1986] 1 NZLR 22.

³³[1988] 1 AC 473; [1988] 2 WLR 418 PC.

³⁴(1984) 10 DLR (4th) 641.

³⁵(1985) 60 ALR 1.

³⁶[1983] 1 AC 410 HL.

³⁷[1985] AC 210.

³⁸[1986] AC 785.

not intended and could not be applied to provide a universal test of the duty of care.

The result of applying the test literally and as a universal formula is apparent from three further cases in which Lord Keith's caution has been repeated. In *Curran v Northern Ireland Housing Association*³⁹ in 1987 an attempt was made to make a public authority liable for negligence in having lent money on mortgage for the erection by the plaintiff's predecessor in title of a defective back addition to his house. It failed and Lord Bridge warned against attempting to extend the *Ams* principle. In *Yuen Kun Yeu v AG of Hong Kong*⁴⁰ again in 1987, the Privy Council upheld the dismissal by the Hong Kong Courts of an action against the Commissioner of Deposit Taking Companies at the suit of a disappointed depositor who claimed that he would never have lent his money if the company's registration had been withdrawn, as it could have been under the Commissioner's powers. Lord Keith again repeated the warning that he had issued in *Peabody*. That was repeated yet again by the Privy Council in the *Takaro Properties* case.

Perhaps the most striking examples of the literal application of Lord Wilberforce's two-stage test have been in relation to attempts to fix defendants with liability for the acts of third persons over whom they have no control whatever but where, in the circumstances, it might be said that the third person's act which has caused the damages was a foreseeable possibility. In *Lamb v Camden London Borough Council*,⁴¹ it was unsuccessfully claimed that the defendants were liable for damage caused by squatters. In *Perl (P) (Exporters) Ltd v Camden London Borough Council*,⁴² it was unsuccessfully claimed that the council was liable for the acts of burglars who had entered through their premises which had been inadequately secured. *King v Liverpool City Council*⁴³ was another unsuccessful claim for damage caused by vandals who had entered the defendants premises. And in *Smith v Littlewoods Organi-*

³⁹[1987] AC 718 HL (NI).

⁴⁰[1988] AC 175.

⁴¹[1981] QB 625.

⁴²[1984] QB 342.

⁴³[1986] 1 WLR 890.

sation Ltd⁴⁴ in 1987 an unsuccessful claim was made against the owners of a derelict cinema which had been set on fire by vandals, the fire having spread to the pursuer's adjoining property. These claims all failed, not on the grounds of lack of foreseeability or of considerations of policy, but on the lack of the relationship which is comprised in the amorphous notion of proximity. And in the *Littlewood* case their Lordships kept open the possibility that there might well be circumstances imposing a positive duty to neighbours to protect one's own land from trespassers.

Probably the high water-mark for extreme claims based on *Anns* was the case of *Hill v Chief Constable of West Yorkshire*⁴⁵ earlier this year, where the mother of the victim of a mass murderer sued the police for what she alleged was their negligent failure to detect and arrest the culprit before he killed her daughter, basing herself on a combination of *Anns* and the *Dorset Yacht Company* case. That claim failed both by reason of the absence of the necessary ingredient of 'proximity' and on grounds of public policy.

'Some further ingredient beyond foreseeability' said Lord Keith is 'invariably needed' to establish the requisite proximity of relationship between plaintiff and defendant. The nature of the ingredient, however, still remains undefined and will be found to vary in a number of different categories of decided cases. In the ultimate analysis it depends simply upon what the court thinks is reasonable.

Finally, both the validity of the basis for the builder's liability in *Anns* and the recoverability of damages for pure economic loss were called in question in the recent case of *D & F Estates v Church Commissioners*⁴⁶ again decided earlier this year. There the plaintiffs were seeking, basing themselves on *Anns*, to recover, some twenty-one years after the premises had been built, the cost of replacing defective plaster fixed by the defendants' sub-contractor when the premises were originally built. The claim failed and the House took the opportunity of disapproving *Batty v Metropolitan Realisa-*

⁴⁴[1987] AC 241.

⁴⁵[1988] 2 All ER 238.

⁴⁶[1988] 3 WLR 368; [1988] 2 All ER 992 HL (E).

tions⁴⁷ so far as it dealt with the builder's liability and of confining the much discussed case of *Junior Books* to its own peculiar facts - so that it may now, I think, be reduced to the status merely of a footnote in the text books.

The result of all this is that the law remains still in a pretty fluid state. What is clear is that foreseeability *per se* is not now sufficient to establish the duty. There is a further ingredient described as 'proximity' or 'neighbourhood' but we still lack any clear indication of what that ingredient is or how it is to be established beyond the fact that it must be 'reasonable' and that it must be positively established. The future is obscure. We still have no clear definition of the circumstances in which pure economic loss can ground an action for negligence and there is, really, no logical reason for excluding it from the category of damage which can ground an action. If you can recover on the basis of the economic loss caused by reliance on my carelessly erroneous advice, what is the logical reason for denying the recovery of the loss which you suffer from closing down your restaurant because I have carelessly severed the power cable in the road? The solution of allowing such recovery wherever the court thinks that it is 'policy' to do so is really simply to invite further judicial legislation without any reference points by which it can be logically contained. If I may venture a prediction, I suspect that the solution may lie rather along the lines of an extension of the *Hedley Byrne* principle of an assumption of responsibility. It may be that what we ought to be looking for is some formula for determining whether in any individual case it would be reasonable to hold that the reasonable man in the position of the defendant would, if he had been asked, have assumed a responsibility for the loss which he has occasioned. I must not pretend that that represents original thought and let me acknowledge that the idea was suggested in an extremely interesting article in the *Canadian Bar Review*⁴⁸ by Mr Christopher Harvey, a member of the English Bar.

⁴⁷[1978] QB 554.

⁴⁸(1972) 50 Can BR 580-621.

Whatever the solution, the path is one which is fraught with difficulty and which ultimately may well lead back to the now abandoned philosophical discussions about when the cause of damage is an effective cause and when it is too remote. But whatever the formula it ought to be one which is firmly based upon established principle. At the same time we have to avoid the danger of being so mesmerized by the past that development is sterilized altogether. I have indicated that I think that in some ways the results of the inventive foray represented by *Annis* have been unfortunate. My criticism is not, however, that it developed the law but that the particular development was not, in all respects, if I may say so respectfully, soundly or logically based in principle. The line between permissible development and inventiveness beyond the judicial function is a fine one which is not always easily discernible. 'Public policy' is a flexible concept which may well fall on either side of the line. Lord Scarman in his speech in *McLoughlin's* case drew attention to the difficulty when he said:

Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.⁴⁹

That was a view not shared by all members of the Committee - in particular by Lord Edmund Davies.

At the same time, the general principle expounded in *Annis*, as it has now been explained and restricted in *Peabody* by reference to what is reasonable, provides the judiciary, I think, with the material necessary for a further development without the necessity for what Lord Edmund Davies in *McLoughlin's* case described as 'the introduction of new legal principles so fundamental that they are best left to the legislature'. That is, perhaps, the best definition of what is comprised in the concept of what I had labelled 'judicial legislation'. Even if, in the end, the establishment of principles

⁴⁹[1983] 1 AC 410 at page 431

of liability for pure economic loss are considered to introduce new legal principles of such a fundamental nature that it is necessary to regulate the question by legislation it is difficult to conceive of any method by which this could be done which did not in the end involve a resort to a criterion of what is reasonable. Thus, there will inevitably be left to the courts an area in which liability is made to depend upon a flexible assessment of what current policy requires. Whatever judges may say, there comes inevitably a point at which the judicial and legislative functions to some extent overlap and the judge is compelled to assume the mantle of the law-maker.

By way of conclusion, may I just say this? You in Malaysia have still a free choice of which road to follow because, as I understand it, the need to express a definitive view has not yet arisen. Perhaps some public benefactor can be stimulated into buying a tumble-down house so as to get the problem resolved. But at the moment you have a perfect freedom within the common law - you may follow the American pattern and carry *Anns* well beyond its logical conclusion. You may follow the New Zealand pattern of wide liability on public authorities. You may follow the Australian pattern and reject *Anns* altogether as an appropriate guide for the development of the common law of Malaysia. Or there may be other approaches in between these disparate lines of development.

It would be inappropriate for me to tender advice to my friends in the Malaysian judiciary and I would not presume to do so. But they might like, on a parting note, to bear in mind the wise words of the English divines who, in 1662, in compiling the *Book of Common Prayer*, observed that:

a change in things advisedly established (no evident necessity requiring it) has resulted in inconveniences many times more and greater than the evils that were intended to be remedied by such changes

That is an aphorism that we may all do well to bear in mind, not only in the law of tort, but in every aspect of the administration of the law.

The Rt Hon Lord Oliver of Aylmerton, PC*

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