In what circumstances may construction professionals, contractors and sub-contractors still owe liability in tort, long after completion, to those now affected by defects in the completed project?

Introduction

In regard to third party claims in tort, professionals and contractors may appear to have protection by means of the doctrine of privity of contract and the decision in *Murphy*[1]. It is however apparent that the speeches of the Law Lords suggest that liability may remain in certain categories of harm.

Negligence is the most frequently used source of action in tort regarding defects, therefore it will be the subject of primary examination. Other tortious avenues will be reviewed but in less detail.

The limitation of action periods will be stated in order to define the parameters of "long after completion".

Whether clarity and predictability currently exist together with the adequacy of the support of principle is to be discussed within the body of this paper albeit summarised within the conclusion.

Murphy v Brentwood[2]

The House of Lords overruled its decision in *Anns*[3] on the law governing the liability of local authorities for the inspection of foundations. The case re-established English Law's reluctance to provide a remedy for economic loss. Additionally, *Murphy*[4] also re-affirmed the concepts of restricting negligence claims to "other property"[5] and provided an exception for buildings close to a boundary where injury may be caused on neighbouring property.

The difficulty of "other property" within construction led to the development of the *complex structure theory* suggested by Lord Bridge in *D & F Estates Ltd v Church Commissioners*[6]. Lord Bridge was later qualified the theory in *Murphy* [7].

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[1] [1991] 1 AC 398
[2] n 1
[3] Anns v Merton London Borough Council [1978] A.C. 728
[4] n 1
[5] Under the principles established in Donoghue v Stevenson [1932] AC 562
[6] [1989] AC 177
[7] [1991] 1 AC 398, 478-479 "A critical distinction must be drawn between some part of a complex structure which is said to be a "danger" only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated"

The speeches of Lords Bridge and Jauncey proposed that the *complex structure theory* could be successfully argued where the defective part was not supplied by the supplier of the building and is a distinct component or item within the building.

With regard to buildings on boundaries, Lord Bridge[8] also took the opportunity to state his view that there should also be an exception on the grounds of safety[9]:

> "… if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger…"[10]

Negligence

Duties of Care

The potential duty of care situations which are owed by professionals, contractors and subcontractors can be categorised by the type harm (the gist of the action in negligence) that result from defects[11] in construction projects:

i. Physical Injury to the person
ii. Damage to "other property" that the claimant has a propriety right in[12] (the damage must be to property other than supplied by the tortfeasor).
iii. Economic loss resulting from a negligent misstatement[13] in a special relationship based upon reliance on advice or where there is a voluntary assumption of responsibility.
iv. Economic loss from being within special circumstances that might give rise to a duty of care.

The current test for establishing a duty to avoid causing any of these categories comprises of three stages; foreseeability, proximity and that of fair, just and reasonable. Saville LJ in *Marc Rich v Bishop Rock Marine*[14] stated:

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[8] n 1
[9] Pure economic loss
[10] Lord Ackner, Lord Oliver, Lord Jauncey and Lord Mackay agreed with Lord Bridge
[11] Flaw in design, or workmanship; the defect may or may not give rise to damage
[12] An exception to the proprietary rule was created by the Latent Damage Act 1986 s3 where damage caused to property remains latent until discovered by a subsequent owner.
[13] The principle established in Hedley Byrne & Co v Heller & Partners [1964] AC 465
[14] [1996] 1 AC 211

> "… in most cases of the direct infliction of physical loss or injury through carelessness, it is self evident that a civilised system of law should hold a duty of care has been broken, whereas the infliction of financial harm may well pose a more difficult problem."

The standard of service expected of a professional was expressed in Bolam[15], and whilst still good law has been refined to include:

- The Judge deciding what the appropriate standard of care was[16];
- The relevant standard is that of a competent practitioner at the time when the services were performed[17].

Physical Injury to the Person

Actionable harm may arise by means of injury occurring on neighbouring property where a building is close to a boundary. The duty of care owed in this circumstance is under the principle in *Donoghue v Stevenson*[18].

In *Morse v Barratt*[19] a wall was deemed unsafe by the local authority compelling the owners to carry out remedial works. It was held that the cost[20] of the works could be recovered from the builders whose negligent workmanship had caused the danger. This can be contrasted with the decision in *George Fischer v Multi Design*[21] where losses from repairs to a dangerous roof were held irrecoverable as the danger of injury was to persons on the same property. So although the defect was only a threat[22], liability may exist if it is to property or persons on other land.

Another duty, particularly associated with designers, that was identified in the case of *Eckersley v Binnie*[23], is the requirement to warn about dangers in completed work. Professionals have to keep themselves reasonably up to date on their professions developments. Bingham LJ defined the standard as:

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[15] [1957] 1 WLR 583. Standards which must be in accordance with a responsible body of opinion, even if others differ in opinion.
[16] JD Williams v Michael Hyde Associates [2001] BLR 99
[17] Nye Saunders v A E Bristow [1987] 37 BLR 92
[18] [1932] AC 562. "The rule that you are to love your neighbour becomes in law you must not injure your neighbour" Lord Atkin p581
[19] [1992] 9 Const LJ 158
[20] This loss can be classed as purely economic however should be recoverable as per Lord Bridge's obiter speech in Murphy.
[21] [1998] CILL 1362
[22] Reasoning in Dutton v Bognor Regis Urban District Council [1973] 1 QB 373 CA and Anns v Merton London Borough Council [1978] A.C. 728
[23] [1988] 18 Con LR 1

> "A professional man should command the corpus of knowledge of the ordinary member of his profession. He should not lag behind… in knowledge of new advances, discoveries and developments in his field. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combing the qualities of polymath and prophet."

In what was a dissenting speech, Bingham LJ also suggested that this particular duty was more likely to be imposed where personal injury was the consequence.

Damage to "Other Property"

A negligent professional, contractor or sub contractor will not be liable in tort for any damage to the building itself but will be liable for "other property" damaged by a defect. The question of what constitutes "other property" is the basis for establishing liability in construction cases. Two categories can be identified:

i. Goods not supplied by the tortfeasor but in which the complainant has a proprietary right.
ii. A part of a building which is distinct from another part and not supplied by the tortfeasor.

> "… where one integral component of the structure was built by a separate contractor and where a defect in such a component had caused damage to other parts of the structure..."[24]

In *Bellefield v Turner*[25], the court held that the owner of a building could recover from the builder the loss resulting from damage to stored goods due to firestopping not being installed correctly; they could not however recover for the damage to the building or goods damaged prior to the fire passing the inadequate firestopping.

It is apparent from *Murphy*[26] that liability for harm by means of the *complex structures theory* could only apply to sub contractors rather than main contractors. Designers of distinct elements of a building (especially if added at a later date to the original construction) will incur liability if damage occurs to the original structure. In *Jacobs v Morton*[27] the defendants approved the design and supervised

[24] Murphy v Brentwood District Council [1991] 1 AC 398, Lord Jauncey page 497
[25] [2000] BLR 97
[26] n 24
[27] [1994] 72 Build LR 92

the installation of supplementary foundations to repair cracking in a property. Jacobs, the current owners brought an action against Morton in tort when further cracking occurred. The judge held that the foundations which had caused damage to the property were separable from the property itself and therefore the case was treated as falling within the *complex structure* exception.

Economic Loss Resulting from a Negligent Misstatement

It remains possible to recover financial losses under the principle affirmed in *Hedley Byrne v Heller*[28], if a proximity test of either reliance on advice or voluntary assumption of responsibility is proved. Lord Oliver enunciated the first of these tests in *Caparo v Dickman*[29].

Due to the nature of their roles, it would initially appear that this category of loss applies to professionals but not to contractors or subcontractors.

Prior to *Murphy*[30], the judges in *Pirelli v Oscar Faber*[31] regarded damage to a chimney, due to the defendant's incorrect specification of materials, as physical. Lord Keith[32] however, suggested that the loss was economic and fell under the principles of *Hedley Byrne*[33] as reliance on advice.

In *Jarvis v Castle Wharf*[34], a case that demonstrates that it is not just designers who may be liable for their careless statements, the court held that a quantity surveyor could owe a duty of care to contractors who relied upon their representations.

The second test was affirmed in *Henderson v Merrett Syndicates*[35]

Lord Goff in the same case also considered that this reasoning would not apply to some construction relationships:

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[28] [1964] AC 465

[29] [1990] 2 AC 605, p645. "The damage which may be occasioned on by the spoken or written word is not inherent. It lies always in the reliance by somebody on the accuracy of that which the word communicates and the loss or damage consequential on that person having adopted a course of action on the faith of it"

[30] n 1

[31] [1983] 2 AC 1

[32] [1991] 1 AC 398, p446

[33] n 28

[34] [2001] Lloyd's Rep PN 309

[35] [1994] 3 All ER 506, 188, Lord Goff, "If a person assumes responsibility to another in respect of certain services there is no reason why he should not be liable in damages (to) that other in respect of economic loss which flows from the negligent performance of those services."

> "For there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."

However in *Barclays Bank* v *Fairclough Building*[36], specialists engaged to clean an asbestos roof used pressure washers but without taking due care. As a result water containing asbestos entered the building. It was held that the specialist owed a duty of care to the contractor in respect of the economic loss suffered by it (the cost of remedial works). The point of principle was dealt with by the court:

> "A skilled contractor undertaking maintenance work to a building assumes a responsibility which invites reliance no less than the financial or other professional adviser does in undertaking his work.

The lack of a voluntary assumption of responsibility was the reason given by the court in *Pacific Associates v Halcrow*[37] for rejecting the imposition of liability on an Engineer regarding claims of negligent supervision.

On the facts the defendant in *Mirant v Ove Arup*[38] was in breach of its duty to ensure the suitability of the design and was held to have assumed responsibility to its client for economic loss.

Economic Loss within Special Circumstances

The case of *Junior Books v Veitchi*[39] regarding a specialist flooring contractor that had been engaged as a nominated subcontractor to lay a floor at the claimant's factory, represents another possible area of liability for contractors and sub contractors. *Junior Books*[40] claimed the cost of relaying a defective floor and other financial losses. The House of Lords decided that on the unique facts of the case there was a sufficient degree of proximity between the parties. It was foreseeable that financial loss would be incurred, there was reliance on skill and experience

[36] [1995] 44 Con LR 35
[37] [1990] 1 QB 993
[38] [2005] 97 Con LR 1 TCC
[39] [1983] 1 AC 520 HL
[40] n 39

and Veitchi were taken to have known of that reliance. The House of Lords in three subsequent cases[41] have emphasised the uniqueness of this decision.

In the more recent case of *Architype v Dewhurst McFarlane*[42] the decision in *Junior Books*[43] was relied upon by the claimant on the basis that it was still good law. Architype appointed Dewhurst as its sub-consultant. Defects found in the structural work required remediation. Claims were brought on Architype who in turn claimed monies from Dewhurst. Judge Toulmin concluded that unless the circumstances in this case were identical to *Junior Books*[44], he was not bound by it.

Concurrency Issues

It has been established that liability can arise in both contract and tort in relation to economic loss[45] therefore professionals, contractors and sub contractor may face an action in tort despite having a contractual relationship with the claimant.

In a recent case, *Robinson v P.E. Jones*[46], it was held that the general rule that a builder is not liable for economic loss, is not intended to exclude circumstances where there was a "special relationship of proximity" for example, when the builder is also in a contractual relationship with a client. However, in this case the contract agreed between the parties expressly excluded liability for defects, therefore the court refused to impose any greater liability in tort.

Defective Premises Act 1972

The Act[47] imposes a statutory duty on professionals, contractors and sub contractors who take on work providing a dwelling; that the work is carried out in a workmanlike manner, built with proper materials, and is fit for habitation.

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[41] D & F Estates v Church Commissioners for England Caparo Industries v Dickman Murphy v Brentwood
[42] [2004] 96 Con LR. 3 TCC
[43] n 39
[44] n 39
[45] Midland Bank Trust v Hett Stubbs & Kemp [1979] Ch 384, 521-522, Oliver J, "A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omissions that would constitute the tort. Subject to this qualification, where concurrent liability in tort or contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any legal consequence"
[46] [2010] EWHC 102 TCC
[47] Section 1

The Court of Appeal in *Bole v Huntsbuild*[48] held that an Engineer had negligently designed foundations to a house. The Engineer unsuccessfully argued that the cracks didn't make the house uninhabitable and each crack should be considered individually. It was held that as the claimants had to relocate whist underpinning was carried out the uninhabitable condition of the property was proven and as all the cracks resulted from one fundamental defect they should be considered as a whole.

Other Areas of Liability

Personal injury or damage to "other property" claims may be available under the Consumer Protection Act 1987 (with certain restrictions[49]).

It is conceivable that circumstances may arise when latent defects cause interference to the *natural right to support*[50] of neighbouring land. In these circumstances it may be possible that an action can be brought in the law of real property[51].

With respect to *natural right to support*[52], liability applies to damage to land; buildings damaged in the same way are only owed an easement of support by contract or by prescription[53].

Limitation of Actions

Prior to *Pirelli*[54], time started to run on discovery of damage and subsequently, when damage occurred. The House of Lords expressed certain dissatisfaction with this rule and suggested that the matter was clarified by means of statute. As

[48] [2009] EWHC 483 TCC

[49] Section 46(3) … the performance of any contract by the erection of any building or structure on any land or by the carrying out of any other building works shall be treated for the purposes of this Act as a supply of goods in so far as, but only in so far as, it involves the provision of any goods to any person by means of their incorporation into the building, structure or works.

[50] Established in Charles Dalton v Henry Angus & Co [1880] LR 6 App Cas 740 (HL)

[51] Analogous to private nuisance albeit in Xpress Print Pte Ltd v Monocrafts Pte Ltd [2000] 3 SLR 545 (CA Singapore), p170, Young CJ stated "But there is in our view another ground on which the liability of the defendants can be based. That is the ground of negligence. Quite apart from any considerations of interference with or disturbance of an easement (which could conceivably occur without negligence) what the defendants did in the present case imposes responsibility on them for the damage which the plaintiffs sustained..."

[52] n 50

[53] The doctrine of 'lost modern grant' where if the owner of the affected building acts as if he has the benefit of the easement for a minimum of twenty years and all the other conditions for the creation of an easement are satisfied

[54] n 31

a result the *Latent Damage Act 1986* was inserted into the *Limitation Act 1980*[55]. The resultant limitation periods are:

- 6 years from the date on which the cause of action accrued (problem became known about, subject only to a counterclaim that it should have been reasonably discovered earlier);
- 3 years from the date when the claimant knew he had an action or from the date damage was discovered (whichever happened first);
- Subject to a long-stop of 15 years from the date of the negligence.

The limitation period under the DPA[56] is 6 years from when the dwelling is completed or from when further work is carried out[57].

Under the CPA[58] claimants are subject to a limitation period of 3 years from discoverability with a 10 year long stop.

Conclusion

The principles supporting the decision in Murphy[59] may be justified by policy[60] however does this override the irrationality of excluding participants in construction projects from liability for their negligent acts that cause latent defects? Other Commonwealth law jurisdictions have successfully overcome these policy concerns and currently allow recovery of pure economic loss[61]. Other property ok, injury ok, economic (courts seem to find reasons for different judgments)?

On the examination of a number of cases since *Murphy*[62], it is evident that current English Law in this area is neither clear nor predicable.

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[55] Sections 14A and 14B
[56] Defective Premises Act 1972
[57] Section 1(5)
[58] Consumer Protection Act 1987
[59] n 1
[60] The floodgates theory was that economic loss would not be recoverable in negligence where the loss was too remote or where it would be impossible to contain liability in other cases within acceptable bounds. Local Authorities should not be liable for the omissions of negligently passing for regulation purposes, the negligent act of construction professionals, contractors or subcontractors
[61] Malaysia does not allow recovery of pure economic loss. Canada allows recovery of pure economic loss for dangerous latent defects.
[62] n 1

The comparative clarity of liability for personal injury and to 'other property' compared with economic loss is nonetheless unpredictable. This is illustrated in *Baxall v Sheard Walshaw*[63] , where it was held that the defect in question was not latent because of reasonable discoverability, however in *Pearson Education Limited v The Charter Partnership Limited*[64] regarding a similar defect; it was held there was no reason to expect a survey to be carried out that have might disclosed any error.

Recovery for economic loss in tort where a contract exists was allowed in *Storey v Charles Church*[65], which involved foundation design. The court held that the principle in *Hedley Byrne*[66] could apply. This case can be contrasted with *Samuel Payne* v *John Setchell*[67] . Here the judge relying on *Murphy*[68] stated that the builder did not owe a duty for care to anybody to avoid causing such loss or damage unless it was physical injury to persons or damage to property other than the building itself.

It is apparent that the liability of a professional for economic loss is greater than that of a contractor. The legal reasoning can be understood; it is the basic justification for this that does not seem to have foundation.

The argument that owners[69] of dwellings should have greater protection from economic loss than those of other buildings is substantiated on moral grounds. This additional liability was tempered however, by stipulating a confined limitation period opening the argument for inclusion of 'other buildings' on the same basis.

Liability in the law of real property[70] under this heading will not arise outside contract until a building has been in place for twenty years. The Chief Justice in Xpress Print[71] expressed his dissatisfaction with this point of law:

> "…the proposition that a landowner may excavate his land with impunity, sending his neighbour's building and everything in it crashing to the

[63] [2002] B.L.R. 100, CA
[64] [2006] PNLR 14
[65] [1995] 73 Con LR 1
[66] n 33
[67] [1995] 73 Con. L.R. 1
[68] n 1
[69] All with a proprietary interest
[70] n 51
[71] n Xpress Print Pte Ltd v Monocrafts Pte Ltd [2000] 3 SLR 545 (CA Singapore)

> ground, is a proposition inimical to a society which represents each citizen's property rights…"

The introduction of the Contract (Rights of Third Parties) Act 1999 together with the emergence of collateral warranties have gone some way to transferring a substantial proportion of claims from Negligence to Contract. Due to the potential of extended limitation periods and in the absence of contract remedies, there still remains a requirement for predictable law supported by principle; until a landmark case reaches the Supreme Court or a statute is passed, Murphy will be followed, manipulated and even contradicted as judged by circumstances.

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