Defective Premises: Rethinking *Murphy v Brentwood*

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A. Introduction

The case of *Anns v Merton LBC*[1], perhaps best remembered for its short-lived two-stage test of 'duty', posed the question of whether a local authority was under a duty of care with respect to inspection of foundations. The complaint centred on a defect in a building's foundations which had caused subsidence, leading to the appearance of cracks in the building's walls. The House of Lords allowed a claim for the recovery of repair costs, with Lord Wilberforce opining that the claimant had suffered 'material physical damage'[2]. Such *dicta* was later cast into serious doubt in the House of Lords' decision in *D & F Estates Ltd v Church Comrs for England*[3], before being completely rejected in *Murphy v Brentwood DC*[4], where their Lordships felt the need to invoke the *Practice Statement* of 1966 only for the eighth time in its near-quarter century of existence to depart from *Anns*.

Much of the thinking underpinning these decisions, it will be suggested, has been tainted by an unfortunate fixation with the anterior, metaphysical question of categorisation of damages, equivocating perilously between 'physical' and 'purely economic'. In the final analysis, this vexed issue of labels is otiose, since it is patent that the cases in reality turn upon the weighing of policy considerations. For this very reason, by drawing on jurisprudence from other common law jurisdictions, it will first be contended that good policy dictates the extension of liability to embrace claims concerning *dangerous* premises, where the premises endanger either the physical safety of the occupant (*Anns* liability only goes so far), or the personal possessions of the occupant.

Having proposed what the law on defective premises should be on policy grounds, this essay will then dissect how the courts may go about achieving this desired result. Three doctrinal approaches will be put forward, each capable of achieving the same end. First, a possible pathway would be to classify *Murphy*-type cases as falling within the rubric of physical damage, as opposed to pure economic loss. Secondly, the courts could retain the 'other property' requirement, but instead create a *sui generis* form of physical damage, embodying present and imminent threats to either an occupant's health and safety, or his personal property. Thirdly and finally, even if one were to adhere to their Lordships' classification in *Murphy*, it will be argued that *Murphy* ought to have fallen within the broad exceptions to the general exclusionary rule *vis-à-vis* pure economic loss, namely the 'assumption of responsibility' exception. It would, alternatively, be just as open to our courts to create a further exception which deals with cases where pure economic loss is incurred in order to remedy defects that may cause actionable damage (*viz.* personal injury or property damage, in the matrix of dangerous defective premises).

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* Jesus College, Oxford. I am grateful to my tutors, Professor Peter Mirfield and Associate Professor Sarah Green, as well as the associate editors at OUULJ for their perceptive comments on earlier drafts. All remaining errors are, of course, my own responsibility.

[1] [1978] AC 728 (HL).

[2] ibid [40].

[3] [1989] AC 177 (HL).

[4] [1991] 1 AC 398 (HL).

B. What the law should be: a question of policy

i) Surveying the case law

In *Anns*, Lord Wilberforce said:

> 'To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.'[5]

The House of Lords, in two subsequent decisions, however, chose to move in a completely different direction. The first sign of what was to come was the decision in *D & F Estates*. The claimants were, respectively, the lessee and the occupiers of a flat in a building which was owned by the first defendants. The building had been erected in 1963-5 by the third defendants (the builders) who had engaged a sub-contractor to carry out the necessary plastering work. The builders believed the sub-contractor to be skilled and competent but in fact the sub-contractor carried out the work negligently. In 1980, the claimants found that the plaster in their flat was loose and brought an action against the builders claiming the cost of remedial work. On appeal to the House of Lords, their Lordships took the parties, and most of the legal world, by surprise[6] when they rejected any application of the *Anns* doctrine to private defendants such as developers, designers or builders. In coming to this conclusion, the House specifically repudiated the view that a subsequent purchaser's claim against a negligent builder for repair of defective foundations was classifiable as damage to property and reasoned that being purely economic loss, it was not compensable in tort. Damage to property meant damage to *other* property, not to the very product which was defective at the outset.

On the other hand, the House understandably perceived themselves as bound by *Anns* as regards the undoubted liability of public byelaw authorities which had been established by that case, and opted to leave that aspect of the decision intact – at least for the time being. But then came along the decision of *Murphy*. There, the claimant was the purchaser of one of a pair of houses, the design of which had been approved by the council on the recommendation of independent consulting engineers. Some ten or more years had passed when cracks began to appear in the walls of the house. The claimant was unable to afford remedial work, which anyway would have been uneconomical, and thus sold the house for £35,000 less than its estimated worth. What was in issue was the negligent performance of the express primary statutory duty of design control by a byelaw authority – namely to pass the plans in every application submitted which complied with the byelaws, and to reject the plans whenever they did not. It was not disputed that the council, through its processional agents had negligently passed foundation plans which were not capable of fulfilling their function. Nonetheless, the House of Lords held that

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[5] *Anns* (n 1) [40]. This was criticised in *Murphy* (n 4) [45] as not proceeding 'on any basis of principle at all, but [constituting] a remarkable example of judicial legislation'. However, Lord Wilberforce's suggestion is not nearly as novel and far-fetched as their Lordships have portrayed it to seem. A similar classification was made some years earlier by Lord Denning MR, in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 396: 'The damage done here was not solely economic loss. It was physical damage to the house.'

[6] See, for example, Peter Cane, 'Economic loss in tort: is the pendulum out of control?' (1989) MLR 200; Malcolm Ross '"Another Fine Mess…"' (1989) PN 11; Elizabeth Jones, 'D & F Estates: a lawyer's lament' (1989) SJ 280.

the claimant's loss was not actionable, again mainly on the ground that it constituted pure economic loss.

ii) A metaphysical question

The fulcrum of the House of Lords' reasoning in both *D & F* and *Murphy* is the notion that a 'pure' defective premises claim – in the sense that it involves no property other than the defective property itself being damaged – falls strictly within the scope of pure economic loss. Their Lordships held that the claimant in such cases has only suffered loss or damage represented by the actual inadequacy of the foundations, that is to say, the pecuniary cost of remedying structural defect in the property which *already existed* at the time it was acquired. The only property which could be said to have been 'damaged' – if that is the right description at all, on this account – is the building itself, since, as their Lordships noted, the building never existed otherwise than with its foundations in that defective state. The upshot is that, '[i]f the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic'[7]. On this view, the essence of the complaint in *D & F* and *Murphy* was that the house was imperfect from the beginning. It was not 'harmed' or 'damaged' in any germane way. Rather, it was simply worth less than what the claimant had paid for it, and the loss was, properly understood, economic as opposed to physical in nature.

At first blush, this carries much force if one accepts as sacrosanct the basic premise that actionable property damage must perforce be done to other property. Such a proposition in the context of defective premises, however, did not appeal to the House of Lords in *Anns*, which chose instead to allow such claims by classifying them as physical damage. At this juncture, nothing will be said in relation to the merits of either classification[8]. Attention, instead, will first be paid to the practical utility of this facet of the judgments, which their Lordships patently invested much analytical thought into. Put another way, did this issue of categorisation, in the last analysis, actually matter at all in determining the outcome of the case?

It is not difficult to see why their Lordships in *Murphy* would perceive this preliminary question of taxonomy to be of importance, warranting treatment of it at the very outset of their judgments. From a practical viewpoint, it is, after all, no secret that a claimant has a far better prospect of success if he is able to frame his tortious action as one falling within the umbrella of physical damage, as opposed to pure economic loss. Having said that, it is imperative not to overemphasise this particular aspect of their Lordships' reasoning. The proneness to place undue weight on the use of such labels – useful in many other cases as they may be – serves to obscure, rather than clarify the true issues in fact determinant of these decisions. The truth is, whether the claim is properly placed within the pocket of pure economic loss or physical damage actually matters less than is commonly perceived: for the real underlying concerns controlling the ambits of liability in this field of tort in fact relate to *policy*[9].

The point may be tested with *Anns*. Lord Wilberforce's choice to allow a remedy for the 'material, physical' damage caused was, for policy reasons elucidated below, only to

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[7] *D & F* (n 3) [32].

[8] See section C below.

[9] Markesinis & Deakin, *Tort Law* (7th edn, OUP 2012), 109: 'What is needed is a frank acknowledgment that policy choices are being made all the time in difficult cases which lie at the boundaries of negligence liability, and that in this area the outcome of decisions cannot be predicted in advance by the mechanical application of verbal formulae'.

the extent that it amounted to a present and imminent danger to the health and safety of the occupants. It did not, however, extend to cases of non-dangerous premises or defective chattels, although doctrinally speaking, those cases also fell squarely within the class of 'material, physical' harm. Equally, the classification of such actions as pure economic loss did not sound the death knell for the claimant's case in *Murphy*. It was still necessary for the House to consider whether the claim before them fell within the many existing exceptions already made to the general exclusionary rule as regards pure economic loss. Consider, further, Lord Bridge's anomalous qualification that, '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]. His Lordship provided no explanation for this exception, and some have attempted to justify it on the ground that the building would constitute a nuisance in respect of which the adjoining landowner would be able to obtain an injunction requiring repair or demolition. But this is embarrassed by two objections. First, an injunction is different insofar as it would impose the cost of repair on the acquirer of the defective property, rather than the creator of the damage. Secondly (and more importantly for our purposes), it represents an unacceptable derogation from the *a priori* reasoning upon which *Murphy* is based. All this goes to show the sizeable role played by policy in shaping their Lordships' judgments. Clearly, purity of doctrine did not, without more, inexorably exacted the denial of remedies in this field of negligence.

iii) Policy

Moving away from theoretical considerations, then, the question becomes one of whether, as a matter of policy, the court ought to have allowed the claim in *Murphy*, and imposed liability on negligent builders or local councils for their negligence in relation to defective premises. Their Lordships were unanimous in answering in the negative. Several factors may be gleaned from their respective judgments – none of which, with respect to their Lordships, seems to hold water.

First, there was a broader, constitutional concern that to develop liability for defective premises any further would be to '[go] much farther than the legislature were prepared to go in 1972'[11]. This strikes one as specious. It is difficult to see why their Lordships should have felt hindered by the Defective Premises Act 1972, given that section 6(2) of the Act expressly provides that any duty imposed by or enforceable by dint of any provision of the Act is *in addition* to any duty a person may owe apart from that provision. With regard to the obligations imposed by their Draft Bill, the Law Commission expressly left any future development of the common law free to take effect[12]. *A fortiori* when one considers the short limitation period: six years from the date of completion of the dwelling or the date on which rectification work is done to correct faults in the original dwelling[13]. This hardly takes into account the prolonged latency of

[10] *Murphy* (n 4) [57].

[11] ibid [36]. See also, *D & F* (n 3) [47]: 'the precise extent and limits of the liabilities which in the public interest should be imposed on builders and local authorities are best left to the legislature'.

[12] Law Commission, *Civil Liability of Vendors and Lessors for Defective Premises* (Law Com No 40, 1965) para 73.

[13] *Cf.* the limitation period in respect of latent damage recoverable at common law: three years from the date at which the existence of a cause of action was reasonably discoverable, up to a maximum of 15 years from the date of the defendant's negligent act (Limitation Act 1980, ss. 14A and 14B). Indeed,

structural defects. No wonder the number of reported cases dealing with s. 1 remains so meagre.

Secondly, their Lordships were disturbed by (what they feared to be) the far-reaching implications of such an extension. Lord Keith observed that holding the builder and local authority liable for defective premises would extend liability on like grounds to the manufacturer of a chattel, thereby '[opening] up an exceedingly wide field of claims'[14]. The *non-sequitur* of this is apparent when one highlights the sensible and perhaps overcautious limits imposed upon *Anns* liability. In formulating his principle, Lord Wilberforce had in mind only claims for recovery of repair costs necessary in order to avoid a 'present or imminent danger to the health or safety of the persons occupying it'. It is submitted that one could take this further still, without causing any annoyance on the floodgates front: liability should not only cover pre-emptive claims relating to 'dangerous' premises that threaten the occupant's health and safety imminently, but also those relating to their personal property. This goes to the very heart of what negligence is seeking to safeguard in our current matrix, namely the right to bodily integrity of the inhabitants of the building (as recognised by Lord Wilberforce), *in conjunction with* the property interests of those inhabitants. Consequently, it is indeed an 'impossible distinction', as Lord Denning noted earlier[15], to differentiate between a situation where a contractor constructs a building negligently which causes damage to persons or property, and another where the dangerous defect is discovered in time and the owner wishes to mitigate the danger by fixing the defect and putting the building into a non-dangerous state. In both cases the duty in tort serves to shelter the same bodily and property rights and interests. Materially, the same cannot be said in relation to a case of *non*-dangerous defective premises, where there is no immediate danger of any personal injury or damage to personal property.

More broadly, it would be feasible, indeed necessary, to draw a line between realty and personalty[16]. This is traditionally done in many branches of the law. The suggestion that, if a claimant fails to abandon a chattel with a known defect and suffers injury or property damage he is the author of his own loss, is surely inapplicable *vis-à-vis* an owner who simply cannot afford to abandon his house[17]. Evidently, neither the right to bodily integrity, nor the property interests of those affected are engaged in the same manner nor to a comparable extent in the former scenario as it is in the latter. Very often, an owner of a defective premises is, by reason of commercial and practical constraints, left with no choice but to continue occupying the house in spite of awareness of the present and imminent dangers. It is quite unrealistic to demand him to stop using the premises or discard of them the way one would with a useless television or a malfunctioning laptop[18].

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an argument may be made that the passing of the Latent Damage 1986 – by providing an alternative limitation period – reflects Parliament's intention of *encouraging* claims relating to defective premises to be made under the common law, and that *Murphy*, far from according with legislative intent, has to a large extent frustrated Parliament's will by categorically deeming such claims as non-actionable.

[14] *D & F* (n 3) [38].

[15] *Dutton* (n 5) 396.

[16] Although it is noteworthy that even with the latter, a claimant may in certain cases recover for expenditure which he must incur to cease using the chattel, or to obviate a threat it poses even after it ceases to be used. See *Losinjska Polvidba v Transco Overseas (The Orjula)* [1992] 2 Lloyd's Rep. 395 at 403, where Mance J held that, 'if property is put into circulation which remains positively dangerous unless preventive measures are taken to neutralize the danger, a person who is obliged to take such steps and does not have the option simply to abandon the property may have a claim in tort against a person who negligently put the article into circulation'.

[17] W E Peel & J Goudkamp, *Winfield & Jolowicz* (19th edn, Sweet & Maxwell 2014), 285.

[18] One is not alone in expressing such sentiments: the potential harshness of a strict application of *Murphy* was accorded judicial buttress in *Targett v Torfaen BC* (1992) 24 HLR 164, 174, in which

It follows that the floodgates concern raised by Lord Keith, whilst ostensibly appealing, is in truth quite illusory. Liability is confined within clear bounds if claims are only allowed as regards defective premises that are *dangerous* in nature (the word 'dangerous' is used here in a broad sense to cover threats to *both* personal injury and property damage), and if a distinction is properly drawn between realty and personalty (with liability only covering the former).

It remains to dispose of one more objection. In *Murphy*, the point was raised that *Anns* introduced 'in relation to the construction of buildings, an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence'[19]. This does not wash. Whenever a truly new point arises *any* solution of it may be termed as creation of a novel category of liability. It is apposite to remind oneself of what Lord Diplock observed, with typical candour, in the *Dorset Yacht* case,

> 'But since *ex hypothesi* the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationships which give rise to a duty of care, the conduct or relationship which is involved in it will lack at least one of the characteristics A, B, C, or D, etc. And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist if the characteristic which is lacking were absent or redefined in terms broad enough to include the case under consideration.'[20] creation of a

So much for the policy considerations against the extension of liability in the context of defective premises. More constructively, can anything be said in favour of extending liability, then? La Forest J in *Winnipeg* provides a compelling justification:

> 'In my view, [the policy reflected by *D & F* and *Murphy*] is difficult to justify because it serves to encourage, rather than discourage, reckless and hazardous behaviour. Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for claimants to mitigate potential losses and tends to encourage economically inefficient behaviour . . . Allowing recovery against contractors in tort for the cost of repair of dangerous defects thus serves an important preventative function by encouraging socially responsible behaviour.'[21]

It is difficult to find fault with this line of analysis, which accords with common sense. Another policy consideration overlooked by the Law Lords in *Murphy* is the argumentation based on economic efficiency. To use their Lordships' counterfactual, suppose a house collapses by reason of defective foundations. Under *D & F* and *Murphy*, damages for the house still would not be recoverable even if the claimant had been injured in the collapse, or his furniture had been crushed. The only recourse the claimant could

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Sir Donald Nicholls V-C recognised that 'knowledge of the existence of a danger does not always enable a person to avoid the danger… it would be absurdly unrealistic to suggest that a person can always take steps to avoid a danger once he knows of its existence, and that if he does not do so he is the author of his own misfortune…'. The same was echoed by the High Court of Australia in *Bryan v Maloney* (1995) 11 Const LJ 274, 281, where the court noted that the purchase of a house was likely to represent 'one of the most significant, and possibly the most significant, investment which the subsequent owner will make during his or her lifetime'. The Supreme Court of Canada, clearly on the same wavelength, similarly described *Murphy*'s reasoning as having 'some appeal on the basis of abstract logic' in *Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd* [1995] 1 SCR 85 [40], but being utterly unrealistic in practice, given that home owners simply do not have the option of discarding a useless or dangerous house.

[19] *Murphy* (n 4) [47].

[20] [1970] AC 1044, 1058-1059. It is tenable that *Murphy* is, rather ironically, in a sense a more salient example of judicial law-making than *Anns* – the Lord Chancellor remarked that it was perhaps one of the most striking cases in the history of English law, inasmuch as it was the overruling of a decision taken after full consideration by a committee consisting of the most distinguished Law Lords.

[21] *Winnipeg* (n 18) 116- 117.

turn to in such a situation would be to pursue the wrongdoers in contract. Here, Laura C.H. Hoyano[22] highlights the economic inefficiencies caused by multiple actions in tort and in contract by the claimant to recover compensation for personal injury and consequential property damage on the one hand, and for the collapsed house on the other, where both types of harm resulted from the *same* accident caused by the *same* defect created by the *same* builder[23].

This brings us neatly to the last point. Our present legal framework in respect of defective premises leaves a glaring lacuna. Two options are currently open to aggrieved property owners. The statutory route, *viz.* reliance on the Defective Premises Act 1972, is all well and good assuming the claim falls within the limitation period. But herein lies the problem: most claims do not fall within the Act since the short period of six years fails to take into account the prolonged latency of structural defects. A subsequent purchaser whose claim falls outwith the limitation period is thus left with no remedy. Such a claimant will find little comfort in pursuing the alternative avenue of suing under the common law of negligence. Here, Parliament has sought to improve the claimant's position by passing the Latent Damage Act 1986, which provides for, in actions for negligence, an alternative limitation period of three years beginning from the time when the claimant could reasonably have known about the damage (subject to a 'long-stop' of 15 years from the last act of negligence) and specifically addresses the case where the property was acquired by a subsequent purchaser. Rather ironically, however, the decision in *Murphy* has rendered the application of the Act – which was undoubtedly enacted with building cases in mind – severely limited in scope by deciding that there is simply no cause of action in the first place. Contractual remedies are analogously of little use to subsequent purchasers who are excluded by reason of the doctrine of privity – indeed, even those falling within the privity rule may find themselves without recourse if the agreement has no warranty of quality, or if the contractor is untraceable or insolvent.

Thus analysed, one feels compelled to arrive at the view that *Murphy* represents a wrong turning: the policy factors weigh heavily in favour of extending liability to cover cases of dangerous[24] premises.

C. Three Doctrinal Pathways

Let us take stock. The bulk of the essay thus far, has been dedicated to the exercise of balancing policy concerns, in a bid to determine what the law should be. The following section will explore the three possible routes that may allow our courts, doctrinally, to reach the position advocated above. The first two routes approach defective premises claims from the outlook of 'physical damage'. It will be argued that the court may either do away with the 'other property' requirement in relation to such dangerous premises claims, or create a category of *sui generis* physical damage which encompasses preventive actions anticipating imminent personal injury or property damage. Notably, the word 'physical' is used in rather different senses in the two routes: with the first, the material,

[22] (2002) MLR 883, 891.

[23] The wastefulness of requiring a separate contract action to recover damages for the collapsed house itself may be aggravated by similar contractual actions up the chain of predecessors in title to reach the builder – and that is if one assumes that each party in the chain of title took contractual warranties of quality from his predecessor, who can even be located so as to be sued, and is solvent and therefore still worth pursuing.

[24] That is to say, premises that endanger the occupant's personal safety or property. One says nothing about faulty chattel claims.

physical damage referred to is the damaged property *itself* (e.g. cracks on the wall), whereas with the second, it is the *potential eventuality* of physical damage done to other property of the defendant, or the defendant himself (*viz.* personal injury) which is the subject of discussion. If our courts are, for one reason or the other, uncomfortable with the idea of placing claims of defective premises under the umbrella of physical damage, a further third route would be to categorise such actions as 'pure economic loss' (as in *Murphy*), but to allow them on the basis of the exceptions made to the general bar against recovery. This would involve either the application of the trite 'assumption of responsibility' exception, or alternatively, the creation of a novel exception, which concerns economic loss suffered with the ultimate goal of the prevention of actionable physical harm (namely personal injury or property damage in our context).

i) Approach 1: Abolish the 'other property' requirement

As mentioned, the salient reason in *Murphy* for their Lordships' reticence to accept Lord Wilberforce's prior classification (of 'pure' defective premises claims as physical damage) was their inability to overcome the doctrinal hurdle that actionable damage must generally be done to property other than the defective product itself. The putative rationale for this 'other property' *sine qua non*, it seems, is rooted in the worry that if the law were to hold otherwise, 'contract law would drown in a sea of tort', as graphically articulated by Blackmun J in the American case of *East River Steamship*[25].

When the basis of this principle is scrutinised it is found to be wanting. Blackmun J's concern is grounded upon the fundamental belief that contract and tort ought to have their own respective and distinct domains. But such a proposition no longer holds in reality (if it ever did)[26]. Tort and contract – two heavyweight albeit ill-defined areas of private law – do not perforce stand for clearly differentiated compartments. There will inevitably be overlap. There is no reason, in principle, why the law should not attach to goods a non-contractual warranty of fitness which would follow the goods into whomever's hands they came from. The logical force of this is recognised by Hoyano[27], who contends that the concern is rooted in a 'fallacious conflation of the builder's contractual duty to the original property owner and its tortious duty to any subsequent purchaser'. The duty in contract as regards materials and workmanship, Hoyano posits, flows from the terms of the contract between the contractor and homeowner. The comparable duty in tort, in stark contradistinction, flows *independently* from the contractor's duty to ensure that the building meets a reasonable and safe standard of construction. This tortious duty in truth extends only to reasonable standards of safe construction and the bounds of the duty are accordingly not defined by reference to the original contract[28].

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[25] *East River Steamship Corporation v Transamerica Delaval Inc* 476 US, 866. See, to similar effect, *D & F* (n 3) [36]: 'To make him so liable would be to impose upon him for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of the plaster as regards materials, workmanship and fitness for purpose' (Lord Bridge).

[26] As made clear by *Henderson et al v Merrett Syndicates et al* [1995] 2 AC 145, [1994] 3 WLR 761.

[27] Hoyano (n 22) 890.

[28] ibid 891: 'there is no logical reason for allowing the contractor to rely upon a private contractual arrangement with the original owner to shield it from liability to innocent subsequent purchasers arising from a dangerously constructed building'.

In the United States, by 1980 at least 35 state courts[29] had accorded some measure of protection for purchasers of new homes by implying some form of warranty of habitability, with there being a patent growing propensity to dispense with the privity requirement[30]. It is, moreover, a common misconception that a warranty is necessarily contractual, for legal historians tell us that until the time of Lord Holt an action for breach of warranty was in actuality grounded in tort, being treated as a species of deceit[31]. Warranties are on that account not necessarily created by an agreement between parties but are instead imposed by law on the basis of public policy. They are said to arise by operation of law by dint of 'the relationship between the parties, the nature of the transaction, and the surrounding circumstances'[32].

The upshot is that a possible route in allowing claims concerning dangerous defective premises would be to dispense with the 'other property' precondition in such actions, and to treat them simply as constituting property damage (as opposed to pure economic loss). Indeed, the main hurdles militating against this suggestion are not doctrinal but stem instead from the policy front (particularly floodgate concerns). But as argued above, the better opinion is that such concerns are misconceived, provided that liability is tightly confined to cases pertaining to dangerous defective premises. Such a conclusion, incidentally, has the advantage of avoiding *Murphy*'s rather artificial and counter-intuitive solution of classifying a situation where clear *physical* defects exist on a property as amounting to pure economic loss. There is also the benefit of dispelling away any need to resort to Lord Bridge's 'complex structure'[33] theory – a hypothesis which even his Lordship himself subsequently rejected in *Murphy* as being 'quite artificial'[34].

ii) Approach 2: Pre-emptive claims

It is often said that 'damage is the gist of negligence'[35]: the tort is not complete until and unless actionable damage is completed, and only then can a remedy may be granted. There is no such thing as negligence in the air.[36] The contention here is that an exception

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[29] As observed in *Redarowicz v. Ohlendorf* 441 N.E.2d 324, 329, a decision of the Supreme Court of Illinois.

[30] See further the perceptive analysis of American warranty law provided by Lord Cooke in (1991) LQR 46, 46-70.

[31] See, for example, *Coggs v. Bernard* (1703) 2 Ld.Raym. 909, 911; 93 E.R. 107, 108; Holdsworth, *History of English Law,* Vol. VIII 68; *Williston on Sales* (4th edn), Vol. 2 322-331.

[32] *Lempke v Dagenais* 547 A.2d 290 (1988) (Thayer J).

[33] *D & F* (n 3) [33]: 'However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property," and whether the argument should prevail may depend on the circumstances of the case'.

[34] *Murphy* (n 4) [63].

[35] *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, 883H (Lord Scarman); *Gregg (FC) v Scott* [2005] 2 AC 176, 231-232 (Baroness Hale); J Stapleton, 'The Gist of Negligence' (1988) LQR 213, 389; Kumaralingam Amirthalingam, 'Causation and the Gist of Negligence', (2005) CLJ 32; Ray Ryan and Des Ryan, 'Damage in Negligence: Getting the Gist?, (2006) Q. Rev. Tort L. 20; Donal Nolan, 'Damage in the English Law of Negligence' (2013) JETL 259.

[36] This old maxim is taken from Sir Frederick Pollock, The Law of Torts (11th ed. 1920) 455, and was a noted favourite of American judge Benjamin Cardozo: see, for example, *Palsgraf v. Long Island R.R.*, 162 NE 99, 102 and *Martin v. Herzog*, 126 NE 814, 816.

ought to be made in *Murphy*-type claims. That is to say, the law ought to allow physical damage claims that are *pre-emptive* in nature to rectify defective premises posing a present or imminent danger to life or property. A departure from the general rule is warranted on the grounds of human rights concerns[37]. As stated above, the right to bodily integrity of the inhabitants of the building, coupled with the property interests of those inhabitants are the primary subject of protection in the matrix of dangerous premises. It therefore matters little whether the imminent personal injury or property damage, as the case may be, has actually materialised when the action is brought: in either situation, those rights and interests in question are similarly engaged. It is surely absurd to compel claimants to stand by and wait till actionable damage has actually occurred (with potentially tragic consequences, it should be added) before he can bring a recognised claim in tort.

Such a suggestion is not as unorthodox as it may seem at first sight. The emphasis on actual (as opposed to anticipated) damage as a necessary threshold for claims is not nearly as prominent in others areas of tort: one only needs to turn to *quia timet* injunctions to know this to be true[38]. Such injunctions demonstrate the need, at certain exceptional and appropriate circumstances, to provide a tortious remedy *in anticipation of* imminent damage. Even in the context of negligence, where the granting of injunctions is admittedly rare[39], it has been convincingly demonstrated that the mantra 'damage is the gist of negligence' should not be seen as the *a priori* reason for its dearth:

> 'it has sometimes been thought that [an injunction] could not [be granted in a negligence case], because… the existence of damage is one of the ingredients of the claimant's cause of action and since one can never tell in advance whether the defendant's activity will cause damage, no occasion to seek the injunction can, as a matter of logic arise. Such reasoning is faulty; if accepted, one could never obtain an injunction to restrain a nuisance, a tort in which damage is equally an ingredient.'[40]

In the case we have been discussing – *viz.* where the defective premises pose a present or imminent danger to the personal safety or property of an occupant – it is proposed that an analogy may be drawn with the granting of *quia timet* injunctions. In both the court is faced with a predicament where there is imminent danger of actionable damage bringing grave consequences, and a compelling equitable urge exists to take some preventative, *ex-ante* measure to neutralise the risk from crystallising. The same rationale thus applies in either situation; the lack of actual damage, in and of itself, ought not be an undue doctrinal obstacle to the granting of remedies. Indeed, if in the case of *quia timet* injunctions, a remedy is granted where a tortious act is yet to materialise (still less any actionable damage), *a fortiori*, claimants in *Murphy*-type actions ought to be entitled to compensation where the negligence has already occurred, and actionable damage – albeit non-existent at the moment – will inevitably and imminently come into existence.

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[37] To be juxtaposed with a 'loss' based model of tort law. See further Robert Stevens, *Torts and Rights* (OUP 2007).

[38] In the context of nuisance, for example. See *Litchfield-Speer v Queen Anne's Gate Sundicate (No 2) Ltd* [1919] 1 Ch 407, where Lawrence J held that the claimants were entitled to an injunction to restrain the defendants from erecting a new building, which, had it been built, would have unreasonably interfered with the claimants' right to light.

[39] Lord Denning MR went so far as to say in *Miller v Jackson* [1977] QB 966, 980: 'there is no case, so far as I know, where [an injunction] has been granted to stop a man being a negligent'.

[40] JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002), [21-05]

It is, of course, recognised that the analogy drawn is not foolproof. For one, *quia timet* injunctions are by nature a different remedy altogether in that they are injunctions to prevent harm, rather than compensation for harm, and accordingly naturally pre-empt any harm being caused. But this distinction, while sound, does not dispose of the substantive point being made above. There is every reason to allow such preventive claims by placing them within a quasi-category of physical damage, where the same bodily integrity and property interests are brought into the spotlight just as much as in other cases where personal injury or property damage has already occurred. This aside, another potential source of difficulty is that mere risk of future harm is not generally actionable in tort[41]. Whilst this is accepted, it must be emphasised that the spectrum of 'risks' is very broad indeed. The *degree* of the risk in question is of vital importance, and where that risk is so substantial that the possibility of future, actionable harm is almost an inevitable eventuality – as is the case with dangerous defective premises[42] – one is driven to question whether the law is wise to impose a hard and fast exclusionary rule against compensation for risks of harm. The solution suggested addresses this by the creation of a *sui generis* form of physical damage which is not nearly as speculative as a pure risk of future harm (because there is actually a tangible physical defect, and the risk involved is present and imminent), but at the same time, not quite property damage (because the property has been born in that flawed state)[43].

iii) Approach 3: Exceptions to the exclusionary rule in pure economic loss[44]

English courts have traditionally been quite reluctant when it comes to imposing liability for causing pure economic loss – and for good reason[45]. It is trite that the primary policy consideration in pure economic loss claims relates to the fear of unlimited liability in amount, time and class[46]. In the matrix of defective premises, however, liability would be delimited in regard to all three elements[47]. One therefore questions the wisdom behind

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[41] *Gregg v Scott* (n 35).

[42] Since, by definition, dangerous defective premises endanger the occupant's personal safety or property imminently. The upshot is that the threshold must be set quite high, to filter out undeserving claims involving non-dangerous premises that do not pose an immediate and impending threat.

[43] *Cf.* Donal Nolan, 'Preventive Damages', (2016) LQR 132: '…the better view is that the preventive damages concept should be limited to *outlays* A makes in order to protect A's person or property, not least because recovery of "preventive costs" of this kind would give rise to obvious anomalies'. However, the 'obvious anomalies' Nolan has in mind seem to exclusively relate to chattels, whereas the scope of the present analysis is instead strictly confined to dangerous premises.

[44] Much ink has already been spilled on this point. See, for example, John G. Fleming's thesis in (1990) LQR 525, 525-30. Also see Lord Cooke's thoughts on this matter, (n 30).

[45] There is no real doctrinal obstacle preventing the courts from allowing pure economic losses; rather, the issue is, as is often the case with negligence, whether the policy factors weigh in favour of extending liability to cover a particular class of claims. An example would be Lord Denning's caution in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 'If claims for economic loss were permitted for this particular hazard, there would be no end of claims. Some might be genuine, but many might be inflated, or even false.'

[46] *Ultramares Corporation v Touche* (1931) 174 NE 441, 444 (Cardozo J)

[47] In *Winnipeg* (n 18), La Forest J postulated that there is no risk of liability to an indeterminate *class* since the potential class of claimants is limited to the very persons for whom the building is constructed: the inhabitants of the building. Further, there is no concern that liability would be in an indeterminate *amount* since the scope of liability will always be constrained by the reasonable cost of repairing the dangerous defect in the building and restoring that building to a non-dangerous state

peremptorily foreclosing the type of economic loss in *Murphy.* The exclusionary nature of *Murphy* is even more difficult to justify when one considers that major inroads have already been made into the general bar against pure economic loss claims[48]. The conventional rationale for the negligent advice exception is that the duty stems from reliance on the one hand, and a special relationship of proximity on the other. The liability of a local authority for a building inspector's negligence, however, has been based, by courts which uphold it, precisely on such grounds[49]. There seems to be nothing against good doctrine or policy, as Lord Cooke has persuasively argued[50], to hold that purchasers of houses rely on the local authority that controls building in the district to exercise its powers responsibility and with reasonable care. The same applies with equal weight in relation to builder contractors. Of course it may be countered that the relationship none the less lacks sufficient proximity, but this then begs the question of what a 'proximate' relationship actually means: one would, again, be resorting to the use of empty labels which escape any substantial definition.

Put that point to one side. Even if the objection holds, and the 'assumption of responsibility' exception ought not to apply, that is not the end of the matter. For the categories of negligence are never closed[51], and it is hence entirely within judges' discretion, rather than applying existing rules of law, to opt for the more adventurous step of creating a further inroad into the general exclusionary rule *vis-à-vis* pure economic loss. What is suggested is an exception concerning cases where pecuniary loss is sustained to prevent the occurrence of actionable damage – in our context, personal injury or property damage. Here, the economic loss in question – that is, the cost involved in remedying the defect in the dangerous premises – is entirely distinct in nature from other quintessential examples of pure economic loss (e.g. investment loss or diminution in value), where the loss incurred is *eo ipso* the only damage that may be suffered and thus the sole objective of recovery. In contrast, the economic loss suffered by the claimants in *Murphy* is, in a sense, not completely 'pure' insofar as it is not recovered as an end in itself (as with most other pure economic loss claims). It would make sense, on this analysis, to create a further exceptional category of pure economic loss claims, where that loss is borne not in isolation but *in order to* prevent future actionable damage.

D. Conclusion

The preceding discussion has sought to expose the rather unsatisfactory nature of the House of Lords' analysis in both *D & F* and *Murphy.* What has been advocated seems straightforward enough: the courts should allow claims of dangerous defective premises by categorising them as 'material, physical damage', in the words of Lord Wilberforce.

(recall that *Anns* liability only goes so far as to cover defects that threaten the health and safety of the inhabitants. And even if one utilises the broad sense of the word 'dangerous', advocated for above, liability would still only extend to encompass defects that pose a threat to an occupant's personal possessions – hardly an indeterminate number of claims). Finally, La Forest J dispelled any apprehension that liability would be for an indeterminate *time*, given that the contractor (or, for that matter, the local council) will only be liable for the cost of repair of dangerous defects during the useful life or the building.

[48] The cases of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 come to mind immediately.

[49] See *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co. Ltd.* [1983] NZLR 190, 196. Also see *Bryan v Maloney* (n 18).

[50] (n 30) 51 (Lord Cooke).

[51] *Donoghue v Stevenson* [1932] AC 562, 619 (Lord MacMillan).

Alternatively, one could embrace the 'pre-emptive claim' analysis: this recognises that no actual damage has occurred as of yet, but in anticipation of such damage, an action ought to be allowed. But even if our judges insist dogmatically on adopting the 'pure economic loss' route, there is no rational reason, whether grounded in doctrine or policy, why such claims ought to be barred. Out of the three possibilities mooted, this enjoys the unique attraction of being the path of least doctrinal resistance. The others both involve the creation of inroads into well-established principles of negligence, namely the separation of tort and contract, together with the damage prerequisite respectively. By contrast, this asks for nothing more than either the simple application of the existing *Hedley Byrne* rule, or the equally straightforward task of creating a further exception to the general bar against recovery for pure economic loss (something which should not cause excessive difficulty, given that the exclusionary rule is not nearly as inviolable as it once was). Either way, a swift change in the law is imperative.