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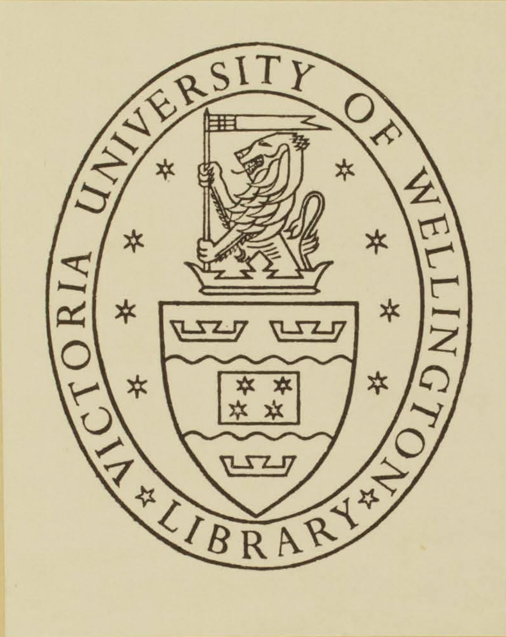
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MISS TANG SWEE KENG

Gabolinscy v Hamilton City Corporation

Submitted for the LL.B.(Honours) Degree at
the Victoria University of Wellington.

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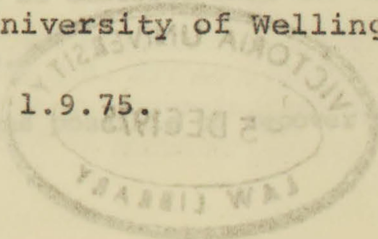

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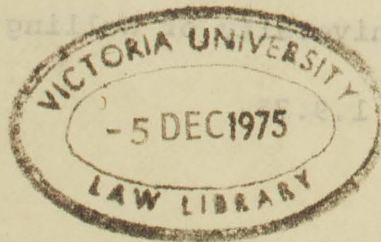

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In this paper, I propose to examine the approach taken by Moller J in deciding Gabolinscy v Hamilton City Corporation (1) and incidentally to observe whether the sequence of the issues discussed in the case were in the appropriate order as was required. Finally to analyse each issue in turn and to question the validity of the conclusion.

The facts of Gabolinscy v Hamilton City Corporation

The land was negligently filled by the defendant in the capacity of owner/subdivider/lessor. It was leased to the plaintiff on condition that it was for the erection of a house. The lessor as local authority had control over the work of the builder. As a result of the negligent filling of the land, damage by settlement of the land occurred which required substantial cost for repair. The plaintiff brought an action for repair costs and general damages.

The issues of Gabolinscy were as follows:

1) Whether a duty of care in tort could be imposed on the defendant.
2) To determine whether the repair cost was property damage or economic loss.
3) To examine whether the Limitation Act 1950 was applicable to the situation in Gabolinscy.
4) Could an implied warranty be inferred from the totality of the circumstances in the case.
5) To determine whether it was possible to recover damages for inconvenience and worry.

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(1) [1975] 1 N.Z.L.R. 157 - A Supreme Court decision.

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Could the liability of the defendant in the capacity of subdivider arise in contract as well as in tort?

In McLaren Maycroft & Co v Fletcher (2), it was held that where a professional man's relationship with his client is contractual, the true nature of an action brought against the professional man for damage caused by lack of proper professional skill and care is an action founded upon contract alone.

In J. Nunes Diamond Ltd v Dominion Electric Protection Co. (3) Pigeon J said:

> "The basis of tort liability considered in Hedley Byrne is inapplicable to any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract as expressed in Elder, Dempster & Co. Ltd v Paterson, Zochonis & Co. Ltd (4)."

A similar view was expressed by Greer L.J. in Javis v Moy, Davies, Smith, Vandervell and Co (5).

It is submitted that the view of Pigeon J seems to be of general application in that if the parties are governed by contract, no tort liability could arise unless it is an "independent tort" not related to the performance of the contract at all.

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(2) [1973] 2 N.Z.L.R.100 see p.102, line 15, p.115, line 52, see also Bevan Investment Ltd v Blackhall and Struthers [1973] 2 N.Z.L.R.45. A solicitor Clark v Kirby [1964] Ch.506. An architect Bagot v Stevens Scanlan and Co. Ltd [1966] 1 Q.B.197. A stockbroker Jarvis v Moy, Davis, Smith, Vandervell and Co. [1936] 1 K.B.399.

(3) [1972] 26 D.L.R. (3d) 699, see p.727, p.728.

(4) [1924] A.C.522 at p.548.

(5) [1936] 1 K.B.399, 405 and Lord Diplock L.J. in Bagot v Stevens Scanlan and Co. Ltd [1966] 1 Q.B. 297 at p.205 considered the view expressed by Greer L.J. to be an accurate statement of the law. The Bagot's decision was followed by McLaren.

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Was the subdivider under a contract with the plaintiff to fill the land?

In Gabolinscy, there was no contract between the subdivider and plaintiff to fill and subdivide the land as it was subdivided and filled before the plaintiff leased it. In the absence of a contract between the subdivider and plaintiff, could tort liability be imposed on the subdivider? Since the negligent filling of the land by the subdivider was an independent tort unconnected with the performance of the contract, an action, in tort would lie as supported by J. Nunes Diamond Ltd v Dominion Electric Protection Co.

Subdividers possess special skill and knowledge. Since they hold themselves out as being capable of subdividing land, they are expected to exercise skill and competence of an ordinary, reasonable member of the profession because their clients rely on their skill and knowledge. It is submitted that it is desirable to impose a duty of care on the subdivider as well as other professional people with skill for the purpose of protecting foreseeable damages to third parties by their negligent acts (6).

Since tort liability was independent of the contract (which was not even present in Gabolinscy) the subdivider could be liable in tort.

In Dutton both Lord Denning and Sachs L.J. were prepared to impose tortious liability on the builder for the negligent filling of the land. They extended this liability to the defendant for negligent supervision. It is submitted that the builder in Dutton was not liable in tort because his negligent acts were connected to the performance of the contract for building the house. Limitation period would commence from the time of the breach. I respectfully submit that the court in Dutton was too anxious

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(6) See Charlesworth on Negligence 5th ed Sweet and Maxwell, Chapter 7.

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to hold that the builder was liable in tort except Stamp L.J. (7). The issue of whether a person under a contract is liable in contract alone or could be liable in tort as well was not discussed in the case.

It must be emphasised that although the builder and the subdivider in Dutton and Gabolinscy were negligent in filling the land, the subdivider in the latter could not be liable in contract as there was no contract to subdivide the land. Tortious liability could be imposed on him as this was clearly an independent tort not connected to the performance of the contract. In Dutton because the negligent filling was related to the performance of the contract, following the decision in Nunes no tortious liability could arise.

Could the defendant in the capacity of landlord be liable in tort or contract?

Apart from the tenancies which subsist by virtue of statute (8), a tenancy or lease is based on an agreement between the landlord and tenant thereby giving rise to a contractual relationship. The general rule is that apart from contract the landlord is under no duty to his tenant as to the state of the demised premises (9).

Hence prima facie, no separate tortious liability could be imposed on the lessor and the only action available against the lessor is in contract.

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(7) [1972] 2 W.L.R. p.305 at p.329 Stamp L.J. said "To hold that either the builder or manufacturer was liable except in contract would be to open up a new field of liability the extent of which could not, I think, be logically controlled."
See Hancock v Brazier 1 W.L.R. p.1317.
Billyack v Leyland Construction Co. Ltd [1968] 1 W.L.R. 471.

(8) See Hill and Redman - Law of Landlord and Tenant 15th ed. p.6 para [2].

(9) Charlesworth on Negligence 5th ed Sweet and Maxwell, para [377]. The issue of whether a lessor is under a duty of care to lessee will be discussed more fully later in the paper.

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In Gabolinscy the negligent filling and subdividing was done prior to the lease (contract). Thus there was no contractual duty prior to the lease to see that the land was fit for building. Later, in the lease, no written terms regarding the fitness of the land were mentioned. Hence in the absence of any terms which gave rise to contractual duties under the contract, no action would lie against the lessor in contract.

It is submitted that an action could lie in contract against the lessor if the negligent filling and subdividing were done after the execution of the lease by a separate contract between lessor and lessee with terms that impose contractual liability upon the lessor.

In Gabolinscy it was desirable and permissible to impose tortious liability on the subdivider (10) but it must be emphasised that because of the simultaneous existence of the lease in Gabolinscy no duty of care could be imposed on the subdivider. In Dutton the majority of the court had erroneously imposed tortious liability upon the builder. In essence because of the very existence of the lease in Gabolinscy which was absent in Dutton, the latter could be distinguished on this ground and therefore not an authority to be followed by Moller J.

Did the Council in the capacity of owner/subdivider/lessor owe a duty of care to the plaintiff (lessee)?

Moller J in the present case made two extensions.

1) In relation to the duty of care, he extended the duty to cover a subdivider.
2) His Honour further extended the rule in Dutton which was not a case involving a contract (lease) between the parties, to the present case

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(10) but not in Dutton as discussed previously.

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which was principally based on a contractual relationship between the plaintiff and the defendant.

Could a duty of care be imposed on the subdivider?

It was foreseeable that damage or harm would result if the subdivider did not exercise reasonable skill and care in filling the land. In order to protect innocent people from harm and to discourage negligent acts which would have adverse effects on society as a whole, it would be desirable to impose a duty of care on the subdivider. It would not be against public policy considerations to do so as in Home Office v Dorset Yacht Co (11).

With reference to the second extension of the rule in Dutton v Bognor Regis UDC (12), the council in that case was neither vendor/builder/lessor. The duty of care which was imposed on the council was not directly imposed on the council. Since Lord Denning and Sachs L.J. were prepared to hold the builder/vendor liable, the court extended the duty of care to the council. Lord Denning in Dutton expressly dealt with the liability of the builder/vendor in detail and analysed the leading cases which related to the builder being the owner as well. He overruled the leading decision of Otto v Bolton (13), a decision subsequent to Donaghue v Stevenson (14). He did not draw a distinction between builder/owner or builder/contractor. Furthermore there was no distinction between chattels and real property in imposing a duty of care on the tortfeasor. In Dutton, the court held that the builder/owner owed a duty of care to the plaintiff and extended it to

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(11) [1970] A.C.1004 see Lord Reid's judgement especially p.1032, 1033.

(12) [1972] 1 Q.B. 373.

(13) [1936] 2 K.B. 46.

(14) [1932] A.C. 562.

the council for negligent supervision of the bad and negligent work of the builder/owner.

If the defendant's capacity in Gabolinscy was only owner/subdivider perhaps by applying the principle of Donaghue v Stevenson to realty a duty of care could arise as the defendant was negligent in filling the land. In Gallagher v N. McDowell Ltd (15) Lord MacDermott C.J. and his colleagues in Northern Ireland (CA) held that a contractor who built a house negligently was liable to a person injured by his negligence. This was followed by Nield J in Sharp v E. T. Sweeting and Son Ltd (16). But the judges in those cases confined themselves to cases in which the builder was only a contractor and not builder/owner. The latter was exempted from liability because of the authority of Bottomley v Bannister (17).

In Bottomley it was not a simple case of builder/vendor, as before the house was completed, the builder entered into a lease with the plaintiff to go into possession before completion as tenant at will. The builder agreed to complete the house by the end of October 1929. But the tragedy occurred on 26 October 1929 (that was during the period when the lease was still in existence). Despite the fact that the house was sold to the purchaser, the agreement contained the clause of tenancy at will which had not expired then. There still remained the lessor and lessee relationship. It was held in Bottomley that there was no evidence of a breach of any duty which the law cast upon the defendant as vendor or lessor of the house towards the lessee and the plaintiff could not recover. It is submitted that the above case was rightly decided upon its facts (18).

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(15) [1961] N.I. 26.

(16) [1963] 1 W.L.R. 665.

(17) [1932] 1 K.B. 458.

(18) Bottomley followed the decision of Robbin v Jones (1863) 15 C.B. (N.S.) 221. Lane v Cox [1897] 1 Q.B.415 and Cavalier v Pope [1906] A.C. 428.

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In Dutton, Lord Denning overruled Bottomley on the basis that if a builder was liable, similarly a builder/owner must also be liable. Throughout the discussion of Bottomley there was no mention of the lease between the builder/owner and the purchaser. The plaintiff failed in his action because of the application of the rule in Robbin v Jones (19) where Erle C.J. said

> "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term for fraud apart, there is no law against letting of tumbledown house and the tenant's remedy is upon his contract if any."

This proposition was approved by the House of Lords in Cavalier v Pope (20). It is submitted that the Robbin v Jones rule applies where there is landlord and tenant relationship. According to Clerk & Lindsell on torts (21)

> "It should be borne in mind, in the first place that the Occupier's Liability Act 1957, imposes on a landlord the common duty of care towards all lawful visitors, but only when he is under an obligation to repair. To this extent Cavalier v Pope has been overruled by the Act, but the other aspect of the case which concerns non liability for letting ruinous premises still holds good."

In Dutton, neither Lord Denning nor Sachs L.J. drew a distinction between builder/owner or builder/contractor. Lord Denning relied on the House of Lords decision in Billing v Riden (22) and overruled Otto v Bolton (23) a post Donaghue v Stevenson decision. Bottomley and Cavalier v Pope (the latter two cases were pre Donaghue v Stevenson decisions)

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(19) (1863) 15 C.B. (N.S.) 221, 240.

(20) [1906] A.C. 562.

(21) 13th ed Sweet and Maxwell publication p.867,

(22) [1958] A.C. 240.

(23) [1936] 2 K.B. 46.

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Sachs L.J. said (24)

> "On the contrary as Lord MacDermott himself in Gallagher's case (25) held "The doctrine of Donaghue v Stevenson can apply to defective houses as well as defective chattels" and in my judgement there is no exception behind which landowners can shelter. Thus the Bottomley v Bannister point fails."

Stamp L.J. was of the opinion that a builder was not liable except in contract, and then only to immediate purchaser for defects in goods which rendered them unfit for their purposes. To hold that either the builder or manufacturer was liable, except in contract would be to open up a new field of liability the extent of which could not be logically controlled. It is submitted that the majority's view in Dutton is preferred on the ground that it is justified in keeping up with the changing needs of a modern society like New Zealand. But I further submit that Dutton was concerned with a case of builder/owner and was clearly not a lessor/lessee situation. It must be emphasised that although the court overruled Bottomley and other cases, with reference to Bottomley the court distinguished it only on the basis of builder/owner capacity and not on the basis of lessor/lessee relationship. Therefore I respectfully submit that Dutton is not an authority to be followed in Gabolinscy as the addition of the capacity of lessor to that of subdivider/owner of the defendant made a great difference to the situation. The crux of the issue was the existence of the lease. As the subdivision and negligent filling of the land was done prior to the lease, apart from any express or implied contract to that effect, a landlord owed no duty either towards his tenant or any other person who entered upon the premises during the tenancy, to take care that the premises were safe either at the commencement of tenancy or during its continuance (26). It is submitted

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(24) [1972] 2 W.L.R. p.317.

(25) [1961] N.I. 26, 41.

(26) See Woodfall - Landlord and Tenant vol. (1) 27th ed. Sweet and Maxwell p.655, 656.
See also Clerk & Lindsell on Torts 13th ed para [867] Sweet and Maxwell.

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that the lessee must take the land as it stands. The above proposition was supported by English, Canadian and New Zealand authorities namely, Travers v Gloucester Corporation (27), MacDonald v Goderich (28) which followed Robbin v Jones, Collins v Torrens (29), Titus v Duke (30).

The New Zealand Authority in support of the proposition was Felton v Brightwell (31). It was held in this case by Wild C.J. that apart from express stipulation, there is no obligation on a lessor during the term of the lease to repair or maintain improvements. A lessee must take land as he finds it and there is no convenant or condition implied by law that the land that is leased is fit for the purpose for which it is taken. Felton followed Gott v Grandy (32) and Sutton v Temple (33).

In Gott v Grandy the tenants of the workshops and buildings claimed to recover from their landlord in respect of his failure to repair a chimney which was part and parcel of the premises and which without any neglect or default on their part, got into an insecure state and fell down. It was held that the duties between landlord and tenant arise from contract and that, since there was no contract requiring the landlord to repair, he was not bound to do so. It is submitted that there is no liability in tort for letting dangerous premises to anyone who suffers injury on the premises (34). This rule was laid down in Robbin v Jones

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(27) [1947] K.B.71.

(28) [1949] 3 D.L.R. 788, 793.

(29) [1956] 3 D.L.R. 740.

(30) [1963] 6 W.I.R. 135, 137.

(31) [1967] N.Z.L.R.276 (Supreme Court decision).

(32) (1853) 2 E. & B. 845.

(33) (1843) 12 M & W. 52.

(34) The above view is also that of Salmond on the Law of Torts 16th ed Sweet and Maxwell p.297 and consistent to that of Charlesworth on Negligence 5th ed (1971) published by Sweet and Maxwell para 377, 378. Para 401 on liability of vendor or lessor.

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which was a long standing rule and regarded as'beyond question' (35) and not to have been affected by the general liberalisation of the law of negligence in recent decades (36). The Robbin v Jones rule extended to dangerous conditions arising from negligent act of misfeasance by lessor who committed it prior to the lease as was the installation of a defective system of gas in Travers v Gloucester Cooporation (37). Briefly the facts of Travers were as follows: The vent pipe of a geyser terminated against the outside wall of a house, built under the direction of the architect of, and owned by, a municipal corporation, was let by them to the plaintiff. The installation of the geyser was dangerous and the defect had been brought to the attention of the responsible officials of the corporation by the local gas company. A lodger of the tenant was gassed and died in the bathroom of the house as a result of the defective and dangerous installation.

The court held that there was no legal duty incumbent on the corporation as the builder, owner or landlord towards the lodger to take care in the provision of the installation. Even if the tenant was the victim and not the lodger it is submitted that the remedy was only in contract as set out by the court in earlier cases (38).

The facts in Travers appeared to be similar to Gabolinscy in that the damage was caused by the negligent act of the defendant (a statutory

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(35) [1906] A.C.428, 430.

(36) Auto Scooter Ltd v Chambers [1966] E.G.D.57 contra Dutton v Bognor Regis UDC [1972] 1 Q.B.373, the defendant was neither the owner/ builder of the defective premises. This observation was expressed by Salmond, Law of Torts 11th ed Sweet and Maxwell p.296 footnote 54.

(37) [1947] K.B. 71.

(38) A.L.J. volume 20 Negligence - Donaghue v Stevenson Application to Realty p.483, 484.

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body). Gabolinscy could be distinguished from Travers in that

1) The former was not aware of the defect in the land.

2) The damage done was only to property and not personal injury which resulted in death.

Hence there are stronger grounds in Gabolinscy for refusing liability.

On the basis of Donaghue v Stevenson, the defendant would still be liable to the plaintiff in negligence though connected with realty. Moller J started off the discussion of the defendant's liability in tort in the capacity of owner/subdivider/lessor (39) and concluded his analysis by holding that a duty of care arises in the case of a defendant in the capacity of owner/subdivider (40). The most crucial word of 'lessor' was missing. It was desirable to extend the duty of care to a subdivider (as discussed previously) as it was not practical to draw a distinction between owner/builder and owner/subdivider. Since in both cases the negligent filling of the land was done by the builder and subdivider respectively. It is submitted that the extension of the duty of care to the subdivider in this regard was desirable and welcomed.

In Gabolinscy because of the presence of the lease, this was a bar to the imposition of a duty of care on the defendant. As the present law stands in Canada, England, and New Zealand, is not in favour of imposing a duty of care on the lessor. But in England via the Defective Premises Act 1972 S4 the landlord is under certain obligations towards the tenant (41).

With Robbin v Jones and Travers still existing as good law, it is submitted with regrets that no duty of care arises between a landlord towards his tenant in tort.

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(39) [1975] 1 N.Z.L.R. 150, see p.154, line 36.

(40) [1975] 1 N.Z.L.R. 150, see p.156, line 24.

(41) See Halsbury Law of England 1974 Cumulative Supplement Butterworth vol. 28, para 50.

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Could the damage for repair of the house be recoverable?

The court in Gabolinscy allowed damages for

1) Cost of repair

2) Engineering fee.

Both these headings would include not only repair of the present or actual property damage caused to the house, but also would include repair to prevent future foreseeable damage which would be likely to materialise if repair was not done then. Thus these future foreseeable damages would be categorised under economic loss as it does not flow from direct physical loss.

According to the recent decision of Spartan v Steel (42), it was held by the majority that if negligent act causes physical damage or personal injury these losses are recoverable. In addition consequential economic loss which is immediate to the physical damage or personal injury is also recoverable. Decision in Spartan was consistent and in line with the earlier cases on this issue (economic loss) namely, Cattle v Stockton Waterworks Co. (43), SCM v Whittall (44).

In Spartan v Steel (supra) Lord Denning suggested five policy factors which militated against the awarding of damages to the plaintiff's steel manufacturer for economic loss suffered when the power supply was interrupted.

1) Statutory boards were not liable for conduct similar to that of the defendant (an independent contractor).

2) The nature of the hazard involved.

3) The difficulty of checking the many claims which might ensue if this claim was allowed.

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(42) [1973] 1 Q.B.27.

(43) (1875) L.R.10 Q.B.453.

(44) [1971] 1 Q.B. 337.

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4) The fact that the plaintiff's loss was better borne by the community rather than by one person.

5) The fact that the plaintiff could recover the economic loss truly consequential on physical damage and was therefore not entirely without remedy.

The traditional rule of non liability for economic loss had its origin in public policy. The starting point was the 1875 decision of Cattle v The Stockton Waterworks Company (45). Blackburn J ruled that, to allow the plaintiff to advance a claim for extra expenses incurred in a contract because of the defendant's conduct, would take redress far beyond the "proximate and direct consequences of wrongful acts". It would mean that a defendant whose negligence resulted in the shutdown of a mine or factory would be liable for all lost profits and wages, a result precluded by "a wise consciousness" of the Court's limitation.

Contrary to the above was the most recent decision of the Supreme Court of Canada in Rivtow Marine Ltd v Washington Iron Works (46). This decision was directly contrary to the English authorities. The majority in Rivtow preferred the dictum of Salmond L.J. in Ministry of Housing and Local Government v Sharp (47) describing it as accurate and succinct

> "So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care."

The Supreme Court of Canada has, therefore, rejected the position that there is a special rule restricting the recovery of economic loss

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(45) (1874-5) L.R.10 Q.B.453.

(46) [1973] 40 D.L.R. (3[d]) 530 reversing the British Columbia Court of Appeal [1972] 3 W.W.R.735 and restoring the decision of Ruttan J 74 W.W.R.110.

(47) [1970] 2 Q.B. 223.

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in negligent cases, and has also rejected the suggestion that has occasionally appeared that the test for liability for economic loss is foreseeability of physical harm (48).

The facts of Rivtow in brief were as follows. The defendants manufactured cranes, one of which was sold via dealers to the plaintiff. The plaintiff installed it on a barge and used it for the purposes of their business of transporting logs up and down waterways. Upon learning that a crane of similar design, made by the defendants had collapsed due to faulty design, the plaintiff ordered the barge to be returned for inspection and repair. An action was taken to recover the cost of the repairs and consequential loss of the services of the barge for thirty days which happened to be during the most profitable time of the year (i.e. for pure economic loss).

The majority of the court allowed the recovery for pure economic loss (i.e. the loss of profit) though not the repair cost. But it is submitted that to allow recovery of pure economic loss is sufficient to create a new milestone in the law of negligence (49). The nine judges in Rivtow were unanimous on one important point and that was that liability in negligence no longer dependended on whether the foreseeable loss was physical or merely economic. But in considering the rules controlling the incidence of liability for economic loss, there was no such unanimity. The court was divided 7:2.

Ritchie J in delivering the majority judgement, relied on a much criticised dichotomy in negligence between cases of articles.

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(48) See Widgery J in Weller v Foot and Mouth Disease Research [1966] 1 Q.B.569.
Also refer to Atiyah, "Negligence and Economic Loss" [1967] 83 L.Q.Rev.248 at p.260-261.Laskin J in his judgement in Rivtow made the same suggestion.
See S. M. Waddams - Product Liability - Duty to warn - Economic Loss - The Canadian Bar Review [1974] vol. 52, p.101. The author approved of the view.

(49) Christopher Harvey; Modern Law Review [1974] Vol. 37, p.320-324.

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a) dangerous per se and

b) dangerous through negligence, i.e. negligent design in this case.

He then held that liability on bases of (b) did not extend to pure economic loss in cases where the defendant was unaware of the danger. Liability on the basis (a) on the contrary did extend to pure economic loss. The fact that the defendant would always know of the danger in this case justified the extension of liability. The learned judge then decided that Rivtow fell within the ambit of (a) because the defendants had actual knowledge of the danger previously. This gave rise to a duty to warn, breach of which led directly to certain economic loss, which was the profit which could have arisen if the crane was not taken away for repair. Liability for repair cost was denied because that loss did not flow from the breach of the duty to warn under category (a) but from breach of the common duty of care under category (b), where recovery for economic loss was excluded (50).

Laskin J (now C.J.C.) with Hall J concurring followed a bolder course of reasoning. He would have enlarged the scope of liability for economic loss in this case to include the repair cost as well. The learned judge did not follow the traditional analysis of 'duty' and 'remoteness' and based his decision on a more reliable foundation which he called the "rationale of manufacturer's liability for negligence."

Laskin J said (51)

> "That liability rests upon a conviction that manufacturers should bear the risk of injury to consumers or users of their products when such products are carelessly manufactured because the manufacturers create the risk in the carrying of their enterprises, and they will be more likely to safeguard the members of the public to whom their products are marketed if they must stand behind them as safe products to consume or

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(50) For critisms of the majority's view see p.322 of footnote (49).

(51) [1973] 6 W.W.R. p.715.

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> to use. They are better able to insure against such risks, and the cost of insurance, as a business expense can be spread with less pain among the buying public than would be the case if an injured consumer or user is saddled with the entire loss that befalls him."

> "This rationale embraces, in my opinion, threatened physical harm from a negligently designed and manufactured product resulting in economic loss"

since the prerequisites of liability were fulfilled namely

a) foreseeability of injury to person or property.

b) the direct nature of economic loss (52).

Thus economic loss was allowed.

In Gabolinscy Moller J did not discuss any of the cases discussed previously. His Honour treated this issue similar to Dutton's approach by classifying the damage for repair as physical loss. I respectfully submit that this issue of whether the damage is of economic nature or purely physical is vital in view of its novelty nature and also because of the conflicting English and Canadian authorities. Although this issue on damage is of importance, it is still subsidiary to the issue of establishing a duty of care which is the crux of the case. Moller J approved of the view taken by Lord Denning and Sachs L.J. that the damage was physical and not economic loss.

Lord Denning in Dutton, when he considered counsel's contention that the liability of the district council must be "limited to those who suffered bodily harm, and could not extend to those who only suffered economic loss" described this as an "impossible distinction" (53). But

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(52) For a full analysis of the concepts controlling liability in economic loss cases, see Christopher Harvey, "Economic Losses and Negligence: The Search for a Just Solution". [1972] 50 Can. Bar Rev. 580. Also see F. James, "Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal" [1972] 12 J.S.P.T.L. 105.

(53) [1972] 1 Q.B. 373, 396.

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one must not disregard the clear distinction between physical and economic loss (which was based on policy decision) in Spartan v Steel (54). Further Professor H. V. Heuston (55) has observed that the reluctance to grant remedy for the careless invasion of financial or pecuniary interest is long standing, deep rooted and not unreasonable. This observation was cited with approval by Barrowclough C.J. in Furniss v Fitchett (56).

Sachs L.J. went even further and adopted Salmond L.J. in Ministry of Housing and Local Government v Sharp (57) where Salmon L.J. did not draw a distinction between physical injury or financial loss which could reasonably be foreseen as a result of a failure to take such care. This approach was also adopted by Ritchie J in his delivery of the majority's view in Rivtow.

The above passage quoted both by Sachs L.J. and later by Ritchie J was treated by Winn L.J. as being wholly obiter (58). The learned judge said:

> "I must respectfully indicate that I'm unable to concur in the full breadth of that remark. There is nothing in Dorset Yacht Ltd v Home Office (59) as I read it which touches upon the question whether or not there is an important distinction in relation to claims to recover damages for negligence between foresight of physical injury or damage to property on one hand, and foresight of economic loss alone on the other. The negligence for which liability was imposed in this case consisted of failing to take due care to prevent borstal boys under the control of the defendant's officers from causing damage to the plaintiff."

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(54) 5 months later than Dutton where Lord Denning took a different view.

(55) Salmond on Torts 15th ed (1969) p.262 published by Sweet and Maxwell.

(56) [1958] N.Z.L.R. 396, p.401.

(57) [1970] 2 Q.B. 223.

(58) SCM v Whittall [1971] 1 Q.B. 337, p.350.

(59) [1970] A.C.1004.

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The Dutton authority relied on by Moller J could be supported by the dissenting judgement of Edmund Davies L.J. (60).

From the above discussion it is submitted that the reasoning of the minority in Rivtow which was based on the rationale of manufacturers' liability for negligence which embraced, threatened physical harm from negligently designed and manufactured products resulting in economic loss is very sound, logical and far better keeps pace with the changing needs of society. It is submitted that in view of the Donaghue v Stevenson neighbour principle, the above rationale should be extended to realty in the interest of justice and of balancing the interest between society as a whole and the negligent tortfeasor. But the decision of the majority in Rivtow was of limited application as could be illustrated below.

1) Liability of the manufacturer was based on a failure of a duty to warn (it was assumed that the manufacturer was aware of the danger). This clearly limited the decision to facts similar to Rivtow.
2) The splitting of negligence between cases of articles into two categories.
   a) dangerous per se and
   b) dangerous through negligence imposed further limits.
3) The stressing of the particular fact that the defect caused immediate personal harm to the user of the crane by the majority (61) and minority in the judgement further reinforced the suggestion of limitation of the decision to the facts of the case.
4) The reasoning of the majority in Rivtow, relying substantially on the remark of Salmond L.J., in Sharp, was not followed by English

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(60) Spartan v Steel [1972] 3 W.L.R. p.505, at p.517.

(61) [1973] 40 D.L.R. (3^d) 530, majority on p.542, minority on p.549.

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authorities except by Sachs L.J. in Dutton which was only obiter. The court further relied on an obiter dictum by Lord Denning in SCM v Whittal (62) where the learned judge said:

> "I must not be taken, however, as saying that economic loss is always too remote."

It is submitted that as regards economic loss the leading English authority is Spartan v Steel (63) which resolved the economic loss issue on policy grounds (64), which was contrary to Rivtow. This contrary view was expressly mentioned in the majority judgement (65).

> "I do not find it necessary to follow the sometimes winding paths leading to the formulation of a "policy decision"."

The minority on the other hand dealt with the case as one where policy required that manufacturers should accept responsibility upon the rationale of manufacturers' liability for negligence whereby loss suffered would be recoverable.

5) The majority only allowed for profit loss and not repair cost by drawing a clear distinction between them. Profit loss was economic loss as it flowed from a breach of duty to warn whilst repair cost did not flow from such a duty to warn. This was a clear indication of limiting economic loss to a defined area only. Although Laskin J and Hall J were prepared to allow repair cost as falling within economic loss (66), nevertheless the grounds under which it could be included are (1) under the rationale of manufacturers' liability (2) not to penalise the plaintiff for trying to mitigate further loss as required by the law. With reference to this later point I

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(62) See footnote (58).

(63) [1973] 1 Q.B. p.27.

(64) [1973] 1 Q.B. p.27, only Lord Denning adopted this approach.

(65) [1973] 40 D.L.R. (3^d) 530, at p.547.

(66) [1973] 6 W.W.R. p.716.

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respectfully submit that to remove the crane for repair during the peak period would not have minimised loss, unless this had been done during the off period so that the crane could have been used during the peak period. However this argument could stand only if the crane could not have caused a danger to its operator.

Could the decision in Rivtow be applicable to Gabolinscy?

Rivtow was concerned with product liability and the liability was based on failure of a duty to warn of an article which was dangerous per se. The damage to the house in Gabolinscy was under category (b) and hence not recoverable. In Gabolinscy there was no immediate threat to physical harm as distinct from Rivtow. It is submitted that Spartan v Steel is the present authoritative decision on the issue of economic loss. Since the facts in Gabolinscy were not concerned with product liability and not akin to those of Rivtow it is unlikely that Rivtow could be applied.

In conclusion it is submitted that if a product liability case like that of Rivtow is to arise in New Zealand, it is likely that Rivtow could have persuasive influence over the court's decision especially the rationale of the minority which is reasonable, sound and logical.

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Could the totality of the circumstances in the present case lead the court to decide that an implied warranty that the lease for land is fit for any particular purpose is permissible?

At common law there is no implied warranty that the premises will be available for any purpose that the tenant may have in view (67). Further there is no implied promise to do any act necessary to render the premises available for the purpose for which they are known to be taken Newby v Sharpe (68). In addition at common law there is no implied warranty on the letting of unfurnished house or land, that as to its physical condition, it is or shall be reasonably fit for habitation, occupation or cultivation, nor is there any implied contract that it is physically fit for the purpose for which it is let (69).

In a New Zealand decision of Balcairn Guest House Ltd v Weir (70), it was held that there is not to be implied against the lessor a convenant or warranty that such premises are fit for the purpose for which they are required to be used.

Leicester J (71) said:

> "No authority has been found which decided that there is any such warranty, what authority there is on the point is against its existence."

In Sutton v Temple (72) a lessee must take land as he finds it and there is no convenant or condition implied by law that land that is leased is fit for the purpose for which it is taken.

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(67) See Hill and Redman - Law of Landlord and Tenant 15 ed para 125.
(68) See Halsbury Law of England 3rd ed vol. 23, para 1249, (1878) 8 Ch. p.39.
(69) See Charlesworth on Negligence 5 ed 1971, p.377.
(70) [1963] N.Z.L.R. 301.
(71) [1963] N.Z.L.R. 301 at p.305.
(72) (1843) 12 M. & W. 52.

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In Hart v Windsor (73) it was held that there is no implied warranty attached by law to a demise of land or premises that they are fit for any particular purpose. Other authorities in support of Hart v Windsor are Cruse v Mount (74). The intending tenant is presumed to make his own inquiries as to the condition of the premises and in the absence of special stipulation he takes the house as it stands (75). The fact that the lessor may have knowledge of serious defects will not in the absence of any warranty by him gives the tenant or anyone claiming under him, any cause of action (76).

In Bartram v Aldous (77), the court held that where a landlord lets an unfurnished house, there is no implied contract by him that it is fit for habitation. Following from this case, if there is no implied contract in the case of letting unfurnished houses, then all the more there should not be an implied warranty to the lease of a piece of land where there is no immediate habitation.

In Gabolinscy although there was a stipulation that the lease must be for the erection of a house, in view of the above discussion, especially in the light of Baron Parke judgement in Hart v Windsor and Weir, it is submitted that no warranty could be implied. Although the general rule is that there is no implied warranty that the lease is fit for the particular purpose, nevertheless there are two exceptions.

1) At Common Law

2) By Statute.

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(73) (1844) 12 M. & W. 68.

(74) [1933] Ch.278, See also Hill v Harris [1965] 2 ALLER.358.

(75) See Halsbury Law of England vol. 23, 3rd ed. p.574.

(76) Cavalier v Pope [1906] Ac. 428, Hart v Windsor (supra)
see also Edler v Auerbach 1950 1 K.B.359.
Bull v London County Council 1949 2 K.B.159.

(77) (1886) 2 T.L.R.237.

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At Common Law

In the letting of a furnished house, a common law warranty that it is fit for habitation is given at the commencement of the tenancy.

By Statute

i) In New Zealand by the application of the Tenancy Act 1955 (78) S47 lists out the conditions implied in tenancies but subject to the existences of total exemptions (SS6-9) and partial exemptions (SS10-17). It is submitted that this Act is of very limited application.

ii) S116H of the Property Law Amendment Bill 1974 would imply in every lease of a dwellinghouse -

a) a warranty by the lessor that the dwellinghouse was, at the commencement of the lease, in a fit and habitable condition for residential purposes, and

b) a covenant by the lessor that he would throughout the term of the lease keep the dwellinghouse in a fit and habitable condition for residential purposes.

It is submitted that because of the narrow application of the Tenancy Act, it does not apply to the Gabolinscy case. Further S116H would imply warranty in a lease of dwellinghouse and not to include the lease of a piece of land. Atcommon law it is well-established that no implied warranty is permissible. Since Gabolinscy does not fall within the exceptions to the general rule, I respectfully submit that there is no implied warranty.

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(78) or the Tenancy Amendment Act 1957.

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Could general damage be awarded for inconvenience and worry?

Moller J himself conceded that the evidence was vague and lacked medical evidence to support the claim that the damage to the house had really caused the ill-health (personal injury). The worry on the contrary was suffered by the wife and there was absolutely no proof to show that the damage did flow from personal injury caused by the damage to the house.

In the case of physical inconvenience and discomfort (79), if a plaintiff is physically injured, he may also suffer from inconvenience, but such a loss would generally be included in the damages for pain and suffering, and loss of amenities of life as was held in the case of Shearman v Folland (80). But where the tort has resulted in some interference with the plaintiff's person short of physical injury, yet has caused him physical inconvenience, the latter must necessarily appear as a separate head of damage. Mr Gabolinscy in the present case seemed to be within this latter category.

Damages for inconvenience could be awarded in the following situations.

1) Deceit as in Mafo v Adams (81). This was followed by a recent New Zealand decision of Foster v Public Trustee (82). Cook J said

   "On the principle illustrated by Doyle's case and Mafo v Adams - not affected as to this principle by anything said in Cassel & Co. Ltd v Broome" (83).

2) False imprisonment - to recover for the loss of his liberty in the absence of physical injury.

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(79) McGregor - Law on Damages 13 ed published by Sweet and Maxwell, para [59] under the heading 2 Physical Inconvenience and Discomfort.

(80) [1950] 2 K.B. 43, 50 (C.A.).

(81) [1970] 1 Q.B. 548 (C.A.).

(82) [1975] 1 N.Z.L.R. p.26, p.29.

(83) [1972] A.C. 1027.

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3) Nuisance - Moore v Buchanan (84) where the plaintiff had been inconvenienced and annoyed by noise, interference with easement, and the like.

Further it is possible to obtain damages for inconvenience in contract (85). The law of torts is not clear on this point, that is whether the inconvenience should be considered as a separate head of non-pecuniary loss or whether it can come within the term "suffering" is a matter which is devoid of clear authority. Asquith L.J. in Shearman v Folland (supra) seemed to put this head of damage for inconvenience under the pain and suffering heading for damage. A different view was advanced by Sachs L.J. in Dutton (86) who said:

> "Something for general inconvenience suffered whilst occupying the premises and for disturbance during repairs"

are recoverable.

At any rate, the present law relating to recovery for inconvenience alone does not proceed further than the above three categories. The wrong suffered by Mrs Gabolinscy could be classified as mental suffering because these two heads are very similar in their basic nature, that is the mental element is involved. According to the learned author (87), it is submitted that mental suffering is not by itself sufficient damage to ground an action which was emphasised by Devlin J in Behrens v Bertram Mills Circus (88). His Honour said:

> "The general principle embedded in the common law is that mental suffering caused by grief, fear, and anguish and the like is not assessable."

This was supported by Lynch v Knight (89) per Lord Wensleydale:

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(84) [1966] 197 E.G. 565.

(85) McGregor - Law on Damages para [1140].

(86) [1972] 2 W.L.R. p.305, at p.323.

(87) McGregor - Law on Damages 13 ed published by Sweet and Maxwell at para [61].

(88) [1957] 2 Q.B.128.

(89) (1861) 9 H.L.C.577, 598.

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"Mental pain or anxiety, the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone."

Thus in view of the above mentioned authorities, it is submitted that the general damages for inconvenience and worry (which was described by the court as vague) ought not to be awarded especially in the absence of cogent evidence that this flowed from or was part and parcel of personal injury resulting from the damage to the house.

The view that damages for fear, anxiety, etc is only recoverable if the plaintiff also sustains physical injuries is supported by the learned writer Harry Street (90). Street said:

"Damages are also recoverable for fear, anxiety, neurosis and psychosis suffered by the victim of personal injuries."

In order to reinforce my argument that in tort, there is no recovery for a separate head of torts for inconvenience and worry there is a statement by the learned author Charles T. McCormick as follows (91):

"One who sustains bodily injury may recover damages for past and future physical pain and serious mental suffering accompanying such injury or produced thereby......."

To support this proposition is the case <u>Bonelli v Branciere</u> (92) where the court referring to an earlier decision said

"It was held that there could be no recovery for mental suffering (worry) unaccompanied with physical suffering, and that such mental suffering must be the outgrowth or result of the physical suffering."

Three situations where damage for mental suffering is allowed are

1) Negligent act of the defendant caused physical injury - recoverable as compensatory damages.

2) Breach of contract of marriage.

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(90) Harry Street, <u>"Principle of Law of Damages"</u> published by Sweet and Maxwell, p.69.

(91) Charles T. McCormick - <u>"Damages"</u> published by West Publishing Company 1935 at p.315.

(92) 127 Miss 556, 90 SO 245, 247 [1922].

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3) Wilful wrong, especially those affecting the liberty, character, reputation, personal security, or domestic relation of the injured party.

I conclude that as the present law stands no recovery for inconvenience and worry suffered is permissible in the absence of personal injury. The distinction between tort and contract for recovery of damage for inconvenience (93) is not based on any valid justification. Unless there are reasonable considerations to maintain the distinction, I submit that worry suffered in our present time would in most cases cause pecuniary loss directly or indirectly. Hence worry suffered independently of personal injury ought to be recoverable. The pioneering effort in this respect by Sachs L.J. in Dutton and Moller J in Gabolinscy is welcomed. If there was a discussion of the previous authorities, then their decisions would carry greater weight.

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(93) as observed by the learned author McGregor, p.1140.

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Conclusion

1) Gabolinscy attempted to extend negligent liability into a new area, that is to impose a duty of care on the lessor. There was a curious omission of the lessor and lessee relationship by Moller J when he arrived at his conclusion to impose a duty of care on the defendant. Similarly there was a mysterious omission on this point by Lord Denning in Bottomley.

2) Moller J pioneered into the novelty area of awarding economic loss in New Zealand as Lord Denning did in Dutton (England) under the disguise of property damage. This spirit and effort by the courts should be commended as the law ought to keep pace with new demands, and development of social needs. At the moment only Canada allows recovery for pure economic loss (94) whilst Spartan v Steel (95) does not favour recovery. The law is not static, the application of Rivtow depends on the facts of the particular case. Until the path is opened Gabolinscy is within the limits of Lord Denning in Spartan v Steel which is based on policy considerations.

3) The award of damages for inconvenience and worry is a step ahead of time and is supported by Sachs L.J. in Dutton. Undoubtedly this step is to be welcomed and if there has been a discussion of previous cases in this respect the decision would carry more weight. It is fervently hoped that other jurisdictions would support it.

As the present law stands, no duty of care is imposed on lessor in relation to the fitness of the premises. Contrary to this, Moller J did impose a duty of care on the defendant (lessor).

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(94) See Rivtow [1973] 6 W.W.R.692.

(95) [1973] 1 Q.B. 27 - the present authoritative decision for recovery of pure economic loss.

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It is submitted that this is against the doctrine of precedent to disregard long standing authorities which have been approved and confirmed by later cases. Although the cases on leases are anomalies to the Donaghue v Stevenson neighbour principle, it is up to the House of Lords or Privy Council to put the matter right. Perhaps the other alternative is by legislation.

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