DEFECTIVE PREMISES LAW: TIME FOR REMEDIAL WORKS?

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> '*Caveat emptor* is the only motto going, and the worst proverb that ever came from dishonest, stony-hearted Rome.' ANTHONY TROLLOPE, *Phineas Redux* (1873)

Introduction

Considering the amount of time that has elapsed since its inception, the Defective Premises Act 1972 is a remarkably underused piece of legislation. This has been due in part to other, simultaneous, legal developments that have taken place, and also to the difficult wording the statute itself exhibits. This paper will analyse the developments that have taken place in the law relating to building defects, in addition to the problems and uncertainties that surround the duty enshrined in section 1 of the Defective Premises Act. It will be concluded that, with minor amendments to its statutory regime, the Defective Premises Act provides the most satisfactory route out of the legal quagmire that currently surrounds liability for defective building work.

The problem

A contract for the sale of a property will in almost all cases include a number of standard contractual warranties, provided to the purchaser. Thus, in respect of a newly built property a builder warrants that the property will be (i) constructed in a good and workmanlike manner, (ii) using proper materials, and (iii) fit for habitation at the moment of sale.[1] But what happens when the defects are encountered by a successive purchaser of that property, a party who has no direct contractual rights against the builder? What rights of redress, if any, does this purchaser have against the original builders or professionals responsible for the property's construction?

Until the 1990s, the answer to this question was a simple one that lay in the law of tort. For just over a decade, the ruling of the House of Lords in *Anns v Merton* provided for the recovery of damages where the owner of a property was faced with defects attributable to the negligence of a professional, designer or contractor.[2] Provided that it could be shown that the defects were sustained as a direct consequence of any negligent work carried out, the party responsible for that work could be held liable.[3] All that was necessary was to show a 'proximate relationship'; in the absence of countervailing policy considerations, a duty of care would be owed, and loss sustained as a result of a breach of that duty, whether physical or otherwise, was recoverable.

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1 *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901 (CA).
2 *Anns v London Borough of Merton* [1978] AC 728 (HL).
3 *Anns*, note 2, pages 751-752.

This move was, however, stopped resoundingly in its tracks in 1990. On just the 63rd occasion since Lord Gardiner LC's *Practice Statement*[4] of 1966 gave the House of Lords power to overrule its own decisions, the House opted in *Murphy v Brentwood District Council* to classify damages sustained as a result of defective building work as 'pure economic loss'.[5] The consequence of this was that, absent a 'special relationship' giving rise to an assumption of responsibility between the parties, recovery was precluded.[6] Lord Oliver stated:

> 'I have found it impossible to reconcile the liability of the builder propounded in *Anns* with any previously accepted principles of the tort of negligence and I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship.'[7]

The ruling came at the high point of Thatcherite conservativism in the United Kingdom and marked arguably the most restrictive development in the availability of recovery since the formulation of the modern law of negligence.[8] Scarcely any law students today would be unfamiliar with the facts or rule laid down in *Murphy*; and the factual matrices that might be capable of giving rise to the requisite 'special relationship' between the parties have been the subject of many an examination question. However, it is clear that the case might not rest on the rock solid foundations it might be expected to. The effect of the decision has been a far reaching one, and it has led to it being invoked as a blanket justification for the denial of recovery in defective building cases.[9] Yet, since *Murphy*, it can be seen that the courts have consistently been striving to find ways to mitigate or circumvent its effect and allow recovery for defects sustained as a result of inadequate building work.

Murphy: attempted solutions

The 'complex structure' theory

In the context of construction defects, an exception to their being classified as pure economic loss was contemplated in *Murphy* itself, having first been raised by Lords Oliver and Bridge in *D&F Estates v Church Commissioners*.[10] The 'complex structure' theory is one that attempts to break a building down into its constituent parts, to the extent that their construction was the responsibility of different parties or performed at different points in time. In

4 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).
5 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).
6 This liability originated from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), in the context of the tort of negligent misstatement.
7 *Murphy*, note 5, page 498B.
8 A development that came through the celebrated speeches of the majority in *Donoghue v Stevenson* [1932] AC 562 (HL Sc).
9 The direction taken by the law in the wake of the decision in *Murphy v Brentwood* was criticised by Professor Ian Duncan Wallace in '*Donoghue v Stevenson* and "complex structure": *Anns* revisited?' (2000) 116 Law Quarterly Review 530.
10 *D&F Estates Ltd v Church Commissioners for England* [1989] AC 187 (HL).

Jacobs v Morton,[11] Mr Recorder Jackson QC adopted this very approach, in holding that the constructors of a defective raft foundation could owe a duty to the subsequent purchaser of a house built on the raft when the house had to be demolished as a result of defects in the raft. It was explicitly noted that the raft was installed at a later date than the house itself, and that the party responsible for its installation bore no responsibility for the construction of the house. On that basis, it was held to be entirely appropriate that the installations could be viewed as separate where they were the responsibility of different contractors on different dates. The upshot was that defects in one part of the structure were capable of causing damage to another part of the same structure – thereby qualifying as physical damage.

It is fair to observe, however, that the 'complex structure' theory has come in for no small amount of academic and judicial criticism. Judge Humphrey LLoyd QC stated in *Payne v Setchell* that the theory was 'no longer tenable';[12] it was also rejected by the Court of Appeal in *Bellefield Computer Services v E Turner & Sons*.[13]

On this basis, the complex structure theory might best be consigned to the annals of history from which it originated. Clearly, it remains a highly artificial exercise to break down a building in this way; moreover, it leads to the (absurd) position whereby the smaller the proportion of work carried out by a builder, contractor or professional, the more likely it is that liability will be imposed upon them. Indeed, this very point was made nearly twenty years ago by the then Sir Robin Cooke:

> 'As a touchstone for answering practical questions it may not turn out to be reliable. A result suggested, though possibly not actually decided, by opinions in *Murphy* is that if a contractor supplies only part of a house, such as the electrical system or boilers or steel framing, he owes a duty of reasonable care to successive owners to safeguard them from economic loss caused by damage to other parts of the building; yet not if he supplies the whole house. The smaller the role, the greater the responsibility. It must be respectfully questioned whether such a distinction can survive.'[14]

Establishing a 'special relationship'

Other attempts to impose liability for construction defects have centred on the concept of a 'special relationship', capable of giving rise to liability for pure economic loss. The position as it stood after *Murphy* was that, where the requisite proximity or 'special relationship' could be established between the parties, one could be held liable for the pure economic loss suffered by the other – naturally, including construction defects. This 'special relationship' was considered further in *Henderson v Merrett Syndicates*:[15] the House of

11 *Jacobs v Morton & Partners* (1994) 72 BLR 92 (QBD)(OR).
12 *Samuel Payne v John Setchell Ltd* [2002] BLR 498 (TCC), para [40].
13 *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2002] EWCA Civ 1823.
14 Robin Cooke, 'An Impossible Distinction' (1991) 107 Law Quarterly Review 46, pages 50-51.
15 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

Lords found that such a relationship could exist where the defendant had voluntarily assumed responsibility for the economic interests of the other party, and where that defendant knew or ought reasonably to have anticipated that his advice, skill or expertise would be relied upon by that party. Such relationship existed independently of – and was capable of existing alongside – any contractual obligations that had been entered into.

Recent first instance decisions from the Technology and Construction Court have attempted to widen the circumstances in which such a relationship might be found to exist.[16] In *Tesco v Costain*, where Tesco had entered into a design and build contract with Costain for a supermarket that had subsequently been damaged by fire, Tesco claimed in respect of Costain's failure to design or construct adequate fire prevention measures.[17] Judge Seymour QC concluded, ruling on a number of preliminary issues, that nothing in *Murphy* prevented a builder from owing a duty in these circumstances, and that *Henderson* made it quite clear that such a duty could be imposed. He concluded:

> 'If the position now is, as I consider that it is, that anyone who undertakes by contract to perform a service for another upon terms, express or implied, that the service will be performed with reasonable skill and care, owes a duty of care to like effect to the other contracting party or parties, which extends to not causing economic loss, there seems to be no logical justification for making an exception in the case of a builder or the designer of a building'.[18]

Most recently, in *Robinson v PE Jones*,[19] Mr Robinson wanted to claim against the contractor who had constructed a new house for him in Cheshire, arguing that the gas flues had not been constructed in accordance with the applicable Building Regulations and needed repair. Limitation issues meant that, despite the existence of a contract, a potential tortious claim was the only one that was not time barred.[20] Judge Stephen Davies held that the fact of entering into a contract which incorporated a requirement to employ all reasonable skill and care was enough to ground a finding that there had been an assumption of responsibility by the contractor. As a result, the requisite 'special relationship' could exist between the parties.[21]

This is a surprising pronouncement, and its correctness might reasonably be doubted. Not only was it made clear in *Henderson* that the 'special relationship' is expressly *not* one founded on the existence of a contractual undertaking, but the consideration of pure economic loss issues by the House of Lords in *Customs and Excise Commissioners v Barclays Bank* included the finding that because the bank was required *by law* to comply with the relevant

16 The uncertainty created in the wake of those decisions, and the perceived inconsistency between the approaches taken by the courts in different circumstances, is highlighted by David Pliener in 'Outflanking *Murphy v Brentwood:* claiming in tort for pure economic loss' (2010) 26 Construction Law Journal 270.

17 *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC).

18 *Tesco*, note 17, para [230].

19 *Robinson v PE Jones (Contractors) Ltd* [2010] EWHC 102 (TCC).

20 By virtue of the latent damage provisions in s14A of the Limitation Act 1980.

21 However, the impact of specific terms in the contract was, the judge held, to negate the duty of care in tort asserted against the builder.

freezing injunction, it could not be said to have assumed responsibility.[22] Similarly, where a duty of reasonable skill and care is imported by law into a contract,[23] it is submitted that this is not of itself capable of grounding a voluntary assumption of responsibility by that party. Indeed, when *Robinson v Jones* reached the Court of Appeal, the court was similarly critical of the automatic finding of an assumption of responsibility based on the existence of a contract.[24] Rather, whilst the two were *capable* of being owed concurrently, the existence of a contract should be regarded neither as a necessary nor a sufficient condition for the existence of a special relationship and the corresponding duty of care in tort. That relationship is, unlike any contractual assumption of responsibility, based not on the intentions of the parties but on the facts of the case, in particular the actual nature of the relationship, in addition to any relevant policy factors militating in favour of or against the imposition of such a duty. Stanley Burnton LJ expressed the conclusion as follows:

> 'In my judgment, it must now be regarded as settled law that the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss.' [25]

Reactions to Murphy

The purpose of this paper is not to explore further grounds of challenge to the rule laid down in *Murphy*. Rather, it is submitted that the cases discussed demonstrate that, notwithstanding the origins of the decision in *Murphy*, its underpinning is not one that is regarded as universally appropriate, and methods have been sought to circumvent its effect, notwithstanding the academic dissatisfaction that might be (and has been) raised in respect of those efforts. It demonstrates, however, a clear motivation to permit the recovery of damages in respect of defective work that has been carried out in conjunction with the construction or provision of a property. In other words, in spite of the rule in *Murphy* and its underpinning, the courts have remained alive to the injustice it appears to produce in a number of situations.

In *Bellefield*, the Court of Appeal was clearly unhappy with the 'blanket' effect of *Murphy*. Schiemann LJ remarked:

> 'The judge [below] held that the case law, as it at present stands, indicates that a subsequent owner of the building can recover from a builder with whom he is not in any contractual relationship in respect of damage to his possessions in the building but not in respect of damage to the building itself. This conclusion, which seems odd, has been arrived

22 *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181.
23 For example, by way of s13 of the Supply of Goods and Services Act 1982.
24 *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9.
25 *Robinson*, note 24, para [92].

> at as a result of the application by the judge to the facts of this case of *control devices formulated in general terms*.[26] [*emphasis added*]

– by which he meant policy factors.

Moreover, it is submitted that the 'floodgates' arguments – namely the fears of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'[27] – are no longer justifiable, even if they ever were.[28] The proposition that parties plan in advance with regard to their contractual liability, but do not do so with regard to tort, cannot be regarded as valid – exposure to liability in tort is simply another factor that must be taken into account on a company's balance sheet when considering its prospective liabilities. The idea of parties inserting a choice of law clause into a contract to determine the law which will resolve any tortious disputes that might (or might not) arise between them would once have been considered unthinkable, but the 2007 Rome II Regulation on Non-Contractual Obligations enables parties – under precise conditions – to do exactly that.[29]

Lastly, it should be noted that the law relating to construction defects has not evolved in a uniform way across the Commonwealth. In particular, liability of the type arising from *Anns* persists in Australia[30] and Canada.[31]

The conclusion can be stated simply: *Murphy* is too restrictive a rule to represent the appropriate legal position with relation to construction defects. However, the prominence of the ruling in *Murphy* and its entrenchment in law is such that a reconsideration by the Supreme Court appears unlikely, at least in the near future. As a result, any development would therefore be required to be a legislative one. It is respectfully suggested that the instrument by which this might best be done is already on the statute book.

Enter the Defective Premises Act

The Defective Premises Bill enjoyed a somewhat unusual passage through Parliament, receiving a total of just one reading before the House of Lords. However, if it was hoped that this lack of Parliamentary discussion would be countered by a wealth of subsequent jurisprudence, such hopes were to be

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26 *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] BLR 97 (CA), page 100.

27 Cardozo CJ in *Ultramares Corporation v Touche* (1931) 174 NE 441 (New York Ct of Appeals), page 444.

28 For a thorough analysis of the policy factors regularly taken into account by the courts in this area of law, shortly after the decision in *Murphy v Brentwood*, see Jane Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 Law Quarterly Review 249.

29 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199/40 (31 July 2007), implemented by The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI 2008/2986).

30 *Bryan v Maloney* (1995) 182 CLR 60, as rethought by *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2004) 20 BCL 176, [2005] BLR 92 (High Ct Aus).

31 *Winnipeg Condominium Corporation v Bird Construction Co Ltd* [1995] 1 SCC 85 (Supreme Ct Canada). For an evaluation of the approaches taken in a number of common law jurisdictions, see also Asanga Gunawansa, 'Pure economic loss relating to construction defects – a comparative analysis' (2010) 26 Construction Law Journal 439.

dashed. Since its inception, the Defective Premises Act 1972 has to its name just 97 reported cases,[32] of which slightly fewer than half are before the appellate courts.

The Act is a short one, whose two principal provisions are contained within sections 1 and 4. This paper is concerned with the former, of which section 1(1) merits reproduction in full:

> 'A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty–
>
> (a) if the dwelling is provided to the order of any person, to that person; and
>
> (b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;
>
> to see that the work which he takes on is done in a workmanlike manner or, as the case may be, professional manner and so that as regards that work, the dwelling will be fit for habitation when completed.'

The Act's lack of use is attributable to a number of factors, the first of which was considered in the initial part of this paper (the pre-*Murphy* availability of remedies in tort). A second factor is section 2, which provides that section 1 does not apply where the dwelling is subject to an 'approved scheme'. This exemption applied, at the time the Act came into force, to the National House-Building Council (NHBC) *Buildmark* warranty. This provided (and still provides) a purchaser of a new property covered by the scheme with a guarantee in respect of specific categories of defect arising within a specified time. At its peak, this scheme covered almost all newly constructed properties in England and Wales; thus the actual number of properties to which the Act originally applied was drastically limited. Since the 31st March 1979, however, *Buildmark* has no longer been approved for the purposes of the Defective Premises Act.

The third, and perhaps greatest, difficulty relates to the wording of the duty enshrined in section 1, which might charitably be described as confusing.[33] Determining the content of this duty presents a number of challenges, yet is of utmost importance if the Act is to provide a satisfactory mechanism for the resolution of disputes arising out of construction defects.

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32 At the time of writing in January 2011. Since then, the Defective Premises Act has in fact been examined by the Court of Appeal on two occasions: in *Robinson v Jones*: note 24, and *Jenson v Faux*: note 42.

33 With some understatement, the learned authors of *Hudson's Building and Engineering Contracts* (London, Sweet & Maxwell, 12th ed, 2010) describe the duty as being 'oddly phrased'.

The content of the duty

Section 1(1) incorporates three principal elements: (i) good workmanship; (ii) proper materials; and (iii) fitness for habitation. The Law Commission, in its Report recommending legislation and draft Bill,[34] clearly envisaged three separate requirements, each of which must be met.[35] The explanatory notes to clause 1 of the draft Bill, the relevant wording of which was enacted unchanged, state explicitly: 'this clause will impose a threefold statutory duty …'. So it was clearly intended that the requirement that the dwelling be fit for habitation should be a free standing obligation.

However, such case law as there is confirms two things in order for a claim to be accepted: first, the property must be 'unfit for habitation' by result of the defective works; and second, defects not causing such an outcome are incapable of founding a claim.[36] This is to be applauded: it prevents liability being imposed in respect of trivial or inconsequential defects that do not affect the purpose for which a property is constructed. A building is not a Swiss watch, and it is to be expected that minor defects will manifest themselves over time. Furthermore, the requirement of 'fitness for habitation' is to be equated with a requirement of fitness for purpose, the not unreasonable conclusion being reached by the Court of Appeal that a residential property's main, if not sole, purpose is that of human habitation.[37]

What is a dwelling?

Another issue presents itself in relation to the Act's application only to claims in respect of a 'dwelling' – a more esoteric concept than might first be apparent. The Act itself provides no definition of a 'dwelling', nor have the courts formulated an authoritative one. Existing judicial statements indicate that the determination of this question is in all cases a question of fact. But the judges' approach to it has been informed by the Law Commission's Report and draft Bill on which the final text of the Act was largely based.[38] Paragraph 16 of the Report indicates that the Law Commission envisaged a distinction being drawn between residential properties on one hand and commercial and industrial ones on the other. This is echoed by *Clerk & Lindsell*, whose authors suggest that the Act provides purchasers of commercial property with no claim.[39] However, in *Catlin Estates v Carter Jonas*, Judge Toulmin viewed the issue as turning not on the *actual* use of the property in question but its *potential* to be used for residential purposes.[40] In this way, the fact that a hunting-lodge was used only intermittently for

34 Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1970): this provided the basis for enactment of the 1972 Act.

35 The same view is taken by Peter North in his essay following the introduction of the Defective Premises Act (1973) 36 Modern Law Review 628 (page 630).

36 See *Thompson v Clive Alexander* , QB (OR), 23 January 1992 [1955-95] PNLR 605, and, *obiter* on this point, *Alexander v Mercouris* [1979] 1 WLR 1270 (CA).

37 *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146.

38 Law Commission Report: note 34.

39 Michael Jones & Anthony Dugdale (general editors), *Clerk & Lindsell on Torts* (London, Sweet & Maxwell, 20th ed, 2010), pages 8-130.

40 *Catlin Estates Ltd v Carter Jonas* [2005] EWHC 2315 (TCC).

residential purposes was no obstacle to the finding that it was a dwelling house to which the Defective Premises Act applied. This conclusion was left intact when the limitation point in the case was re-examined by the Court of Appeal in *Bole v Huntsbuild*.[41]

It appears therefore that the courts have produced a formulation that differs from the original views of the Law Commission. As a result, the Defective Premises Act is no longer confined to the class of properties to which it was originally envisaged it would apply. It is suggested that this once again reflects the courts' perception that the remedies available in respect of construction defects remain unduly limited, so judges have seen fit to adopt ever more creative solutions in order to do practical justice on each set of facts. Nevertheless, it should not be forgotten that in 'pure' commercial situations, obligations are more likely to be determined on a contractual basis, as a result of negotiations between the parties. Further, assignment and novation provide frequently utilised mechanisms by which a successive purchaser can enjoy the benefit of those rights. By contrast, the greater degree of protection advocated in this paper is more clearly required in the domestic situations where the purchasing party does not have the freedom or strength of bargaining power to protect itself on a contractual basis.

Whilst the restriction of the statutory duty to residential cases might be appropriate, this by no means ensures that the definition of a 'dwelling' currently in use is satisfactory. This much is arguably apparent from the recent decision of the Court of Appeal in *Jenson v Faux*.[42] The court had to decide whether a number of conversion and repair works to a property in Battersea entailed the provision of a new dwelling (and thus attracting the statutory duty in section 1(1)) or not. In the view of Longmore LJ (with whom Etherton LJ and the Master of the Rolls concurred), this was '… more of a metaphysical issue than an issue which could helpfully be resolved by the assistance of expert evidence …'; and there was '… a grey area within which it would be genuinely arguable that a dwelling had so changed that it had a different identity from before …'.[43] In the present case, the issue was determined by '… detailed consideration of photographs and plans'.[44] With all due respect to the judges, this is hardly an approach that simplifies or clarifies the correct approach, and it is far from clear that detailed examination of photographs of the works in question is an efficient use of court time to resolve an issue that should in all but exceptional cases be capable of being determined long before the court hears the case. It is therefore hoped, albeit probably optimistically for the time being, that further clarification will refine this concept and indeed anchor it more in the physical realm, rather than the metaphysical.

41 *Bole v Huntsbuild*: note 37.
42 *Jenson v Faux* [2011] EWCA Civ 423.
43 *Jenson v Faux*, note 42, para [17].
44 *Jenson v Faux*, note 42, para [20].

The standard of care required

Having established the present day *content* of the duty in section 1(1), determining the *standard* of that duty presents even greater problems. Specifically, it remains unclear whether the duty is a strict one – to achieve the statutory objectives; or merely to make such efforts as are reasonable in all the circumstances to achieve compliance. Practically speaking, the quandary can be expressed thus: should an architect or professional, having designed a property that now exhibits defects rendering it unfit for habitation, be fixed with liability notwithstanding that he made all appropriate efforts and cannot be regarded as having acted negligently or otherwise?

It is submitted that, on a reading of the statute in its current form, the weight of authority suggests that there exists no justification or basis for reading section 1(1) as if it is enough for the relevant party to display all the skill and care that is reasonable in all the circumstances. Firstly, and most obviously, the words are not there: there exists no justification for reading words into a statute that do not appear there in the first place. Moreover, the duty in section 1(1) might helpfully be contrasted with the duty enshrined in section 4 of the very same Act: a landlord's duty of upkeep and repair in respect of a property. In section 4(1), the landlord owes 'a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect'. It is self-evident that this wording is different from that in section 1(1).

Based on the principle espoused in *SA Maritime et Commerciale v Anglo Iranian Oil*[45] – that when construing an Act of Parliament one should lean towards treating words as adding something, rather than as mere surplusage – the corollary is quite clearly that there is no basis for inserting words to mitigate the standard of the duty contained in section 1(1).

It is also expressly clear that the liability which section 1 imposes is not based on, or determined by, the incidence of negligence. Further confirmation, if it were needed, is provided by the Law Commission in its Report on Contributory Negligence.[46] Here, the statutory duty in the Act is distinguished from the contractual duties of reasonable skill and care that are implied by statute,[47] making it quite clear that it is envisaged that the duty in section 1(1) is different and not based on negligence or fault based liability.

Strict liability, but with a new defence?

Having established that the duty in section 1 is a strict one, it might usefully be considered at this stage whether this is *appropriate*. Manifestly, any duty imposing strict liability will inevitably be an onerous one, capable of giving

45 *SA Maritime et Commerciale of Geneva v Anglo Iranian Oil Co Ltd* [1954] 1 WLR 492 (CA), page 495 (Somervell LJ).

46 Law Commission, *Contributory Negligence as a Defence in Contract* (Law Com No 219, 1993).

47 Law Commission No 219, note 46, para 4.10, fn 27.

rise to significant injustice in some cases. It should be recalled that liability under the Act cannot be contracted out of.[48]

Indeed, strict liability fails properly to reflect the very nature of the work that is done by, for example, architects, engineers and other design professionals. Faced with a construction project, that party must apply his expertise in order to formulate a solution, based on his knowledge and experience, that will overcome that problem. No architect can ever know with 100% certainty that the solution will be free from problems, much less that it was in all cases the most desirable one to take.

Moreover, engineering and design practice is a continually evolving profession, and a whole plethora of materials and methods might be available in any given situation. Equally, the study of materials science is an ongoing one, in which new properties exhibited by particular materials might be discovered at any time. The point might well be illustrated by the high alumina cement saga: until the sudden loss of strength experienced by structures constructed with the cement was discovered, the material had been regarded as an entirely appropriate one for use in construction projects.

Just as the rule from *Murphy* was criticised earlier as being too restrictive to be concordant with public policy, it would be unduly harsh to hold a builder or construction professional liable when a material he had adopted exhibits properties that could simply not have reasonably been known to (or discoverable by) that party at the time that the design was adopted.

The solution proposed here therefore has its roots in the 'state of the art' defence enshrined in the Consumer Protection Act 1987: the Act provides that it shall be a defence to any claim in respect of a defective product to show, '… that the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control'.[49] The defence is therefore not based on showing reasonable skill and care, but instead refers to the state of knowledge at the time.

The position is complicated by the availability of British Standards, compliance with which is one of the prescribed ways of ensuring compliance with the relevant Building Regulations. A British Standard for a particular material will frequently set out the properties of a material, and will note applications of that material that are or are not advisable. Many of the existing British Standards have been supplanted by pan-European 'Eurocode' specifications, produced by the European Committee for Standardisation. The problem will arise where a material exhibits a particular failure or defect following its application in compliance with the relevant Eurocode (or British Standard) in force at the time. In such cases, it may be that the most

48 Defective Premises Act 1972, s6(3).

49 Consumer Protection Act 1987, s 4(1)(e), giving effect – but not in identical words – to article 7 of Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L210/29 (7 August 1985).

appropriate avenue for claim is not against the builder or professional but against the regulatory body responsible for the production of that design standard.

The 1972 Act and limitation of actions

The Act's final limiting factor is precisely that: the extremely restrictive limitation period which section 1(5) sets down. Time starts to run at the date of completion of the work, irrespective of when the defects manifested themselves, and expires six years later.[50] This is despite the latent damage provisions inserted into the Limitation Act 1980 by the Latent Damage Act 1986: these apply only to claims based in tortious negligence and therefore leave the limitation period under the Defective Premises Act unchanged.[51]

Proposals have been made to modify the limitation period, the most far reaching of which come from the most recent Law Commission report.[52] This proposed a limitation period running from the time of discoverability – which, in a case involving construction defects, could well be some time after the work has been completed.

It should be remembered that a limitation defence is at best a technical defence rather than a substantive one; its effect is that a party's claim is barred in its entirety. To the extent that doing so is not wholly justified on public policy grounds, the position is an unsatisfactory one. It is therefore important that the limitation period enshrined in section 1(5) of the Act should be modified so as to run from the point at which the defect arose or could have been discovered, so that the majority of claims are not already time barred at the point at which they are first contemplated.

Conclusions

The approach taken to liability for construction defects taken by the English courts is unduly restrictive, and at odds with the demands of practical justice in many individual cases. It is inappropriate to blithely designate all such losses that arise as pure economic loss on the basis of policy reasons that are not appropriate in the modern day. To that end, the courts have attempted to find a number of ways around the rule laid down by the House of Lords in *Murphy*, with varying degrees of success. However, in our view the issue is too fundamental to turn on the number of fine distinctions that have currently been drawn: a clearer approach is required.

The underused Defective Premises Act 1972 provides a potential safety net, although there are a number of problems with that statute that largely derive from its initial design. Of those problems, a number are no longer of relevance today. However, the wording of the duty in section 1 of the Act is, in the absence of jurisprudence from the senior courts, in dire need of

50 Limitation Act 1980, s2.

51 For early criticism of this position see Richard James, 'Defective premises and limitation periods' [1998] Conveyancer and Property Lawyer 466.

52 Law Commission, *Limitation of Actions* (Law Commission No 270, 2001).

clarification. Further, the limitation period under the Act is far too restrictive, taking the wrong event as the starting point from which time will run. That this limitation period has not already been reformed is a cause for surprise; indeed, it has been considered, recommended and indeed all but approved on a number of occasions. It would not be a difficult step to take to amend the Act so that time runs from discoverability, subject perhaps to an overall long-stop.

Concerns relating to the duty itself are, however, more problematic. The Act is not a negligence based statute, yet the evolving nature of the industry it covers entails that strict liability is too onerous a standard, with the potential to produce some unjust results. It is therefore suggested that the lead be taken from the Consumer Protection Act 1987: that a 'state of the art' defence, based on the available knowledge at the time the relevant work was done, be inserted into the Act. This would have the advantage of meeting the demands of public policy, and also of providing the opportunity for Parliament to clarify the standard of the duty in section 1(1) without the need to wait for appellate jurisprudence.

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