WHAT HAS BECOME OF *ANNS*?

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The author examines the effects on Canadian law of a recent House of Lords decision overruling the case of Anns v. Merton London Borough. The author begins by tracing the development of the law of negligence from its beginnings in Donoghue v. Stevenson, through the Rivtow Marine decision in Canada, to the House of Lords decision in Anns, its treatment of the concept of economic loss, and the subsequent Canadian decisions in this area. The author then considers the building criticism of the Anns case and it ultimate downfall in the Murphy v. Brentwood District Council decision. The author highlights several results of this decision including: (1) the fallacy of ignoring the type of loss involved and beginning with a prima facie duty based on the mere foreseeability of damage; (2) the much higher degree of proximity required if damage is economic; and (3) the necessity of having regard to the statutory framework where the liability of public bodies is in issue. The author finally considers the Canadian jurisprudence in this area and concludes that, for the most part, the Canadian position will not be affected by the demise of Anns.

L'auteur examine les conséquences pour le droit canadien de l'arrêt prononcé par la Chambre des lords et annulant la décision antérieure rendue dans la cause Anns c. Merton London Borough. L'auteur retrace l'évolution du droit de négligence à partir de Donoghue c. Stevenson, en passant par la décision Rivotow Marine au Canada, et jusqu'à la cause Anns — la façon dont la Chambre des lords a abordé la notion de préjudice économique, et les décisions ultérieures rendues au Canada dans le domaine. L'auteur examine les critiques grandissantes soulevées par la cause Anns et le sort que lui a fait la décision Murphy c. Brentwood District Council. L'auteur retient plusieurs résultats de cet arrêt parmi lesquels: (1) le faux raisonnement qui consiste à ne pas considérer le type de préjudice impliqué et à commencer par une présomption fondée sur la seule prévisibilité des dommages; (2) le degré beaucoup plus direct de la cause d'un préjudice qui est de type économique; et (3) la nécessité de tenir compte du cadre statutaire quand la responsabilité des corps publics est engagée. L'auteur considère finalement la jurisprudence canadienne en la matière pour conclure que, dans la majorité des cas, la position canadienne ne sera pas touchée par la dévolution de Anns.

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In the recent English case of *Murphy* v. *Brentwood District Council*,[1] the House of Lords overruled two leading decisions in tort law: *Dutton* v. *Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462 (C.A.) and *Anns* v. *Merton London Borough*, [1977] 2 All E.R. 472 (H.L.). This comment is mainly concerned with the effect of overturning the second case. It has become entrenched in Canadian law and can give rise

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1. [1990] 2 All E.R. 908 (HL). The case appears to be a subrogated action by the Plaintiff's insurer.

to problems where the loss is economic. Because the *Murphy* decision represents a return to earlier principles, and so that its consequences can be seen in perspective, it is useful to begin with a rough sketch of some key developments in the tort of negligence.

I. NEGLIGENCE IN A NUTSHELL

A. *DONOGHUE (OR MCALISTER)* v. *STEVENSON*

Our starting point is, by necessity, the remarks of Lord Atkin in *Donoghue* v. *Stevenson*.[2] They have become pervasive.

Though the facts of that case do not bear repeating, it is well to remember that what stood in the path of a remedy for 'negligence' was the absence of a contract between Mrs. McAlister and the retailer or the manufacturer, and the difficulty that partially decomposed snails in ginger beer bottles had not been regarded by the law as dangerous. Historically, negligence was actionable in a contractual setting but not otherwise unless the object causing harm fell into the special category of inherently dangerous things.[3]

The parties went to court to determine whether there was a cause of action. Lord Atkin said:[4]

> At present I content myself with pointing out that in English law there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. *The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*

With those remarks Mrs. McAlister could assert a claim for her purely physical loss[5] (the manufacturer presumably settled) and negligence law was poised for an era of unprecedented growth.

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2. *Donoghue (or McAlister)* v. *Stevenson*, [1932] All E.R. Rep. 1.
3. In the words of Lord Dunedin in *Dominion Natural Gas Co. Ltd.* v. *Collins*, [1909] A.C. 640 at 646; quoted by Lord Atkin in *Donoghue* v. *Stevenson*, *ibid.* at 19: "What that duty is will vary according to the subject-matter of the things involved."
4. *Donoghue* v. *Stevenson*, *supra*, note 2 at 11 (emphasis added).
5. Shock and gastro-enteritis.

The precise effect of this decision has been the subject of much academic comment. Some say it elevated negligence to the status of a nominate or independent tort.[6] Others say it swept away the 'contract fallacy' set out in *Winterbottom* v. *Wright*.[7] Both descriptions suggest a new cause of action.

Whether, from an academic point of view, the decision has only to do with the liability of suppliers of goods not inherently dangerous, or whether it goes further, there is little doubt from a practical perspective that Lord Atkin's remarks have had a wide-reaching effect.[8] Indeed, the story has been of negligence post-*Donoghue* v. *Stevenson*[9] is principally one of definition.

This task is eloquently described by Spencer Bower and Turner:[10]

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6. Cf P.H. Winfield, "The History of Negligence in Torts" (1926) CLXVI L.Q.R. 184.

7. (1842) 10 M. & W. 109; 11 L.J. Ex. 415; 152 E.R. 402. The case concerns a defective carriage. In *Donoghue* v. *Stevenson*, *supra* note 2 at 5, Lord Buckmaster refers to *Winterbottom* and says: "This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction for there can be nothing in the character of a coach to place it in a special category." He then quotes Baron Alderson in *Winterbottom*: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go fifty."

8. J.M. Kaye, who endeavoured to teach the author legal history, discusses theses questions in 'The Liability of Solicitors in Tort', (1984) 100 L.Q.R. 680. Finding the application of the 'neighbour principle' to solicitors unfortunate, he says (at 683-4):

> "...for it is apparent that the actual *ratio* of *Donoghue* v. *Stevenson* had nothing to do with the liability of professional men, and was limited to a quite distinct area of law, namely, that concerned with the suppliers of goods not inherently dangerous. This happened to be an area to which no previous House of Lords decision was relevant, and, in order to create a new duty-situation, the House simply had to overrule *Winterbottom* v. *Wright*, a decision of the court of Exchequer. The House did not seek or purport to derogate from the authority of any of its own decisions in other areas of law, and so the principles laid down in such cases as *Robertson* v. *Fleming* and *Cavalier* v. *Pope* were unaffected by it. Unfortunately, where *Donoghue* v. *Stevenson* is concerned, adherence to normal principles of case-analysis is apt to give way to wishful-thinking, it is the fashion, in some quarters, to suppose that, in that case, the House of Lords, going beyond what it actually said it was doing, (a) introduced an "independent tort of negligence," which is incorrect, as even a cursory examination of early nineteenth-century law reports will reveal, and (b) swept away what is called the "contract fallacy": a rule, supposed to have been inherent in the law before 1983, to the effect that where there was a contract between A and B, by the terms of which A was to supply goods or perform services for the benefit of someone other than B, A's liability for misfeasance or nonfeasance was to be determined solely by relation to the law of contract, so that only B could sue. This is scarcely less incorrect, for no such rule existed in general terms in the nineteenth- and early twentieth-century law. ... the "contract fallacy" existed in some areas of law but not in others, and there was, in 1932, no general principle for the House of Lords to sweep away, even had it been minded to do any such sweeping."
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> The tendency has been to overlook the nicer points of the decision with the result that Lord Atkin's remarks and the 'neighbour principle' have escaped and done mischief in many places. An instance of this is exactly what Mr. Kaye complains of when he makes his comment.

9. *Supra*, note 2.

10. G. Spencer Bower, *The Law of Actionable Misrepresentation*, ed. by Sir A.K. Turner (London: Butterworth, 1974) at 436 para 414.

> In extending the area of tortious responsibility, as it should henceforth be delineated, the Lords adopted Luke X, 25-37 as stating the new principle - but only with the addition of a modern gloss upon the simple admonition there recorded. For it had of course to be acknowledged at once that the duty to one's neighbour so clearly stated in the parable is not recognised by the common law as extending to all cases. But the Lords did not attempt to say, to what cases it did apply; and the courts are still involved in defining the classes of case to which they must be deemed to have intended the duty of an Atkinian neighbour to be limited.

Definition, however, is complicated by the fact that there are competing forces at work. Spencer Bower and Turner refer to this as the 'struggle between those who wish to hold the gate wide open and those who are glad to see it held only ajar.'[11] This struggle very much characterizes subsequent developments. Definition is further complicated by the existence of different kinds of negligence and various types of loss. Lord Atkin's remarks opened the gate but the question was, 'how wide?'.

B. *HEDLEY BYRNE*

It goes without saying that the harm suffered as the result of negligence may be economic rather than physical. It also goes without saying that negligent words rather than negligent acts can give rise to this harm.

The distinction between words and acts was described picturesquely by Lord Pearce:[12]

> Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are used without being expended and take effect in combination with innumerable facts and other words. Yet these are dangerous and can cause vast financial damage... If the mere hearing or reading of words were held to create proximity, there might be no limit to the persons to whom the speaker or writer could be liable. Damage done by negligent acts to persons or property on the other hand is more visible and obvious; its limits are more easily defined and it is with this damage that the earlier cases were more concerned.

On this basis, the need to limit the application of the neighbour principle was self evident.

The potential effect of imposing a broad duty in these circumstances was that foreseen by the American Chancery Judge, Cardozo J.[13] His remarks in *Ultramares* v. *Touche*[14] have become the classic statement of the 'floodgates argument.' The question in that case was whether liability for negligence should be imposed upon accountants for a poorly performed audit. Speaking for the New York Court of appeals, Cardozo J. said:[15]

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11. The *Law of Actionable Misrepresentation, ibid.*
12. *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.) at 613-4.
13. *Ultramares Corp.* v. *Touche* (1931), 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139. This American case was decided the year before *Donoghue* v. *Stevenson.*
14. *Ibid.*
15. *Supra*, note 13, 74 A.L.R. 1139 at 1145.

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubts whether a flaw may not exist in the implication of a duty that exposes to these consequences.

This is the argument against holding the gate wide open. It was also to become the argument against giving the neighbour principle universal application.

The facts of *Hedley Byrne* v. *Heller*[16] did not raise the spectre of indeterminate liability. Time, class and amount were all limited. Moreover, it was not an appropriate situation for a finding related to fraud as in *Ultramares*.[17] But for a disclaimer, the circumstances were compelling. Accordingly, the case proved a useful vehicle for considering the question of liability for negligent but innocent misrepresentation.

The requirements of reliance and a special relationship of proximity, which arise out of that judgment, are well known. Its restrictive aspect, however, is what is of particular importance here;[18] the neighbour principle was rejected as being the foundation for recovery for misstatements causing economic loss. Lord Pearce said:[19]

> The House in *Donoghue* v. *Stevenson* was, in fact, dealing with negligent acts causing physical damage and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.

The restrictive nature of the test for negligent words and economic loss averts the danger that would arise had the door been held wide open and the Atkinian test used.

If we look at the situation just following this decision, two categories are apparent: recovery for *physical harm* arising from *negligent acts* or *misstatements* based on the broad 'neighbour principle'; and, recovery for *economic harm* resulting from *negligent words* based on the more restrictive test set out in *Hedley Byrne*.[20] In the second category, elements such as a special relationship of proximity and reliance are necessary so that the particular dangers attaching to negligent words or economic loss can be avoided.

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16. *Supra*, note 12.
17. *Supra*, note 13.
18. The views of P.P. Craig in 'Negligent Misstatements, Negligent Acts and Economic Loss' (1976) 92 L.Q.R. 213 have been of great assistance to the writer both here and following.
19. *Supra*, note 12 at 615.
20. *Supra*, note 12. Recovery for misstatements causing physical loss was available before *Hedley Byrne*: Craig, *supra*, note 18 at 217, *Salmond and Heuston on the Law of Torts*, 18th ed. (Street & Maxwell: London) at 193. *Clay* v. *A.J. Crump & Sons Ltd.*, [1963] 3 All E.R. 687 (C.A.) and *Clayton* v. *Woodman & Sons (Builders) Ltd.*, [1961] 3 All E.R. 249, reversed on its facts, [1962] 2 All E.R. 33 (C.A.) are examples. Both cases concern misstatements by architects resulting in physical injury to workers.

As Craig points out in 'Negligent Misstatements, Negligent Acts and Economic Loss',[21] despite *dicta* suggesting it would be illogical or arbitrary to base liability on the nature of the damage, 'later cases on negligent *acts* leading to *economic loss* denied recovery'. That is, of course, unless the economic loss was closely connected to accompanying physical harm.

C. *DUTTON*: THE CATEGORIES BLURRED

Many cases do not fit into neat pre-established categories. There are many situations which invite a remedy, but getting it requires breaking new ground. This is true of the cases just mentioned. It is also true of *Dutton* v. *Bognor Regis United Building Co. Ltd.*[22]

In that case, Mrs. Dutton was the subsequent purchaser of a house that had been built over an old dump. The foundations had been approved (orally) for the builder before being covered up. The house was purchased by another, then sold to Mrs. Dutton. After she bought it the house began to crack because the foundations were inadequate.

Mrs. Dutton sued the builder and the local authority. She settled with the builder[23] but the claim against the local authority went on to the Court of Appeal.

This case had several unique features. First, the negligence complained of was a misrepresentation, though it was not made directly to Mrs. Dutton. Moreover, the inspector may not have had subsequent purchasers in mind; they frequently are required to have their own surveys done in order to obtain financing. On the question of proximity Lord Denning M.R. said:[24]

> ... the foundations of a house are in a class by themselves. Once covered up, they will not be seen again until the damage appears. The inspector must have known this or, at any rate, he ought to know it. Applying the test laid down by Lord Atkin in *Donoghue* v. *Stevenson*, I should have thought that the inspector ought to have had subsequent purchasers in mind when he was inspecting the foundations — he ought to have realized that, if he was negligent, they might suffer damage.

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21. *Supra*, note 18 at 217. Two cases are referred to: *S.C.M. (United Kingdom) Ltd.* v. *W.J. Whittall & Sons Ltd.*, [1971] 1 Q.B. 337 and *Spartan Steel and Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*, [1973] Q.B. 27.

22. [1972] 1 All E.R. 462 (C.A.).

23. The headnote indicates: "The plaintiff's claim against the builder was settled for 625 pounds Sterling because it was accepted that on the authorities he was exempt from liability for negligence".

24. *Supra*, note 22 at 474. The case was also one step removed from *Hedley Byrne* on the question of reliance. Lord Denning M.R. said at 473:

> "It is at this point that I must draw a distinction between the several categories of professional men. I can well see that in the case of a professional man who gives advice on financial or property matters - such as a banker, a lawyer or an accountant - his duty is only to those who rely on him and suffer financial loss in consequence. But, as the case of a professional man who gives advice on the safety of buildings, or machines, or material, his duty is to all those who may suffer injury in case his advice is bad."

The operative test was the neighbour principle rather than the more restrictive test found in *Hedley Byrne*.[25]

The second feature was that the loss could be characterized as economic; Mrs. Dutton got a house that was valueless or at least of diminished worth. Though there was physical damage to the house, there was no physical damage to Mrs. Dutton. She had suffered no bodily harm. Lord Denning M.R. canvassed the question about whether the nature of the loss was a bar to recovery saying:[26]

> Counsel for the council submitted that the liability of the council would, in any case be limited to those who suffered bodily harm; and did not extend to those who only suffered economic loss. He suggested, therefore, that although the council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of *S.C.M. (United Kingdom) Ltd.* v. *W.J. Whittall & Son Ltd.* I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If counsel's submission were right, it would mean that, if the inspector negligently passes the house as properly built and it collapses and injures a person, the council are liable; but, if the owner discovers the defect in time to repair it – and he does repair it – the council are not liable. That is an impossible distinction. They are liable in either case. I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.

Though it was a case from the Court of Appeal, it had great persuasive force. But it is where the problems began. The decision ignored the difficulties raised in *Hedley Byrne*[27] and awarded damages for Mrs. Dutton's economic loss on the wide test of proximity reserved for physical injury.

Dutton[28] is also distinctive for the remarks made by the Master of the Rolls about policy. He said:[29]

> This case is entirely novel. Never before has a claim been made against a council or its surveyor for negligence in passing a house. The case itself can be brought within the words of Lord Atkin in *Donoghue* v. *Stevenson*; but, it is a question whether we should apply them here. In *Home Office* v. *Dorset Yacht Co. Ltd.* Lord Reid said that the words of Lord Atkin expressed a principle which ought to apply in general unless there is some justification or valid explanation for its exclusion. So did Lord Pearson. But Lord Diplock spoke differently. He said that it was a guide but not a principle of universal application. It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing.

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25. *Supra*, note 12. On a simple application of *Hedley Byrne*, Mrs. Dutton's claim probably would have failed. In this regard Lord Denning's remarks about reliance (at 473, see Note 24) are particularly telling.
26. *Supra*, note 22 at 475.
27. *Supra*, note 12.
28. *Supra*, note 22.
29. *Supra*, note 22 at 475.

> In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable, or not? Was it too remote? And so forth.
>
> Nowadays we direct ourselves to considerations of policy.

Considerations of loss distribution figure prominently here. Lord Denning M.R. observed that the problems with the house occurred through no fault of Mrs. Dutton and that she was in no position herself to bear the loss.[30] The shoulders of the local authority, however, were much broader.

This development was considered in an article written a few years later. In 'Negligent Misstatement, Negligent Acts and Economic Loss', P. Craig observes:[31]

> What has happened in *Dutton* is that in making the transition from the limited form of tortious liability in *Hedley Byrne* to the broad Atkinian principle, Lord Denning brings with him the potentiality of the unlimited liability and multiplicity of litigation which in the past has led him to deny liability for pure economic loss in cases of negligent acts. Lord Denning's speech in the case places misstatements concerning buildings and machines on all fours with cases of negligent act producing economic loss, and separate from the original form of liability as expressed in *Hedley Byrne* itself. It is asking too much to say at one and the same time that the principle upon which liability is invoked is the Atkin test, and that we will use the misstatement reasoning to allow recovery for pure economic loss. The availability of recovery for such loss in the misstatement area is explicable only upon the basis that by imposing the limited form of tortious liability, one is obviating the problems that have led us to deny recovery for economic loss *per se* in the cases upon negligent act. [sic] Once the form of liability shifts back to the ordinary *Donoghue* v. *Stevenson* principle the rationale for differentiating between the two areas collapses totally. One cannot use the ordinary reasonable foresight test, and then pick from the misstatement cases the idea that economic loss is recoverable; the issue of breadth of duty and type of loss recoverable are inextricably linked. Lord Denning, by applying a generalised principle of tortious liability usually associated with negligent act cases, should equally have applied the economic loss rules from that area.

Thus it remained for the courts to sort things out. The gate seemed to have swung wide open.

D. *RIVTOW*: THE SENSIBLE APPROACH IN CANADA

If the stage was set for a court of high authority to further consider these questions, the first opportunity appears to have been afforded the Supreme Court of Canada in *Rivtow Marine Ltd.* v. *Washington Iron Works.*[32]

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30. *Ibid.*

31. *Supra*, note 18 at 223.

32. (1973), 40 D.L.R. (3d) 530 (S.C.C.). The trial decision preceded *Dutton* by about two years. *Dutton* was considered by Laskin J. (Hall J. concurring) (dissenting in part) in the Supreme Court but no direct reference was made to it by the majority.

In that case, manufacturers discovered defects in the cranes they made. They did not tell the plaintiff. One of the cranes the Plaintiff chartered broke. It and another had to be sent for repairs. Had the plaintiff known about the defects, these repairs might have been made at some time other than at the peak of their busy period.

The defendants had failed to warn the plaintiff. Silence, or acquiescence in the face of a known danger, had caused direct economic harm to the plaintiff.

Two losses were identified. The first was revenue lost because the crane had to be repaired during the busy season. The second was the cost of the repairs. Both were economic. On the basis of a restrictive test, the majority allowed the first but refused the second.

The failure to warn was, in the circumstances, sufficient to give rise to liability for economic loss because of an analogy with *Hedley Byrne*.[33] The wider duty of a manufacturer based on the neighbour principle applied to different circumstances. No duty arose which could sustain liability for the cost of repairs.

The distinction between the majority and minority judgments is important. Ritchie J., writing for the majority, adopted the reasoning of the trial judge, Mr. Justice Ruttan. Though the authorities are reviewed by Mr. Justice Ritchie, the clearest statement of principle is to be found at first instance. There Ruttan J. said:[34]

> The intent of these judgments is clear: To remove any distinction between remedies and to affirm that there can be economic recovery for any tort of negligence, *provided the proper duty relationship between the parties can be established.*
>
> At the same time their Lordships were very conscious that by allowing recovery for pure economic loss they were enlarging the scope of recovery *and that there must be some control to the limits, otherwise ordinary persons could be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class.* So their Lordships found the limits to liability lay in the limits of proximity between the parties ...
>
> *While it is admitted that the tort of negligence has been widened to bring economic loss within its scope, the mere fact that loss of that kind is foreseeable will not give rise to a duty of care. There still must be present between the parties some special relationship, and such a relationship may be found in cases in negligent misstatement, but rarely, if ever in cases in negligent action* which follow the principle of *McAlister (Donoghue)* v. *Stevenson*, when the general rule remains that the duty to take care to avoid injury to others is restricted to physical injury to persons or property.

This narrower test for proximity where economic loss is involved, is in contrast to the broader Atkinian test adopted by Lord Denning in *Dutton*.[35] Had that case been decided by the *Rivtow* majority, the result would have been the opposite.

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33. *Supra*, note 12. Here I am reading the reasoning of the trial judge into Ritchie J.'s decision.
34. (1970), 74 W.W.R. 110 (B.C.S.C.) at 123, 124 (emphasis added).
35. *Supra*, note 22.

Mr. Justice Laskin took a different approach. The key to his reasoning appears to be the threat of physical harm. He could see no distinction between suffering harm and the cost required to avert it. After referring to the manufacturers' superior ability to bear loss or risks, he said:[36]

> This rationale embraces, in my opinion, threatened physical harm from a negligently designed and manufactured product resulting in economic loss. I need not decide whether it extends to claims for economic loss where there is no threat of physical harm or to claims for damage, without more, to the defective product.
>
> It is foreseeable injury to person or to property which supports recovery for economic loss suffered by a consumer or user who is fortunate enough to avert such injury. If recovery for economic loss is allowed when such injury is suffered, I see no reason to deny it when the threatened injury is forestalled.
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> ... The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations), but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such harm gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury care.

On this basis he would have allowed recovery for the cost of repairs as well as for the lost income.

To a certain extent this decision shows the two paths that can be taken. The first, taken by the majority, takes cognizance of the problem of indeterminate liability and follows a more conservative path; economic loss is allowed but on the basis of a restricted duty. Mr. Justice Laskin followed a second path which, with respect, overlooks these difficulties. His conclusion involves a much broader duty and was closer to that of the Master of the Rolls in *Dutton*[37].

II. *ANNS*

The House of Lords brought the neighbour principle into the public sphere in *Home Office* v. *Dorset Yacht Co. Ltd.*[38] That case involved escaping borstal boys, for whom the Home Office was vicariously liable, who did damage to a yacht. Lord Reid said:[39]

> In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but

36. *Supra*, note 32 at 552. It should be noted that an operator was killed when the first crane collapsed.
37. *Supra*, note 22.
38. [1970] 2 All E.R. 294 (H.L.). The case involved physical damage to a yacht and the positive duty to prevent prisoners from doing it. It is similar to *Anns* and other cases of that kind where the question involves the duty to prevent another from committing a tort; as would be the case if a municipality failed to prevent a builder from making a defective house. See *Murphy*, *supra*, note 1 at 916, 917 per Lord Keith.
39. *Ibid.* at 297.

> whether recognized principles apply to it. *Donoghue* v. *Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

As already noted, the 'principle' had been applied to economic loss in *Dutton*.[40] It had also been the starting point in *Hedley Byrne*[41] and *Rivtow*[42].

By the mid '70's the neighbour principle had taken root. Despite restrictions applied in some cases involving economic loss, the 'broad outlook'[43] suggested by Lord Atkins' remarks in *Donoghue* v. *Stevenson*[44] had found favour and was the usual starting place for cases involving allegations of negligence. The neighbour principle seemed ready for universal application, subject to whatever qualifications might be appropriate in the circumstances.

This is what occurred in *Anns* v. *London Borough of Merton*;[45] a case factually similar to *Dutton*.[46] In considering whether a cause of action existed against a local authority for failing to inspect, or doing a poor job of inspecting foundations, Lord Wilberforce said:[47]

> Through the trilogy of cases in this House, *Donoghue* v. *Stevenson*, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* and *Home Office* v. *Dorset Yacht Co. Ltd.* the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his party may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owned or the damages to which a reach of it may give rise (see the *Dorset Yacht* case, per Lord Reid).

In finding that a cause of action existed, Lord Wilberforce was persuaded by the approach taken by Lord Denning in *Dutton*[48] and by the reasoning of Mr. Justice Laskin in *Rivtow*.[49]

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40. *Supra*, note 22.
41. *Supra*, note 12.
42. *Supra*, note 32.
43. These are the words of Lord Pearce in *Hedley Byrne*, *supra*, note 12 at 615.
44. *Supra*, note 2.
45. [1977] 2 All E.R. 492 (H.L.).
46. *Supra*, note 22.
47. *Supra*, note 45 at 498.
48. *Supra*, note 22, though he thought the duty set out there was too high. See *Anns*, *supra*, note 5 at 504.
49. *Supra*, note 32.

The remarks of Lord Wilberforce soon became the starting point for most negligence cases. Their effect is significant. Rather than a battle fought between a particular plaintiff and a particular defendant on the basis of previously decided cases, now the struggle occurred between notional parties. Instead of asking whether *this* defendant owes *that* plaintiff a duty on the authority of earlier decisions, the first question has become whether this *kind* of defendant owes that *kind* of plaintiff a duty based on foreseeability of injury and the broad principle of neighbourhood.[50]

Though this is in keeping with objective standards of behaviour and foresight, the starting point is virtually the assumption of the existence of a duty. There is no incremental development of the duty aspect made by reference to previously decided cases. The effect is to shift the burden to the defendant to show it should be limited in particular circumstances.[51]

Negativing the duty for policy reasons put the ingenuity of defence counsel to the test. One of his most important allies, the spectre of open floodgates and indeterminate liability, appeared to have become less frightening.[52] Moreover, policy is more frequently spoken of in terms of loss distribution and the party more able to bear the risk than the converse. Though wide shoulders might give rise to liability, narrow ones are unlikely to provide a defence. The net effect of *Anns* is unsettling and very much favours the plaintiff.

A. THE BLOSSOM OF YOUTH

Except so far as shifting a burden to the defendant is concerned, where physical loss is in issue *Anns*[53] is reasonably uncontroversial. Economic loss, however, is the acid test for the development of principle.

In Canada the approach to economic loss had been conservative. Though the majority in *Rivtow*[54] had allowed a measure of economic loss, being the loss of earnings because the crane had to be repaired during the busy season, the cost of repairs, which was also

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50. Status and the relative positions of the parties became particularly important. Spencer Bower and Turner, *supra*, note 10 at N. 432 para 441 say this about the path of negligence:

> "The duty to take care is one which arises out of the relative situations of Plaintiff and representor. To this extent, at least, *Hedley Byrne* can be seen as another step in the series of cases, of which *McAlister (or Donoghue)* v. *Stevenson* is so conspicuous an example, which illustrate the reversal, in the development of the common law in recent years, of that tendency of progressive societies noticed more than 100 years ago by sir Henry Maine, to proceed from status to contract."

Perhaps the evolving importance of status made the decision in *Anns* inevitable.

51. B. Feldthusen, *Economic Negligence*, 2nd ed. (Carswell, 1989) at 8-9, uses the expression 'presumptive liability' for the rebuttable presumption in favour of recovery.

52. In *Junior Books Ltd.* v. *Veitchi Ltd.*, [1982] 3 W. W. R 477 at 494 H.L., for example, Lord Roskill said: "The history of the development of the law in the last 50 years shows that fear aroused by the floodgates argument have been unfounded. See also following.

53. *Supra*, note 45.

54. *Supra*, note 32.

economic in nature, was disallowed. With respect, this is a sound distinction. Even when the threat of physical injury is present, allowing recovery on that basis makes the line increasingly more difficult to draw. It is easier to say manufacturers are not liable for economic loss (absent a contract or extraordinary circumstances) than trying to define when and what 'threats' become actionable.

The trend in England was not so conservative. *Dutton*[55] had allowed the cost of repairs to a house based on the neighbour principle and a similar remedy was available in *Anns*.[56] So far as this economic loss was concerned, *Dutton*,[57] *Anns*[58] and the dissent of Laskin J. in *Rivtow*,[59] all lined up against the *Rivtow*[60] majority.

The opposing team grew with the decision of the House of Lords in *Junior Books* v. *Veitchi Ltd.*[61] In that case owners of a building sued subcontractors for the cost of repairing a negligently laid floor. The loss was economic. There was no physical danger to the owner.

The majority in *Rivtow*[62] was discounted in *Junior Books*[63] and the dissenting views of Laskin and Hall J.J. found support. Lord Roskill said:[64]

> My Lords, in the first of this trilogy, *Rivtow Marine Ltd.* v. *Washington Iron Works* (1973) 40 D.L.R. (3d) 530, the Supreme Court by a majority held that the manufacturer of a dangerously defective article is not liable in tort to an ultimate consumer or user of that article for the cost of repairing damage arising in the article itself, nor for such economic loss as would have been sustained in any event as a result of the need to effect repairs. But there was, if I may respectfully say so, a powerful dissenting judgment by Laskin J. with which Hall J. concurred. The learned judge posed as the first question, at p. 549, whether the defendants' liability for negligence should 'embrace economic loss when there has been no physical harm in fact.' He gave an affirmative answer. After pointing out, at p. 551, that the judicial limitation on liability was founded upon what I have called the "floodgates" argument rather than upon principle, he adopted the view that economic loss resulting from threatened physical loss from a negligently designed or manufactured product was recoverable. It was this judgment which my noble and learned friend Lord Wilberforce described in his speech in *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 760A. as "of strong persuasive force."

Lord Keith, following *Anns*,[65] gave further support to the minority reasoning in *Rivtow*[66] saying:[67]

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55. *Supra*, note 22.
56. *Supra*, note 45.
57. *Supra*, note 22.
58. *Supra*, note 45.
59. *Supra*, note 32.
60. Ibid.
61. [1982] 3 W.L.R. 477.
62. *Supra*, note 32.
63. *Supra*, note 61.
64. *Supra*, note 61 at 493.
65. *Supra*, note 45.
66. *Supra*, note 32.

> *[Hedley Byrne]* was concerned with a negligent statement made in response to an inquiry about the financial standing of a particular company, in reliance on the accuracy of which the plaintiffs had acted to their detriment. So the case is not in point here except in so far as it established that reasonable anticipation of physical injury to person or property is not a *sine qua non* for the existence of a duty of care. It has also been established that where a duty of care exists through the presence of such reasonable anticipation, and it is breached, then even though no such injury has actually been caused because the person to whom the duty is owed has incurred expenditure in averting the danger, that person is entitled to damages measured by the amount of that expenditure: *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 759, per Lord Wilberforce.

Two other observations can be made: the floodgates argument was discounted, generally, and *Anns*[68] came into her prime. Lord Roskill said:[69]

> Lord Wilberforce, at p. 751, in the passage I have already quoted enunciated the two tests which have to be satisfied. The first is "sufficient relationship of proximity," the second any considerations negativing, reducing or limiting the scope of the duty or the class of person to which it is owed or the damages to which a breach of the duty may give rise. My Lords, it is I think in the application of those two principles that the ability to control the extent of liability in delict or in negligence lies. The history of the development of the law in the last 50 years shows that fears aroused by the floodgates argument have been unfounded. Cooke J. in *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1971] 1 N.Z.L.R. 394, 422 described the floodgates argument as "specious" and the argument against allowing a cause of action such as was allowed in *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373, *Anns* v. *Merton London Borough Council* [1978] A.C. 728 and *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394 as *"in terrorem* or doctrinaire."

There was reliance and a degree of proximity just short of a contractual relationship. This was the end of the defence:[70]

> Applying those statements of general principle as your Lordships have been enjoined to do both by Lord Reid and by Lord Wilberforce rather than to ask whether the particular situation which has arisen does or does not resemble some earlier and different situation where a duty of care has been held or has not been held to exist, I look for the reasons why it being conceded that the appellants owed a duty of care to others not to construct the flooring so that those others were in peril of suffering loss or damage to their persons or their property, that duty of care should not be equally owed to the respondents who, though not in direct contractual relationship with the appellants, were as nominated sub-contractors in almost as close a commercial relationship with the appellants as it is possible to envisage short of privity of contract, so as not to expose the respondents to a possible liability to financial loss for repairing the flooring should it prove that that flooring had been negligently constructed.

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67. *Supra*, note 61 at 484. Lord Brandon's strong dissent was based upon the importance of the threat of physical danger.
68. *Supra*, note 45.
69. *Supra*, note 61 at 494.
70. Lord Roskill, *supra*, note 61 at 490-91. See also 494.

Anns,[71] showing the full blossom of youth, had finally reached the age of majority.

The developments in England did not go unnoticed in Canada but they gave rise to some difficulties. Where economic loss was concerned, *Rivtow*[72] remained the law: *Anns*[73] was aligned with the dissenting minority in that case.

The Supreme Court of Canada had its first opportunity to deal with the trans-Atlantic problem in *Kamloops* v. *Nielsen*.[74] At issue in that case was the liability of a public body for the failure to enforce a stop-work order relating to the construction of a house. Madam Justice Wilson confronted the problem of *Rivtow*,[75] directly, saying:[76]

> 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 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.

Fortunately for the respondent (plaintiff), *Rivtow*[77] was not at all like the case at bar and it was distinguished for several pages. In *Kamloops*,[78] a public authority was involved and the duty arose under a statute. There were no "contractual overtones" and no difficulties related to concurrent liability in contract and tort. What's more, the floodgates argument did not pose a problem.

The *ratio* of *Kamloops*[79] ended up being quite narrow. It was based on a 'double duty' or the overlap of private and public law duties. To allay any residual fears, Wilson J. said:[80] "...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." *Anns*[81] debut in Canada was comparatively mild.

Anns[82] emerged again in another economic loss case that found its way to the Supreme Court of Canada. *B.D.C. Ltd.* v. *Hofstrand Farms*[83] concerned the failure of a courier to deliver documents to a land registry in time. The courier had contracted with the Crown to deliver the documents the next day. They were late and a third party, the

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71. *Supra*, note 45.
72. *Supra*, note 32.
73. *Supra*, note 45.
74. [1984] 5 W.W.R. 1 (S.C.C.).
75. *Supra*, note 32.
76. *Supra*, note 74 at 43 Ritchie and Dickson J.J. concurred. Ritchie J, it is to be remembered, wrote the majority judgement in *Rivtow*.
77. *Supra*, note 32.
78. *Supra*, note 74.
79. *Supra*, note 69.
80. *Supra*, note 74 at 45.
81. *Supra*, note 45. The case figured in earlier decisions but none as potentially controversial as this.
82. *Supra*, note 45.
83. [1986] 3 W.W.R. 216 (S.C.C.).

plaintiff, suffered economic loss from its resulting inability to close a real estate transaction. There was no physical loss.

Mr. Justice Estey, who had dissented in *Kamloops*[84] wrote for the majority. He cited *Rivtow*[85] as authority for the proposition that, in principle, a plaintiff could recover negligently cased economic loss in the absence of associated physical injury or damage.[86]

His approach, however, was conservative. Rather than simply apply the *prima facie* duty from *Anns*[87] and go on to ask whether there were policy reasons to negative or limit the duty, he found the plaintiff's case failed at the first stage on the question of proximity. He said:[88]

> In sum, the requirements of proximity contained in the principles enunciated in *Hedley Byrne* and confirmed in *Anns*, *supra*, are not met on the facts of this appeal. As I have concluded that the respondent did not come within a limited class in the reasonable contemplation of a person in the position of the appellant, it is unnecessary to proceed to the second stage or test set out by Lord Wilberforce in *Anns*.

So far as economic loss is concerned, we are left in doubt about whether *Anns*[89] has had any significant impact in Canada at all. Mr. Justice Estey appeared to have followed the old law while using the new only for window dressing.

The importance of *Anns*[90] is that it begins with the assumption of a *prima facie* duty based on foreseeability of damage and the neighbour principle. With this starting point it has the potential to blur distinctions established by earlier cases between negligent acts and words or physical and economic loss. Once the *Anns*,[91] *prima facie* duty is found to exist, the next step is to ask whether considerations such as those in *Hedley Byrne*[92] limit or negative the duty in the circumstances. Mr. Justice Estey, however, brings *Hedley Byrne*[93] in from the start.[94]

Though *Anns*[95] is generally endorsed, later *dicta* remains cautious. Estey J. said:[96]

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84. *Supra*, note 74.
85. *Supra*, note 32.
86. *Supra*, note 83 at 225.
87. *Supra*, note 45.
88. *Supra*, note 83 at 228.
89. *Supra*, note 45.
90. *Supra*, note 45.
91. *Supra*, note 45.
92. *Supra*, note 12.
93. *Supra*, note 12.
94. In *Hofstrand* at 223 he said: "In applying the first test [from *Anns*] to the facts of this appeal, one turns naturally to *Hedley Byrne*, supra."
95. *Supra*, note 45.
96. *Supra* note 83 at 228.

> The *Anns* principle sets out a broad and independent right and a concomitant liability in the law of negligence. It has found application in a variety of ways and circumstances in the courts of this country and elsewhere in the years since it was decided. Doubtless, the principle and its reach will be the subject of discussion in the courts as the law of torts continues to evolve. This appeal does not, on its facts, face the court with the need to re-examine the parameters of the doctrine or its definitive role in our jurisprudence. No doubt the courts of this country will continue to search for reasonable and workable limits to the liability of a negligent supplier of manufactured products or services, to the liability of a negligent contractor for contractual undertakings owed to others, and to the liability of persons who negligently make misrepresentations. In this search courts will be vigilant to protect the community from damages suffered by a breach of the "neighbourhood" duty. At the same time, however, the realities of modern life must be reflected by the enunciation of a defined limit on liability capable of practical application, so that social and commercial life can go on unimpeded by a burden outweighing the benefit to the community of the neighbourhood historic principle.

Madam Justice Wilson concurred on the question of proximity and found that the principles of *Anns*[97] or *Kamloops*[98] had no application to the facts.

Though the remarks in this case represent a large step from *A. G. Ontario* v. *Fatehi*[99] where two years before Estey J. said:[100] "It is not possible to say whether the law of Canada as reflected in the authorities to-date contemplates recovery for pure economic loss...", it was hardly the revolution that might have been expected.[101]

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97. *Supra* note 45.

98. *Supra* note 74.

99. [1984] 2 S.C.R. 536, 25 D.L.R. (4th) 132, 31 C.C.L.T. 1 (S.C.C.).

100. *Ibid.* at 615. Estey J. was writing for the court. In that case the defendant's careless driving damaged the highway. The Plaintiff incurred expense to clean it up.

The case is interesting because it exposes unsettled views about economic loss. Pigeon J. in *Agnew Surpass Shoe Stores Ltd.* v. *Cummer-Younge Investments Ltd.* (1975), 55 D.L.R. (3d) 676 at 692-3 (S.C.C.) cited *Rivtow* for the proposition that 'recovery for economic loss caused by negligence is allowable without any recovery for property damage.' This did not go unnoticed in the *Fatehi* case. Wilson J.A. (as she then was), sitting on the Ontario Court of Appeal in *Fatehi*, reviewed the English and Canadian cases ((1982) 127 D.L.R (3d) 603 at 607 *et seq*) but came to a narrower conclusion. When the *Fatehi* case reached the Supreme Court of Canada, even with the benefit of Lord Roskill's remarks in *Junior Books* and Pigeon J.'s views *Agnew Surpass*, Estey J. found difficulty ignoring the restrictive outlook imposed by the *Rivtow* majority. Recovery of 'pure economic loss' in the sense of 'diminution of worth incurred without any physical injury to any asset of the Plaintiff' was much in doubt, especially when what was complained of was a negligent act. In *Fatehi*, however, a final determination was unnecessary; the damage was found to be direct injury to property.

An excellent review of authority can be found in *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co. Ltd.* (1990), 65 D.L.R. (4th) 321 (Fed. C.A.).

101. *Anns* was applied to concurrent liability by the Supreme Court of Canada in *Central Trust Co.* v. *Rafuse et al* (1986), 31 D.L.R. (4th) 481. Mr. Justice LeDain writing for the court said at 521:

> 1. The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilferforce in *Anns* v. *Merton London Borough Council, supra*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue* v. *Stevenson, Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or

III. *MURPHY*: DECLINE AND FALL

Reservations about foreseeability leading automatically to a duty of care were expressed by Lord Wilberforce himself in *McLoughlin* v. *O'Brien*, [1982] 2 All E.R. 298 at 303.[102] That case concerned a plaintiff who had suffered nervous shock from hearing about an accident shortly after it occurred. In subsequent cases others were outspoken about the shortcomings of *Anns*.[103]

Brennan J, in *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1, a decision of the High Court of Australia, said:[104]

> Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification – perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns*. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed."

In the *Yuen*[105] case, Lord Keith referred to decisions, including the one above, that had doubted *Anns*[106] and said (at 710):

> Their Lordships venture to think that the two-stage test formulated by Lord Wilferforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater than its author intended. The truth is that the trilogy of cases referred to by Lord

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independently of contract. I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract.

In a situation such as this the degree of proximity is naturally very high.

Anns also made an appearance in *Just* v. *British Columbia* (1989), 64 D.L.R. (4th) 689. In that case a rock fell on the Plaintiff's car. He alleged that the Crown had done a poor job of inspecting the rock face along the road. The Supreme Court of Canada ordered a new trial on this question. Cory J., writing for the majority (Sopinka J. in dissent found no duty to inspect), described the *Anns* test as a 'sound approach', at least where government agencies are concerned; though he noted that the two step test should not be slavishly followed. The case involves physical injury. In this light the application of *Anns* may not be particularly controversial.

102. As Lord Keith observes in the later case *Yuen Kun-yeu* v. *A.G. of Hong Kong*, [1987] 2 All E.R. 705 at 710 (P.C.).

103. *Supra*, note 45. See *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.*, [1984] 3 All E.R. 529 at 534 per Lord Keith, (which adds the just and reasonable' requirement), *Leigh & Sullavan Ltd.* v. *Aliakmon Shipping Co. Ltd.*, '*The Aliakmon*', [1986] 2 All E.R. 145 at 153 per Lord Brandon, *Curran* v. *Northern Ireland Co-ownership Housing Association Ltd.*, [1987] 2 All E.R. 13 at 17 per Lord Bridge, *Caparo Industries plc* v. *Dickman* [1990] 1 All E.R. 568 (H.L.).

104. At 43-44. These remarks or some portion of them are frequently quoted.

105. *Yuen Kun-yeu* v. *A.G. of Hong Kong*, *supra*, note 102. The question was whether, the Commissioner for Deposit-taking Companies could be liable to depositors for failing to revoke the registration of an unfit company.

106. *Supra*, note 45.

> Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.

Lord Keith added[107]

> In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

Moreover, doubts about whether *Anns* could be reconciled with earlier decisions were expressed by Lords Bridge and Oliver in *D & F Estates Ltd.* v. *Church Commissioners for England* [1989] 2 All E.R. 922.[108]

The end came in *Murphy* v. *Brentwood District Council.*[109] That case was factually similar to *Anns*[110] and *Dutton.*[111] It concerned a house with an inadequate raft foundation. The house cracked and the owner was forced to sell at a loss. Plans had been approved for the builder before the house was constructed and purchased. The question was whether the local authority owed the plaintiff a duty to see that the house was properly designed.

In England the *Defective Premises Act* 1972 obliges the local authority not to pass plans in various circumstances. Imposing a private-law duty in this situation and ignoring the liability that may arise from the Act, can be viewed as making decisions such as *Anns*[112] very close to judicial legislation. The field is occupied by the Act and a breach of it, rather than some other duty, may be the proper foundation for a determination of negligence.[113] Lord Mackay L.C. said:[114]

> While of course I accept that duties at common law may arise in respect of the exercise of statutory powers or the discharge of statutory duties I find difficulty in reconciling a common law duty to take reasonable care that plans should conform with byelaws or regulations with the statute which has imposed

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107. *Supra*, note 105 at 712.
108. That case concerned 'anticipatory repairs to a defective building'. The complex structure theory (whether a defective part of a building could be viewed as having damaged another part), amongst other things, prompted a critical article by I.N. Duncan Wallace Q.C.: 'Negligence and Defective Buildings: Confusion Confounded?', (1989) 105 L.Q.R. 46.
109. [1990] 2 All E.R. 908 (H.L.).
110. *Supra*, note 45.
111. *Supra*, note 22.
112. *Supra*, note 45.
113. Though it is not suggested that breach of a statutory duty gives rise to a cause of action in negligence. In Canada see *Sask. Wheat Pool* v. *Can.*, [1983] 1 S.C.R. 205, [1983] 3 W.W.R. 97, 23 C.C.L.T. 121, 143 D.L.R. (3d) 9 (S.C.C.).
114. *Murphy*, *supra*, note 1, 109 at 912.

> on the local authority the duty not to pass plans unless they comply with the byelaws or regulations and to pass them if they do.
>
> In these circumstances I have reached the clear conclusion that the proper exercise of the judicial function requires this House now to depart from *Anns* in so far as it affirmed a private law duty of care to avoid damage to property which causes present or imminent danger to the health and safety of owners, or occupiers, resting on local authorities in relation to their function of supervising compliance with building byelaws or regulations, that *Dutton* v. *Bognor Regis United Building Co. Ltd.* should be overruled and that all decisions subsequent to *Anns* which purported to follow it should be overruled. I accordingly reach the same conclusion as do my noble and learned friends.

The other law lords spent greater time reviewing developments in the law of negligence before reaching the same conclusion. Lord Keith considered the cases expressing doubts about the principle found in *Anns*.[115] Referring to the Master of the Roll's opinion in *Dutton*,[116] he said:[117]

> The jump which is here made from liability under the *Donoghue* v. *Stevenson* principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for the cost of rectifying a defect in such an article which is *ex hypothesi* no longer latent is difficult to accept.

Junior Books[118] was 'explained' as being an instance of the application of the *Hedley Byrne*[119] principle; involving, as it did, reliance and a close relationship of proximity.[120]

Lord Keith also pointed out that the loss in *Anns*[121] was properly regarded as being purely economic. Where there was no physical injury, the law as it stood at that time did not extend recovery past appropriate situations of negligent misstatement as in *Hedley Byrne*.[122] The *Rivtow*[123] majority was supported and explained as having been decided on the basis of *Hedley Byrne*[124] principles. Of *Anns*[125] he said:[126]

> Liability under the *Anns* decision is postulated on the existence of a present or imminent danger to health or safety. But, considering that the loss involved in incurring expenditure to avert the danger is pure economic loss, there would seem to be no logic in confining the remedy to cases where such danger

115. *Supra*, note 45. These remarks of Lord Keith can be found in *Murphy* at 914 *et seq.*
116. *Supra*, note 22.
117. *Murphy, supra*, note 1 at 918. Lord Denning's remarks are quoted in the text above (*Dutton, supra*, note 22 at 475).
118. *Supra*, note 61.
119. *Supra*, note 12.
120. *Murphy, supra*, note 1 at 919. The relationship was not quite contractual; the owner sued a subcontractor. Lord Keith was in the majority in *Junior Books*.
121. *Supra*, note 45.
122. *Supra*, note 12. See *Murphy, supra*, note 1 at 920.
123. *Supra*, note 32.
124. *Supra*, note 12. See *Murphy, supra*, note 1 at 921.
125. *Supra*, note 45.
126. *Supra*, note 1 at 922, 923. The term 'pure economics loss' is used in a broader sense. See note 100, *supra*.

exists. There is likewise no logic in confining it to cases where some damage (perhaps comparatively slight) has been caused to the building, but refusing it where the existence of the danger has come to light in some other way, for example through a structural survey which happens to have been carried out, or where the danger inherent in some particular component or material has been revealed through failure in some other building. Then there is the question whether the remedy is available where the defect is rectified, not in order to avert danger to an inhabitant occupier himself, but in order to enable an occupier, who may be a corporation, to continue to occupy the building through its employees without putting those employees at risk.

In my opinion it is clear that *Anns* did not proceed on any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been through that the law of negligence had any proper place.

... I think it must now be recognized that it did not proceed on any basis of principle, at all, but constituted a remarkable example of judicial legislation. It has engendered a vast spate of litigation, and each of the cases in the field which have reached this House has been distinguished. Others have been distinguished in the Court of Appeal. The result has been to keep the effect of the decision within reasonable bounds, but that has been achieved only by applying strictly the words of Lord Wilberforce and by refusing to accept the logical implications of the decision itself. These logical implications show that the case properly considered has potentiality for collision with long-established principles regarding liability in the tort of negligence for economic loss.

On this basis he agreed the case should be overruled.

Lord Bridge took a similar course. *Kamloops*,[127] however, was referred to as a further development of the *Anns*[128] doctrine. After mentioning English cases that had been critical of *Anns*[129] he saw what was required as a choice between following the Canadian position as shown in *Kamloops*[130] or the Australian position as set out in the *Sutherland Shire*[131] case. Lord Bridge said:[132]

The House has already held in *D & F Estates* that a builder, in the absence of any contractual duty or of a special relationship of proximity introducing the *Hedley Byrne* principle of reliance, owes no duty of care in tort in respect of the quality of his work. As I pointed out in *D & F Estates*, to hold that the builder owed such a duty of care to any person acquiring an interest in the product of the builder's work would be to impose on him the obligations of an indefinitely transmissible warranty of quality. ...

127. *Supra*, note 74.
128. *Supra*, note 45.
129. *Supra*, note 45.
130. *Supra*, note 74.
131. (1985) 60 A.L.R. 1 as quoted above.
132. *Supra*, note 1 at 929-30. At 927 Lord Bridge rejects the minority view of *Rivtow* as wholly unconvincing and 'dependent on the same fallacy that vitiated Lord Denning's judgment in *Dutton*.'

Accordingly, limits were required. These limits were seen to lie in reliance and close proximity. Lord Bridge added:[133]

> There may, of course, be situations where, even in the absence of contract, there is a special relationship of proximity between builder and building owner which is sufficiently akin to contract to introduce the element of reliance so that the scope of the duty of care owed by the builder to the owner is wide enough to embrace purely economic loss. The decision in *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1982] 3 All E.R. 201, [1983] AC 520 can, I believe, only be understood on this basis.
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> In *Sutherland Shire Council* v. *Heyman* (1985) 60 ALR 1 the critical role of the reliance principle as an element in the cause of action which the plaintiff sought to establish is the subject of close examination... a duty of care of a scope sufficient to make the authority liable for damage of the kind suffered can only be based on the principle of reliance and that there is nothing in the ordinary relationship of a local authority, as statutory supervisor of building operations, and the purchaser of a defective building capable of giving rise to such a duty. I agree with these judgments. It cannot, I think, be suggested, nor do I understand *Anns* or the cases which have followed *Anns* in Canada and New Zealand to be in fact suggesting, that the approval of plans or the inspection of a building in the course of construction by the local authority in performance of their statutory function and a subsequent purchase of the building by the plaintiff are circumstances in themselves sufficient to introduce the principle of reliance which is the foundation of a duty of care of the kind identified in *Hedley Byrne*.

He too agreed that *Anns*[134] should be overturned.

Lord Oliver found it fallacious to equate dangerous defects with the costs of averting danger before it occurred as the minority in *Rivtow*[135] had done. Proximity and the nature of the duty was of vital importance in determining liability, not simply the nature of the damage.[136] This is not to say that the type of damage is insignificant. It forms the starting point and will determine how strict the duty, or how close the degree of proximity, ought to be. Lord Oliver said:[137]

> I frankly doubt whether, in searching for such limits, the categorisation of the damage as 'material', 'physical', 'pecuniary' or 'economic' provides a particularly useful contribution. Where it does, I think, serve a useful purpose is in identifying those cases in which it is necessary to search for and find something more than the mere reasonable foreseeability of damage which has occurred as providing the degree of 'proximity' necessary to support the action.
>
> ... Lord Atkin's test, though a useful guide to characteristics which will be found to exist in conduct and relationships giving rise to a legal duty of care, is manifestly false if misused as a universal.
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> ... The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorized as wrongful it is necessary to find some

133. *Supra*, note 1 at 930.
134. *Supra*, note 45.
135. *Supra*, note 32. Lord Oliver's remarks on this point can be found in *Murphy, supra*, note 1 at 935-6.
136. See *Murphy, supra*, note 1 at 933-4.
137. *Supra*. note 1 at 934.

> factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required and it is one of the unfortunate features of *Anns* that it resulted initially in this essential distinction being lost sight of.

To look at things another way, there is little doubt that economic interests are regarded as less worthy of protection than physical loss or injury. Not every wrong entails a remedy. Not every instance of forseeable harm will found a duty. From a plaintiff's perspective, *Murphy*[138] narrows the scope of potential defendants.

If the case can be spoken of in general terms, several effects are clear. First, it is incorrect to ignore the type of loss involved and begin with an universal *prima facie* duty based on the mere foreseeability of damage.[139] Second, if the damage is economic, a much higher degree of proximity is required. The existence of a duty in these circumstances is a function of applying such as the restrictive principles of *Hedley Byrne*.[140]

The decision also reminds us to have regard to the statutory framework where the liability of public bodies is in issue. One of the problems with *Anns* was that it took its duty (albeit the wrong one) from common law. Imposing broad common law duties in the public sphere may not only cause a greater departure from principle than can be justified by the benefits of having the general public bear a risk, it may simply amount to judicial legislation.

The decision cautions us not to be misled by loss that has a physical element. Properly viewed, this too can be economic in the sense that the damage stems from a defect of quality.[141] Here a careful approach is required. If recovery is allowed outside a contract or a special relationship of proximity, there is the danger of creating the transmissible warranties spoken of by Lord Bridge. To avert this danger we are reminded to look critically at the nature of the loss.

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138. *Supra*, note 1.

139. In this regard, see Lord Oliver's remarks in *Murphy*, *supra* note 1, 109 at 934-5.

140. *Supra*, note 12.

141. In *Murphy*, *supra*, note 1 at 925, Lord Bridge said:

> If a dangerous defect in a chattel is discovered before it causes any personal injury or damage to property, because the danger is now known and the chattel cannot be safely used unless the defect is repaired, the defect becomes merely a defect in quality. The chattel is either capable of repair at economic cost or it is worthless and must be scrapped. In either case the loss sustained by the owner or hirer of the chattel is purely economic. It is recoverable against any party who owes the loser a relevant contractual duty. But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss.
>
> In *Fatehi*, *supra* note 99, Estey J. speaks of 'pure economic loss'. Though a defect in quality may not be pure economic loss in the sense used there, it is economic loss nonetheless and it merits careful treatment. Otherwise Mrs. McAlister would be entitled to a remedy against the manufacturer if her ginger beer had only been flat or somewhat less palatable than she had hoped.

Murphy[142] has returned the English common law to much the same position it was in pre-Dutton.[143] What remains is to ask whether this turn of events is significantly different from the way things now stand in Canada.

IV. CANADA

There are many decisions in Canada that follow *Anns*.[144] There are also instances of cases following the subsequent decisions expressing doubts about *Anns*[145] doctrine. The decision in *Murphy*,[146] however, does not entail that the cases following *Anns*[147] are fundamentally flawed. Nor does it mean there is necessarily an irreconcilable tension between cases which follow *Ann*[148] and those which follow decisions critical of that case.

So far as *Anns*[149] stands for the proposition that Lord Atkins' neighbour principle should be applied as a *prima facie* duty in cases involving negligent acts (or misstatements) and physical loss, it is not controversial. In these circumstances this is likely the test to be applied in any event. *Murphy*[150] does not change that. From a defendants viewpoint, there isn't any significant difference between using a *prima facie duty based on forseeability* and pointing to pre-*Anns*[151] decisions establishing foreseeability as the relevant test for proximity in that category of case.

The importance of *Murphy*[152] is that neither the neighbour principle nor the assumption of a duty based on mere foreseeability of damage is to be regarded as a universal starting point for negligence cases. This was the danger of *Anns*.[153] Circumstances, including the nature of the loss, determine the proper place to begin. Moreover, development of the existence of a duty in novel cases must occur incrementally, by category, on analogy with decided cases. But that *Anns*[154] or *Dutton*[155] cannot now be used as a common starting point will not affect many decisions outside the category of cases where economic loss is involved. The problem with

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142. *Supra*, note 1.
143. *Supra*, note 22.
144. *Supra*, note 45.
145. *Supra*, note 45. A notable example in Alberta is *Birchard* v. *Alberta Securities Comm.* (1987), 54 Alta. L.R. (2d) 302 per Agrios J.

In the *Just* case, *supra*, note 101 at 701, Cory J. mentions the *Yuen* decision and observes that the *Anns* two-step test should not be slavishly followed.
146. *Supra*, note 1.
147. *Supra*, note 45.
148. *Supra*, note 45.
149. *Supra*, note 45.
150. *Supra*, note 1.
151. *Supra*, note 45.
152. *Supra*, note 1.
153. *Supra*, note 45.
154. *Supra*, note 45.
155. *Supra*, note 22.

Anns[156] was that it invited application of the broad neighbour principle to situations involving economic loss.

Thus it would be an impossible and largely unnecessary task to review each Canadian decision referring to *Anns*[157] and go on to test it against the reasoning in *Murphy*.[158] For the reasons just given, much of this effort would be pointless. However, four cases in the Supreme Court of Canada involving economic loss: *Rivtow*,[159] *Central Trust*,[160] *Kamloops*[161] and *Hofstrand Farms*,[162] merit our review. They will give a rough answer about the effect *Murphy*[163] may have if courts here choose to follow it.

Rivtow[164] is a convenient starting point. The answer for that case is easy to provide. As mentioned above, *Dutton*,[165] *Anns*[166] and the dissent in *Rivtow*[167] line up together.

In England, when *Anns*[168] and *Dutton*[169] were overturned, the dissenting views in *Rivtow*[170] were subjected to strong criticism. Though *Rivtow*[171] was a slightly unusual case; concerning the duty to warn, the majority based their views about the existence of a duty on the restrictive principles set out in *Hedley Byrne*.[172] In this light it is consistent with the reasoning in *Murphy*[173] and so far as it is aligned with pre-*Dutton*[174] law, *Rivtow*[175] is unaffected by *Murphy*.[176] To a certain extent it formed the anchor that prevented Canadian cases from drifting too far.[177]

Central Trust v. *Rafuse*[178] also poses no problems. That case dealt with economic loss suffered by a client relying on his solicitors negligent advice. Though *Anns*[179] was applied with approval to concurrent liability in contract and tort, the elements of reliance

156. *Supra*, note 45.
157. *Supra*, note 45.
158. *Supra*, note 1.
159. *Supra*, note 32.
160. *Supra*, note 101.
161. *Supra*, note 74.
162. *Supra*, note 83.
163. *Supra*, note 1.
164. *Supra*, note 32.
165. *Supra*, note 22.
166. *Supra*, note 45.
167. *Supra*, note 32 per Laskin J. (Hall J. concurring).
168. *Supra*, note 45.
169. *Supra*, note 22.
170. *Supra*, note 32.
171. *Supra*, note 32.
172. *Supra*, note 12.
173. *Supra*, note 1. *Junior Books* was reconciled in this way.
174. *Supra*, note 22.
175. *Supra*, note 32.
176. *Supra*, note 1.
177. Note also *Haig* v. *Bamford* (1976), 72 D.L.R. (3d) (S.C.C.).
178. *Supra*, note 101.
179. *Supra*, note 45.

and close proximity were present. On this basis, its application of *Anns*[180] does not conflict with *Murphy*.[181]

The *Hofstrand Farms*[182] case involved economic loss arising from the failure of a courier to deliver documents in time. The court unanimously found there wasn't sufficient proximity between the courier and the injured third party, with whom the courier had not contracted, to found liability.[183] As has been noted above, Mr. Justice Estey applied a restricted duty from the outset.

The outcome of that case is consistent with an application of the reasoning in *Murphy*.[184] Only a broad test for proximity would have availed the plaintiff.

Mr. Justice Estey's *dicta* later in the decision suggests that *Anns*[185] and the neighbourhood duty may be a universal and proper starting point for negligence cases, generally. However, this portion of his speech is conservative in tone and refers to the need for the 'enunciation of a defined limit on liability capable of practical application.'[186] Nevertheless, the potential for conflict with *Murphy*[187] is obvious. It is hoped that the reasoning in *Murphy*[188] will be persuasive and that the limit spoken of by Mr. Justice Estey will be found in a return to earlier categories.

On first glance, *Kamloops*[189] poses the greatest obstacle to consistency between

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180. *Ibid.*

181. *Supra*, note 1.

182. *Supra*, note 83.

183. The courier also did not know of the importance of the documents. Though he had promised to deliver the documents the next day, his contract was with the Crown.

184. *Supra*, note 1.

185. *Supra*, note 45.

186. *Hofstrand Farms, supra*, note 83 at 228.

187. *Supra*, note 1.

188. *Ibid.*

189. *Supra*, note 74. *Rothfield* v. *Manolakos* (1989), 63 D.L.R. (4th) 449 (S.C.C) first appears to pose a similar problem. However, in that case the municipality approved what was a 'manifestly inadequate' design for a retaining wall. It was to be checked during construction but owing to a failure on the part of the owner/contractor to give the City notice, the wall was covered up before this could be done.

At issue was whether this failure prevented recovery: Dickson C.J.C., LaForest, Wilson, L'Heureux-Dube and Gonthier J.J. thought not; Cory and Lamer J.J. disagreed. The owner got a defective retaining wall. The neighbour's property was damaged when things went wrong.

Despite some broad remarks about the applicability of the *Anns* test, the degree of proximity was very high (similar to that in *Hedley Byrne* or *Junior Books* and higher than that in *Kamloops*) and the neighbour's loss was physical. The municipality had simply approved defective plans. (Note *Murphy supra*, note 1 at 928-9 per Lord Bridge.) This case need not create an insurmountable obstacle to the adoption of *Murphy* in Canada.

Canadian and English law. Lord Bridge in *Murphy*[190] appears to regard *Kamloops*[191] as having followed and further developed the *Anns*[192] doctrine.

With respect, there is little doubt the case can be viewed in this way. The 'private law duty', which was seen as an essential ingredient for the municipalities' liability, was founded on *Anns*[193] and the neighbour principle. However, that was not the end of the matter; the case can also be viewed narrowly.

The duty of the municipality, though it had been described as an obligation to protect the plaintiff from the builders negligence,[194] was similar to that found in rescuer cases. Having decided to take the positive step of issuing a stop-work order, it was obliged to follow it through; and, at the very least, forebear from issuing any further permits.[195] To put it another way, once a power is exercised there is a duty to do it well and completely within reasonable standards.

The claim was described as being based, ultimately, upon the 'breach of a private law duty of care arising under a statute'.[196] That was one of the features that distinguished it from the lawsuit between private litigants in *Rivtow*.[197] It was not simply an instance of recovering economic loss based in the neighbour principle. As noted above, Wilson J. said:[198]

> 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. ... 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.

These remarks appear to support a narrow view of the case. They do not suggest a broad principle where economic loss is concerned, and the neighbour principle, though it provided the starting point, does not also provide the conclusion. The findings of liability ended up being much qualified in context.

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190. *Supra*, note 1 at 924.
191. *Supra*, note 74.
192. *Supra*, note 45.
193. *Ibid.*
194. *Kamloops, supra*, note 74 at 29.
195. A plumbing permit was issued after the stop-work order, though that was explained as being done only so that the plumber could be paid.
196. *Kamloops, supra*, note 74 at 43.
197. *Supra*. note 32.
198. *Supra*, note 74 at 45. One wonders whether, if the English *Defective Premises Act* (U.K.), 1972 were substituted for 'public law duty' and 'statute' and the reasoning of *Murphy* applied to these facts, the outcome would be any different.

    A significant difficulty with *Anns* is that a broad private-law duty eclipsed the more limited public-law duty. The Act imposes a transmissible warranty of quality upon the builder, subject to time limits. Finding a co-extensive public-law duty to ensure compliance may not have been problematic. See *Murphy, supra*, note 1 at 929, 930 per Lord Bridge.

Indeed, Wilson J.'s remarks fit well with one of Lord Bridge's conclusions in *Murphy*. At page 929 he said:

> All these considerations lead inevitably to the conclusion that a building owner can only recover the cost of repairing a defective building on the ground of the authority's negligence in performing its statutory function of approving plans or inspecting buildings in the course of construction if the scope of the authority's duty of care is wide enough to embrace purely economic loss.

The similarity of these conclusions does not suggest the cases are irreconcilable.

Perhaps equally telling is Wilson J.'s judgement in *Hofstrand Farms*[199]; a case that failed on the basis of proximity. Had the test there been mere foreseeability of damage, it is submitted that the defendant ought to have been liable. The actual test used was much narrower. Hence, if it is correct to view *Kamloops*[200] in these terms, it may not necessarily conflict with *Murphy*.[201] At the very least it exhibits a cautious approach to economic loss which is consistent with the tenor of the *Murphy*[202] decision.

Anns[203] and the prospect of a *prima facie* duty of care restrained only by negativing policy reasons, has finally ceased to exist in England. In effect, the *Murphy*[204] case returns us to an earlier position; the neighbourhood principle for physical loss, and a special relation or reliance where economic loss is concerned.

So far as the cases reviewed above provide a representative sample, Canadian law appears not to have strayed far from this path. Though the effect of *Anns*[205] demise on the developing jurisprudence in Canada remains to be seen, it is doubtful the consequences will require revolutionary changes.

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199. *Supra*, note 83.
200. *Supra*, note 74. See also *Wirth* v. *City of Vancouver*, [1990] 6 W.W.R. 225 (B.C.C.A.) of *Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225 (Ont. H.C. Div. Ct.).
201. *Supra*, note 1.
202. *Ibid.*
203. *Supra*, note 45.
204. *Supra*, note 1.
205. *Supra*, note 45.