SUPREME COURT OF CANADA
Kamloops v. Nielsen, [1984] 2 S.C.R. 2
Date: 1984-07-26

City of Kamloops *Appellant;*

and

Jan Clemmensen Nielsen *Respondent;*

and

Wesley Joseph Hughes and Gladys Annetta Hughes *Respondents.*

File No.: 16896.

1982: November 22; 1984: July 26.

Present: Ritchie, Dickson, Estey, McIntyre and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Municipality — By-law adopting building standards and imposing duty of enforcement on municipal building inspector — House inspected, changes required and stop work order issued — House completed and occupied without permit — Serious structural defects discovered by subsequent purchaser without notice — Whether or not misfeasance/non-feasance distinction relevant to liability in negligence where duty found to exist — Whether or not City negligent — Municipal Act, R.S.B.C. 1960, c. 255, ss. 714, 738, 739 (now R.S.B.C. 1979, c. 290) — Limitations Act, 1975 (B.C.), c. 37, ss. 3, 6.

A contractor placed the footings of the house he was building on loose fill notwithstanding the requirement in the approved plans that the footings be taken down to solid bearing. Kamloops' building inspector, acting under municipal by-laws, made three inspections and then issued a stop work order pending the submission of a plan to correct structural deficiencies. A plan was submitted, but was not followed, and work continued in spite of a warning that the stop work order was still in effect.

The city solicitor informed the first purchasers—the contractor's parents—of the deficiencies, the stop work order, and the need for an engineer's certification of the adequacy of the construction to lift the stop work order. A strike of municipal employees, however, interrupted the inspection process, and nothing further was done. The house was later sold to Nielsen without notice of its

[Page 3]

chequered history or of the state of its foundations. A contractor hired by Nielsen to make a general inspection did not crawl under the house to inspect the foundations. When Nielsen learned that the foundations had subsided, he brought an action against the vendor and Kamloops.

The Court of Appeal upheld the trial judge's findings of negligence on the part of the vendor and Kamloops with fault apportioned at 75 per cent and 25 per cent respectively. The City argued here that it was not liable in that it owed no duty of care to Nielsen and, in any event, the action was statute-barred.

Held (Estey and McIntyre JJ. dissenting): The appeal should be dismissed.

Per Ritchie, Dickson and Wilson JJ.: Kamloops made a policy decision to regulate construction by by-law and charged its building inspector with the enforcement of the by-law. In discharging this operational duty the City owed a duty of care to persons whose relationship was sufficiently close that they ought to have been reasonably within its contemplation as likely to be injured by a breach of its duty. The City's breach of duty was causative, notwithstanding the fact that the builder's negligence was primary, for it allowed construction to continue in breach of its duty to protect the plaintiff against the builder's negligence. The City's failure to act in the face of a duty to act, or at the least its failure to make a conscious decision on policy grounds not to act, could not be a policy decision taken in the *bona fide* exercise of discretion.

The distinction between non-feasance and misfeasance is irrelevant in the face of a duty to act.

The flood gates would not be opened by a finding of a private law duty owed by public officials because the principle in *Anns v. Merton London Borough Council* contains built-in limitations to its application. In particular, the applicable legislation must be found to impose a private law duty on the municipality or public official and the principle has no application to purely policy decisions made in the *bona fide* exercise of discretion.

[Page 4]

Plaintiff's cost of restoring his home—an economic loss—was recoverable, notwithstanding the *Rivtow* case. The situation was free of the contractual overtones found in *Rivtow* and differed as to the nature and extent of the duty owed.

Sections 3(1)(a) and 6(3) of the *Limitations Act* postponed the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. Plaintiff was not barred in the circumstances of this case by the failure of the first purchasers to litigate.

[Anns v. Merton London Borough Council, [1978] A.C. 728; *McCrea v. White Rock (City of)* (1974), 56 D.L.R. (3d) 525; *Sparham-Souter v. Town and Country Developments (Essex) Ltd.,* [1976] Q.B. 858, approved; *Rivtow Marine Ltd. v. Washington Iron Works,* [1974] S.C.R. 1189, distinguished; *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners (a firm),* [1983] 1 All E.R. 65; *Cartledge v. E. Jopling & Sons Ltd.,* [1963] A.C. 758, disapproved; *East Suffolk Rivers Catchment Board v. Kent,* [1941] A.C, 74, reversing [1940] 1 K.B. 319; *Barratt v. North Vancouver (Corporation of),* [1980] 2 S.C.R. 418; *Stevens and Willson v. Chatham (City of),* [1934] S.C.R. 353; *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 136 C.L.R. 529; *Junior Books Ltd. v. Veitchi Co.,* [1983] A.C. 520, considered; *Donoghue v. Stevenson,* [1932] A.C. 562; *Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465; *Home Office v. Dorset Yacht Co.,* [1970] A.C. 1004; *Dutton v. Bognor Regis United Building Co.,* [1972] 1 All E.R. 462, [1972] 1 Q.B. 373, *sub nom. Dutton v. Bognor Regis Urban District Council; Schacht v. The Queen in right of the Province of Ontario,* [1973] 1 O.R. 221; *Wing v. Moncton,* [1940] 2 D.L.R. *740; Neabel v. Ingersol (Town of)* (1967), 63 D.L.R. (2d) 484; *Cattle v. Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; *Weller & Co. v. Foot and Mouth Disease Research Institute,* [1966] 1 Q.B. 569, [1965] 3 All E.R. 560; *Ultramares Corp. v. Touche,* 255 N.Y. 170 (1931); *Ministry of Housing and Local Government v. Sharp,* [1970] 2 Q.B. 223; *The Queen in right of Canada v. Saskatchewan Wheat Pool,* [1983] 1 S.C.R. 205; *Gypsum Carrier Inc. v. The Queen,* [1978] 1 F.C. 147; *Agnew-Surpass Shoe Stores Ltd. v, Cummer-Yonge Investments Ltd.,* [1976] 2 S.C.R. 221; *Bethlehem Steel Corp. v. St. Lawrence Seaway Authority* (1977), 79 D.L.R. (3d) *522; Ital-Canadian Investments Ltd. v. North Shore Plumbing and Heating Co.,* [1978] 4 *W.W.R. 289;*

[Page 5]

Bagot v. Stevens Scanlan & Co., [1966] 1 Q.B. 197; Dennis v. Charnwood Borough Council, [1982] 3 All E.R. 486, referred to.]

APPEAL from a judgment of the British Columbia Court of Appeal (1981), 31 B.C.L.R. 311, dismissing an appeal from a judgment of Andrews J. Appeal dismissed, Estey and McIntyre JJ. dissenting.

Harry J. Grey, Q.C., for the appelant [sic].

R. J. Gibbs, Q.C., and J. A. Horne, for the respondent Jan Clemmensen Nielsen.

The judgment of Ritchie, Dickson and Wilson JJ. was delivered by

WILSON J.—This case raises the rather difficult question whether a municipality can be held liable for negligence in failing to prevent the construction of a house with defective foundations. It also raises a number of ancillary questions, such as whether such a liability, assuming it exists, extends to third party purchasers, what sort of damages are recoverable, and when the limitation period starts to run.

1. The Facts

Since the facts are of vital importance I set them out in some detail. Mr. Hughes, Jr. set out to build a house on a hillside for his father who was an Alderman in the City of Kamloops. To this end he submitted plans to the City's building inspector. The plans were approved, subject to the requirement that the footings were to be taken down to solid bearing, and a building permit was issued. Mr. Hughes did not take the footings down to solid bearing; instead he set the foundations on piles which were set into loose fill. He then requested an inspection of the foundations. When one of the City's building inspectors arrived to make his inspection on December 18, 1973 he realized that the foundations were not in accordance with the plans but he was unable to check whether they were adequate to support the building because the concrete had been poured. Accordingly, on his own initiative the building inspector followed up with

[Page 6]

two further inspections on December 23, 1973 and January 2, 1974 and sent a letter to Mr. Hughes on the latter date indicating that a stop work order had been placed on the site and would not be lifted until new plans had been submitted showing how

the structural defects were going to be remedied. Mr. Hughes retained a firm of professional engineers to prepare the new plans and on receipt of their proposal the building inspector lifted the stop work order. Mr. Hughes, however, did not cooperate with the engineers on the required changes but continued with the construction of the house on the original plans. The engineers, disavowing all liability, notified the building inspector.

On February 27, 1974 two building inspectors attended at the site. This was followed next day by a registered letter from the building inspector to Mr. Hughes telling him that the stop work order would remain in effect until he submitted a report from a structural engineer. Mr. Hughes ignored this communication and carried on with the building. Various further inspections were made by building inspectors who reported to their superior, the building inspector, that construction was continuing despite the stop work order.

On April 9, 1974 Mr. Hughes, Sr. and his wife purchased the property from their son. The City Solicitor wrote to them on April 22, 1974 advising them of the City's concern over the structural integrity of the building and that the stop work order which was currently in force would not be lifted until the City was provided with complete structural drawings from an engineer verifying the adequacy of the proposed construction. Mr. Backmeyer, Director of Planning for the City, became involved at this stage but no resolution to the problem was effected. The dialogue moved into the Council Chamber and Mr. Backmeyer testified that Mr. Hughes, Sr.'s plea to his fellow council members was that this was his retirement home

and, since he was going to live in it, any problems that arose would be his and his alone. It was therefore no one's business but his and why was he being subjected to this kind of harassment?

At this point a strike of city employees broke out and the Director of Planning and the Building Division Administrator were left to run the Building Division by themselves until the strike ended sometime in July. No further inspections were made after the strike and no occupancy permit was ever issued. A plumbing permit was, however, issued in August 1974. The house was completed and the Hughes moved in February 1975. In December 1977 they sold the property to the present plaintiff who was told nothing of its chequered history. Before purchasing the house the plaintiff had taken a contractor with him to advise him on the cost of some renovations and also to make a general inspection of the house. The contractor did not see anything to alert him to a potential problem with the foundations but he did not crawl under the house to examine them. Accordingly, the first the plaintiff knew of the defective foundations was when they were drawn to his attention in November 1978 by a plumber called to attend to a burst pipe. The plumber discovered the situation when he went into the four-foot crawl space under part of the house and saw that the foundations had subsided.

The plaintiff issued his writ in January 1979 alleging against his vendor: (l) fraudulent misrepresentation; (2) breach of contract; and (3) negligence in the construction of the house. He alleged negligence also against the City of Kamloops for failing to enforce the stop work order or alternatively for failing to condemn the building as unfit for habitation.

Andrews J. found both defendants liable and apportioned fault between them, 75 per cent against the Hughes and 25 per cent against the City. No appeal was taken by

the Hughes. The City's appeal to the Court of Appeal of British Columbia was dismissed.

[page 8]

But for the issue of limitations which I will deal with later, the City's grounds of appeal to this Court were substantially the same as those presented to the Court of Appeal and rejected by it. The first was that no duty of care was owed by the City to the plaintiff and, absent such a duty, no liability in negligence could be incurred.

2. The Duty of Care

The leading English authority favouring the existence of a duty of care owed by the City to the plaintiff is the decision of the House of Lords in *Anns v. Merton London Borough Council, [1978]* A.C. *728.* The facts, in brief, were that the Borough Council in February 1962 approved plans for the creation of a two-storey block of flats. The plans called for the foundations to be "3'0" or deeper to the approval of local authority". In fact the foundations were only two feet six inches deep. By February 1970 cracks had appeared in the walls of the flats and the floors had begun to slope. Two of the plaintiffs were original lessees; the others were assignees from original lessees. All claimed against the Borough for the negligence of the council surveyor in approving foundations that were inadequate.

The relevant English legislation was the *Public Health Act 1936, s.* 61 of which empowered Council to make by-laws to regulate the construction of buildings. By-law 18(1)(b) provided that the foundations of every building should be taken down to such depth or be so designed as to safeguard the building against damage caused by swelling and shrinking of the subsoil. The builder was under a statutory duty to notify the local authority before covering up the foundations and the local

authority had at that stage the right to inspect and to insist on any correction necessary to bring the work into conformity with the by-laws.

Lord Wilberforce pointed out that the local authority is a public body whose powers and duties are definable in terms of public rather than private

[page 9]

law. However, in some circumstances the law could impose over and above, or perhaps alongside, these public law powers and duties a private law duty towards individuals enabling them to sue the authority for damages in a civil suit. The difficulty was to determine when such a private law duty could be imposed. The first step, Lord Wilberforce said, is to analyse the powers and duties of the authority to determine whether they require the authority to make "policy" decisions or "operational" decisions. He said at p. 754:

> 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 area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion." It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

His Lordship then adverted to the fact that frequently policy decisions are affected by budgetary considerations. It is for the local authority to decide what resources it should make available to carry out its role in supervising and controlling the activities of builders. For example, budgetary considerations may dictate how many inspectors should be hired for this purpose, what their qualifications should be, and how often inspections should be made. He approved the statement of du Parcq L.J. in *Kent v.*

East Suffolk Rivers Catchment Board, [1940] 1 K.B. 319, at p. 338, that public authorities have to strike a balance between the claims of efficiency and thrift and whether they get the right balance can only be

[page 10]

decided through the ballot box and not in the courts. He then dealt with the argument that where the local authority is under no duty to inspect but merely has a power to inspect, it can avoid liability for negligent inspection by simply deciding not to inspect at all. He pointed out that this overlooks the fact that local authorities are public bodies operating under statute with a clear responsibility for public health in their area. They must, therefore, make their discretionary decisions responsibly and for reasons that accord with the statutory purpose. They must at the very least give due consideration to the question whether they should inspect or not and, having decided to inspect, they must then be under a duty to exercise reasonable care in conducting that inspection.

Lord Wilberforce rejected the notion that a distinction was to be made in this context between statutory duties and statutory powers, the former giving rise to possible liability and the latter not. Such a distinction, he says, overlooks the fact that parallel with public law duties owed by local authorities there may co-exist private law duties to avoid causing damage to other persons in proximity to them. The trilogy of House of Lords cases—*Donoghue v. Stevenson,* [1932] A.C. 562, *Hedley Byrne & Co. v. Heller & Partners Ltd.,* [1964] A.C. 465, and *Home Office v. Dorset Yacht Co.,* [1970] A.C. 1004—clearly established that in order to decide whether or not a private law duty of care existed, two questions must be asked:

> (1) is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,

> (2) are there any considerations which ought to negative or limit (a) the scope of the duty

[page 11]

> and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

These questions, Lord Wilberforce said, must be answered by an examination of the governing legislation.

Lord Wilberforce categorized the various types of legislation as follows:

> (1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;
>
> (2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

Lord Wilberforce found that the defendant in *Anns* was under a private law duty to the plaintiff. It had to exercise a *bona fide* discretion as to whether to inspect the foundations or not and, if it decided to inspect them, to exercise reasonable skill and care in doing so. He concluded that the allegations of negligence were consistent with the Council or its inspector having acted outside any delegated discretion either as to the making of an inspection or as to the manner in which the inspection was made.

Following the path charted by Lord Wilberforce and directing myself to the governing legislation, s. 714 of the *Municipal Act of* British Columbia, R.S.B.C. 1960, c. 255, as amended, now R.S.B.C. 1979, c. 290, provides in part as follows:

[page 12]

> 714. The Council may, for the health, safety, and protection of persons and property, and subject to the *Health Act* and the *Fire Marshal Act* and the regulations made thereunder, by by-law
>
> (a) regulate the construction, alteration, repair, or demolition of buildings and structures;
>
> (b) require that, prior to any occupancy of a building or part thereof after construction, wrecking, or alteration of that building or part thereof, or any change in class of occupancy of any building or part thereof, an occupancy permit be obtained from the Council or the proper authorized official, which permit may be withheld until the building or part thereof complies with the health and safety requirements of the by-laws of the municipality or of any Statute.

It would appear from the use of the word "may" in s. 714 that the Council has a discretion under the statute whether to regulate the construction of buildings by by-laws or not. However, in fact Council decided to exercise its regulatory power and passed By-law No. 11-1. The By-law prohibited construction without a building permit, provided for a scheme of inspections at various stages of construction, prohibited occupancy without an occupancy permit and, perhaps most important, imposed on the building inspector the duty to enforce its provisions. It should be noted, however, that the By-law also imposed a duty on the owner of the building or his agent to give notice to the building inspector when the building reached the various stages at which inspection was called for under the By-law.

It seems to me that, applying the principle in *Anns,* it is fair to say that the City of Kamloops had a statutory power to regulate construction by by-law. It did not have to do so. It was in its discretion whether to do so or not. It was, in other words, a "policy" decision. However, not only did it make the policy decision in favour of regulating construction by by-law, it also imposed on the city's building inspector a duty to enforce the provisions of the By-law. This would be Lord

Wilberforce's "operational" duty. Is the City not then in the position where in discharging its operational duty it must take care not to injure persons such as the plaintiff whose relationship to the City was sufficiently close that the City ought reasonably to have had him in contemplation?

3. The Argument on Causation

Counsel for the City puts forward two main propositions which it says should insulate it against liability to the plaintiff. The first is that even if this Court were to adopt the principle in *Anns* and find that the City owed the plaintiff a private law duty of care, the plaintiff's damage was not caused by any fault of the City. The plaintiff's damage, it submits, was caused solely by the wilful disregard by the Hughes of the building by-law and the structural safety requirements imposed on them by the building inspector and their deceit in concealing their knowledge of the structural defects from the plaintiff when he bought the house. Reliance was placed on the House of Lords' decision in *East Suffolk Rivers Catchment Board v. Kent,* [1941] A.C. 74. Alternatively, the City argued, the plaintiff's damage was caused or contributed to by the plaintiff's own negligence in failing to make a proper inspection at the time of purchase. Counsel for the City submits that surely a careful examination of the foundations of a house built on a hillside would be a primary consideration in the mind of any competent contractor retained by a prospective purchaser to opine on the structural integrity of the house.

It seems to me that the learned trial judge was right in the way he dealt with the liability of the Hughes. He agreed that they played a major role in causing the plaintiff's damage and imposed a 75 per cent liability on them. He did not deal in his brief reasons for judgment with the defence of contributory negligence on the part of the plaintiff put forward by the City but it is implicit in the

result he reached that he found none. The Court of Appeal in dealing with this issue said there was no evidence to show that, at the time the plaintiff had his contractor check out the house, the subsidence of the foundations had taken place or would have been apparent even if his contractor had entered the four-foot crawl space. It seems to me that this may not be completely accurate. There was some evidence that efforts had been made to shore up the foundations prior to the plaintiffs acquisition of the house. I prefer therefore to adopt the inference to be drawn from the trial judge's finding of no contributory negligence that the plaintiff had no obligation in the circumstances to crawl under the house to inspect the foundations.

I do not think the House of Lords' decision in *East Suffolk* helps the City on the causation issue. In that case the Catchment Board exercised its statutory power to repair a breach in a retaining wall when the river broke through it as a result of a flood. But the Board carried out its work so inefficiently that the flooding continued over an extensive period of time and did serious damage to the plaintiffs pasture land. The evidence disclosed that the breach could with reasonable skill have been repaired in fourteen days. The trial judge found for the plaintiff. If the defendant Board had done nothing, he concluded, it would have been free of liability. But having injected itself into the action it owed a duty to the plaintiff to use reasonable care. The Court of Appeal agreed with the trial judge that the defendant, having elected to exercise its powers, came under a duty to exercise them with a reasonable degree of skill and care. The House of Lords, however, (Lord Atkin dissenting) reversed the Court of Appeal, holding that the defendant Board was under no obligation to repair the wall or to complete the work after having started it. Viscount Simon and Lord Thankerton both found that the plaintiffs damage was

caused by the flooding and not by the abortive efforts of the defendant to repair the gap in the

[page 15]

wall. There was no evidence that any additional damage was caused as a result of its intervention.

Lord Wilberforce was not content to characterize *East Suffolk* simply as a case on causation. He thought rather that it revealed that in 1940 the concept of a general duty of care resting on public officials was not yet fully recognised and, indeed, that that recognition did not come until 1970 with the decision in *Home Office v. Dorset Yacht Co., supra.*

In my view, the *East Suffolk* case is clearly distinguishable from the present case. This is not the case of a power which the City decided to exercise but exercised in a negligent manner. This is the case of a duty owed by the City to the plaintiff, a person who met Lord Wilberforce's test of proximity in *Anns.* The City's responsibility as set out in the By-law was to vet the work of the builder and protect the plaintiff against the consequences of any negligence in the performance of it. In those circumstances it cannot, in my view, be argued that the City's breach of duty was not causative. The builder's negligence, it is true, was primary. He laid the defective foundations. But the City, whose duty it was to see that they were remedied, permitted the building to be constructed on top of them. The City's negligence in this case was its breach of duty in failing to protect the plaintiff against the builder's negligence.

In *Anns* Lord Wilberforce suggests that if *East Suffolk* were being decided today the Catchment Board, although free of liability if it decided to take no steps to stem the flood, might attract a liability if it decided to exercise its power and take steps but

exercised its power negligently. It seems to me that this would follow from a finding that the Board had made a policy decision to exercise its power and acted negligently in carrying its policy decision into operation. A liability might then be incurred not only with respect to any fresh damage caused by its negligent intervention but

[page 16]

also with respect to damage the flood would have caused regardless of its intervention provided that damage could and ought to have been mitigated by a non-negligent intervention.

I believe that if the courts below had found in this case that the City owed no private law duty of care to the plaintiff, they would have held the Hughes one hundred per cent liable. Their apportionment of liability therefore must stand or fall on the existence of such a duty.

4. Non-feasance and Misfeasance

The second proposition put forward on behalf of the City goes directly to the central issue in the case, namely what, if any, duty was owned by the City to the plaintiff. Counsel submits that even if this Court were to adopt the principle in *Anns,* it should not be applied in this case because at most the City was guilty of non-feasance rather than misfeasance. He submits that this distinction between non-feasance and misfeasance is well established in Canadian law and that non-feasance does not give rise to a liability in negligence. Accordingly, he submits, the principle in *Anns,* if adopted, should be confined in Canada to misfeasance cases. It is necessary to consider this submission in some detail.

A good starting point is the case most strongly relied upon by counsel, namely *McCrea v. White Rock (City of)* (1974), 56 D.L.R. (3d) 525. The circumstances giving rise to that litigation are not dissimilar to those arising here. An owner of a building sued the municipality for negligent inspection of the structure after it collapsed. Alterations had been made to the building to substitute a beam supported by two columns for a bearing wall. Three inspections were made at the call of the contractor, one at the time of the pouring of the cement floor, another in relation to a laminated fire wall and the third in connection with the

[page 17]

floor repair. Maclean J.A. summarizes the crucial facts, at pp. 528-29, as follows:

There was evidence that the practice in White Rock was for the contractor to call for inspections on behalf of the owner. No further calls for inspections were made and the inspector did not inspect the beam. In fact, the contractor did not follow the plan which he had submitted in support of the application for the building permit. However, the inspector had no reason to believe that an inspection other than one called for by the owner or his agent was required.

Mr. Justice Berger found that the City had been negligent, applying the reasoning in *Dutton v. Bognor Regis United Building Co., [1972]* 1 All E.R. 462, [1972] 1 Q.B. 373, *sub nom. Dutton v. Bognor Regis Urban District Council.* The Court of Appeal of British Columbia reversed the decision of the trial judge. Maclean J.A. distinguished the *Dutton* case on the basis of the distinction between non-feasance and misfeasance. Quoting from his judgment at pp. 529-30:

> In my view, if it could be said that the building inspector was at fault at all, his fault was one of non-feasance at the worst, rather than misfeasance. The respondents relied on the case of *Dutton v. Bognor Regis United Building Co. Ltd. et al.,* [1972] 1 All E.R. *462,* [1972] 1 Q.B. *373 sub nom. Dutton v. Bognor Regis*

Urban District Council. In that case the builder erected the building on a rubbish tip, and upon discovering the nature of the ground, he enlarged the foundations and made other provisions in an attempt to ensure the safety of the building. These attempts were futile, however, and the building became an almost total loss because of settling of the foundations. The building inspector had passed the foundations following an inadequate inspection. There is no doubt that his inspection was inadequate and careless in the extreme. The negligent inspection by the building inspector was clearly an act of misfeasance as Lord Denning, M.R., said at p. 475 of the report of the *Dutton* case:

> It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly

[page 18]

> built. They received public funds for the purpose. Yet, they failed to protect them. *Their shoulders are broad enough to bear the loss.*

(Emphasis added.)

It should be noted that the building inspector was also held liable for the loss, but, as previously noted, the *Dutton* case was clearly a case of misfeasance on the part of the servant, the building inspector. Liability was imposed upon him by the law of England, but in my view, the same result does not necessarily follow here. In any event, the *Dutton* case is distinguishable because that was a case of misfeasance whereas in my view this is a case of non-feasance if it is anything. [My emphasis.]

Robertson J.A. agreed with Maclean J.A. that the *Dutton* case was distinguishable on this basis. In the course of his reasons for judgment he made reference to the judgment of Schroeder J.A. in *Schacht v. The Queen in right of the Province of Ontario,* [1973] *1 O.R.* 221, in which certain police officers failed to warn the plaintiff of an excavation on the highway and as a result he suffered personal injuries. Action was brought against the Crown. After reviewing a number of cases and statutory provisions Mr. Justice Schroeder, delivering the judgment of the Court, said at p. 231:

> Looked upon superficially the passivity of these two officers in the face of the manifest dangers inherent in the inadequately guarded depression across the highway may appear to be nothing more than non-feasance, but in the case of

> public servants subject not to a mere social obligation, but to what I feel bound to regard as a legal obligation, it was non-feasance amounting to misfeasance. [My emphasis.]

Seaton J.A. commented on *Schacht* at pp. 548-49 as follows:

> In *Schacht* there is reference to non-feasance amounting to misfeasance. I do not understand that statement. In *Dutton* Sachs, L.J„ dealt with the borderline between non-feasance and misfeasance so as to much reduce the area termed non-feasance. The judgment under appeal adopts that reasoning and carries it further. I think that the result is not consistent with the decisions in England (for example, *East Suffolk, supra),* this jurisdiction (for example, *Stevens & Willson v. Chatham, supra, Mainwaring v. Nanaimo,* [1951] 4 D.L.R. 519, 3 W.W.R. (N.S.) 258,

[page 19]

> and *Miller & Brown Ltd. v. City of Vancouver* (1966), 59 D.L.R. (2d) 640, 58 W.W.R. 191), or elsewhere (for example, *Gorringe v. Transport Com'n (Tas.)* (1950), 80 C.L.R. 357, and *Oamaru Borough v. McLeod,* [1967] N.Z.L.R. 940). I think that this case must turn upon the presence or absence of a duty to inspect. If a duty is discovered the non-feasance/misfeasance dichotomy is not necessary. [My emphasis.]

Mr. Justice Seaton concluded that there was no duty on the appellant in the *McCrea* case to inspect and that was sufficient to dispose of the appeal. He was able to reach this conclusion because there was no obligation on the inspector to inspect until the owner had given notice and no notice had been given in respect of the beam.

The *McCrea* case, of course, predates *Anns.* Counsel relies also therefore on a number of Canadian decisions since *Anns* including a decision of this Court. In *Barratt v. North Vancouver (Corporation of),* [1980] 2 S.C.R. 418, a plaintiff was thrown from his bicycle and injured when he rode into a deep pothole in the road surface. The evidence indicated that the municipality had a once every two weeks inspection system, that the road was properly inspected one week before the accident and that the pothole developed between the time of that inspection and the date of the

accident. It was held that the plaintiff could not recover in negligence from the municipality on the ground that it should have provided for more frequent inspections. It should be noted that s. 513(2) of the British Columbia *Municipal Act* gave the municipality authority to lay out, construct, maintain and improve highways but it imposed no duty on the municipality to maintain its highways. Mr. Justice Martland said at p. 428:

> In my opinion, no such duty existed. The Municipality, a public authority, exercised its power to maintain Marine Drive. It was under no statutory duty to do so. Its method of exercising its power was a matter of policy to be determined by the Municipality itself. If, in the implementation of its policy its servants acted negligently, causing damage, liability could arise, but the Municipality

[page 20]

> cannot be held to be negligent because it formulated one policy of operation rather than another.

The position of the Municipality is well stated in the judgment of du Parcq L.J. in the Court of Appeal in *Kent v. East Suffolk Rivers Catchment Board,* [1940] 1 K.B. 319, at p. 338:

> The law would perhaps be more satisfactory, or at any rate seem more satisfactory in some hard cases, if a body which chose to exercise its powers were regarded as being in exactly the same position as one upon which an Act of Parliament imposed a duty. On the other hand, it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

Mr. Justice Martland then stated his conclusion as follows, at p. 428:

> My conclusion is that the trial judge sought to impose upon the Municipality too heavy a duty, that the determination of the method by which the Municipality decided to exercise its power to maintain the highway, including its inspection

> system, was a matter of policy or planning, and that, absent negligence in the actual operational performance of that plan, the appellant's claim fails.

Two things are of interest about Mr. Justice Martland's reasons for judgment in *Barratt.* The first is that he makes no reference to any distinction between non-feasance and misfeasance although presumably, if the distinction was significant, this would be categorized as a non-feasance case. The second is that it seems to be central to his judgment that no duty was imposed upon the municipality. It was in the discretion of the municipality whether or to what extent it exercised its maintenance power. The courts could not therefore interfere in the absence of negligence in the implementation of the policy it adopted with respect to inspection. This, it appears to me, is the ratio of the decision in *Barratt.*

[page 21]

This Court did, however, indicate some support for the non-feasance/misfeasance distinction in its earlier decision in *Stevens and Willson v. Chatham (City of),* [1934] S.C.R. 353. Indeed, that case may be viewed as the primary source of the distinction. The facts in brief were that the plaintiff's building burned while firemen stood by helplessly because they did not know how to turn off the electricity which was the source of the fire. The firemen telephoned the Public Utilities Commission to get them to turn off the electricity but by the time this was done the fire was out of control and the building could not be saved. Duff C.J. and Smith J. agreed with the trial judge and the majority of the Ontario Court of Appeal that the firemen were not in these circumstances negligent. Rinfret J. concurred but added at p. 363:

> The City is not legally responsible in damages, in this case, for mere inactivity on the part of its firemen.

Crocket J. dissented, expressing no opinion on whether the firemen were negligent in their "non-feasance or misfeasance" in waiting for the Commission to shut off the

power. He found that the Commission had been negligent in being slow to shut off the power. Only Lamont J. based his judgment primarily on the ground that the City was not liable "for mere inactivity on the part of its servants" (p. 364). The "mere inactivity" approach would appear to have formed the basis of the non-feasance/misfeasance distinction adopted and applied in cases such as *Wing v. Moncton,* [1940] 2 D.L.R. *740, Neabel v. Ingersol (Town of)* (1967), 63 D.L.R. (2d) 484, and *McCrea v. White Rock (City of), supra.*

5. The Nature of the Alleged Breach

Two important questions that must be answered in the present case are: (1) What was it that the building inspector failed to do in this case that is alleged to have contributed to the plaintiff's damage? and (2) Was he under a duty to do that thing? If the building inspector was under a duty

[page 22]

to do the thing he failed to do, then it seems to me that Seaton J.A. was right in *McCrea* when he stated that the non-feasance/misfeasance dichotomy becomes irrelevant. He is in breach of a duty and, if his breach caused the plaintiffs damage, liability must ensue. If, however, he is under no duty to do the thing he failed to do, there can be no liability. Again, the non-feasance/misfeasance dichotomy is irrelevant.

Lambert J.A., speaking for the Court of Appeal, ((1981), 31 B.C.L.R. 311], found that the building inspector was under a public law duty to prevent the continuation of the construction of the building on structurally unsound foundations once he became aware that the foundations were structurally unsound, He was also under a public law duty to prevent the occupancy of the building by the Hughes or the plaintiff. He failed to discharge either of those public law duties. Lambert J.A. then went on to discuss the nature of the private law duty he was under. He said at p. 319:

> I turn now to the private law duty. The conduct of the building inspector in response to the public law duties involved decisions on alternative courses of conduct which were, in my opinion, operational in character. The building was a danger to the occupant of the house and to adjoining property owners. It may have been a danger to anyone in the house. Policy decisions could have confronted the city as to whether to prosecute or to seek an injunction. There may have been other policy choices. But a decision not to act at all, or a failure to decide to act, cannot be supported by any reasonable policy choice. That decision or failure was not "within the limits of a discretion bona fide exercised", using again the words of Lord Wilberforce. It was certainly open to the trial judge to reach that conclusion. Indeed, having regard to the evidence of Mr. Backmeyer, it was open to the trial judge to conclude that the decision not to act or the failure to decide to act, was influenced by the pressure exerted by Mr. Hughes Sr. in his capacity as alderman.
>
> I would follow the reasons of Lord Wilberforce in *Anns* in concluding that a private law duty was owed to Mr. Nielsen as the owner and occupier of the house at the time when the defective foundations first became

[page 23]

> apparent by causing actual subsidence and damage. [My emphasis.]

It seems to me that Lambert J.A. was correct in concluding that the courses of conduct open to the building inspector called for "operational" decisions. The essential question was what steps to take to enforce the provisions of the by-law in the circumstances that had arisen. He had a duty to enforce its provisions. He did not have a discretion whether to enforce them or not. He did, however, have a discretion as to how to go about it. This may, therefore, be the kind of situation envisaged by Lord Wilberforce when, after discussing the distinction between policy decisions and operational decisions, he added the rider [[1978] A.C. 728, at p. 754]:

> Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

It may be, for example, that although the building inspector had a duty to enforce the by-law, the lengths to which he should go in doing so involved policy considerations. The making of inspections, the issuance of stop orders and the withholding of occupancy permits may be one thing; resort to litigation, if this became necessary, may be quite another. Must the City enforce infractions by legal proceedings or does there come a point at which economic considerations, for example, enter in? And if so, how do you measure the "operational" against the "policy" content of the decision in order to decide whether it is more "operational" than "policy" or vice versa? Clearly this is a matter of very fine distinctions.

Mr. Justice Lambert resolves this problem, as I apprehend the passage already quoted from his reasons, by concluding that the City could have

[page 24]

made a policy decision either to prosecute or to seek an injunction. If it had taken either of those steps, it could not be faulted. Moreover, if it had considered taking either of those steps and decided against them, it could likewise not be faulted. But not to consider taking them at all was not open to it. In other words, as I read his reasons, his view was that the City at the very least had to give serious consideration to taking the steps toward enforcement that were open to it. If it decided against taking them, say on economic grounds, then that would be a legitimate policy decision within the operational context and the courts should not interfere with it. It would be a decision made, as Lord Wilberforce put it, within the limits of a discretion *bona fide* exercised.

There is no evidence to support the proposition that the City gave serious consideration to legal proceedings and decided against them on policy grounds. Rather the evidence gives rise to a strong inference that the City, with full

knowledge that the work was progressing in violation of the by-law and that the house was being occupied without a permit, dropped the matter because one of its aldermen was involved. Having regard to the fact that we are here concerned with a statutory duty and that the plaintiff was clearly a person who should have been in the contemplation of the City as someone who might be injured by any breach of that duty, I think this is an appropriate case for the application of the principle in *Anns*. *I* do not think the appellant can take any comfort from the distinction between non-feasance and misfeasance where there is a duty to act or, at the very least, to make a conscious decision not to act on policy grounds. In my view, inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion. Where the question whether the requisite action should be taken has not even been considered by the public authority, or at least has not been considered in good faith, it seems clear that for that very reason the authority has not acted with reasonable care. I conclude therefore that the

[page 25]

conditions for liability of the City to the plaintiff have been met.

It is of interest to note in this connection that other courses were open to the City. It could have posted warning notices on the building and it could have condemned it. In fact, it did neither even although it knew that work was continuing despite the stop work order and that the house was being occupied without an occupancy permit. Indeed, it issued a plumbing permit in August 1974 before the Hughes moved in.

6. The "Floodgates" Argument

Before leaving the issue of the liability of public officials and moving on to the equally vexatious issue of recovery for pure economic loss, I should like to say a word or two

about what has come to be known as the "floodgates" argument. The floodgates argument would discourage a finding of private law duties owed by public officials on the ground that such a finding would open the flood-gates and create an "open season" on municipalities. No doubt a similar type of concern was expressed about the vulnerability of manufacturers following the decision in *Donoghue v. Stevenson, supra.* While I think this is an argument which cannot be dismissed lightly, I believe that the decision in *Anns* contains its own built-in barriers against the flood. For example, the applicable legislation or the subordinate legislation enacted pursuant to it must impose a private law duty on the municipality or public official before the principle in *Anns* applies. Further, the principle will not apply to purely policy decisions made in the *bona fide* exercise of discretion. This is, in my view, an extremely important feature of the *Anns* principle because it prevents the courts from usurping the proper authority of elected representatives and their officials. At the same time, however, the principle ensures that in the operational area, *i.e. in* implementing their policy decisions, public officials will be exposed to the same liability as other people if they fail in discharging their duty to take reasonable care to avoid injury to their neighbours. The only area, in my view, which leaves scope for honest concern is that difficult area identified by Lord Wilberforce where

[page 27]

the operational subsumes what might be called secondary policy considerations, *i.e.* policy considerations at the secondary level. This, I believe, is the area into which this case falls. This case, however, is more easily disposed of by virtue of the complete failure of the municipality to deal with the policy considerations. On the assumption that by and large municipalities and their officials discharge their responsibilities in a conscientious fashion, I believe that such a failure will be the exception rather than the rule and that the scope for application of the principle in

Anns will be relatively narrow. I do not see it, as do some commentators, as potentially ruinous financially to municipalities. I do see it as a useful protection to the citizen whose ever-increasing reliance on public officials seems to be a feature of our age: see Linden, "Tort Law's Role in the Regulation and Control of the Abuse of Power", *Special Lectures of the Law Society of Upper Canada, 1979,* p. *67.*

7. Recovery for Pure Economic Loss

It was forcefully argued by the appellant that even if the Court were to find a breach by the City of a private law duty owed to the plaintiff, the plaintiff's action should be dismissed because his loss was purely economic. Reliance was placed on the decision of this Court in *Rivtow Marine Ltd. v. Washington Iron Works,* [1974] S.C.R. 1189.

It will be recalled that in *Rivtow* the plaintiff had purchased a crane manufactured by the defendant from a distributor. The crane had a latent defect which made it dangerous to operate—a fact which the defendant discovered when one of its cranes broke, killing the operator. The defendant knew that the plaintiff had purchased one of its cranes, but it took no steps to warn the plaintiff. The plaintiff discovered the defect when cracks appeared during the busy season and had to withdraw the crane from operation in order to

[page 27]

have it repaired. The Supreme Court characterized the cost of the repairs as economic loss. The majority held that that cost was not recoverable but, since the defendant was in breach of its duty to warn the plaintiff of the defect in the crane, it was liable to the plaintiff for the difference between the loss of earnings it sustained during the busy season and the loss of earnings it would have sustained if its

attention had been directed to the defect and it had had the crane repaired during the slack season. The minority would have allowed the cost of repair to the crane itself.

The learned trial judge identified the damages in the instant case as being the cost to the plaintiff of having his home restored to the condition it should have been in if properly constructed plus certain expenses he could incur while this was being done. He awarded general damages in the amount of $45,004.27 and attributed 25 per cent of that sum to the City.

The City submits that this is pure economic loss analogous to the cost of repairs to the crane which was expressly disallowed by the majority in *Rivtow.* Lambert J.A., after pointing out that recovery for economic loss was allowed in *Anns,* Lord Wilberforce expressing a preference for the dissenting judgment of Laskin J. (as he then was) in *Rivtow* over that of the majority, proceeded to distinguish *Rivtow.* The majority, he said, analyzed the breach in that case as a failure in the duty of the manufacturer and sales agent to warn the plaintiff of the defects in the crane. However, and this he thought was the key to *Rivtow,* even if that duty had been complied with the crane would still have been damaged and the plaintiff would have had to bear the cost of repair in the absence of any contractual warranty. Accordingly, the plaintiff could recover only for the economic loss occasioned by the breach of the duty to warn. The minority, on the other hand, would have allowed the cost of the repair to the crane, not as damage

[page 28]

flowing from breach of a duty to warn but as the cost of avoiding damage to persons or property.

There is no doubt that the preclusion of recovery for economic loss in the absence of physical injury to person or property has a venerable history. The decision of Blackburn J. in *Cattle v. Stockton Waterworks Co.* (1875), L.R. *10* Q.B. *453, was* still held to be good law by Widgery J. in *Weller & Co. v. Foot and Mouth Disease Research Institute,* [1966] *1* Q.B. *569,* [1965] *3* All E.R. *560.* The *rationale* for the economic loss rule was probably most articulately stated by Cardozo C.J. in *Ultramares Corp. v. Touche, 255* N.Y. 170 (1931) who said at p. *179* that to allow such recovery would "expose [defendants] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class".

It took the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., supra,* to spark a review and reassessment of the economic loss rule by legal scholars and judges, and this review has been going on now for almost two decades. How, it is asked, can one justify to injured plaintiffs the difference in treatment the law accords to physical and to economic loss caused by a defendant's negligent acts? In one you are compensated by the wrongdoer: in the other you have to bear the loss yourself. Does it make sense to permit the recovery of economic loss for negligent words but not for negligent acts? What is the significant difference between them? Why, if economic loss is reasonably foreseeable as a consequence of negligent acts, should it not be as recoverable as reasonably foreseeable physical injury to persons or to property? And should Chief Judge Cardozo's fear of indeterminate liability to an indeterminate class preclude recovery by a very specific plaintiff in a very specific amount? Can a policy consideration which leads to a manifest injustice in certain types of cases be a good policy• consideration? Is there some *rationale* whereby injustice in specific cases can be avoided and Chief

Judge Cardozo's fear guarded against at the same time?

In an edifying article *Negligent Misstatements, Negligent Acts and Economic Loss, 92* L.Q.R. 213, Mr. Craig points out that it is the reasonable foreseeability test of recovery in *Donoghue v. Stevenson* which could open up an exposure for economic loss of indeterminate scope. It is arguable that no such exposure arises under the *Hedley Byrne* principle because of the restricted class entitled to recovery under that principle. Quoting from Mr. Craig's article at p. 218:

> The very nature of the duty framed by the House of Lords in 1964 has within it certain limiting factors mentioned above which mean that these problems of indeterminate liability are far less likely to arise: the need for some form of relationship between the participants, reasonable reliance leading to loss, knowledge by the representor of some particular transaction for which the information is to be required. The nexus envisaged was far closer than reasonable foresight *per se.*

Mr. Craig is clearly not completely satisfied with this distinction since the full scope of the duty in *Hedley Byrne* has not yet been determined. There has been a tendency to expand it in subsequent cases (see, for example, *Dutton v. Bognor Regis United Building Co., supra,* and *Ministry of Housing and Local Government v. Sharp,* [1970] 2 Q.B. *223)* and this is a trend which might well continue as the jurisprudence around *Hedley Byrne* develops.

The High Court of Australia has tried to find a solution to the economic loss problem by narrowing the test of reasonable foreseeability. In *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (1976), 136 C.L.R. *529,* the *Willemstad,* while conducting dredging operations in Botany Bay, damaged an oil pipeline belonging to a refinery

which ran across the bed of the Bay to a terminal operated by Caltex. Caltex supplied crude oil to the refinery for processing and received the refined product back by way of the pipeline. By reason of the damage to the pipeline Caltex had to

find other means of transportation, either by road or ship, and this cost it $95,000. This amount was characterized as pure economic loss.

Gibbs J. affirmed that the general rule was that economic loss was not recoverable. The fact that it was reasonably foreseeable did not make it recoverable. However, he held (at p. 555) that an exception to this rule of non-recovery arises when the defendant "has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence". He found that the defendant had knowledge in this case and permitted recovery. The decision was unanimous. Stephen and Mason JJ. adopted Gibb J.'s exception to the general rule. Jacobs J. distinguished between physical injury to property and physical effect on property and said that physical effect on property was recoverable even if it took the form of economic loss resulting from the immobilization of the property. Murphy J. stated that there was no satisfactory general principle governing the recovery of economic loss and that the issue was really a policy one. Just as *Donoghue v. Stevenson* had brought the law into conformity with the then notions of social justice, so must the court do the same in permitting recovery for economic loss unless there are acceptable policy reasons for not doing so. He saw none in this case.

It is quite apparent that Gibbs and Jacobs JJ., and possibly Stephen J. also, were seeking some means of permitting recovery for pure economic loss while avoiding the undesirable consequences of applying the reasonable foreseeability rule, namely indeterminate liability to an indeterminate

class. They saw the solution in limiting foreseeability to specific individuals rather than members of a class. I am not sure, however, that their exception solves the problem. It may make the class determinate but it gives no guarantee that it will be small.

The House of Lords took a fresh look at the issue in *Junior Books Ltd. v. Veitchi Co., [1983]* A.C. 520. In that case the defendants were hired to lay a floor in a factory which was being erected for the plaintiffs by a building company. The defendants were sub-contractors and had no contractual relationship with the plaintiffs. The plaintiffs claimed that the floor was defective owing to the defendants' negligence and that the defendants knew what products were required and were alone responsible for the composition and construction of the floor. They also knew that the plaintiffs were relying on their skill and judgment. The plaintiffs brought an action for the estimated cost of relaying the floor and for various items of economic loss consequential on its replacement, such as the cost of removal of machinery and the loss of profits while the floor was being relaid.

It was held by the House of Lords (Lord Brandon of Oakbrook dissenting) that where the relationship between parties is sufficiently close the scope of the duty of care owed by a person doing work is not limited to a duty to avoid causing foreseeable harm to persons or property by negligent acts or omissions but extends also to a duty to avoid defects in the work itself which will involve the plaintiffs in the cost of having them remedied. There was a sufficient degree of proximity between the plaintiffs and the defendants in this case and the plaintiffs were entitled to recover the cost of repairing the floor.

Lord Roskill, who delivered the main judgment in the case, said the case must be approached as

one in which there was no physical damage. He referred with approval to Lord Wilberforce's two propositions in *Anns.* (1) his test of proximity and (2) whether there were any considerations which would call for a limitation on recovery. He found the proximity test was met and that the only reason for negating recovery was the traditional attitude of the law to economic loss. He held that this was not good enough. He saw no reason why "damage to the pocket" *simpliciter* should be disallowed when "damage to the pocket" coupled with physical damage has always been allowed. It was time for the law to take the next step forward in its development and he saw no untoward consequences from doing so. He expressed the view that the fears raised by the floodgates argument had proved unfounded.

Lord Brandon, dissenting, agreed that Lord Wilberforce's two propositions in *Anns* were sound. He agreed also that the proximity test was met in *Junior Books.* However, he found that *Donoghue v. Stevenson* itself and all the cases in which it had been followed had one thing in common, namely the existence of danger or the threat of danger of physical damage to persons or their property excluding the property from the defective condition of which the danger or threat of danger arose. In the absence of a contractual relationship Lord Brandon thought it inappropriate to extend the duty in tort so as, in effect, to create a warranty. He was, I believe, expressing a concern not dissimilar to that troubling the majority of this Court in *Rivtow.*

It is noted that in the instant case there is present the danger or threat of danger referred to by Lord Brandon. However, that was so *in Rivtow* also. The majority in *Junior Books* do seem to have carried the law a significant step forward.

As I mentioned earlier, recovery for economic loss was permitted in *Anns* with an expression of preference for the minority rather than the majority judgment in *Rivtow.* It seems to me, however, that the minority judgment results from the

[page 33]

application of the reasonable foreseeability test which, it would appear, gives rise to the concern over indeterminate liability. In any event, the majority judgment of this Court in *Rivtow* stands until such time as it may be reconsidered by a full panel of the Court.

It seems to me, however, that *Rivtow is* distinguishable from this case in several significant respects. *Rivtow* was a lawsuit between private litigants. The plaintiff's claim here is against a public authority for breach of a private law duty of care arising under a statute. (This should not be confused with breach of statutory duty *per se;* see *The Queen in right of Canada v. Saskatchewan Wheat Pool,* [1983] *1* S.C.R. 205. It is noted that in the *Dutton* case Sachs L.J. put great emphasis on the fact that the defendant was a public authority and stated that the type of loss recoverable was the type of loss the private law duty arising under the statute was designed to prevent. If economic loss was within the purview of the statute, then it should be recoverable for breach of the private law duty arising under the statute whether or not it is recoverable for breach of a duty at common law. In my view, the private law duty in this case was designed to prevent the expense incurred by the plaintiff in putting proper foundations under his house. It was imposed to ensure that proper foundations would be under his house from the outset. I suppose it is arguable that the damage the duty was designed to prevent was injury to the occupants from the collapse of the house or damage caused by the house sliding down the hill. But it seems to me that this is too narrow an approach to the protection the statute was designed to provide. The purpose of the By-law in this case was to prevent the

construction of houses on defective foundations. The duty of enforcement which the By-law imposed on the building inspector required him at the very least to determine the scope of the measures which were necessary to achieve that end and, if required, to attempt to obtain the approval of the City for them. If he failed in that duty and a house on defective foundations resulted, it was obviously going to have to be repaired since it represented a threat to the health and safety of the occupants. This is not a case, like *Rivtow, of*

[page 34]

failure to warn of the defective foundations: this is a case of failure to give consideration to a course of action which would have prevented the defective foundations. What else was the plaintiff to do to rectify the situation resulting from the City's breach?

It is noted also that there are no contractual overtones to this case as there were in *Rivtow.* It seems to have been important to the majority in *Rivtow* that no contractual warranty had been given with respect to the crane. Accordingly, there was some concern that the tort door should not be opened so far as to permit a recovery in tort which would not have been available in contract. No such problem arises in this case.

I said earlier in commenting upon the floodgates argument in relation to the imposition of a private law duty of care that I was not troubled by the thought that public officials in discharging their duties should incur the same liability as ordinary citizens. It may be that in exposing public authorities to liability for economic loss when under our law as it presently stands a private litigant may not be so exposed, the Court would be extending the liability of public authority beyond that of private litigants. I am not, however, persuaded that this is so. Like Lambert J.A. I tend to

think that the problem of concurrent liability in contract and tort played a major role in the restrictive approach taken by the majority in *Rivtow* and that, as in the case of *Hedley Byrne,* we will have to await the outcome of a developing jurisprudence around that decision also: see *Gypsum Carrier Inc. v. The Queen,* [1978] 1 F.C. 147; *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.,* [1976] *2 S.C.R.* 221; but *cf. Bethlehem Steel Corp. v. St. Lawrence Seaway Authority* (1977), *79* D.L.R. (3d) *522 (F.C.); Ital-Canadian Investments Ltd. v. North Shore Plumbing and Heating* Co., [1978] 4 W.W.R. 289 (B.C.S.C.).

[page 35]

I do not believe that to permit recovery in this case is to expose public authorities to the indeterminate liability referred to in *Ultramares.* In order to obtain recovery for economic loss the statute has to create a private law duty to the plaintiff alongside the public law duty. The plaintiff has to belong to the limited class of owners or occupiers of the property at the time the damage manifests itself. Loss caused as a result of policy decisions made by the public authority in the *bona fide* exercise of discretion will not be compensable. Loss caused in the implementation of policy decisions will not be compensable if the operational decision includes a policy element. Loss caused in the implementation of policy decisions, i.e. operational negligence will be compensable. Loss will also be compensable if the implementation involves policy considerations and the discretion exercised by the public authority is not exercised in good faith. Finally, and perhaps this merits some emphasis, economic loss will only be recoverable if as a matter of statutory interpretation it is a type of loss the statute intended to guard against.

It seems to me that recovery for economic loss on the foregoing basis accomplishes a number of worthy objectives. It avoids undue interference by the courts in the affairs of public authorities. It gives a remedy where the legislature has impliedly sanctioned it

and justice clearly requires it. It imposes enough of a burden on public authorities to act as a check on the arbitrary and negligent discharge of statutory duties. For these reasons I would permit recovery of the economic loss in this case.

8. Limitation of Actions

The City alleged in its pleadings that the plaintiff's action in this case was statute-barred by the *Municipal Act,* R.S.B.C. 1960, c. 255, ss. 738 and *739*

[page 36]

or, alternatively, by the *Limitations Act,* 1975 (B.C.), *1975, c. 37, s. 3,* as amended. The limitations issue was not raised on appeal to this Court but for reasons which I will refer to in a moment the Court subsequently invited counsel to address it on this subject.

Limitations was an issue before the Court of Appeal and, according to Mr. Justice Lambert, the City accepted the proposition that the limitation period starts to run from the date on which the plaintiff actually discovers the damage or should with reasonable diligence have discovered it. It accepted, in other words, that the law in Canada was as stated in *Sparham-Souter v. Town and Country Developments (Essex) Ltd., [1976]* Q.B. *858.* It did not put forward any other date. Rather, it confined its case before the Court of Appeal to the proposition that the plaintiff ought reasonably to have discovered the damage before he purchased the house in December 1977.

Since the hearing of the appeal in this Court the law in England has been changed by the decision of the House of Lords in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (a firm),* [1983] 1 All E.R. *65,* and the Court now has the written submissions of counsel on the implications of the change for this appeal.

The limitation problem stems from the apparent conflict between the decision of the English Court of Appeal in *Sparham-Souter* and the earlier decision of the House of Lords in *Cartledge v. E. Jopling & Sons Ltd.,* [1963] *A.C. 758.* In *Sparham-Souter* the date of discoverability of the damage was held to be the date from which the limitation period started to run. In *Cartledge,* however, the effective date was held as a matter of statutory interpretation to be the date on which the damage occurred. The statutory language in *Cartledge* precluded the bringing of an action after the expiration of six years "from the date on which the ' cause of actions accrued...." The (statute contained a separate provision that where fraud or mistake was involved time did not begin to run until the fraud had been or could with

[page 37]

reasonable diligence have been discovered. The House of Lords held unanimously, although regretfully, that these provisions left no room for an argument that in the absence of fraud the limitation period started to run from the date of discovery. Accordingly, since the plaintiff had contracted an industrial disease several years prior to his becoming aware of it, and also it appears, prior to the ability of medical science to detect it, his cause of action was barred by the statute before he even knew he had one.

The members of the English Court of Appeal discussed *Cartledge* in *Sparham-Souter.* They distinguished it on a variety of different bases and I think it is fair to say that no clear basis of distinction emerges from the several sets of reasons. The House of Lords nevertheless in *Anns* approved the views of the Court of Appeal in *Sparham-Souter.* Lord Wilberforce stated at p. 760 that the cause of action can only arise when "the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it". Lord Salmon expressed the view at p. 770 that the cause of action arose "when the building began to sink and the

cracks appeared". He said also that the period started to run when "the building suffered damage . . . which endangered the safety of its occupants or visitors".

In *Pirelli* the House of Lords overruled *Sparham-Souter* and applied *Cartledge.* The defendants in *Pirelli* were consulting engineers who in March 1969 were negligent in the design of a boiler flue chimney at the plaintiff's works. As a result cracks appeared in the chimney. The plaintiffs did not discover the cracks until November 1977 and issued the writ in October 1978. The trial judge found that the cracks could not have occurred later than April 1970. He also found that the plaintiffs could not with reasonable diligence have discovered the damage before October 1972. He concluded, applying *Sparham-Souter,* that the plaintiffs only suffered damage when they discovered

[page 38]

or ought reasonably to have discovered the damage. Accordingly, the cause of action accrued within the six year limitation period and the plaintiffs were entitled to judgment. The defendants appealed to the Court of Appeal on the basis that the action was statute-barred. The Court of Appeal dismissed the appeal but the defendants succeeded in the House of Lords.

Their Lordships held that the cause of action accrued when physical damage occurred to the building, *Le.* when the cracks formed in the chimney, whether or not the plaintiffs were or should have been aware of the damage at that time. The cause of action therefore accrued in April 1970 and the action was statute-barred. Their Lordships repudiated any distinction between personal injury damage and property damage for purposes of the application of the principle in *Cartledge.*

In addition to overruling *Sparham-Souter* on the date of discovery as the effective date, their Lordships also seized the opportunity to put to rest the problem of the

limitation period applicable to successive owners. They rejected the idea that the period starts to run afresh with each new owner and instead found that the duty was owed to owners as a class so that if time ran against *one* owner it ran also against all his successors in title.

It seems to me that it is now settled, at least in England, that the defendant's negligence has to have manifested itself in the shape of physical damage to the property, e.g. cracks or subsidence, before time starts to run for limitation purposes. It is vital, therefore, that the trial judge make a finding as to when this occurred. Once the damage has manifested itself it is, according to *Pirelli,* immaterial when the plaintiff discovered or ought reasonably to have discovered it.

[page 39]

It seems to me that *Pirelli* casts a bit of a cloud on that part of Lord Wilberforce's judgement in *Anns* in which he adopts the reasoning of the Court of Appeal in *Sparham-Souter,* Lord Fraser of Tullybelton was clearly sensitive to this and attempted, in my view not too successfully, to analyze the extent to which Lord Wilberforce intended to approve *Sparham-Souter.*

Be that as it may, the question for this Court now is whether or not it should adopt the law in *Pirelli.* If it were to adopt it, it would face a problem in this particular case in that the trial judge made no findings as to when the defective construction caused cracks or subsidence to the building. Counsel for the City now submits that physical damage appeared as early as the spring of 1974 prior to the Hughes' purchase of the property from their son. Lambert J.A., however, stated in his reasons for judgment, (1981), 31 B.C.L.R. 311, at p. 322:

There was no evidence that would show or would tend to show that anyone who entered the crawl space in December 1977 would have seen the same sight as that

which greeted the plumber, Mr. Nielsen and Mr. Hank in November 1978. There was no evidence that the defect which was apparent in November 1978 must have been apparent in December 1977, or that the structural deterioration had been gradual rather than sudden. The trial judge made no relevant finding of fact.

There is no doubt that in the spring of 1974 and even earlier the building inspector was expressing concern about the inadequacy of the foundations. The defect which had the potential for damage was there, but was the damage? In *Bagot v. Stevens Scanlan & Co.,* {1966] 1 Q.B. 197, Lord Justice Diplock (as he then was) expressed the view that latent defects in a structure give rise to damage for limitation purposes at the time construction is completed but this approach, although consistent with *Cartledge,* was rejected by Lord Salmon in *Anns* and by Lord Fraser in *Pirelli.* Damage accrued only when the latent defect manifested itself in the form of physical damage such as cracks.

[page 40]

There are obvious problems in applying *Pirelli.* To what extent does physical damage have to have manifested itself? Is a hairline crack enough or does there have to be a more substantial manifestation? And what of an owner who discovers that his building is constructed of materials which will cause it to collapse in five years time? According to *Pirelli* he has no cause of action until it starts to crumble. But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence. Lord Fraser and Lord Scarman were clearly concerned over this but considered themselves bound by *Cartledge.* The only solution in their eyes was the intervention of the legislature.

This Court is in the happy position of being free to adopt or reject *Pirelli.* I would reject it. This is not to say that *Sparham-Souter* presents no problem. As Lord Fraser

pointed out in *Pirelli* the postponement of the accrual of the cause of action until the date of discoverability may involve the courts in the investigation of facts many years after their occurrence. *Dennis v. Charnwood Borough Council, [1982]* 3 All E.R. *486, is* a classic illustration of this. It seems to me, however, to be much the lesser of two evils.

Applying *Sparham-Souter* then to s. 738(2) of the *Municipal Act* which bars an action on the expiration of one year from the date on which the cause of action arose, the plaintiff's cause of action would not have arisen until November 1978 when his plumber, called to fix a burst pipe, drew the damage to his attention. By this time, however, s. 738(2) had been repealed by the *Limitations Act,* 1975 (B.C.), c. 37, which came into force on July 1, 1975.

As already mentioned, the City relied in the alternative on s. 3 of the *Limitations Act* as barring the plaintiff's action. Section 3, however, must be read in conjunction with s. *6.* The relevant parts of these sections read as follows:

[page 41]

> 3. (1) The following actions shall not be brought after the expiration of 2 years after the date on which the right to do so arose:
>
> > (a) an action for damages in respect of injury to person or property, including economic loss arising therefrom, whether based on contract, tort, or statutory duty [...]
>
> 6[...]
>
> (3) The running of time with respect to the limitation periods fixed by this Act for an action
>
> > [...]
> >
> > (b) for damage to property, or
> >
> > [...]
> >
> > (e) in which material facts relating to the cause of action have been wilfully concealed

[...]

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing

(j) that an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(k)that the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) For the purpose of subsection (3),

[...]

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant, and

(ii) that a breach of a duty caused injury, damage, or loss to the plaintiff;

(c) where any person claims through a predecessor in right, title, or interest, the knowledge or means of knowledge of the predecessor before the right, title, or interest passed is that of the first-mentioned person; [...]

[...]

(5) The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

[page 42]

It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in *Sparham-Souter* by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. The Act has also resolved the problem of stale claims which was the major criticism of the principle. Section 8(1) reads in relevant part:

8. (1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6,

> 7, or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose [...]

However, the 1975 legislation seems also in s. 6(4)(c) to have given statutory effect to the reasoning in *Pirelli* concerning successive purchasers by attributing the knowledge or means of knowledge of a predecessor in title to a subsequent owner. It may be said therefore that the Hughes' knowledge for purposes of the application of s. 6(4)(c) is the plaintiff's knowledge and he is accordingly statute-barred under the section by the Hughes' failure to litigate.

With respect, I do not think it is open to the City to make that argument. I think it would be doing violence to the facts in this case to say that the plaintiff was a person "claiming through" the Hughes. The Hughes were well aware of the structural defects. They were advised of them and of the stop work order by the city's solicitor in April, 1974 and their response was to encourage the City to drop the matter. I cannot see how the Hughes in these circumstances could allege a cause of action against the City so as to start time running against the plaintiff. This being so, the *Limitations Act,* even if applicable to the plaintiff's cause of action, does not assist the City. I find that the plaintiff, when he issued his writ in January 1979, had a valid and subsisting cause of action against the City which was not foreclosed by either s. 738(2)

[page 43]

of the *Municipal Act* or s. 3 of the *Limitations Act.*

I would dismiss the appeal with costs.

The reasons of Estez [sic] and McIntyre JJ. were delivered by

MCINTYRE J. *(dissenting)—This* case involves consideration of whether or not a municipal government is under a duty to enforce its building by-law by proceedings in court after inspection has revealed breaches of the by-law in the construction of a building. I have read the reasons for judgment prepared in this matter by my colleague, Wilson J. I am content to accept, generally, her statement of the facts of the case, but because of their importance I wish to stress certain elements.

The son of the respondents Hughes (hereinafter Hughes, Jr.) set about the construction, or the completion of the construction, of a house for his parents, the respondents Hughes. He procured a building permit from the appellant municipality (the City) and deposited construction plans which, according to the building by-law, he was required to follow. Hughes, Jr., as he was required to do under the by-law, called for the inspection of the foundations after some construction work had been done. Being the only inspection called for, it was, according to the by-law, the only one the City was required to make. Not satisfied with the foundations, the inspectors directed corrective steps to be taken, and recommended that professional engineering advice be sought. The inspectors were prepared to cooperate with the builder in the necessary corrective program which was prepared by a qualified engineer, but Hughes, Jr. did not implement the scheme and, as a result, the engineers withdrew from the matter. The City made several further inspections wherein deficiencies in the foundations were noted and, on February 28, 1974, the administrative officer of the city inspection department wrote to Hughes, Jr., informing him that the design he was using for the foundations was unsafe and reimposing an earlier 'stop

[page 44]

work' order. Hughes, Jr. continued to build in defiance of the order and, on April 22, 1974, the city solicitor wrote to him and affirmed that the 'stop work' order would

remain in effect. The 'stop work' order was posted on the premises during the month of February, 1974. Further inspections revealed continuing violations of the 'stop work' order. A plumbing permit was issued on August 23, 1974. According to the evidence of one Duncan, one of the building inspectors, the permit was issued to enable the sub-contractor who had completed the plumbing work to be paid, and because it did not interfere with the structural integrity of the building. No occupancy permit for the premises, as required by the building by-law, was ever issued despite many requests by the respondents Hughes.

It was not said, nor could it be said, that there was any negligence on the part of the city inspectors in the inspections they carried out or in the actions they took thereafter. The only fault alleged against the City is a failure to enforce the 'stop work' order. Consideration of the City's duty to the respondent Nielsen must be upon that basis.

The trial judge in very short reasons found both defendants, that is, the City and the respondents Hughes, negligent and, applying the provisions of the *Negligence Act, R.S.B.C.,* 1979, c. 298, he apportioned 75 per cent to the respondents Hughes and 25 per cent to the City. He awarded damages in the amount of $45,004.27, which included the costs of the necessary repairs to the building and certain additional expenses which would be borne by the plaintiffs, together with the pre-judgment interest at 10 per cent per annum from December, 1978. An appeal by the City was dismissed.

Lambert J.A. wrote the judgment of the court (Taggart, Lambert and Macdonald JJ.A.) After reciting the facts, he pointed out that the claim made by the plaintiff Nielsen against the City:

> [...] was for negligence in failing to take steps to enforce the stop work order or to condemn the building as unfit for habitation.

He posed the question which confronted the court in these terms:

> Was there, in this case, a private law duty owed by the city to an as yet unrevealed Mr. Nielsen, "over and above, or perhaps alongside" the public law duty of inspection and the related public law duties under the Municipal Act, R.S.B.C. 1960, c. 255, and the Kamloops building by-law?

He adopted the terminology and reasoning *of* Lord Wilberforce in *Anns v. Merton London Borough Council, [1978] A.C. 728,* in deciding on the existence of a private law duty *of* care and then said:

> A private law duty of care may exist whether the corresponding public law imposes a duty or merely grants a power. Decisions as to the manner of performing the duty or as to whether to exercise the power, or, if it is exercised, as to the manner of performance, may raise alternative courses of action. If the decision as to the choice of alternatives should be classified as a policy or planning decision, that is, a decision involving allocation of scarce resources or balancing such factors as efficiency and thrift, then there is no liability in the realm of private law for making a choice which causes harm. If the decision as to the choice of alternatives should be classified as an operational decision then the particular choice, the particular decision, and the particular omission or commission must be examined to see whether the ordinary principles of the law of negligence operate to impose a private law liability. The relationship of proximity or lack of proximity between the parties that determines whether a private law liability should be imposed arises, of course, from the behaviour of the public authorities in response to the public law duty or power.

Then, after referring to parts of the building by-law, he continued:

> In my opinion those provisions established a public law duty on the building inspector to prevent the continuation of the construction of the building on structurally

[page 46]

> unsound foundations after it came to his notice that the foundations were unsound and a public law duty on the building inspector to prevent the occupancy of the building by Mr. and Mrs. Hughes Sr. or by Mr. Nielsen. Those

> public law duties should, in the last resort, have been exercised by seeking an injunction under the powers given by ss. 734 and 735 (now ss. 750 and 751) of the Municipal Act, R.S.B.C. 1960, c. 255.
>
> I turn now to the private law duty. The conduct of the building inspector in response to the public law duties involved decisions on alternative courses of conduct which were, in my opinion, operational in character. The building was a danger to the occupant of the house and to adjoining property owners. It may have been a danger to anyone in the house. Policy decisions could have confronted the city as to whether to prosecute or to seek an injunction. There may have been other policy choices. But a decision not to act at all, or a failure to decide to act, cannot be supported by any reasonable policy choice. That decision or failure was not "within the limits of a discretion bona fide exercised", using again the words of Lord Wilberforce. It was certainly open to the trial judge to reach that conclusion. Indeed, having regard to the evidence of Mr. Backmeyer, it was open to the trial judge to conclude that the decision not to act or the failure to decide to act, was influenced by the pressure exerted by Mr. Hughes Sr. in his capacity as alderman.

I would interject here to say that, having read the entire record, I have been unable to find any evidence which would support any such inference of impropriety on the part of the Council. Later he said:

> The duty of the building inspector was not a duty to warn. It was a duty to prevent the construction of the house and a duty to prevent its occupation.

It will be seen that Lambert J.A. has applied the principles expressed by Lord Wilberforce in the *Anns* case to find a private duty upon the building inspector to prevent construction and occupation once the defective construction has been discovered by seeking an injunction under the powers conferred in ss. 734 and 735 of the *Municipal Act,* R.S.B.C. 1960, c. 255. I have difficulty with the application of the trilogy of cases much discussed in this and other recent cases: *Dutton v. Bognor Regis United Building Co.,* [1972] 1 All E.R. 462;

Home Office v. Dorset Yacht Co., [1970] A.C. 1004; and *Anns, supra,* to the facts of the case at bar. In each of those cases the courts considered the position of a public authority whose liability depended upon the negligent conduct of their employees. *Dutton* was a case of faulty inspection of building construction. The *Dorset Yacht Co.* case was one of negligent supervision of prisoners, and *Anns* dealt with faulty building inspection. In each case the liability of the public authority was vicarious and depended upon the underlying negligence of its employees. In *Anns,* Lord Wilberforce held that a private law duty of care could arise in these circumstances, the breach of which would give to a person injured a cause of action for damages against the public authority. There is nothing novel in this proposition as far as Canadian law is concerned. Robertson J.A. pointed this out in *McCrea v. White Rock (City of)* (1974), 56 D.L.R. (3d) *525, [1975] 2* W.W.R. *593,* at p. 541 and p. 610, respectively, where he said:

> I am of the opinion that, where there is a duty to inspect and the person on whom the duty rests enters on its performance and carries it out in a negligent way, a person who thereby suffers damage has a cause of action against him.

He cited in support *Ostash v. Sonnenberg* (1968), 63 W.W.R. *257,* in the Appellate Division of the Supreme Court of Alberta, where liability was found against a gas inspector for negligent inspection of a gas appliance, as well as against his employer, the Crown.

This is not, however, the case before us. The building inspector had a duty to enforce the by-law. In pursuance of that duty the inspector and his associates by adequate inspection found the defects, directed correction and when correction was not made issued a 'stop work' order. They posted a notice of the 'stop work' order on the premises and declined to issue an occupancy permit, despite repeated requests by the Hughes.

[page 48]

No complaint has been made of the manner of inspection and no allegation of negligence in that respect has been made. The building inspectors have fully and adequately performed their duties in the case at bar and no vicarious liability can be visited upon the City because of any failure on their part. The only complaint seriously advanced in this Court has been non-enforcement by proceedings in court.

This is a situation fundamentally different from that arising in *Anns* or in the other cases it referred to. If liability is to be found against the City in this case, it can have nothing to do with the conduct of the building inspectors. It can only be on the basis of its own conduct in not seeking to enforce the 'stop work' order and to prevent the occupation of the unsafe house by legal proceedings. Since the case sounds in negligence, it must be shown that the City was under a duty to enforce its by-law by proceeding in the courts and that that duty was one the non-performance of which could give a cause of action in damages to persons injured.

The City argued in this Court that it was under no duty to the Hughes or Nielsen to exercise its power to prosecute or sue the Hughes in order to procure compliance with the by-law. The power is permissive, lying within the discretion of the City and one in which, on the authorities, the Court would not interfere. To recognize a duty upon the City to enforce its by-law by legal proceedings would impose an impossible burden upon it, one exceeding any burden imposed by the governing statute, the *Municipal Act.*

The *Municipal Act, supra,* in force at the relevant time, deals with enforcement of municipal by-laws in ss. 734 and 735 in these terms:

734. (1) Any by-law adopted under this Act *may be enforced,* and the breach of any by-law, resolution, or

[page 49]

regulation of the Council or any provision of this Act restrained by action, suit, or proceeding in the Supreme Court or a County Court whether or not any penalty has been imposed for such breach.

(2) Any civil action, suit, or proceeding to enforce, or to prevent or restrain the breach of, any by-law, resolution, or regulation of the Council or any provision of this Act, or relating to any damage to or interference with any highway or any property of the municipality, *may be brought or taken by and in the name of the municipality;* and neither the Crown nor the Attorney-General, nor any officer of the Crown, is a necessary party plaintiff to any such action, suit, or proceeding; provided, however, that in all cases a municipality shall, before the expiration of the time limited by the writ for appearance by the defendant, or within such further time as may be added by the Court in which such action is brought, serve a copy of such writ on the Attorney-General.

735. Where a building is erected or used, or land is used, in contravention of a by-law adopted under the authority of this Act, in addition to any other remedy provided in this Act, and to any penalty imposed by the by-law, *such contravention may be restricted by action at the instance of the municipality alone.*

and see s. 715:

715. (1) The *Council may by by-law* authorize

(a) the demolition, removal, or the bringing up to a standard specified in the by-law of a building, structure, or thing, in whole or in part, that is

(i) in contravention of any by-law; or,

(ii) in the opinion of Council, in an unsafe condition; or

(b) the filling-in, covering-over, or alteration in whole or in part of an excavation that is

(i) in contravention of any by-law; or

(ii) in the opinion of Council, in an unsafe condition.

(2) A by-law adopted under subsection (l) shall provide for thirty days' notice of the comtemplated [sic] action to be given the owner, tenant, or occupier of the real property affected.

> (3) An appeal lies to a Judge of the County Court having jurisdiction against the contemplated action under any by-law aforesaid.

[page 50]

> (4) Notice of an appeal under subsection (3) shall be given the municipality within ten days from the date of the notice given under the by-law to the owner, tenant, or occupier of the affected premises.
>
> (5) The Judge shall hear and finally determine the matter, making such order as seems meet to him.
>
> (6) At the expiration of the thirty-day period mentioned in subsection (2), it shall be competent for the proper authorized official to proceed in accordance with the by-law or the decision of the Judge, as the case may be. [Emphasis added.]

The provisions of the building by-law passed by the City, pursuant to the discretionary powers given in s. 714 of the *Municipal Act,* provide in s. 900:

> 900. The building inspector shall enforce the provisions of this by-law and administer the by-law.

This section imposes a duty on the building inspector with respect to enforcement matters within his competence, but in my view does not include authority to commence proceedings in court. The duty is satisfied when the building inspector, having made an adequate inspection and issued the 'stop work' order, reports fully to the Council. This duty was fully performed in the case at bar. Further steps towards enforcement are beyond the competence of the inspectors and solely within the powers of the Council to be exercised by by-law or resolution of the Council (see s. 165 of the *Municipal Act).* It *will* be observed that the sections give a statutory power to enforce its by-law by court proceedings or demolition without imposing a statutory duty to do so.

It has been held that a municipality has no duty to enforce by-laws passed under statutory powers which leave a discretion as to whether such powers may be exercised or not. The provisions of the *Municipal Act* of British Columbia which empower the

passage of a building by-law are found in s. 714 of the Act and are clearly permissive. The provisions of ss. 734, 735 and 715, cited above,

[page 51]

give a power to take legal steps towards enforcement but impose no duty.

In *Brown v. Hamilton (City of)* (1902), 4 O.L.R. 249, the City of Hamilton had passed a by-law which prohibited the setting off of fireworks in the city streets. The by-law had for many years been ignored by the public and, presumably, by the City. The plaintiff was injured by a Roman candle during a display of fireworks in the streets. He sued the City for damages arising from its failure to enforce its by-law. In the High Court, Chancellor Boyd said, at p. 251:

> Having enacted such a by-law, there is no duty cast on the municipality to see to its enforcement.

and at p. 252 he added:

> The argument of the plaintiff was that a cause of action arose because the city had passed a by-law, and that the by-law was systematically disregarded to the knowledge of the officers of the city, and that no steps were ever taken to enforce it by the city.
>
> This is a novel proposition, which has its sole sanction in the decisions of the Maryland courts, but is opposed to all other American, English and Canadian authorities.

In another trial judgment in *Bertrand v. Neilson and City of Vancouver,* [1934] 3. W.W.R. 433, a case where the plaintiff sought damages against the City for injuries alleged to have been caused or contributed to by the non-enforcement of a traffic and parking by-law, passed under powers given in the *Vancouver Incorporation Act,* Robertson J. of the British Columbia Supreme Court considered a breach of a permissive by-law would not render a city liable to a third party injured by the breach. In so doing, he referred to *Sheppard v. Glossop (Borough of),* [1921] 3 K.B. 132;

Stevens and Willson v. Chatham (City of), [1934] S.C.R. 353; and *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 A.C. 400.

[page 52]

In *Toronto (City of) v. Polai* (1969), 8 D.L.R. (3d) 689 (Ont. C.A.), the City brought proceedings for an injunction to restrain the use by the defendant of her house as a multiple family dwelling house in an area zoned against such use. For a number of years, the City had maintained a "deferred list" of known offenders of the zoning by-law against whom no prosecutions were to be brought during the current year. The list was subject to annual review. By this device, the City was exercising a discretion to prosecute some offenders and not others. The defendant, not being on the list, became the target of the City's action and resisted it on the ground that the action of the City was inequitable and discriminatory. The defendant succeeded at trial but an appeal was allowed (Schroeder, Jessup and Brooke JJ.A.) Three separate opinions were written. Schroeder J.A. said, at pp. 696-97:

> As members of the city corporation the inhabitants are entitled to look to the duly elected representatives who comprise the municipal council for enforcement of the provision of by-laws passed for their protection, and in enforcing those by-laws the corporation, whether by means of a prosecution or in a suit for injunctive relief, acts on behalf of all the inhabitants. The municipality, acting through its council and duly appointed officials, occupies in a more restricted sense the same position as does the Attorney-General who represents the Crown in its capacity as *parens patriae* charged with the responsibility of enforcing the rights of the public when they are violated. The decision whether or not the Attorney-General should prosecute or sue is a matter for him, and the Courts have no power to question his right to do so or to refrain from doing so as distinct from his right to relief.
>
> The Attorney-General is in a different position from the ordinary litigant, for he represents the public interest in the commmunity [sic] at large; when he intervenes to ask for relief the Courts should pay great heed to his intervention and only refuse relief in the most exceptional circumstances: *Atty-Gen'l v. Harris,* [1961] 1 Q.B. 75.

In my opinion the city, acting in a more restricted sphere in the enforcement of its own by-laws, is likewise in a different position from the ordinary litigant. The

[page 53]

inhabitants and the municipality are sufficiently interested in the dispute to warrant intervention by the corporation for the purpose of asserting public rights, and the dispute is not one between individuals. Rather it is one between the public and a small section of the public refusing to comply with the by-law. In suits in which the Court's equitable jurisdiction is invoked and the clean hands doctrine is pleaded regard must be had to the nature of the relief sought and the character in which the plaintiff is suing. It would be a most extraordinary result if in a suit brought by an individual taxpayer, a course sanctioned by s. 486 of the *Municipal Act,* the relief were to be granted, but in a suit brought by the city, representing the general body of ratepayers, the suit should fail. The result appears even more incongruous when it is considered that the mere passing of a by-law by a municipal corporation does not cast any legal duty on the municipality to see to its enforcement: *Brown v. City of Hamilton* (1902), 4 O.L.R. *249 (per* Chancellor Boyd).

And later he said, at pp. 698-99, in reference to the deferred list:

No doubt, to persons who are obliged to comply with the by-law this practice may present the appearance of policitical [sic] favouritism or it may smack of discrimination. It is one of the difficult problems of administration to decide what acts are harmless in themselves in particular circumstances or, in isolated instances, must be forbidden in the public interest, or what acts may be tolerated without doing injury to the public interest. Without embarking on a wide-ranging inquiry into all these other cases which are, in reality, *res inter alios acta,* the Court cannot determine whether the decision of the Committee was right or wrong, fair or unfair, in the particular circumstances. Be that as it may, that course is not open to us in these proceedings and the Court has neither the right nor the power to control the exercise of Council's discretion by either direct or indirect means, except, possibly, in a case where Council lays down a general policy not to enforce its restrictive zoning by-laws: *Vide R. v. Commissioner of Police, Ex p. Blackburn,* [1968] 2 W.L.R. 893.

Jessup J.A., while expressing a different view as to the findings of fact by the trial judge than that suggested by Schroeder J.A., supported the view that the Council's discretion in enforcing zoning by-laws was not, as a rule, reviewable by a court. He said, at p. 703:

[page 54]

> In his statement of law and fact, filed, counsel for the appellant concedes, "The 'deferred list' practice is admittedly open to abuse", However, it is to be emphasized that the learned trial Judge made no finding of corruption in the "deferred list" practice. There was absolutely no evidence of impropriety of that or like nature. In the absence of such evidence it is to be assumed that in placing properties on the "deferred list" the members of the Committee on Buildings and Development exercised *bona fides* the discretion they undoubtedly have in the enforcement of the city's zoning enactments: *Brown v. City of Hamilton* (1902), 4 O.L.R. *429.*

Brooke J.A. reached his conclusion for different reasons, but recognized as well as the other judges the discretionary nature of municipal prosecution to enforce its by-laws. He said, at pp. 707-08:

> Municipal council has a discretion as to when it will prosecute for a breach of or sue to enforce the provisions of the zoning by-law. To deny the discretion in municipal council would be to place the most technical breach of the by-law beside the most blatant and to remove from consideration the harm done to the offender and the value to the community of the proposed proceedings when considering when they ought to be taken. The discretion when to prosecute or when to sue which rests with the municipal corporation or the comparable discretion which rests with public authorities charged with the responsibility of enforcing the rights of the public when they are violated, is one of the great strengths of our system of justice. It is true that the Court cannot interfere with that discretion and the remedy by way of injunction provided by s. 486 of the *Municipal Act* should not be used for this purpose. On the other hand, and equally important, the Court must see to it that its processes are never used to accomplish a wrong against any person and, of course, this is so irrespective of who applies for the remedy. There may well be circumstances where it would be in the public interest to refuse relief by way of injunction to a plaintiff whether a municipal corporation or otherwise in this type of action and some actions where wrongful discrimination could be shown would fall within the class of cases to which I refer.

[page 55]

An appeal of this decision to the Supreme Court of Canada was dismissed, [1973] S.C.R. 38, without any comment on the quoted passages.

Authority for this view may also be found in English cases, notably *East Suffolk Rivers Catchment Board v. Kent,* [1941] A.C. 74 (H.L.) It seems to me that in Canada and in England, at least up until 1941, a public authority which had a mere power to act, as distinct from a duty to do so, could not be made liable in damages only by reason of a failure to exercise that power. It has been suggested that the three well-known cases in England, *Dutton v. Bognor Regis United Building Co.; Home Office v. Dorset Yacht Co.* and *Anns v. Merton London Borough Council,* have had the effect of changing the law in that respect in England and that Canadian courts should follow the lead. Indeed, the *Anns* case has been followed in Canadian courts and its principles concerning the law of negligence at least viewed with approval in this Court in *Barratt v. North Vancouver (Corporation of),* [1980] 2 S.C.R. 418. My colleague, Wilson J., has dealt with the *Anns* case and it is not necessary for me to go into it at any great length. Lord Wilberforce, who wrote the principal judgment, suggests that the duty of care issue be approached in two steps. First, one should ask whether a relationship of proximity exists so as to give rise to *a prima facie* duty of care and then, if such a duty is found, it becomes necessary to consider whether there are considerations which ought to limit the scope of that duty. In respect of public authorities exercising statutory powers and duties, a distinction is drawn between policy and operational matters. There can be no liability in negligence, in respect of acts or omissions based on *a bona fide* policy consideration. In summary, it appears that the *Anns* case set aside the distinction between statutory powers and statutory duties as a source of a private law duty on a public authority. *Anns* placed the public authority on the same footing as the ordinary litigant with respect to liability for negligence, but recognizing the special nature of a public authority provided that it could be excused its want of care in respect of acts or omissions based on a *bona fide* policy choice which, but for the policy choice, would have led to

[page 56]

liability. In my view, *Anns,* and the principles it lays down, have no application in the case at bar.

Liability for negligence of a public authority, as dealt with in *Anns* and the other cases considered with it, would arise out of the activities of the public authority in the conduct of its business. Public authorities, in addition to their administrative and regulatory functions, must perform many tasks. They enter into a wide variety of contracts covering business, commercial and industrial enterprises, and public works. They enter the market place and operate as do private corporations and private individuals. In these circumstances there would seem to be no reason why a public authority should not be liable for its own acts of negligence and vicariously liable for the negligence of its servants in the performance of their duties of employment. The public authority, as has been noted in *Anns,* differs from the private citizen in that, while it must undertake much in accordance with its mandate, it has as a rule limited resources and frequently limited credit and relatively fixed revenues. The employment of those resources, frequently not sufficient to cover completely all responsibilities, will involve policy choices as to their application. The policy choice protective provision developed in *Anns* meets this problem. It will be observed, however, that in *Anns* and in the various other cases which preceded it *(Dutton v. Bognor Regis United Building Co.* and *Home Office v. Dorset Yacht Co.)* and in many later cases which have applied it, the policy choice required of the public authority was one which would protect it against negligence in carrying out the corporate functions and such negligence is ordinarily found in the conduct of its employees for which the authority may be vicariously liable.

[page 57]

No such negligence occurred in the case at bar. The building inspectors, as has been pointed out, fully and adequately carried out their duties and I am unable to agree with Lambert J.A. when he said:

> The conduct of the building inspector in response to the public law duties involved decisions on alternative courses of conduct which were, in my opinion, operational in character.

The building inspector in his response to the problems he discovered faced no alternative courses of action. His duty was to report, and he did so, and any alternative courses of conduct in response to public duties were for the Council, the City itself, and I am wholly unable to characterize them as operational in character.

The exercise of the discretion by the City regarding enforcement proceedings in court differs fundamentally from the 'policy choice' contemplated by *Anns.* In my opinion, it does not involve considerations of negligence because it is not properly subject to restriction by a private law duty of care. It involves, in my view, such considerations as those discussed by Laskin J. (as he then was) in *Wellbridge Holdings Ltd. v. Greater Winnipeg (Metropolitan Corporation of),* [1971] S.C.R. 957. In that case action was brought against the City of Winnipeg by an apartment company to recover damages suffered in acting in reliance on a city by-law declared *ultra vires* because of the procedural failure by the Council in its enactment. Laskin J. said, at pp. 965-66:

> The liability in negligence sought to be imposed upon the defendant is not a vicarious one, resting upon the fault of a servant or agent of the defendant, but rather an original, independent liability. As I took the argument, it was said to proceed from a duty of the defendant, in enacting a rezoning by-law enlarging the development possibilities of designated land, to exercise reasonable care to see that the procedures upon which valid enactment depended were followed; and this duty was owed specially to those persons having or obtaining an interest in the affected land which enabled them to exploit those possibilities. There was, in the circumstances,

> more than merely a duty at large to the residents of the municipality or to the smaller number residing in the affected area. If a duty such as is urged exists, I would not exclude the appellant from the class of those to whom it was owing, merely because the appellant did not come into existence until after the invalid by-law was passed and did not acquire any interest in the affected land until about sixteen months after its passage.

and later, at pp. 968-69:

> The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component (as the *Wiswell* case determined) and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.
>
> Its public character, involving its political and social responsibility to all those who live and work within its territorial limits, distinguishes it, even as respects its exercise of any quasi-judicial function, from the position of a voluntary or statutory body such as a trade union or trade association which may have quasi-judicial and contractual obligations in dealing with its members: cf. *Abbott v. Sullivan; Orchard v. Tunney. A* municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. "Invalidity is not the test of fault and it should not be the test of liability": see Davis, *3 Administrative Law Treatise,* 1958, at p. 487.

The facts in *Wellbridge* differ widely from the facts at bar, but the case emphasizes the different consequences that may flow from the exercise or

non-exercise of quasi-judicial powers by a public authority. Laskin J. also pointed out the difference between a public body vicariously liable in negligence for the conduct of its employees and a public body charged with "an original independent liability". This factor is of fundamental importance and goes far to distinguish the case at bar from the trilogy of cases culminating in *Anns.* Here we have a public body against whom it is said, you are negligent in that you failed to exercise what is essentially a quasi-judicial function, that is, you failed to enforce your by-law by proceeding in court. It is my view that a public body, vested with the discretion of by-law enforcement, may not be required by a court to exercise that power in a certain way and is not under a private law duty to do so. I draw support in reaching this conclusion from *Wellbridge.*

Finding that the City is not under a private law duty to enforce its building by-law by court proceedings or demolition does not mean that its discretion is completely unfettered. This becomes clear from a reference to *Roncarelli v. Duplessis,* [1959] S.C.R. 121, where Rand J., at p. 140, said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature of purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

[page 60]

These words have the support of Martland J. in his reasons in the same case, at p. 155-57, which was concurred in by Kerwin C.J. and Locke J. The plaintiff might have succeeded in this case on a showing of corruption upon the part of the City

officials and Council, or upon showing that the failure to prosecute resulted from consideration of extraneous or improper matters or from bad faith. But the scanty evidence in the perhaps inadequate record before this Court would allow no such conclusion to be drawn.

In the case at bar the record discloses little as to what, if any, steps were taken by the Council towards the enforcement of its by-law. It is clear that the defective foundations rendered the house unsafe. It is equally clear that the building inspectors, having found the defective work, reported the matter to the Council and took such steps as were open to them to correct matters including the refusal to lift the 'stop work' order or give an occupancy permit. It is also evident that the Council was aware of the infraction of the by-law and that the respondents Hughes were living in the house. There is no evidence of any positive step taken in the matter by the Council, save that at one time it consulted its City solicitor who shortly after returned the file with a covering letter which is not before us. From all this, the only conclusion that can be reached is that the Council took no further step toward enforcement and there is no evidence which would justify any inference of bad faith or impropriety.

I would conclude as follows:

1. This is not a case of underlying negligence by employees of a public authority which could visit liability upon the appellant City.

2. At common law, a municipality has no duty to enforce its by-laws by court proceedings. The matter is discretionary. Failure to exercise enforcement

powers in court does not give rise to a private cause of action in negligence to those suffering harm from non-enforcement.

3. The concept of negligence as developed in *Anns* and its predecessors may apply to render a public authority liable for its own negligent acts or omissions or vicariously liable for the negligence of its employees, but municipal prosecutorial or enforcement powers by court proceedings, like municipal legislative functions, are different in kind and are not amenable to judicial constraint by the imposition of a private law duty of care.

4. The discretion regarding enforcement proceedings in court is not, however, unfettered and may be subject to judicial constraint in cases of corruption, bad faith, or in cases where extraneous or irrelevant considerations affect the exercise of the discretion. In the case at bar there was, however, no evidence of bad faith or reliance on irrelevant considerations arising from the mere failure to take legal proceedings, and no private cause of action can therefore arise.

For all of the above reasons I would allow the appeal, order the dismissal of the action against the City and attribute full liability to the respondents Hughes.

Appeal dismissed with costs, ESTEY and McINTYRE JJ. dissenting.

Solicitors for the appellant: Harper, Grey, Easton & Company, Vancouver.

Solicitors for the respondent Jan Clemmensen Nielsen: Berna, Horne, Marr & Coates, Kamloops.

Solicitor for the respondents Wesley Joseph Hughes and Gladys Annetta Hughes: John Gnitt, Kamloops.