DYNAMIC INTERPRETATION
IN
NEGLIGENCE LAW

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SUBMITTED TO
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I CONFIRM THAT THIS THESIS, IS MY OWN WORK, HAS BEEN COMPOSED BY MYSELF, AND, DOES NOT INCLUDE WORKS SUBMITTED FOR ANY OTHER DEGREE OF PROFESSIONAL QUALIFICATION.
ABSTRACT

The present study aims at an explanation of dynamic interpretation in negligence law. It is argued that the development of negligence law is dynamic on the grounds that it has to incorporate tentative social presumptions, open-textured concepts, and flexible standards. Furthermore, the courts have considerable leeway in formulating basic premises and creative freedom in re-shaping, re-interpreting, and applying rules in particular cases. The central task of the study is therefore to explore this assertion, to demonstrate the ambiguity inherent in seemingly clear-cut legal principles, and to reconstruct legal reasoning so that it would be more coherent and responsive to social needs.

Thesis starts with a fundamental presupposition of the central theme. It is presupposed that one helpful approach to analysing dynamic interpretation in negligence law is to consider it in the setting of legal reasoning treated as what Weinrib calls the 'justificatory enterprise'. In respect of that, there have to be some justificatory premises (legal concepts) by reference to which it is justified, and some justificatory reasoning process which links the premises and justification. The justification of any legal decision thus requires the application of appropriate justificatory reasoning to show how the decision is supported by or derivable from appropriate justificatory premises. Once these premises are agreed, a conclusion can be made, or justified, by deductive logic. Legal problems of interpretation, however, arise exactly when we seek to determine the premises, that is, when we seek to ascribe their possible meanings as well as the criteria for deciding which cases are alike for this purpose or that. It involves two levels of enquiry: textual and contextual. The first level involves establishing what the relevant legal concepts mean and the relation between these concepts and the object of their reference. The second level is the contextual enquiry. It confronts the consequences of competing interpretations, and, by evaluating these, one chooses a preferable interpretation.

Weinrib shows that the law of negligence illustrates the coalescence of a number of normative conceptual premises e.g. standard of care, duty of care, and proximity into a coherent justificatory ensemble. Chapters two to four deal with problems of textual interpretation. They give an analytical account of the open-textured concept of negligence, the flexible and reasonable standard of care particularly in relation to customary practice, and the varying interpretation and qualification of duty of care in different legal contexts.

Chapter Five is concerned with changing judicial attitudes towards the 'neighbour' principle since Amos, and focuses on its historic development as a carrier and developer of values rooted within the legal context itself. Chapter Six considers different types of legal rules and tests, such as the reliance principle, the assumption of responsibility and the three-stage test, and examines how they interrelate with the proximity test. Chapter Seven, in examining debates between the precedent-based approach (the so-called incremental approach) and the principle-based approach, argues that deciding that cases are alike for the purpose of doing justice in a particular instance involves an irreducible element of classification and qualification, that is, saying that a given characteristic is more relevant than that. But, in the end, it must conform to some accepted reasonable standards, expectations, norms, or principles satisfied by what Stanley Fish calls the 'interpretive community'.

It is concluded that negligence law as a system of law has to minimise, strictly, the arbitrariness that can enter into such valuations unless we settle down certain justificatory premises, that is, rules, precedents, and principles, that guide the judge in reaching a sound legal decision, in selecting what is to be given weight and what is to be ignored, in distinguishing one case from another, and in determining what class a particular situation is to be subsumed under. However, legal interpretations of factors relevant to negligent liability are open-ended and indeterminate. It is the great range of the scope of legal interpretation and argumentation that makes the development of negligence law so dynamic.
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ABBREVIATIONS

A. C.  Appeal Cases (Law Reports)
All. E. R.  All England Law Reports
A.L.J.R.  Australian Law Reports Journal
B.C.C.A.  British Columbia Court of Appeal
B.C.L.R.  British Columbia Law Reports
B.L.R.  Building Law Reports
C.A.  Court of Appeal (England and Wales)
C.A.R.  Criminal Appeal Reports
C.L.J.  Cambridge Law Journal
Col. L. R.  Columbia Law Review
Ch.  Chancery Division (Law Reports)
E.G.L.R.  Estates Gazette Law Reports
Edin. L. R.  Edinburgh Law Review
H.L.  House of Lords
I.R.L.R.  Industrial Relations Law Reports
J.R.  Juridical Review
L.Q.R.  Law Quarterly Review
L.R.  Law Reports, England and Wales
Man. C.A.  Manitoba Court of Appeal
M.L.R.  Modern Law Review
M.R.  Master of the Rolls, England and Wales
N.S.W.C.A.  New South Wales Court of Appeal
O.J.L.S.  Oxford Journal of Legal Studies
O.R.  Ontario Reports
P.N.  Professional Negligence
P. L.  Public Law
Q.B.  Queen's Bench Division (Law Reports)
S.A.S.R.  South Australian State Reports
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Simmons v. Pennington [1995] 1 WLR 183
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Slipper v. B.C.C. [1991] 1 QB 283
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Wilson v. Swanson (1956), 5 DLR (2d) 113 SCR 804
Winterbottom v. Wright (1842) 10 M & W 109; 152 E R 402
Wise Bros. v. Commissioner for Railways (1947) 75 CLR 59

X (Minors) v. Bedfordshire C.C. [1995] 2 AC 633

Yuen Kun Yen v. Attorney General of Hong Kong [1988] AC 175 (PC)
The present study aims to explain that negligence law has been interpreted dynamically, that is, judges interpreting negligence law consider not only the text of the precedents and their historical context, but also their subsequent history, related legal developments, and current social context. There are various factors which contribute to this phenomenon. The main task of the study is, however, to move beyond abstract description of the phenomenon to the review of particular cases in this area of law to see if we can establish an enquiry into how dynamic interpretation in negligence law may be understood.

The development of negligence law cannot be properly understood without an appreciation of the role of the judge in the common law system. Chapter 1 gives an analytical account of the formulation and interpretation of rules in the courts. It extrapolates from these to offer an analysis of rules and to develop an understanding of the way in which rules are applied in negligence law. It thus forms the methodological framework for the present study.

Chapter 2 emphasises the ambiguity of legal concepts (or sub-concepts), claiming that however much one might try to clarify them, such terms as ‘fault’, ‘negligence’, ‘reasonableness’, ‘duty of care’ and the like will remain inherently vague. Moreover, it is the unreliability of the fact-finding process that contributes to uncertainty in the judicial process. The proof of negligence has been made considerably more difficult as a result of the inherent ambiguity of ‘legal’ facts. Judges often make decisions based upon what witnesses say about an event with the benefit of hindsight.

Chapter 3 raises questions about reasonableness falling within the category of ‘question of fact’ as a matter of evidence, even though they are also in part questions of value. In any case, we must know what was done, and for what reasons, and what is customary practice in such matters, before we can judge of the reasonableness of the acts or omissions in question. This process of judgment therefore involves an appreciation which is based on the customary practice in the community. However, as discussed in this chapter, common practice is only one of the relevant factors that
the courts should have to take into account in determining the reasonable standard of care.

Chapter 4 is concerned with the concept of 'duty of care'. It asks how the idea of 'duty of care' is formulated within the discourse of the tort of negligence. It consists of two related issues: (1) The existence of the duty: does the defendant owe any duty of care to the plaintiff? If so, (2) the extent of the duty: to whom and for what loss that duty extends? With respect to the existence of duty, it raises the distinction between general duty and particular duty. After examining a number of leading authorities, it shows that when the courts say 'X owes a duty to Y,' it could mean that X owes either a general duty or a particular duty to Y. With respect to the latter, it is argued that the concept of 'duty of care' is a notion of variable content which contains a wide range of qualifications in different areas of law.

Chapter 5 summarises the changes over the last two decades in the judicial attitudes towards the principled approach of negligence law. It starts with that most influential of the general duty tests, now rejected, the general formulation of Lord Wilberforce in Anns v. Merton London Borough Council. The test of 'proximity' adopted by the House of Lords is also discussed. It is argued that no generalisation can solve the problem as to the basis upon which the courts may hold that a duty of care exists. Everyone agrees that a duty must arise out of some 'relationship' between the parties, but no one has ever succeeded in capturing in any precise formula what that relationship is.

Chapter 6 draws together examples of how different types of legal rules and tests, such as the reliance principle, the assumption of responsibility and the three-stage test interact. It reveals a multiplicity of techniques for interpreting different types of rules. Legal interpretation in this way tends to encourage coherence in a legal system in the sense that the rules of the system as a whole will knit together; it also tends to promote consistency and uniformity in the resolution of disputes, thus, improving internal intelligibility among rules. This phenomenon is illustrated by reference to recent negligence cases such as Henderson, Spring, White, and Marc Rich.

Chapter 7, in examining debates between the precedent-based approach (the so-called incremental approach) and the principle-based approach, shows how all precedents could be interpreted broadly and narrowly, depending on how the courts want to use them. It claims to show that all precedents are what Llewellyn calls 'Janus-faced' and can be used to support contrary positions. It also stresses the role
principles play in interaction with rules, focusing on the fact that concrete legal questions involve appraisal of the overall balance in a range of rival principles. Recent developments in England in this area of law which have been discussed in Chapter 6 are contrasted with divergent views in recent cases decided by courts of Australia, Canada and New Zealand. The contrast allows us to reconsider legal rules in the law of one jurisdiction in the light of the variety of social policies taken in other jurisdictions.

Undeniably, Scots law plays an important role in the development of common law of negligence as a great deal of vital principles can be found in three leading Scottish authorities,1 Donoghue v. Stevenson,2 Glasgow Corporation v. Muir3 and Bourhill v. Young.4 However, I have attempted to refer to many important developments which have occurred in a wider context, especially in England and other Commonwealth jurisdictions. Given the nature of this study, however, it has been difficult to concentrate only on the Scots law of delict. As a consequence, I have adopted the legal terminology generally used in English law instead of that in Scots law.

1 Lord Rodger, 'Mrs Donoghue and Affenus Varus' Current Legal Problems 1988, at p.9  
2 [1932] AC 562  
3 [1943] AC 448  
4 [1943] AC 92
1.1. Aim

The present study aims at an explanation of dynamic interpretation in negligence law. It is argued in the thesis that the development of negligence law is dynamic on the grounds that it has to incorporate tentative social presumptions, open-textured concepts, and flexible standards. Furthermore, the courts have considerable leeway in formulating basic premises and creative freedom in re-shaping, re-interpreting, and applying rules in particular cases. The central task of the study is therefore to explore this assertion, to demonstrate the ambiguity inherent in seemingly clear-cut legal principles, and to reconstruct legal reasoning so that it would be more coherent and responsive to social needs.

Before proceeding to a full examination of the theme, a few methodological issues will be explained in this section. Legal studies may be constructive or critical. It is one thing intelligently to apply principles; it is another thing to step back to consider them. A legal practitioner who pauses in order to inquire why he poses particular questions or whether they are right questions to pose, ceases for the time to be a practitioner and becomes a legal theorist. This duality of interests may be beneficial to both practice and theory. Honoré suggests that a proper method for legal enquiry is to set out to analyse an area of law in a way which is independent of what may be called the ideology of system. Though the description he offers is independent of preconceptions about the ideology and function of legal systems, and concentrates on the way in which laws are formulated, it turns out to have implications for the ideology of law.¹

Plausible legal theories normally come from an enquiry in which the lawyers have been forced to try to resolve internal puzzles about the principles of their study.
In order to resolve these puzzles, one therefore must be some sort of a critic of principles of method. For example, Hart wanted not only to explain certain legal concepts but also to elucidate what sort of a thing a good legal explanation would be. He began by wondering about the long-established categories constituting the framework of legal theory, but he did not stop there. He co-ordinated the categories of both constructive and critical inquiries. They belong to two different branches of enquiry, in two different disciplines. Both theories apply their own principles and canons of enquiry and both disciplines apply their own several principles and canons of practice. Their categories, that is, their questions, methods and canons are different. In Collingwood’s word, they work with different presuppositions. In other words, both employ their own standards or criteria by which their particular exercises are judged successfully or unsuccessfully.

H.L.A. Hart thinks that the content of legal concepts is, like other concepts, roughly conveyed by means of explicit definitions. Hart’s major methodological premise is that legal concepts’ semantics must start with attention to how an expression is used. This premise directs attention to actual instances of application, and consequently to sentences like ‘X has a right’, rather than to single word in abstraction from such judgments of application. The requirement that the explication of concepts focus on such sentences entails that the social practices within which such judgments are produced are relevant to the understanding of the concepts themselves.

The aim of any legal study, it is hoped, is to provide us with satisfactory explanation of the law in question. Prediction and control thus follow. But to make this aim clear is more difficult than stating it, since a number of seemingly obvious questions need to be answered before this aim can be properly understood. Namely, what is legal interpretation? How legal justification inter-relates with legal interpretation? What criteria do interpretations need to satisfy before we are ready to

accept? Honoré argued that one of the major contributions of Roman law was the development of a canon of acceptable arguments proper to legal discourse. This notion of a canon of legal arguments which were acceptable legal arguments developed by the legal establishment still has a valuable place in grasping the nature of legal reasoning today.

Without standards discriminating between acceptable and unacceptable arguments in legal justification, there could be no difference between the justified and the unjustified, hence no premises to adduce or oppose in giving or contesting of justification. The question of justification is therefore open to the further question: justification by what standards? Legal justification is justification in terms of the standard of law as itself a highly systematised set of standards of acceptable legal arguments. This assumes a relativistic notion of justification - all justification is justification relative to some presupposed standards. What counts as a satisfactory or sound legal justification depends simply on the available standards of legal judgment derivable from a variety of formal sources.

1.2. Negligence Law as 'Justificatory Enterprise'
One way of looking at the law of negligence is to treat it as a system of rules. It consists of a complex of rules which can be identified as rules about 'rights' and 'duties'. Such nouns as 'right', and 'duty' have no semantic reference, no counterpart in reality. A system of rules described by law is comprised of rules of law stipulating duties and exceptions to duty, that is, of ought meaning-contents. It is itself a field of meaning, within which no contradiction is allowed, stipulating the totality of legal duties and exceptions to duty. This is known as Kelsen's positivistic theory. Kelsen's model of a legal system is designed to provide a logical justification for the

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7 The doctrine of formal sources of law means that courts are required to apply as law those rules and other norms or standards that are validly generated by a recognised formal source. Since it is a judge's duty to apply valid rules in making decisions, it is ex hypothesi an acceptable justification for a decision to show (a) that it applies a rule belonging to the system of valid rules, and (b) that this rule is not in conflict with any rule having higher or equal authority with the hierarchy of legal sources. Judicial decisions are supposed to be law-
principles to be referred to as 'principle of consistency' and 'the principle of subsumption'. He does this by postulating a basic norm, presupposed in law, which gives unity to the system of norms. The basic norm enables the system of norms to be interpreted as a 'meaningful', that is, 'non-contradictory,' system.

In this model, the legal system appears as a primarily 'dynamic' system, in which lower norms appears as individualisations and concretisations of higher norms. A higher norm 'determines' a lower norm at least to the extent of authorising (permitting) the act of will which creates the lower norm; it may also determine the procedure for the creation of the lower norm and, to a greater or lesser extent, its contents. To postulate the existence of the 'legal system' as a kind of 'regulative ideal' focused on an ordered, self-consistent and coherent body of norms, is a way of making the legal system intelligible.

The present study is based on a fundamental presupposition of the central theme. It is presupposed that one helpful approach in analysing dynamic interpretation in negligence law is to consider it in the setting of legal reasoning treated as what Weinrib calls the 'justificatory enterprise'. All who have tried to work out a theory of negligence law have asked themselves the question Holmes asked of himself, 'Whether there is a common ground at the bottom of all liability in tort, and if so, what that ground is'. More recently, Weinrib has asked the same question again. He points out that to understand law as a justificatory enterprise, three features of justification has to be elucidated: (1) its nature; (2) its structure(s); and (3) its ground. By the nature of justification Weinrib means 'the minimal conditions that any consideration must observe if it is to be justificatory'. By the structure of justification he means 'the most abstract and comprehensive patterning of justificatory coherence.' By the ground he means 'the presuppositions about agency that ultimately account for the normative character of any justification'. Finally, referring to

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Oakshott's article, Weinrib suggests that a truly legal enquiry should not simply accept the conclusions of special disciplines. We must instead start with what we, in some sense, already know about law in a given context, and work back through three features mentioned above to a clearer and fuller knowledge.

1.2.1. The Structure of 'Justificatory Enterprise'

It is therefore important to give an analytical account of the structure of justificatory enterprise in terms of justification, justificatory premises and justificatory reasoning. There have to be some justificatory premises (legal concepts) by reference to which it is justified, and some justificatory reasoning process which links the premises and justification. The justification of any legal decision thus requires the application of appropriate justificatory reasoning to show how the decision is supported by appropriate justificatory premises. It is important to offer both justificatory premises and reasoning by showing how justification itself is concerned with its premises. Once these premises are agreed, a conclusion can be made, or justified, by deductive logic. Thus any application of law and any legal justification will involve interpretation, since it calls for an understanding of the meaning of the legal rule and the legal text applied in the case.

1.3. Interpretation in Negligence Law and its Problems

1.3.1. Forming Rules

A fundamental issue should be explained before elaborating on interpretation in negligence law, namely, how rules are formulated in negligence law. The most obvious characteristic of such propositions is that they are not expressed in canonical form of language, or, as Pollock put it, they 'have never been committed to any authentic forms of words.' In an article 'Judicial Legislation', Lord Oliver observed that the interesting features of the case [Donoghue] in the present context is the way in which Lord Atkin reaches his decision. The approach he used was a careful review of previous cases, the extraction from them of a number of propositions, and

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an extrapolation from those propositions to the broad general proposition on liability which is enshrined in the classic passage in the speech.\textsuperscript{16}

The law of negligence, as a system of rules, consists of a complex of rules which can be identified as rules about ‘rights’ and ‘duties’. Here I would refer to a general approach to formulating rules in negligence law expounded by Lord Diplock in \textit{Dorset Yacht Co. Ltd. v. Home Office}. His approach can be converted to a relatively straightforward formula, namely, ‘In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises.’ Rules are hypothetical normative propositions, stipulating that if certain circumstances (hereinafter, certain ‘operative facts’) obtain, then certain consequences are to (or ‘must’ or ‘ought to’) follow or be implemented.

Lord Diplock’s approach takes the canonical form: ‘if $x$, then $y$.’ If $x$ is the factual predicate of the rule, the generalisation discussed above; ‘then $y$’ is the consequence: what happens when the instance embraced in the generalisation occurs. The substance of the rule is thus its operative facts or factual predicate - that which makes it operative; its scope is a function of the relationship of the operational facts to the rule’s justificatory reasons (substantive as well as formal). The legal consequence of the rule may be described as its character.\textsuperscript{17}


\textsuperscript{17} In \textit{Dorset Yacht Co. Ltd. v. Home Office} [1970] AC 1004 at 1058-59, he said:

‘The justification of the courts’ role in giving the effect of law to the judges’ conception of the public interest in the field of negligence is based upon the cumulative experience of the judiciary of the actual consequence of lack of care in particular instances. And the judicial development of the law of negligence rightly proceeds by seeking first to identify the relevant characteristics that are common to the kinds of conduct and relationship between the parties which are involved in the case for decision and the kinds of conduct and relationships which have been held in previous decisions of the courts to give rise to a duty of care.’

The method adopted at this stage of the process is analytical and inductive. It starts with an analysis of the characteristics of the conduct and relationship involved in each of the decided cases. But the analyst must know what he is looking for, and this involves his approaching his analysis with some general conception of conduct and relationship which ought to rise to a duty of care. This analysis leads to a proposition which can be stated in the form:

In all the decision that have been analysed a duty of care has been held to exist wherever the conduct and the relationship possessed each of the characteristics A, B, C, D, etc., and has not so far been found to exist when any of these characteristics were absent.

For the second stage, which is deductive and analytical, that proposition is converted to:

In all cases where the conduct and relationship possess each of the characteristics A, B, C, D, etc., a duty of care arises.

The conduct and relationship involved in the case for decision is then analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision.

But since \textit{ex hypothesi} the kind of case which we are now considering offers a choice whether or not to extend the kinds of conduct or relationship which gave 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
Since legal norms are open hypotheticals, applying to any situation in which the relevant operative facts are instantiated, we should envisage both X and Y as analysable in terms of a suitably amended form of predicate logic. Any one who confronts a legal decision which he regards as possibly governed by the law stated in a given text has then to decide whether 'X' holds good in the case in view; if so, then the normative consequences 'Y' also holds good and must be respected if the subject wishes to act within the law. This involves ascribing a certain meaning to each of X and Y. Such interpretation is often not perceived as problematic by judges. In contested cases, however, disputes may be raised by parties or judges as to the meaning properly to be applicable to the case in hand, and if it is, in what sense it is so and with what effect. In such cases operative interpretation is called for.

Legal problems of interpretation arise exactly when we seek to ascribe their possible meanings as well as the criteria for deciding which cases are alike for this purpose or that. Expressing this formulaically, A says that 'if x then y' should be understood as meaning 'if x1 then y1', and that the decision he supports will properly give effect to y on this interpretation, the operative facts being present, on the proper appreciation of the factual situation in the light of the proper interpretation of x. The opponent B then attacks this view at least by challenging the correctness of the interpretation of either or both of x and y as meaning respectively x1 and y1, or by challenging the relevant appreciation (or qualification, or characterisation, or classification) of the factual situation, a process which in effect amounts to challenging the interpretation offered of the rule, since what is in issue is whether this which has happened counts as a case of the operative facts x. Frequently such a challenge can be effective only if it is accompanied by or couched in terms of a rival interpretation of either or both of x (e.g., as meaning x2) and y (e.g., as meaning y2), or of a rival characterisation of the factual situation in hand.

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. The policy decision will be influenced by the same general concept of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as Lickbarrow v. Mason (1787) 2 Term Rep. 63; 100 E. R. 35; Rylands v. Fletcher (1868) L. R. 3 H. L. 330, Indemnity v. Dames (1866) L. R. 1 C. P. 274, Donoghue v. Stevenson [1932] AC 562, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wider general terms of characteristics of conduct and relationships which give rise to legal liability.
In this state of controversy, what has to be decided is at least whether or not A’s proposed interpretation ought to be accepted, and probably also whether B’s rival interpretation is to be preferred. The judicial task of settling legal controversies becomes, inter alia, a task of ruling upon the soundness of A’s and/or B’s thesis as to the correct or better interpretation of the present legal context.

A legal decision has to be made in order to resolve the doubt and ascribe a functionally unequivocal meaning to the rule for the purpose of applying it in the case in hand. The decision in the case is justified in the light of the facts as established and qualified by the court, and in the light of some legal rules as interpreted by the court; where these interpretations themselves are interpreted and justified, a more complete justification is stated for the final decision than where they are simply enunciated as operative interpretations.

It is important to view this sort of interpretation in an essentially dynamic and interactive way. There is the dialogue between the judge and his predecessors as he turns to and examines the precedents. There is the dialogue between the judge and the counsel who set out the case before the court by presenting argument and also seek to guide the court in different directions - to choose different principles or analogies and to decide differently. It is in the setting of dialogue as involving such an interaction that legal interpretation is undertaken. This is true in general, but nowhere more obvious than in interpretation in negligence law.

Sometimes interpretation may require no more than stating the rule in question and some instances of the operative facts of the rule. Subsumptive reasoning in this case connects premises satisfactorily and unproblematically to the conclusion. But sometimes reasons must be given for qualifying the concrete facts as instances of the operative facts stipulated in the rule. Rules are generalisations: they group together particular instances or attributes of an object or occurrence and abstract or generalise from them to build up a category or definition which then forms the operative basis of the rule.18 The initial selection of the relevant ‘category’, based on the factual similarity of the cases, can preclude resort to policy premises from factually

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18 ‘In terms of our understanding of a system of case law as a system of reasoning, not simply as a repository or formal source of binding law, it is the process of generalisation, the search for overall intelligibility, that gives our doctrine of precedent that other, open-ended, character (as opposed to its technically binding aspect) that so attracted the attention of Karl Llewellyn.’ Neil MacCormick, ‘Donogue v. Stevenson and Legal Reasoning’ in Donoghue v.
dissimilar cases, which are nevertheless relevant. The selection is an incomplete inductive process whereby a similarity between two concepts in one respect is inferred from a known similarity in other respects. It is not necessary to bring the facts of a later case completely within the earlier one, as long as they have ‘sufficient’ similarity for an analogy to be drawn. But this method is flexible, and implicitly evaluative. An analogy can always be drawn between two cases if the judge is willing to view them at a high level of generality. Depending upon the degree of generality with which one is willing to view the concepts, an analogy can be drawn between an orange and a lemon (because they are both citrus fruit); an orange and an apple (because they are both fruit); an orange and an egg (because they are both food) and so on. Hence, the process of rule formulation is an essentially evaluative one. In making the generalisation, the judge is choosing from a range of individual properties which an event or object possesses; in making that choice he searches for the aspect of the particular which is causally relevant to the aim of the rule - the goal which is sought to be achieved or the harm which is sought to be avoided.\textsuperscript{19} It is thus the overall aim or objective of the rule which determines which among a range of generalisations should be chosen as the operative fact or facts for the ensuing rule. However in generalising rules, only some features of the particular event or object are focused on and are then projected onto future events, beyond the particulars which served as the paradigm for the formulation of the rule. The generalisations in rules are thus simplifications of complex events, objects or courses of behaviour. Aspects of those events will thus be left out by the generalisation. Further, the generalisation, being necessarily selective, will also include some properties which will in some circumstances be irrelevant.

Justification of purposes thus interacts with the generalisation. The generality of a rule is a function of the rule’s justification. However, the match may not always be perfect between the rule and its purpose which is represented in the description of rules as over-general or over-specific. For example, Lord Goff declared his impulse to do practical justice and in White v. Jones\textsuperscript{20} and he then stated:

\textit{Justification of purposes thus interacts with the generalisation. The generality of a rule is a function of the rule’s justification. However, the match may not always be perfect between the rule and its purpose which is represented in the description of rules as over-general or over-specific. For example, Lord Goff declared his impulse to do practical justice and in White v. Jones\textsuperscript{20} and he then stated:}

\textsuperscript{20} [1995] 2 AC 207.
If such a duty is not recognised, the only persons who might have a valid claim (ie, the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie, the disappointed beneficiary) has no claim...It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in the law...21

This mismatch can occur for three reasons. First, as noted, the generalisation which is the operative basis of the rule inevitably suppresses properties that may subsequently be relevant or includes properties that may in some cases be irrelevant. Secondly, the causal relationship between the event and the purpose is likely to be only an approximate one; the generalisation bears simply a probable relationship to the harm sought to be avoided or goal sought to be achieved. Thirdly, even if a perfect match between the generalisation and the aim of the rule could be achieved, future events may develop in such a way that it ceases to be so. As Schauer states:

'in part because human beings are fallible, in part because they have imperfect knowledge of a changing future, and in part because the world itself is variable, rules premised on the empirical relationship between generalisation and justification remain vulnerable to future discoveries or events that would falsify what had previously been thought to be universal or exclusive with respect to their background justifications retain the prospect of becoming so.'22

It follows from this that over-generality or over-specificity, although inherent, is likely to be exacerbated in certain circumstances - particularly where the legal context in which the rule operates is one which is subject to frequent change, where the course of change is unforeseeable, where the range of situation in which the rule will apply is great, or where there is an uncertain causal relationship between the events, objects or behaviour focused upon and the harm to be avoided or goal to be achieved. Furthermore, the analysis thus far has assumed that the rule is formed in reaction to an observed or experienced event.

1.3.2. Indeterminacy and Open-textured Concept

The indeterminacy of concepts derives from two factors, defeasibility and open-texture. Defeasibility is the key notion in Hart's attempt to capture the fact that no

22 Schauer, Playing by the Rules, at p. 35.
closed set of conditions can determine the application of a legal concept. The indeterminacy arises in part from the nature of language, in part from anticipatory nature of rules. The indeterminacy matters because rules are entrenched, authoritative statements which are meant to guide behaviour, be applied on an indefinite number of occasions, and which have sanctions attached for their breach. Hart described rules as having a core meaning and a penumbra of uncertainty or fringe of vagueness. The indeterminacy arises not because the meaning of the word is unclear in itself, but because in applying the rule the question would always arise as to whether the general term used in the rule applied to this particular fact situation. As Hart contended that,

'particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; not can the rule itself step forward to claim its own instances.'

There will be cases in which the general expression will be clearly applicable; in others it will not. There may be fact situations which possess only some features of the plain case, but others which they lack.

This indeterminacy in application Hart described as the 'open texture' of the rules. The concept of open texture was drawn from a theory of language developed by Waismann, although Hart recast it in his theory of rules, and it has been used by Schauer to show why rules can be inherently indeterminate. In Hart's analysis, as in Schauer's, open texture stems from the inability of rule makers to anticipate all future events and possibilities: 'the necessity for such choice is thrust upon us because we are men, not gods.' So even if consensus could gradually be built up as to the 'core meaning' of a particular term, the vagaries of future events would mean that there would still be instances 'thrown up by nature or human invention' which would possess only some of the features of the paradigm case or cases but not others. Waismann's example illustrates the point: although we may think that we had a precise definition covering all cases when we established that if something has

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properties, a, b, c, and d, it is an x, and if something does not have those properties, it is not x, when we encounter something which is only two-thirds b, this unanticipated contingency creates a vagueness where none had hitherto existed. Rules thus have an inherent and characteristic vagueness - even if determinant, the limits of human foresight mean that the least vague term may turn out to be vague when applied to a situation unforeseen when the term was defined.

It is noted that a negligence action is not founded upon a pre-existing legal framework - the foundation of any action for negligence is the negligent conduct itself. For this reason, negligence action can arise in any sphere of human conduct or activity, where rights and obligations are often tacit. Therefore, judges are very concerned with the indeterminacy which arises from its anticipatory nature when dealing with negligence actions. As Lord Wright points out in *Bourhill v. Young*, negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. The test is never of universal application, it is subject to two important defeasible factors. In the first place, the degree of risk may be so small and the chance of serious harm resulting therefrom so slight that a reasonable person would not consider it necessary to guard against the danger. Secondly, save in exceptional circumstances, the harm which is foreseeable must be harm resulting from physical injury to the person or property of the plaintiff. In *Ultramares Corp v. Touche*, the New York Supreme Court decided that an accountant who negligently audits the books of failing concern and prepares a statement showing that the concern is a good credit risk is not liable to creditors who extend credit in reliance on his audit. Cardozo, J., said.

'It if liability for negligence exists, a thoughtless ship or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.'

It has become clear that nearly all arguments for restricting negligence liability are at bottom versions of the above floodgates argument. Every rule, no matter how precisely worded, will always have a measure of open texture. But there is perhaps something to be said for the claim that words will have the effect of further

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30 174 N.E. (1931) 441, at 444, *per* Cardozo C.J.
restricting the initial range of potential indeterminacy, especially when conventions of construction can then be brought into play.

The differing views of whether and in what way the law of negligence applies to the particular fact situations at hand, arise from the general fact that the law of negligence make sense only in their context, which is the dynamic social and political context. Honoré pointed out rightly that

“They [rules] have a history and a development. The life and identity of a rule in time is however dialectical. Its genealogy consists in the fact that its present state has been derived by a process of argument, amendment and modification from its former state. It also follows that rules overlap, since exceptions to rules and propositions defining the scope of rules are themselves _prima facie_ universal propositions of an inherently debatable character and are themselves rules. Whether they are to be stated as substantive rules or as fragments of other rules depends on the context of discussion.”\(^{32}\)

The resolution of these questions in a rational manner is essential to a legal system, for only then could the law be said to be intelligible and the rule be truly to prescribe behaviour before the event. The approach of dynamic interpretation in negligence law is, it is contended, to be considered in this light.

### 1.4. Two Levels of Enquiry: Textual Analysis and Contextual Interpretation

Having given an analysis of the dynamic character of interpretational problem, the development of negligence law can then be appreciated for what it is only through reflection upon this dynamic deployment. The whole study involves two levels of enquiry: textual analysis and contextual interpretation. The first level involves establishing what the relevant legal concepts mean and the relation between these concepts and the object of their reference. The second level is the contextual enquiry. It confronts the consequences of competing interpretations, and, by evaluating these, one chooses a preferable interpretation.

#### 1.4.1. Textual Analysis


As mentioned in the previous section, there are three main problems associated with the application of rules in any context. These are their tendency to generality or specificity, their indeterminacy, and their interpretation. These problems stem from two roots: the nature of rules and the nature of language. Prescriptive rules are anticipatory, generalised abstractions, when endowed with legal status are distinctive, authoritative forms of communication. They are also linguistic structures: how we understand, interpret, and apply rules depend in part on how we understand and interpret language. In considering the nature and limitations of rules, a legal analysis of the roles which rules are asked to play in a legal system needs to be coupled with an examination of these linguistic properties.

In *The Idea of Private Law*, Weinrib shows that the law of negligence illustrates the coalescence of a number of normative conceptual premises e.g., standard of care, duty of care, and proximity, breach of duty, damage and causation and so on, into a coherent justificatory ensemble. As a product of legal discourse, the concepts ‘invite us to make sense of them and of their normative dimension.’34 Chapters two to four examine some essential conceptual premises in negligence law, such as the concept of negligence, standard of care and duty of care. It focuses primarily on the ‘meaning of the text’ as a linguistic object. As such, they can be taken to disclose the court’s interpretation in the case about the meanings of these conceptual premises used. They give an analytical account of the open-textured concept of negligence, the flexible and reasonable standard of care particularly in relation to customary practice, and the varying interpretation and qualification of duty of care in different legal contexts.

The analysis of negligence demonstrates that the traditional approach to the law of negligence scholarship rests upon conceptualists’ understanding of law. The possibility of such an account in the area rests in part upon the plausibility of the central conceptual categories around which the different types of negligence are constructed. Law requires that essential building blocks of law of negligence - sub-concepts such as ‘duty of care’, ‘foreseeability’, ‘standard of care’, and so on - be established as logically coherent. These chapters aim to reveal the implicit interconnection between these sub-concepts and to understand how these sub-concepts

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34 Ibid., at 170.
relate to one another and to the totality that they together form. By tracing the varying content of sub-concepts in the context of negligence law, we can see not only their meanings, but to some extent the complexities of how these meanings are developed.

In all these cases, it will be noted that the textual analysis involves reading the text in context. This reflects the obvious but important truth that words and sentences do not have meaning in abstract but always against some understood background. Hence, although textual analysis takes priority in the interpretative process, they require supplementation by recourse to other arguments which establish the interpretative context.

1.4.2. Contextual Interpretation

We now turn to contextual interpretation which carries weight towards the resolution of the problems mentioned above. Here I assign contextual interpretation to three types: namely, historical interpretation, different types of rule in a given legal context and their interaction. There are two stages of interpretation: at the first stage, one offers an interpretation of the relevant legal rules and gives an interpretative argument in support of that (there is also a rival interpretation). Here, then, we confront arguments at the first interpretative stage. To resolve them, we must proceed to the second stage of interpretation in a given context.

The second stage of interpretation not only has regard to preferences among the first stage interpretations, considered abstractly in themselves, but also takes account of values relevant to the particular case in which the conflict occurs. A possibility might be that one should choose whichever interpretation does best justice in the individual case. A subtler way would be that which directs the judge to have regard both to the generalised and to the particular consequences of the rival interpretations, and to evaluate these by a range of relevant values accepted in the legal community. This would then authorise a process of the weighing of relative values. This weighing process itself should incorporate some reference to general principles of law, and perhaps also to certain widely held moral principles.

1.4.2.1. Historical Interpretation
Chapter Five is concerned with changing judicial attitudes towards the ‘neighbour’ principle since Ann's, and focuses on its historic development as a carrier and developer of values rooted within the legal context itself. Historical interpretation indicates both the relationship of the law to the prior state of the law in the light of political and social history, and the part which the law (or whole relevant body of law) has come to play in the general fabric of the law. However, this should not be taken to suggest that this is a purely historical study. History provides the raw material for analysis, but what can be learned from an investigation of this kind is of general significance for the understanding of negligence law. Legal rules, principles, and doctrines have themselves a history of dynamic development over time. The act of legal interpretation, especially that of the appellate court, is an act in a process of historical development of legal doctrines or legal principles. Ronald Dworkin has proposed here the analogy of the ‘chain novel’; each court that faces the task of interpreting the previous chapters in the story of this doctrine’s development, and renders its own decision as the best or more persuasive fresh chapter of the unfolding story. The court has to do this in the full awareness that others will later write further chapter carrying the story on from this one.35

1.4.2.2. Different Types of Rule and Their Interaction
Given the existence of a plurality of types of rule relevant to interpretation, there necessarily exist possibilities of conflict between rival interpretations of a legal rule, where each of the rival interpretations can be justified by the respective courts. My concern with interpretation as justification requires us to focus on the types of argument that are relevant to justifying interpretative decisions, as well as on the ways in which those decisions contribute to the overall justification of a decision. The justification of decisions in cases involving conflicting interpretations of even a single rule requires a sound basis for justifying the choice between rival interpretations.

There is another significant kind of legal conflict in which interpretation has an important part to play. This arises in those situations in which the decision of particular case would go one way if one rule were to be applied, but another if a

different rule were chosen. For each of the rules in question, there is a possible interpretation according to which it is applicable, and one according to which it is not applicable at all, or applicable in a different sense and to a different effect. Quite often the courts use different types of argument, or different interpretation, in respect of the different rules. Such conflicts are commonplace in negligence law. Chapter Six considers different types of legal rules and tests, such as the reliance principle, the assumption of responsibility and the three-stage test, and examines how they inter-relate with the proximity test. Here again, the interpretative justification rests heavily on the weighing of significant values as criteria of preference for one first-stage interpretation over another.

Chapter Seven, in examining debates between the precedent-based approach (the so-called incremental approach) and the principle-based approach, argues that deciding that cases are alike for the purpose of doing justice in a particular instance involves an incommensurable element of classification and qualification, that is, it involves saying that a given characteristic is more relevant than another. Because at this stage of interpretation, the perennial problem is the inter-subjective disputability of the values and principles that should guide us. We move in the end into a broader sphere of practical argumentation.36 Here, we must reflect on some accepted reasonable standards, expectations, norms, or principles appropriate to the ‘interpretive community’.37

1.5. Conclusion

It is concluded that negligence law as a system of law has to minimise, strictly, the arbitrariness that can enter into such valuations unless we settle down certain justificatory premises, that is, rules, precedents, and principles, that guide the judge in reaching a sound legal decision, in selecting what is to be given weight and what is to be ignored, in distinguishing one case from another, and in determining what class a

particular situation is to be subsumed under. In the case of interpretative justification, this implies that the norm as interpreted has to be understood as applicable universally, not only for the special facts of a given case; and this is independent in the formal sense within the given legal system. This feature of justificatory reasoning, and thus of interpretative justifications, is essential to the possibility of rational evaluation of competing possible interpretations. It is often itself important in the elimination of arbitrariness in decision-making. However, there is a very great range of variables involved in any interpretative justification. While there might be some criteria in the weighing and balancing of competing interpretations, there remains an element of irreducible subjectivity in the leeway of legal judgment. It is this great range of variants that makes the interpretative process in negligence law so dynamic.

PART I

TEXTUAL ANALYSIS
2.1. The Meaning of Negligence

Negligence is a concept which has a number of possible meanings. In the technical legal sense, if negligence is treated as a subjective conception, a negligent act is an act in which the agent did not foresee a consequence of his act which a reasonable person should have foreseen. It can also be stated as an objective concept based on the proposition that 'the courts are not asking whether the defendant is thinking or not thinking, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances.'\(^1\) Considered as an objective fact, negligence may be defined as conduct which involves an unreasonable risk of harm to others.\(^2\) It is also described, as White does,\(^3\) as a failure in a particular situation to exercise the degree of care which the circumstances demand. It may also consist either in omitting to do something which a prudent and reasonable person would do in the circumstance or in doing something which a prudent and reasonable person would not do in the circumstances.\(^4\)

On the other hand, negligence can also be understood as a breach of legal duty by an inadvertent act or omission which injures another person.\(^5\) Birks defines this breach as 'the breach of legal duty which affects the interests of an individual to a

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2 American Restatement of Tort, §282.
3 Alan White considers negligence as ‘a failure to give active measure-taking attention to the risks inherent in the successful prosecution of the some activity.’ Alan White, Grounds of Liability (Oxford: Oxford U. P., 1985) at p.102. H. L. A. Hart proposes a good example of negligence which is a workman who is mending a roof in a busy town and starts to throw down into the street building material without first bothering to take the elementary caution of looking to see that no one is passing at the time. Hart, H. L. A., 'Negligence, Mens Rea, and Criminal Responsibility', in his Punishment and Responsibility (Oxford: Oxford U.P., 1968) at p.147.
4 Blyth v. Birmingham Waterworks Company (1856) 11 Ex. 781, 784, per Lord Alderson.
degree which the law regards as sufficient to allow that individual to complain on his account. Negligence will not be a ground of civil liability unless there existed in the particular case a legal duty to use care. As Lord Kinnear observed in Kemp & Dougall v. Darngavil Coal Co. Ltd., 'A man cannot be charged with negligence if he has no duty to exercise diligence.' The legal conception of negligence, therefore, involves two elements - a duty of care, and a breach of that duty. Although this is not necessarily the traditional Scots view, it is clear that in an action of negligence a plaintiff must always start by showing that the defendant owed him a duty of care in both Scots and English law. The requirement serves two distinct purposes. Firstly, it is used as a test for deciding whether the plaintiff is or is not too remote from the reasonable contemplation of the defendant for damage done to the former to be imputable to the latter. Secondly, it is used as a means to determine the kinds of injury which can be brought within the action of negligence where there is no question of remoteness. Sometimes a person is under a duty to ensure safety, absolutely to prevent the happening of certain damage. Such duties, which may be called peremptory duties, lie entirely outside of the law of negligence. However, the failure to perform the duty is often called negligence, or it is said that in such a case negligence is conclusively presumed, as was said, for instance, in Dorset Yacht Co. Ltd v. Home Office, in which the House of Lords held that the defendant, through its officer, owed a duty of care to the owners of yachts to prevent boys under its control from escaping and causing damage to those yachts.

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* Ibid., at p51.
* Kemp & Dougall v. Darngavil Coal Co., Ltd., 1909 SC 1314 at 1319 per Lord Kinnear, see also in Clelland v. Robb,

'Negligence per se is not a ground of liability, and can only infer liability where it has caused a breach of duty. 'Negligence per se will not make liability unless there is first of all a duty which these has been failure to perform through that neglect.' Clelland v. Robb 1911 SC, 253 at 256, (per Lord President Dunedin)

in Mullen v. Barr

'In these cases two points were taken at the debate, one of which raises a question of law and the other a question of fact. The question of law is whether the defenders owed a duty to the pursuer so as to make them liable to the pursuer in damages for the negligent discharge of their duty. The question of fact is, assuming the existence of such a duty, has negligence on the part of the defenders been proved?' Mullen v. Barr 1929 S.C. 461, at 478, per Lord Anderson.

and in Campbell v. Kennedy (1864) 3M 121.

A similar approach can be found in the law of criminal negligence. Lord Mackay in *Adomako* states that he was not prepared to give a detailed definition of gross negligence. However, he went on to say that

‘that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred.’

Clearly Lord Mackay’s treatment of gross negligence in this passage is also based upon the meaning of negligence as a breach of duty.

Weinrib argues that the law of negligence illustrates the coalescence of a number of concepts into a coherent justificatory ensemble. The meaning of negligence law instantiate some form of justice by tracing different aspects of the progression from the doing to the suffering of harm. Throughout, negligence law treats the plaintiff and the defendant as correlative to one another: the significance of doing for negligence law lies in the possibility of causing someone to suffer, and the significance of suffering lies in its being the consequence of someone else’s doing. Central to the linkage of the plaintiff and the defendant is the idea of risk, for, as Justice Cardozo observed in *Palsgraf v. Long Island R. R.*, ‘risk imports relation.’ The sequence start with the potential for harm inherent in the defendant’s act (hence the absence of liability for non-feasance), and concludes with the realisation of that potential in the plaintiff’s injury (hence the necessity for factual causation). The further requirements of reasonable care and remoteness link the defendant’s action to the plaintiff’s suffering through judgments about the substantiality of the risk and the generality of the description of its potential consequences. The sub-concepts of negligence thus organise an ensemble that brackets and articulates a single normative sequence.

2.1.1. Negligence and Fault

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11 In Weinrib’s view, negligence law should be based on Aristotelian corrective justice.
12 248 N.Y. 339, at 344 (1928) *per* Cardozo CJ.
Suppose we say that X is liable to Y only in those cases when X is under a duty to compensate Y. In discussions of legal liability for negligence, there are two claims which are generally accepted. The first is that harm is necessary for liability: X is liable to Y only if Y has been harmed. The second is that causation is necessary for liability: X is liable to Y only if X caused Y to be harmed. However, the following claim which I intend to discuss is more controversial, namely the claim that fault is necessary for liability: X is liable to Y only if X was at fault. It is difficult to give an analysis of when an agent is at fault in performing an action in part because the term ‘fault’ has a place in both ordinary moral discourse and the law, and its usage is not settled.

Fault, in the moral sense, is imputed only to a person who could have controlled the situation in which he was placed but failed to do so. Only someone who could in the circumstances have acted otherwise is morally responsible, and if necessary, blamed for his actions. The ‘could have done otherwise’ test seems to be a fair rule.13 Apply that test to the law of negligence, and a person is at fault only when he could observe the objective standard, but fails to do so. So this rule entails that a clumsy agent who fails to come up to standard is not at fault. However, the law treats deficient characters (e.g., clumsiness or lack of concentration) as fault, which the person clearly cannot correct in time, and perhaps not ever. On one line of argument the deficient agent is not morally to blame but reasons of social policy justify us in treating him as liable. Another pragmatic argument for the objective standard concerns proof. It is hard to prove that the person concerned has not done as much to avoid harming himself or others as he could have done. Failure to meet the objective standard is easier to prove, since we have by experience an idea of how to apply that standard. We reckon to know how a reasonable motorist drives a car but, unless we know his driving very well, find it almost impossible to fix the standard of which a particular motorist is capable. One may argue that the agent should not undertake the task when he knows or should know that his clumsiness or lack of concentration will make the consequences of his performance dangerous to others. As shown above, the meaning of ‘fault’ is emerging from the language of moral condemnation into the technical legal term which covers both fault-based liability as well as non-fault-based liability.

Nevertheless the distinction between fault and negligence should be clarified. To say someone is at fault implies that he has behaved in some way that he should not have behaved but leaves open the nature of the behaviour. To say that someone has been negligent implies that he has acted in a careless fashion and that he ought to have foreseen that what he did would cause damage. When the lawyer presents the facts of a negligent case and draws the conclusion that there has, or has not, been fault, the conclusion is not that fault is negligence, rather that carelessness was among the state of affairs held to constitute a fault which amounts to a legal liability for negligence. Only after liability has been determined can negligence be merged with the conduct in question, and even then for clarity’s sake the merger should be called negligent conduct.

‘Cause,’ ‘fault,’ and ‘blameworthiness’ have a large area of common meaning and are frequently used in conjunction with one another in negligence law. The primary usefulness of terms such as ‘duty,’ ‘breach of duty,’ ‘assumption of responsibility’ and ‘contributory negligence’ is to identify the normative considerations subsumed under the concept of ‘fault’. They may still have moral implications but their chief substance is made up of other factors subsumed under the concept of ‘fault’ in the legal sense. Holmes rejected the idea that liability should be based on ‘personal fault’ or ‘a state of the party’s mind.’

His proposed alternative was that liability should be based on an ‘objective’ failure of the defendant’s behaviour to measure up to the reasonable standards of the community. Although the law of negligence, as he noted, ‘abounds in moral phraseology,’ it should be freed from the unnecessary and misleading overlay of moral terms.

2.1.2. Negligence as a Failure to Conform the Objective Standard

There is a familiar rule of the law of negligence that everyone is bound to achieve an objective standard of care and capacity. ‘Negligence’ refers to legal liability for unintended harm, when this is caused by a person’s failure to meet the required

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16 Ibid., at p.79.
17 Ibid., at p.80.
standard of care and capacity. One corollary is that a person is required to meet the expected standard of conduct, even if he acts as he does because of a shortcoming which he cannot help. For example, an inexperienced surgeon cuts an artery which with more experience he would have known how to avoid. Under an objective standard theory of negligence, the agent's respective deficiency (ineptitude, inexperience) makes him liable. Negligence is commonly taken as connoting fault, and yet the objective standard of care in negligence requires people to display the same competence as a fictional reasonable person. The model is variously depicted as a reasonable person, an abstract type, or a careful and a conscientious member of the class in question. The class may, according to the circumstances, be that of doctor, driver, electrician and so on. The person concerned is expected to possess the same standard degree of capacity as that possessed by fellow practitioners who have the same training and occupy a similar position. The classification depends on the type of person expected to undertake the task, the performance of which goes wrong (operating, driving, running a business, crossing the street), and to display care or skill in doing so. A good illustration of this is provided by the decision in Nettleship v. Weston which was an action by a driving instructor against his pupil. On the third lesson, the pupil drove carelessly and injured the driving instructor. What was the standard of care required of the learner driver to her driving instructor? The Court of Appeal decided that the standard of care which the learner driver must attain in relation to all these categories of persons was exactly the same. As Lord Denning MR said: 'He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing and is free from any infirmity.' He added: 'The learner driver may be doing his best, but his incompetent best is not good enough.' In Wilsher v. Essex AHA a trainee hospital doctor was also held to the same standard of care as the court would have applied to an experienced doctor.

The objective standard is also argued on the ground that every person has the same right to be secured from harm to person or possession caused by any lapse of

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19 Muir v. Glasgow Corporation, 1943 SC (HL) 3, per Lord Macmillan.
20 Nettleship v. Weston [1971] 2 QB 691
21 Ibid., at 699.
22 Ibid., at 699.
reasonable standard of care on the part of any other person - not a standard of protection varying according to the degree of forgetfulness or clumsiness of each particular individual. The standard should be a certain ‘objective’ standard of care, not calculated in terms of what this or that individual was subjectively capable of achieving in given circumstances, but calculated in terms of what a reasonable person could and would achieve given the degree of risk of a certain kind of harm occurring in given circumstances.\(^{24}\)

One of the important practical considerations for the objective standard concerns proof. It is hard to prove that the person concerned has not done as much to avoid harming himself or others as he could have done. Failure to meet the objective standard is easier to prove, since we, as well as the jury, are supposed to consist of reasonable persons, and therefore have by experience an idea of how to apply that standard. We reckon to know how a reasonable motorist drives a car but, unless we know his driving very well, find it almost impossible to fix the standard of which a particular motorist is capable. One may argue, as Lord Hewart did in Bateman\(^{25}\), that the agent should not undertake the task when he knows or should know that his incompetence or inexperience will make the consequences of his performance dangerous to others. The objective standard has to be met both in avoiding harm to others and in protecting oneself;\(^{26}\) failure to meet it may make the wrongdoer liable for the harm. The objective standard of care therefore clashes with a fundamental moral principle, namely, the ‘capacity to do otherwise’ rule.\(^{27}\) According to this long-established rule, blame is imputed only to a person who could have controlled the situation in which he was placed but failed to do so. Under this rule, the mentally incapable is not held to account, whereas a child may be


\(^{25}\)‘It is, no doubt, conceivable that a qualified man may be held that liable for recklessly undertaking a case which he knew, or should have known, to be beyond his power…’ per Lord Hewart, C.J. in *R. v. Bateman* (1925) 19 Cr. App. R. 8, at 13. This issue is also discussed in *Wilsher v. Essex Health Authority* [1986] 3 All E. R. 801.


regarded as wholly or partially incapable. The incapable may be excepted altogether, or required to meet a standard adjusted to their limitations. Only someone who could in the circumstances have acted otherwise is morally responsible, and if necessary, blamed\textsuperscript{28} for his actions. The ‘could have done otherwise’ test seems to be a fair rule.\textsuperscript{29} Apply that rule to the law of negligence, and a person is at fault only when he could observe the objective standard, but fails to do so. This rule entails, then, that an incompetent agent who fails to come up to standard is not at fault and should not be held guilty of negligence.

One should pay attention to the obvious, if often ignored, difference between capacity in general condition and capacity in particular. For instance, a competent chef can cook a delicious dish if he possesses the general capacity to do so; and he possesses that capacity it is usually the case that when he tries he succeeds. It is compatible with his possessing this general capacity that on a given occasion he cannot produce the same good results as would generally be expected of him. If he tries to cook a dish successfully on one occasion and does not succeed, that does not mean he could not do so. It will be nevertheless be true that he could have succeeded to do so. Why he did succeed, given the expectation that he could have done so? The explanations can be either internal factors such as fatigue or lack of concentration, or external circumstances such as the oven is not functioning properly as the chef expected, may have prevented him exercising his capacities on this occasion. Suppose I judge a driver to be incompetent or drunk. But if by his bad driving he runs me down it is no defence to his misconduct that I did not think him competent. I rely on the competence of motorists in general, which is inevitably an ‘objective’ standard, but need not suppose any particular motorist to be up to scratch to hold him to the ‘objective’ standard. In any case the crucial question is not whether in general people rely on others to meet the ‘objective’ and ‘external’ standard of competence but whether they are entitled to do so. In the law of negligence, the subjective attributes of the defendant are generally not relevant when determining whether the defendant has been negligent. In \textit{Wilsner v. Essex Area Health Authority},\textsuperscript{30} Lord Mustill contended that there is only one degree of negligence. It means that


\textsuperscript{30}[1986] 3 All E.R. 801, 810, per Mustill, L.J.
failure to meet the standard of reasonable care constitutes negligence. No matter how skilled the doctor’s conduct was, he will be responsible for even a single occasion when he fell below the standard of reasonable care. Lord Mustill’s point is indeed prescriptive, that is, the reason for allocating responsibility to people on the basis of their general capacity is that when they try, they usually perform up to their ability.

There is often doubt where best to draw the line between internal factors and circumstances; both our everyday judgements and the law of negligence assume that it must be drawn somewhere. A driver must drive reasonably in the circumstances, where circumstances include the slippery road and the dim light, but not fatigue or a lapse of concentration. But why is a lapse of concentration not accounted a circumstance? Could one not argue that a driver whose concentration lapses need only conform to the model of a driver, otherwise competent, whose concentration has lapsed? Why is the unfortunate driver blamed for his lapse and held to be negligent in law? Every driver has some lapses of concentration. As mentioned above when dealing with the two concepts of capacities, in no activity or walk of life do people consistently maintain the expected standard of skill and care invariably required by law. It is not only the stupid and clumsy who are incapable of meeting the objective standard of care on the road. The intelligent and skilful cannot consistently meet it either. So if a vigilant and skilful driver has a lapse of attention from which an accident results, unlike the driver with slow reactions, he could have swerved in time, our ground for saying this cannot be a supposed capacity to remain alert every moment that he is driving. We must instead be thinking of his general capacity as a driver. To ascribe responsibility to a competent driver whose attention has lapsed we need not believe that, given all elements internal and external having a bearing on the concrete situation, despite his lapse he could have swerved and avoided the accident.31

The present legal position is that we retain the notion that responsibility depends upon the ability to do otherwise, but construe the required capacity as a general ability to perform the sort of action which would in the instant case have led to a different outcome. This general ability need not have been exercisable in all the concrete conditions, external and internal, of the case. This view is preferable since it

enables us to retain, in a modified form, our common sense belief in the importance of capacity to act otherwise as an element in responsibility. On this view the capacity to remain alert, when alert would have avoided the accident, does not refer to the possibility of someone's remaining in an steady state of alert for an indefinite period but rather to an ability to remain alert in normal conditions most of the time. So though we are responsible for lack of alert, it is not a condition of our responsibility that we should be able to exercise our capacity to remain alert on every occasion when it is sought to hold us responsible. To construe capacity in the way as general capacity is to make the point that, if law requires for responsibility an invariant capacity which can be exercised on every occasion, no one will consistently be responsible for his conduct. We can take the view that, even if human conduct is determined by the factors, internal and external, present on a given occasion - which we have at present no way of deciding - an agent can properly be judged on the basis of his general capacity. After examining the problems and functions of applying the objective standard in the law of negligence, focusing on an agent's general capacity, effectively leads to a form of strict liability, a liability for outcome.

The crucial question of objective standard of care is not whether in general people rely on others to meet the 'objective' standard of competence but whether they are entitled to do so. Hence, it is perhaps over-simplistic to classify problems of liability by classifying the test of liability as being either 'subjective' or 'objective'.

It is contended that the standard of care is best understood as a constant interaction between an 'invariant' standard of care and individualised conditions of liability as Hart contended.

Hart's argument is that negligence is not to be judged simply by appeal to a so-called objective 'reasonable person'. Instead of asking 'Would a reasonable person have foreseen what would happen?', we should ask: 'Is it reasonable to expect that this person would have foreseen what would happen?' The latter, he says, is a 'subjective,' while the former is an 'objective,' question. However this introduces a

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32 This view is also given in R. v. Caldwell by Lord Diplock, where his Lordship is against over-simplistic approach of treating problems of liability by classifying the test of liability as being either 'subjective' or 'objective.' R. v. Caldwell, [1982] AC 341 per Lord Diplock at pp 353-354.
33 Hart, H.L.A., 'Negligence, Mens Rea and Criminal Responsibility', in Punishment and Responsibility (1968), at pp. 153-154. I will argue in section 2.1.3. below that the concept of negligence has been formulated in a similar way in both cases of criminal negligence and civil negligence cases.
34 Ibid., at pp.153-6.
different sense of ‘subjective’ in which it means that the standard of reasonableness is geared to the particular person involved rather than to the invariant standard of the reasonable person. It would simply play on words to assert that a subjectivist in relation to the negligence (one who favours a variable standard) is a subjectivist in relation to mental element (one who favours a requirement of intention, knowledge and therefore the ‘capacity to do otherwise’).

In his treatment of negligence, Hart suggests that the expression ‘objective’ and ‘subjective’ are ‘dangerous’ and ‘unhappy’. It simply obscures the real question concerning negligence: whether it involves an ‘invariant’ standard of care or individualised conditions of liability; only the former involves an abandonment of the subjective approach. Hart maintains that negligence can constitute a fault requirement and be appropriate for criminal responsibility where it satisfies two inquiries:

(i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

(ii) Could the accused, given his mental and physical capacities, have taken those precautions?

There are valid arguments in favour of resorting to objective negligence, especially in the case of Hart’s concept of objective negligence, which makes generous allowance for individual factors. However, there are also important pragmatic and realistic considerations. The capacity of the agent we are concerned with in the legal sense is his capacity, under normal circumstances, that when he tries, he usually performs up to that standard of capacity. We exclude subjective factors pointing to why he fails in a particular situation. Since this capacity is the general condition of the agent’s ability, which is expected by society, the standard involved is inevitably objective. Hart concludes his essay by saying that to assert that ‘responsibility for negligence is a form of strict or absolute liability, rests on a confused conception of the subjective element and its relation to responsibility’.

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36 Ibid.
37 Ibid., at p.157.
2.1.3. Negligence as an Inadvertent State of Mind as to Harmful Consequences

Negligence is normally treated as ‘carelessness’, a state of mind, inadvertence to some harmful consequences. Thus, the word ‘carelessness’ is used to connote conduct that becomes negligence when it is a breach of the duty of care. Although convenient, the word is misleading to the uninitiated because it wrongly suggests the idea of one who does not care. In truth the ‘careless’ person of the law may care very much about the consequences of his conduct. He may do his best not to cause injury, and yet be accounted ‘careless’ and ‘negligent’ when he does so.

Negligence is most often caused by carelessness (or heedlessness); the actor does not advert properly to the consequences that may follow from his conduct, and therefore fails to realise that his conduct is unreasonably dangerous. But it may be due to other states of mind. Thus the actor may recognise the fact that his conduct is dangerous, but may not care whether he does the injury or not; or, though he would prefer not to do harm, yet for some reason of his own he may choose to take a risk which he understands to be unreasonably great. This state of mind is recklessness (as a gross form of carelessness), which is one kind of wilfulness, and negligent conduct due to recklessness is often called wilful blindness. Negligent conduct may also be due to a mere error of judgment, where the actor gives due consideration to his conduct and its possible consequences, and mistakenly makes up his mind that the conduct does not involve any unreasonably great risk. He is not therefore excused if his conduct is in fact unreasonably dangerous. He must judge and decide as a reasonable and prudent person would judge and decide; so that if he is not in fact such a person, he may decide wrongly and be guilty of negligence, even though he acted as well as he knew how to. Whatever the state of mind be that leads to negligent conduct, the state of mind, which is the cause, must be distinguished from the actual negligence, which is its effect. Conversely, if in a given case the actor does

\[\text{(Cunningham recklessness)}\]

\[\text{38 There is little doubt about the core concept of recklessness which is to have 'foreseen' the likely consequences of his action, or to have 'adverted' to them. In everyday language, it is to describe the reckless person as one who realise the risk of untoward consequences (Cunningham recklessness). The imputation of recklessness is normally in the form that any person of D's capacities, situated as the defendant was, must have realised the risk he was creating. To say of the reckless individual that he must realise the risk he ran is, at the same time, to suggest ways in which he can explicate a denial of recklessness. See Professor Glanville Williams Textbook of Criminal Law (2nd ed., London: Stevens, 1983), at pp. 88-114. Finnis, J., 'Intention and Side-effect' in Liability and Responsibility, (ed.) R. G. Frey & Christopher Morris, (Cambridge: Cambridge UP, 1991), 34, at pp.33-5, 45-6.}\]
nothing that involves an unreasonably great risk, his conduct is not negligent; it amounts legally to due care, however careless or reckless he may be in his mind. Just as a person can do wrong though his state of mind is not blameworthy, so he can do right though his state of mind is blameworthy.

Jules Coleman contests the assumption behind the proposition that tort liability ought to be related to individual moral desert. For one thing, tort liability is often strict liability, in which considerations normally associated with desert are deemed irrelevant. However, if we focus on the law of tort, we find that few tort lawyers represent tort law as a system designed merely to secure compensation for people who have been wronged. For instance, Weinrib regards tort law as a system of responsibility for human conduct, based on corrective justice. More recently, Peter Cane adopts a mixed approach that regards tort law partly an embodiment of sound ethical principles of personal responsibility and partly a system that furthers certain goals.

In a traditional view, the function of criminal law is to censure persons for wrongdoings, whereas the central function of tort law is surely not censure but to provide a remedy to the victim for the invasion of protected interests. However, is it possible to draw a satisfactory functional distinction between crimes and torts? One obvious preliminary point is that conduct may be both a civil wrong and a criminal offence. This is perfectly acceptable, since the functions of the various branches of law may differ. Indeed, where there is a question whether to criminalise conduct that is already a civil wrong, this draws particular attention to the justifications for criminal liability.

Nevertheless, there is not much different in terms of the concept of negligence between criminal negligence and civil negligence. In Bateman, Lord Hewart used the following formulation which became the classical statement of the gross negligence test:

In order to establish criminal liability the facts must be such, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and show such

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41 Cane, P., The Anatomy of Tort Law Chap.7.
disregard for the life and safety of others as to amount a crime against the State and conduct deserving punishment.\textsuperscript{42}

The dictum fails to clarify the degree of culpability required for conviction of manslaughter rather than for a finding of civil liability. It is arguable to say that any negligent conduct deserving punishment will suffice for a conviction of manslaughter if it happens to cause death. In \textit{Andrews v. DPP}\textsuperscript{43}, the House of Lords listed ‘culpable,’ ‘criminal,’ ‘gross,’ ‘wicked,’ ‘clear’ and ‘complete’ to describe criminal negligence, but attached no particular meaning to any of them. The substance of the law was said in \textit{Andrews} to be as follows:

‘Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established.’\textsuperscript{44}

Yet it is still not clear just what degree of heightened negligence is required. Is a higher degree of negligence than that which amounts to ‘recklessness’ as defined by Lord Atkin in \textit{Andrew}? It is only clear that there must be a very high degree of negligence which has to be established before criminal liability is attributed. In \textit{Bateman}, Lord Hewart said:

‘in the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence but on the amount of damage done. In a Criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be mens rea.’\textsuperscript{45}

Lord Hewart did not explore what sort of mens rea is required for criminal negligence. However, he stressed in his speech that the degree of criminal negligence should be higher than the ordinary careless action and ‘it is such a degree of negligence as excludes the loosest degree of care, and is said to amount to dolus.’\textsuperscript{46} Indeed the distinction between civil and criminal negligence is one of degree, and one which has proved difficult to express.

\textsuperscript{42} \textit{R v. Bateman}, (1925) 19 Cr. App. R., 8 at 11.
\textsuperscript{43} \textit{Andrews v. DPP} [1937] A.C. 576.
\textsuperscript{44} \textit{Andrews v. DPP} [1937] A.C. 576, at 583.
\textsuperscript{45} \textit{Bateman} (1925) 19 Cr. App. R. 8, at p.11.
\textsuperscript{46} \textit{Ibid.}
Despite the differences of policy, the conceptual framework of negligence for both civil and criminal liability adopted by the courts is essentially the same. There is no clear definition of 'criminal negligence' in common law, the term 'criminal negligence' is conveniently used as a term of legal art, describing that degree of negligence which is sufficient for manslaughter and this particular expression underlines a distinction between criminal and civil negligence. Since negligence is a tort and the same fact(s) may therefore give rise to both a criminal prosecution and a civil action for damages, the question has arisen whether the degree of negligence which has to be proved in the two proceedings is the same. The law is that to support a conviction for manslaughter a much higher degree of negligence must be proved than would support a civil action for damages. Since the conceptual distinction between civil and criminal negligence is not clear, the court have not found it easy to state with precision in the abstract how to distinguish criminal from civil negligence.

In Lord Hewart's enunciation it seems clear that criminal negligence is substantially the same as civil negligence, that is gauged against an objective test of reasonableness, but of such a high degree as to go beyond a matter of compensation between subjects. His Lordship stated:

'It is in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.'

Although there is a reference to difference in kind between the two types of negligence Lord Hewart measured it in terms of degree and made no attempt to formulate the distinction except in such terms. This view was taken by The New Zealand Court of Appeal in R. v. Storey where the distinction was rejected on the ground that the relevant provision in (what is now) the Crimes Act 1961 defined the same standard of care in criminal negligence as in civil negligence. It is important to recognise in relation to this head of liability that the central focus is not on the accused's state of mind but rather on his conduct which fails, to a gross degree, to measure up to an objective standard determined by jury. The courts will not attempt to specify the degree of negligence required with any greater precision, as they

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48 (1925), 19 Cr. App. R. 8, at p.16.
recognise it is not possible to do so. The reach of the criminal law, therefore, in this area of law is left to be determined by the jury. This sort of legal formulation inevitably fails to make clear the degree of culpability required for conviction of manslaughter rather than for a finding of civil liability. It can also be seen as a circular definition, that is, the jury should convict the defendant of a crime if they found that the accused behaviour is criminal.

Another question is also raised as to whether criminal liability for negligence should be based on the objective standard of care, which is the standard adopted in civil negligence. Although criminal negligence has been viewed as an objective test, in the light of authority, the presence of gross negligence for the purposes of involuntary manslaughter is not so clearly determined by a strictly objective test. Gross negligence may be based on both objective and subjective criteria. In the case of Andrews v. DPP Lord Atkin gave an example of where he felt there would be gross negligence, which relies on the defendant's own state of mind. He states that a person would be grossly negligent where:

'the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk, such a high degree of negligence as would justify a conviction.'

A similar approach was taken in the Court of Appeal, when Lord Taylor stated in Prentice:

'...without purporting to give an exhaustive definition, we consider proof of any of the following states of mind in the defendant may properly lead a jury to make a finding of gross negligence: (a) indifference to an obvious risk of injury to health; (b) actual foresight of the risk coupled with a determination nevertheless to run it; (c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction; (d) inattention or failure to advert to a serious risk which goes beyond 'mere inadvertence' in respect of an obvious and important matter which the defendant's duty demanded he should address.'

Test (b), similar to the gross negligence test required in Andrews, is indeed a mixture of an objective and subjective standard. Thus gross negligence covers both objective and subjective states of mind. While Lord Taylor states that there must have been a

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32 Ibid, at 583.
risk of death, he does not state that this risk must be foreseen or be obvious. Yet, one can reasonably infer that the standard of risk required for the purposes of gross negligence in the criminal context should be much higher than that of the civil law test of negligence. The discourse of the standard of risk is a causal one, namely, where there is a death the courts will have the benefit of hindsight and it will be clear that there must have been a risk of death or the death would not have occurred.

2.1.4. The Benefit of Hindsight
Psychologists have provided the first systematic demonstration of the phenomenon that the folk wisdom on hindsight is correct - past events seem more predictable than they really were. The psychological research on the hindsight bias shows that people blame others for failing to have predicted adverse outcomes that could not have been predicted. Two recent research reports show explicitly that the bias even causes people to hold decision-makers legally liable for outcomes that they could not have predicted. Court’s ex post facto judgments of ex ante decisions fall into three major categories: (1) judgments under objective standard (should have known), (2) judgements under subjective (‘did know’) standards, and (3) judgment of what was foreseeable. The hindsight bias probably influences all three of these, albeit different ways. Courts also make many judgments in hindsight that do not require an evaluation of ex ante decisions and are therefore not subject to the influence of the hindsight bias.

Although the hindsight bias also might affect judgments of subjective knowledge or foreseeability, according to psychologists’s report these theories lack empirical support. The result of the research about the influences of the hindsight bias on objective standards in legal judgments is reasonably clear. In the case of objective judgments, the legal system asks judges and juries to make determinations that closely resemble the questions that psychologists have used in their materials.

Good faith assessments of what constitutes a reasonable course of action in foresight can easily be judged unreasonable in hindsight.

Of these three types of judgments, research on the hindsight bias most directly implicates objective standards. When a court must determine what someone ‘knew or should have known,’ it is especially likely to fall prey to the hindsight bias. Consider the assessment of negligence in a negligence case as an example. A defendant’s conduct was negligent if it created an ‘unreasonable risk of harm’ to others, which the actor should be aware at the time of his action or omission. The determination of whether a defendant’s conduct was unreasonable is necessarily made after the consequences of an actor’s conduct are known, but this knowledge is not supposed to influence the determination of reasonableness. As Prosser and Keeton explain:

‘The actor’s conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward ‘with wisdom born of the event.’ The standard is one of product, rather than of consequences. It is not enough that everyone can see now that the risk of harm was great, if it was not apparent when the conduct occurred.’

Unfortunately, people always judge conduct on its consequences. The legal formulation of negligence requires a trier of fact to do something that people cannot do - see the world through the eyes of the defendant before the adverse outcome occurred. Judgments made under objective standards, such as a determination of negligence in tort, invite the hindsight bias’s influence.

2.1.5. Problems of the Foreseeability Test

The notion of foreseeability in the law of negligence is removed from the realities of human behaviour. It is a test of truth or probability which direct proof by immediate observation is unavailable. Lord Wright explained that foreseeability ‘is always relative to the individual affected. This raised a serious additional difficulty in the case where it has to be determined not whether the act itself is negligent against

56 Green v. Sibley, Lindsay & Curr, Co, 257 NY 190, 192, 177 NE 416, 417 (1931) per Cardozo CJ.
someone but whether it is negligent vis-à-vis the plaintiff. 58 We cannot simply say that such and such an event is or is not foreseeable. The foreseeability of any particular event depends largely on its probability. But in between the extremes there are an infinite number of gradations, and these degrees of probability are reflected in the language of the courts. 59 It is essential to grasp that there is no fixed point at which the law requires people to take account of a possibility. The point is a moving one because negligence is a function of several variables. In other words, it may be negligent to disregard a very remote risk in one situation, but not negligent to disregard a much greater risk in another situation. Foreseeability is difficult to determine because an event may be more or less foreseeable according to the detail in which the event is explained. The fact that mishandling dangerous weapons is testimony to the foreseeability of the possibility of killing someone; but it would be very different matter to say, after death has occurred, that anyone should and could have foreseen when, where and how it might happen. There is no fixed point at which we can say: this amount of detail needs to be foreseeable before we can condemn as negligence failure to foresee it or act on it.

What has to be reasonably foreseeable is only the type of injury suffered, 60 rather than its exact extent 61 or manner of occurrence 62. This rule implicitly acknowledges that harms can usually be described in a variety of ways and in various degrees of detail. For example, in Lamb v. Camden LBC, 63 workmen of the council negligently broke a water main. Escaping water undermined the foundation of a house forcing the tenants to leave. Squatters broke into the now desert house and did more damage. It was held that the house owner could not recover against the council for the damage caused by the squatters. Two of the judges reached this conclusion by applying the test of foreseeability. Oliver LJ held that the criminal acts of squatter were not foreseeable. From this case we can see that it is for the court to decide the degree of detail with which the injury-causing event is to be described, and hence whether the event so described can be said to have been foreseeable.

59 Events may be described as 'very probable,' 'highly probable,' 'quite likely,' 'not likely'; event may be described, after they have happened, as 'remarkable' or 'extraordinary'; risks may, before the event, be stigmatised as 'remote' or 'fantastic' possibilities.
61 Smith v. Leech Brain & Co. Ltd [1952] 2 QB 405
62 Hughes v. Lord Advocate [1963] AC 863
Furthermore, foreseeability may not only depend on knowledge of the actual circumstances in question. Whose knowledge, then is to be taken into account in deciding whether negligence is proved? It is clear that the foreseeability test is normally based on what the ‘reasonable person’ would have known in the position of the defendant at the time of the accident.

The uncertainty of ‘foreseeability’ is also expressed by saying that in order to justify liability for failure to guard against a particular risk, that risk have been not just foreseeable but ‘reasonably’ foreseeable. In The Wagon Mound (No.1), one of the main arguments in favour of foreseeability as the test of remoteness was that it was unfair to hold the defendant liable for any consequences other than those which it was negligent of the defendant not to take steps to avoid. Since negligence is failure to guard against foreseeable risks, liability should be imposed only for foreseeable consequences. But the law’s concern with fairness is rather selective. In other words, the concept of ‘foreseeability’ really adds nothing to the balancing of the factors of probability of harm (at whatever level of detail the harm might be described), likely magnitude of harm, burden of precaution and blameworthiness of the defendant’s activity.

63 [1981] QB 625
64 The Wagon Mound (No.1) [1961] AC 388.
2.2. The Proof of Negligence

2.2.1. A Question of Fact?

'Negligence' means a failure to take that degree of care which was reasonable in all circumstances of the case or a failure to act as a reasonable person would have acted. The question of whether a person acted reasonably or not is often said to be a question of fact, but the question is more than that. It is true that questions as whether the plaintiff did this or the defendant did that are causal and thus factual questions. There are always two vital questions, namely the truth question and the probability question, which need to be answered when we seek to characterise whether the defendant acted negligently. (1) What in fact did happen? (2) What would have happened had the defendant behaved reasonably? We can prove whether the defendant acted negligently only if we know, as a matter of fact, what happened and how he did in fact behave. In some cases, we know what did happened, and what would have happened. In some cases, we do not know exactly what did happen, but if we did know that we would have no difficulty in deciding what would have happened if a precaution had been taken. Yet, in some cases, we know what did happen but we are not sure what would have happened. Lord Delvin commented on this vividly in saying that the question is not what the agent actually did but 'what he would have done in circumstances that never arose...this cannot be proved as a matter of fact but can only be inferred as a matter of likelihood or probability'.

A judge once remarked that there are always two points that are taken at the debate in determining whether the conduct in question has been negligent or not, 'one of which raises a question of law and the other a question of fact. The question of law is whether the defendants owed a duty to the plaintiff so as to make them liable to the plaintiff in damages for the negligent discharge of their duty. The question of fact is, assuming the existence of such a duty, has negligence on the part of the defendants been proved?' Hence, the fictitious character of the reasonable person comes into play. Certain broad propositions about the characteristics of the reasonable person are established by authority and precedent and are, in this sense, propositions of law. The judge is entitled to direct the jury in general terms about the standard of reasonableness, for example, about the relevance of age or skill or

The question of what the reasonable person would do is a value question about the right conduct which is answered in the light of the facts as found. The answer is sometimes called an inference from the facts or an inference of fact. Both of these phrases are misleading in that they disguise the essentially evaluative nature of a ‘finding’ of negligence.

For example, although the test of reasonable foreseeability plays an important role in determining liability for negligence, foreseeability alone is, in fact, insufficient as a test for establishing a duty of care, as Lord Goff pointed out:

'It is very tempting to try to solve all problems of negligence by reference to an all embracing criterion of foreseeability, thereby effectively reducing all decisions in this field to questions of fact. But this comfortable option is, alas, not open to us.69

It is true that in legal enquiries, which depend on understanding sufficiently for their purposes an actual, physical or mental event it is often necessary to describe as cause and effect, as if they were actual sequences. The determination of legal responsibility inevitably involves normative judgement. The root idea is the idea of the ‘ought’ and it must also be ‘right’ in legal sense; it is thus distinguished from judgement of fact. No doubt judgements of fact have a great role to play in legal reasoning. But legal judgements are inevitably evaluative judgements, because they give effect to the ‘ought’ in the relevant application. The mere statement of fact is not a legal judgement; it has no legal effect to say that one event caused another, when indeed the relation of cause and effect is purely factual proposition of fact, not of law. While the judgement that an event has been caused by another particular event is not a value judgement and not a legal judgement, but a judgement of fact, it becomes a legal judgement if the facts are subsumed under some legal principle of right and wrong, and responsibility can be applied. The object of the enquiry of ‘reasonable foreseeability’ is to fix responsibility for the act in question which has caused the harm.

Furthermore, it is noted that reasonable foreseeability is only one part of the concept of breach of duty. A breach of duty arises where the conduct of the defendant is ‘unreasonable’ in the sense of failing to reach the appropriate standard

68 Nova Mink Ltd v. Trans Canada Airlines [1951] 2 DLR 241, 25, per MacDonald J.
of care. This will be the invariant standard of competent behaviour in the profession, occupation, or activity in question. In civil side of law of negligence, the courts frequently balance the degree of foreseeability or risk of harm against the costs to the defendant of avoiding the harm and the wider benefits foregone if a certain activity cannot be carried on. The level at which the standard is set is an evaluative question which the courts have acknowledged involved issues of policy and judgement, and not a question which can be addressed solely by asking whether the particular harm was foreseeable in the circumstances.

The risk calculus, for example, is a more detailed criterion of reasonable foreseeability test which has developed more for use by judges than juries. Now that civil juries are almost never used in England, the detailed filling out of the standard of reasonableness is done much more by judges. So it has become much more common for detailed standards of conduct to appear in the law reports and hence easier for them to be taken into the law as statements of legal principle. These developments have led appeal courts to deprecate the making of detailed standards of conduct in such a way as to encourage their generalisation and repeated use as precedents, namely, by putting them forward as statements of duty or as general propositions about reasonableness.

70 Latimer v. AEC Ltd. [1953] AC 643.
71 e.g., United States v. Carroll Towling Co. 159 F.2d 169 at 173 (1947) where Judge Learned Hand’s formula was given: If the probability be called P, the injury L and the burden B, liability depends upon whether B<PL. Bolton v. Stone [1951] AC 850, where it was held that the possibility of such occurrence involved a risk so small that a reasonable person would feel justified to disregard it.
73 See general discussion below in Chapter 3.
2.2.2. Causal Interpretation

2.2.2.1. Causality

Negligent acts and omissions can also be deemed as two kinds of failure to act, namely, failure to act properly and failure to act. In a legal context of negligence, the causal enquiry is not with what would have happened had the defendant done nothing, but what would have happened had he acted properly. The basic premise of negligence relates to the standard of care which is required by the law, while in the law of omission it relates to the duty of care which the law imposes especially in the cases involving inadvertent negligent acts. The liability of both negligent acts and omissions presupposes a hypothetical standard of care. This test contains the notion of actions that the defendant could and should have done. What this means depends, among other things, on what use is being made of moral assessment. The aim of the causal enquiry is, therefore, to discover not only whether the defendant’s conduct as such made a difference (that is, was causally connected) to the outcome, but also whether the fact that it was wrongfully done so.

Hart and Honoré contend that the distinction between the abnormal condition and other normal conditions is not based on differences in actual contributions to the consequence, but rather depends on the context and purpose of the enquiry. This enquiry calls for policy judgements on matters of degree and reasonableness. They observe that,

"in relation to human conduct,... the notion of what is natural is strongly influenced by moral and legal standard of proper conduct, though weight is also given to the fact that certain conduct is usual or ordinary for a human being."74

They state that abnormal human conduct (as well as omissions) is conduct that deviates from the usual, expected, or established standards of behaviour. They acknowledge that their causal criteria (voluntary or abnormal conduct) do not have anything to do with the enquiry into actual contribution to the injury, which is the causal aspect of responsibility denoted by the word ‘cause’ in the phrase ‘the cause.’75 Instead, the two criteria are relevant only in determining whether the defendant’s conduct was ‘the’ responsible cause. The two criteria accomplish this

75 Ibid., xlvi-xlix, 72-74, 110-111.
task by focusing on the wrongful (intentional or negligent) character of the conduct that contributed to the injury.

It is easy to think and speak of the defendant's negligence as the case of the plaintiff's loss that it is frequently overlooked that causal relation is merely one of necessary elements of liability and must be established or tentatively assumed before issues involving duty, negligence, damages, and the defensive issues can be determined. The plaintiff in his pleading frequently pinpoints the specific conduct of the defendant which he alleges contributed to his injury and which was negligent. The specific conduct may be characterised as some act or omission. This narrows and restricts the issue of negligence to the specific conduct. But it does not narrow or restrict the defendant's conduct to the specifications as a cause of the injury.

In a highway collision case, the defendant may be charged with driving his automobile at excessive speed, with bad brakes, failure to keep a lookout or to give a signal, driving while intoxicated, or the violation of any combination of traffic regulations. For example, the charge is excessive speed. The driving of the car which resulted in the collision is a factual cause of the injury; the excessive speed characterises the driving as negligent. The negligence issue cannot be determined until causal relation between the defendant's driving and the plaintiff's injury is established or provisionally assumed, although the same evidence may support both issues. Causal enquiry is the factual basis for finding that the speed was negligent or not. It may be undisputed that the plaintiff was injured as a result of the defendant's driving, but his speed may be found not excessive and hence not negligent. It is the defendant's conduct that inflicts the plaintiff, but it is the law that makes his conduct negligent.

The problem of relevancy is another important principle of selecting the causes attributed to the agent. Consider the unlicensed driver who runs down a pedestrian and is charged with negligence. In such cases there is usually only one question that the driver's conduct in driving the motor vehicle contributed to the plaintiff's injury. Nothing more needs to be known on the issue of causal relation. To attempt to link the plaintiff's injury to an absence of a driver's license would be irrelevant. If the absence of a license has any relevance at all it must be to some other issue. i.e., Did the driver owe a duty to the pedestrian to have a license? Was he negligent in not having a license with respect to the injury suffered by the pedestrian? If the absence of a license were relevant to show the driver's incompetence that would go only on
the negligence issue. Even for that purpose, the factual data pertains to the collision would foreshadow any inference that could be drawn from the absence of a license. The only certain generalisation that can be made is that it has no relevance at all to the causal relation issue, and there is no general rule that would make it relevant to other issues.

The causal link between the defendant’s conduct and the plaintiff’s loss must necessarily precede a finding that the defendant was negligent with respect to the plaintiff and the injury he suffered. What the courts have to do is to draw in some other issues which they seek to determine on the basis of causal fact. It may further be observed in this connection that even though both the causal relation and the defendant’s negligence are clear, there still may be no liability. Courts frequently have to show whether there is no causal relation between the plaintiff’s injury and the defendant’s negligence when the problem is whether the risk is one within the protection of the duty owed by the defendant to the plaintiff. There are also many cases in which a defendant has breached the duty of care, negligence is found, and the plaintiff has been injured as a result of the defendant’s conduct, but defences of assumed risk and contributory negligence such as stepping out in front of a speeding car, crossing against a red light, etc., preclude the risk to which he has been subjected as beyond the scope of the defendant’s duty. It is in these cases, especially, that the causal relation issue may be pertinent to other issues.

2.2.2.2. Causal Explanation as Counterfactual Enquiry
Causal explanation is used to pose a causal question about whether some factors played a role in a relevant transition in the world: Did the plaintiff’s injury result from the neglect of the defendant or did it result from other source of risk? Here the law’s task is to determine the nature and form of evidence the plaintiff should be permitted to adduce to prove the required causal link. It must also choose in relation to which of the possible hypothetical worlds the ‘but-for’ test of causal relevance should be asked. In this context, causal explanation is used to re-construct what

76 Bolitho v. City & Hackney Health Authority [1998] AC 232.
may later be called a set of conditions together sufficient to produce a given result, a certain way of explaining a given event. Having assembled what seems to be a set of sufficient conditions, we whittle them down by eliminating those that trial and error shown to be unnecessary. It turns out to be necessary that a certain condition is necessary while another condition is not.

The causal issue is therefore inevitably focused on whether a certain act or omission is a sufficient condition of the result. It can also be understood as whether such an act or omission is the cause of the result. In order to attribute responsibility for results caused by an act or omission, we explain event backwards in terms of previous events and conditions. We normally use the concept of the necessary members of a set of conditions together sufficient to produce a result of a given type, though we may not be able to specify or qualify all the conditions. In explaining events backwards, a question must be put and answered which involves a counterfactual proposition, namely, that if conditions that in fact occurred had not occurred, the outcome would have been so and so. On the but-for test, we must ask whether in the circumstances the consequence would have occurred had the conditions not occurred. No one will deny that the but-for test has in many instances a heuristic value: it often provides a quick way of testing the existence of causal connection. It is, however, a less reliable way to connect a negligent act and the resulting damage.

In most legal contexts, this sort of counterfactual enquiry requires that all conditions be kept steady except that we substitute rightful conduct and its likely consequences for the wrongful conduct of which the defendant is alleged to have been guilty. Therefore, the purpose of the causal enquiry determines how we should frame the hypothesis to be tested. Suppose the law lays down what counts as negligent acts entailing liability and thus states what the plaintiff has to prove. The law here aims to protect people against wrongful infringement of their rights and exposure to undue danger. So, to ascertain whether an infringement has occurred, the negligent act or omission of the defendant must normally be compared with the notional rightful acts that the defendant is expected to perform in the circumstances.

The question to be examined is whether the difference between negligent act that occurred in the real world and the rightful act (together with its likely consequences) that we assume as desirable would have led to a different result in the hypothetical world that resembles the real world in all other respects. The causal enquiry is
adapted to this aim. Surely one of the important tasks of legal authority at the trial level is to make determinations of fact. The questions of fact that fall to be answered are questions of past events. We usually want to know why things happened as they did, and a part of the answer to the 'Why?' question is a causal explanation. Courts of law can never enter into the raw history of the facts and events they decide upon. As explained above, the *ex post facto* enquiry is an essentially counterfactual one, and therefore cannot be subject to a single correct account.

Suppose in an action for wrongful death the plaintiff was found dead, his body in the highway near his car parked beside the highway. Marks on his clothing indicate that he was crushed by the wheels of a truck. Several trucks, including that of the defendant, are known to have passed along the highway shortly before the body was found. Did the defendant's conduct in driving his truck kill or contribute to the death of the plaintiff? The plaintiff may be able to prove circumstantial details that point to the defendant and the defendant may offer evidence to counter the details. The problem for the trial judge is the sufficiency of the evidence to support a reasonable inference that the defendant's conduct in driving the truck killed or contributed to the death of the plaintiff. It is for the court or jury to draw the inference if the issue is submitted.

In some extreme cases, such as injuries resulting from the simultaneous discharge of firearms by two or more persons, or injuries suffered during a surgical operation in which several persons participated, the plaintiff has no means of identifying the person or persons whose conduct(s) resulted in his loss, but the court may, through the doctrine of *res ipsa loquitur*, place the burden on the defendants to offer evidence to show the factual details of the incident, and further to show that their conduct did not contribute to the plaintiff's loss. In determining whether form all the factual inquiries of the incident an inference can be drawn that the defendant's conduct contributed to the plaintiff's loss, it is very clear that the court may be greatly influenced by policies which it considers essential to the ends of justice.

Although causal relation cannot be reduced to any lower terms and cannot be measured by any yardstick other than the good judgment of judge and jury, various tests have been suggested and utilised for its determination. The 'but-for' test is quite widely supported as a reliable test for causal relation. ‘But for A would B have happened?’ The question focuses enquiry on another issue more difficult than the
original and may not be answerable. 'Event A is not a cause if event B would have happened without A.' This may or may not be true in many cases and its truth can never be demonstrated with complete certainty. Tests of this character have the same weakness as 'if' statements. They are not factual inquiries, but only evaluative analogies. The defendant's conduct may contribute to the plaintiff's injury even though there are other causal factors that would have caused the same or similar injury to the plaintiff. This is demonstrated in the fire cases - multiple fires (some of innocent, some of unknown, and some of negligent origin), merging fires, and fires contributed to by the plaintiff's own conduct.

A so-called rule of 'probabilities' is also frequently put into play as a test of causal relation. It is a highly attractive 'decoy'. It has the same weakness as the 'but-for' test, namely, it takes the focus off the defendant's conduct and focuses on other causes. At most it is an argument and, though a legitimate one for the advocate, can never rise to the level of a test of causal relation. The plaintiff's loss as the result, at least in part, of the defendant's conduct may be highly improbable and yet admittedly true, while on the other hand it may be highly probable and yet the result of other cause factors. Since there may be other causes in every case that also contributed to the plaintiff's loss, to seek to find whether the defendant's conduct was the cause is therefore rather contingent. The situation may be the same in the 'probabilities' test as employed on the issue of causal relation issue because of confusing the use made of the concept as a rule of admissibility of evidence, and also as a test of the negligence issue in which probability of harm is frequently employed interchangeably with 'foreseeability' of harm.

Perhaps cases in which the causal relation issue is most difficult are those in which the defendant has failed to provide some safeguard for the plaintiff's protection. Usually in these cases the other issues will be found favourable to the plaintiff if a causal relation between his loss and the defendant's conduct can be found. Such are cases in which the failure to provide fire escapes, life boats and lifesavers, lighting for stairways and the like. The causal relation issue in these cases seems at first blush to call for a judgment on what would have happened had the defendant performed his duty - and here it is that 'but-for' and 'probability' arguments have their greatest play. But the causal relation issue still is whether did the defendant's conduct in failing to provide safety facilities contribute to the plaintiff's injury.
It will be noticed in these cases that the factual details of the immediate situation out of which the case arose must be shown with considerable particularity. Causal relation will not be presumed from the fact of injury or from a proof the defendant has violated his duty. It may be a case in which the duty and its violation did not include the risk to which the plaintiff was subjected. But if the details indicate that the plaintiff’s safety was put in peril by the defendant’s conduct it is for the court to find whether that conduct did in fact contribute to the injury he suffered. The difficult question is the sufficiency of the evidence to raise the issue. There is no doubt that judges are influenced by policy considerations in their determination of the sufficiency of the evidence as a basis for submission of the causal relation issue.

In some types of cases it may also be extremely difficult to establish a connection between the plaintiff’s injury and the defendant’s conduct. The parties may have to rely almost wholly on scientific proof, i.e., the opinion of experts, and they may differ widely in their opinions. In most courts it is combined with other issues, usually issues such as proximity and the like or combined with the reasonable foreseeability formula, thereby submerging the causal relation issue in a complex of doctrinal terminology that serves primarily as a source of rule formulation for appellate review.

79 See discussion in Chapter 3 (on reasonableness).
80 See discussion in Chapter 4 (on foreseeability).
2.2.2.3. Causal Explanation as Storytelling

To induce the court to affirm the alleged fact, the plaintiff has to present a number of statements from which, in his contention, the alleged fact can be inferred. It is not essential that each of these statements should yield the inference that the alleged fact is true; they may each only contribute to the inference that a certain elements of fact are true and the truth of the alleged fact will then follow when all the elements of fact are established. The task of the court is to decide whether the assertion of the statements justifies the assertion of the alleged fact. Obviously, facts that the defendant acted negligently are established by evidence. There is often cause of doubts about the accuracy of evidence, the passage of time, the fading of memory the motivations of witnesses etc. MacCormick contends that this process of reasoning is one of the deliberate storytelling, 'a narrative encapsulating another narrative or set of narratives.'

Hence, the issue with which concerned here is best illustrated by an example. Suppose a collision between two cars occurs and both cars come to rest entirely on one side of the road. Three questions might arise: (1) Firstly, was one of the cars wholly or partly on the wrong side of the road immediately before the collision? (2) If so, secondly, why was it on the wrong side of the road - was it because of carelessness on the defendant's part? (3) Thirdly, did the fact that it was on the wrong side of the road cause the accident? The second question, as we have seen, has two aspects: what did the defendant do (a factual issue), and was his conduct negligent (an evaluative issue). The third question also has two aspects; a factual one (would the accident have happened but for the defendant's act?) and an evaluative one (was the plaintiff's injury a foreseeable result of the defendant's act?). The first question is a purely factual one. It is the factual aspects of these questions that we are here concerned. If witnesses, whom the court believes, are able to say that one of the cars was wholly or partly on the wrong side of the road, this enables the court to make a relevant finding of 'primary fact.' By this is meant that the fact found is exactly the fact to which the witnesses deposed. On the other hand, if the only

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81 'there must be some plan as to the type of legal action to initiate, the allegations to be made, the evidence to be offered in proof of them. This planning involves decisions about the narrative to be constructed indicating the wrong suffered. For, clearly, counsel in the case must have a view of the story that is to be told, or unfolded, through the presentation of the evidence of witnesses and by other admissible elements of proof.' MacCormick, 'Time, Narrative and Law,' in ARSP-Beiheft 64, Time, Law and Society, Jes Bjarup/Mogens Blegvad (ed.), 1995. 111, at 115.
relevant evidence is that the cars ended up both entirely on one side of the road, this evidence is only circumstantial evidence of the fact in issue and the question for the court is whether it can infer from the circumstances that one of the cars was on the wrong side of the road immediately before the accident. The need to draw inferences arises particularly in relation to the question of causation because of the difficulty of the notion of a witness observing and deposing to a causal connection between two events. The first major problem of proof involves, therefore, the drawing of inference as to what happened from circumstantial evidence, of bridging the gap between the facts deposed to by the witnesses and the facts the court needs to find in order to justify a decision for the plaintiff. This is essentially a problem of judging the probability of events and sequences of events. The second problem which arises even with apparently accurate accounts is the problem of credibility.

Lord Denning once made a very clear distinction between primary facts and secondary facts. According to this theory, there is a distinction between ‘primary facts’ (or ‘real facts’ or ‘brute facts’ or ‘specific facts’) which are the ‘data of experience’ and from the ‘raw material’ of the judicial process on the one hand and ‘conclusion of fact’ or ‘secondary facts’ which are inferences from primary facts, on the other hand. It has also been expressed as a distinction between the perception of facts and the evaluation of facts. As mentioned above, in a negligence case, the court first determines the primary facts - what the defendant in fact did and the circumstances in which he did it - and then decides on the secondary facts - whether what he did amounted in the circumstances to negligence.

To add to this, the question of inference is always decided retrospectively with the benefit of hindsight. This element of retrospectivity removes the question of inference from the straightforward factual explanation since the question asked is not really tied to the factual position the defendant was actually in before the event.

2.3. Conclusion

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82 British Launderers’ Research Association v. Honda Rating Authority (1949) KB 462, at 471, per Lord Denning. See also Bracegirdle v. Oxley [1947] KB 349 at 358, per Lord Denning.
83 Sydney County Council v. Dell’Oro (1974) 132 CLR 97, 106 per McTiernan J.
84 MacCormick, Neil, ‘Time, Narrative and Law,’ in ARSP-Beihft 64, Time, Law and Society, Jes Bjarup/Mogens Blegvad (ed.), 1995. 111, at 116. He emphasises that ‘courts of law can never enter into the raw history of the facts and events they decide upon. They have access only after the events, perhaps long after them, only through narrative accounts of things that are said to have happened.’
In this chapter, I have tried to unmask and draw together some of the issues which the courts have come to terms with the complex moral and legal concerns underlying their resolution for determining the liability in the tort of negligence. As shown above, there are aspects of negligence law that have also been proved problematic and uncertain. Among these is the issue of causation which has given rise to difficulty with respect of the 'but-for' test. There are also two important aspects of negligence, namely unreasonableness of conduct and foreseeability of harm. The standards of conduct recognised by tort law are reasonable care. The reasonable person test emphasises on the wrongful conduct of the defendant, rather than on the violation of the plaintiff’s right. However, these rules are double-edged. In the context of negligence law, there will be no liability where the conduct is not unreasonable, and the corollary of liability for foreseeable harm is no liability for harm which is not foreseeable. Moreover, as will be discussed in Chapter 3, the law does not specify with precision what is to be done in every variety of circumstances. Instead, its rules are often stated in terms of what is reasonable, or of what a reasonable person would do in the light of customary practice. Consequently the courts have been obliged to wrestle with the issue of reasonable standards of care in determining whether a defendant has breached whatever duty he owed the plaintiff.
3.1. The Reasonable Person

When we say that a person has been negligent we are saying that he acted in a way he ought not to have acted. This assumes that we presuppose how he ought to have acted. The way in which we consider that he ought to have acted is the ‘objective’ standard which entitles us to blame him for being negligent when he fails to comply with it. By contrast, where a person's action does not comply with the standard of care expected of him and injury to others results, we say of the person at fault that he caused the harmful result. It can also be said of a person that he is negligent when he acts without due care and attention in regard to risk of the harmful consequences of his actions. Presupposed is the existence of a certain level of risk to which the defendant can expose the plaintiff without committing a wrong, even if injury should result. The defendant is liable only for injuries that materialise from risks above that level.

'Negligence' refers to legal liability for unintended harm when this is caused by a person's failure to meet the required standard of care and or failure to demonstrate the necessary capacity. It is a generally accepted rule of the law of

1 J. S. Mill, On Liberty, Chapter 3, Paragraph 6. (emphasis added)
negligence that everyone is bound to reach an objective standard of care and competence.\(^2\) Of course, there are certain steps which must be taken before we can reach the legal conclusion that a person has been negligent. To begin with, a decision must be made as to whether there is a duty of care in the particular circumstances. It must then be ascertained whether or not the condition in question was the cause of the harmful outcome. Of course, it is emphasised that, in tort law, the causal issue is not the open-ended one \(i.e.,\) `What caused this harm?' but `Did the fact that the defendant behaved in an unreasonable way cause it?' The first question calls for a descriptive explanation of how the harm came about, the second for a normative assessment of the defendant's responsibility for conduct prescribed in categories fixed by the law. Each of these steps raises different kinds of legal problems, and most are closely interrelated with the basic ideas or notions which are a constitutive part of the concept of negligence. The common law, in accordance with its traditional method, has engaged in the elaboration of its doctrine through cases in which plaintiffs vindicated their entitlements against defendants. Since the defendant is liable for the harm that materialises from the creation of an unreasonable risk, an alternative method of looking at the same problem is to decide whether the damage suffered was within the scope of risk created by the defendant's negligence.

Under the law of negligence, wrongdoing consists of a failure to live up to the standard of reasonable care.\(^4\) This standard is breached by action that creates a risk that no reasonable person would impose upon others. One may ask what is the standard of care? It is not difficult to answer it by saying the `standard of reasonable care' is the standard of care that a `reasonable person' would exercise on the occasion in question. Lord Macmillan contends that `the degree of care for the safety of others which the law requires human being to observe...varies according to the circumstances. There is no absolute standard,...'\(^5\) However, a general guideline of `reasonable person' is defined in the American Law Institute's Restatement of Torts. So who is this reasonable person?

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2. This expression is not entirely correct. Because the `objective' test, as opposed to `subjective,' obscures the real issue of reasonable standard of care, namely, whether it involves a general standard of care, or individualised conditions of liability. This issue is discussed in Chapter 2.


He is ‘a person exercising those qualities of attention, knowledge, intelligence and judgement which society requires of its members for the protection of their own interests and the interests of others.’

The proper question to put to oneself in such cases is ‘whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it.’ Once more, from the same source:

‘The standard to which the actor must conform is that of a reasonably careful person under like circumstances, in other words that which is customarily regarded as requisite for the protection of others rather than that of the average man in the community. The two are generally identical, but, occasionally, the actor in particular situations is required to exercise an attention which is far higher than that which is exercised by any but a few members of the community.’

So we are to understand that the conception of the ‘reasonable person’ is based on the ‘model’ person in the situation of the person whose conduct is in question. The crucial point of this test is that a model person does not mean an ideal or perfect person, although he might be expected to be the ‘embodiment of all the qualities we demand of the good citizen.’ All that the law requires of a person is reasonable conduct, not the most reasonable nor even the more reasonable. Anything that a reasonable person (model person) would do is reasonable. Since this standard person, being human, may err in his judgment, conduct which in fact causes injury, if due to an error of judgment which a hypothetical reasonable person might make, may not be held negligent. But this must be distinguished from an error which a reasonable person would not make.

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6 Torts § 283 (b): Qualities of the ‘reasonable man’.
7 Torts § 283 (c).
8 Torts § 289 (f).
11 ‘The reasonable person is presumed to be free from over-apprehension and overconfidence’. Glasgow Corp. v. Muir [1943] AC 448 at 457 per Lord Macmillan
12 The view was sometimes expressed that there is a difference between negligence and an ‘error of professional judgement’ or a ‘mere error of judgment.’ ‘We must say, and say firmly, that, in a professional person, an error of judgment is not negligent.’ Whitehouse v. Jordan
A reasonable person is required to meet the expected standard of conduct, even if he acts as he does due to his personal deficiency. For example, the learner driver is expected to observe the same standard of care as the skilled, experienced and careful drivers, although his very inexperience makes it impossible for him to do so; the home handyman must keep to the same standard of care as a reasonably competent tradesman doing the work in question, and persons of unsound mind are responsible to the same extent as if they were sane. The 'standard of care' expected of the actor is that of 'reasonable person'; this is an objective standard 'independent of the idiosyncrasies of the particular person whose conduct is in question'.

In R. v. Bateman, Lord Hewart identified the minimal standard of care which every qualified doctor should possess. It was, therefore, clear that the test for negligence envisaged by the Court of Appeal in Bateman was an external one: the defendant's conduct was to be judged against an external standard. Anything that a standard person would do is reasonable. If there are several different courses which he might take, any one of them is reasonable, even though one would be more reasonable than another.

In certain cases skill or special knowledge is a constituent element of due care; i.e., it is unreasonable for a person who does not possess the necessary competence or knowledge to do certain acts. A specialist is expected to achieve the standard of care of a reasonably competent specialist in that field. He must exercise the 'ordinary skill of his speciality.' This is inherent in the Bolam test, as Lord Bridge recognised in Sidaway v. Bethlem Royal Hospital Governors:

'The language of the Bolam test clearly requires a different degree of skill from a specialist in his own special field than from a general practitioner. In


13 Holmes points out to this bad luck and blame, he said, 'If a mans is born hasty and awkward, is always having accident and hurting himself or his neighbours, ...his slips are no less troublesome to his neighbours than if they sprang from guilty neglect... Hence 'the law considers...what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune.' The Common Law, Holmes, O. W. Jr., (London: Macmillan, 1911) at p.108.


16 Glasgow Corp. v. Muir [1943] AC 448 at 457, per Lord Macmillan.


the field of neuro-surgery it would be necessary to substitute for the Lord President's phrase 'no doctor of ordinary skill', the phrase 'no neurosurgeon of ordinary skill'. All this is elementary, and firmly established law.19

In some situations, if a person is caught in a sudden emergency, which would perturb the judgement of a standard person, and has to act quickly, he may excused for doing something that would be unreasonable if he had had time for more deliberate action. The emergency is a part of his situation. But he must still act as a standard person would act in such an emergency.20

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19 [1985] 1 All E. R. 643, 660. See also Whitehouse v. Jordan [1981] 1 All E. R. 267, 280 per Lord Fraser, 'Negligence meant 'a failure ...to exercise the standard of skill expected from the ordinary competent specialist having regard to the experience and expertise that the specialist hold himself out as possessing.'

20 Keeton and Prosser on Torts, § 33, at pp.196-197 (on emergency).
3.2. The Reasonable Person and Customary Practice

A custom is usually evidence that conduct is in accordance with what is reasonable. It sometimes tends to show that conduct contrary to it is unreasonable. For example, the practitioner who departs from an accepted method of treatment will normally have to provide some justification for doing so, if as a consequence, the patient suffers injury. In Wilsher v. Essex Area Health Authority Mustill L.J. said that where the doctor embarks on a form of treatment which is still comparatively untried, with techniques and safeguards which are still in the course of development, then 'if the decision to embark on the treatment at all was justifiable and was taken with the informed consent of the patient, the court should... be particularly careful not to impute negligence simply because something has gone wrong.'

In discovering what is reasonable conduct in the circumstances, the courts have relied on general practice because 'what is reasonable in a world not wholly composed of wise men and women must depend on what people presumed to be reasonable constantly do.' A custom is, therefore, usually significant evidence that conduct in accordance with it is reasonable. A custom includes the way of acting of standard persons or professionals. It tends, therefore, to show that to act contrary to it is unreasonable; the question is one of what others may reasonably expect him to do. Since the standard of care is determined by reference to community valuation, considerable evidentiary weight attaches to whether or not the defendant's conduct conformed to standard of practices accepted as normal and general by other members of the community in similar circumstances. But the actor's own habitual way of acting is not relevant to the reasonableness of his own conduct, though it may be so on the question of what others may reasonably expect him to do. Ordinarily a person may regulate his conduct on the assumption that others will act rightly and reasonably.

The standard of care is based on the reasonableness of the defendants' actions. The most difficult test is that of reasonableness. The true rule seems to be not that a

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21 Morris, C. 'Custom and Negligence' (1942) 42 Col. L. R. 1147.
Custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable. However, just as compliance with accepted practice is good evidence that the defendant has acted with reasonable care, a departure from accepted practice may be evidence of negligence, but in neither case is the evidence conclusive. Custom is limited in its application. It does not apply to all situations, but only to a particular class of persons or to a particular profession. What is said of particular usage is true of all customs; hence the rule that customs are to be regarded as requiring strict proof.

To determine the reasonableness of conduct, in law, is a process of inference from data. The data consist of the conduct in question and the facts of the actor's situation. The existence of the data is a question of fact. When the data are disputed, the question of negligence must go to the jury, with proper instructions from the court if necessary. The data being given, the inference of reasonableness or unreasonableness, of due care or negligence, is in its nature one of fact, the data furnishing the minor premise and the major premise being drawn from common experience, whereas in a true inference of law the major premise is a rule of law.

Where a practice is carried on in disregard of the obviously unreasonable, and is therefore unreasonable, the courts reserve the right to rule that practice negligent. This argument can be traced back to the nineteenth century, in 1875, Robinson v. Mollett, says Brett J.,

'...When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person ignorant of it, is unreasonable, contrary to law, and void.'

The position is analogous to that posited by Lord Keith in Cavanagh, when discussing the application of the rule in Morton v. Dixon to industrial injuries cases. But this right is only minimally exercised, for common practice, or even the practice

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26 Robinson v. Mollett (1875) LR 7 HL 802, 817.
28 1909 S.C. 807.
of a group of practitioners, is likely to be based on reasonable grounds, and so expert
evidence approving the defendant's actions will, if believed by the judge, normally
be conclusive.

It may be convenient to begin our examination of the authorities on customary
practice in the context of professional negligence by considering three nineteenth-
century cases, Vaugham v. Menlove,29 Lanphier v. Phipos30 and Rich v. Pierpont.31 The
rule that the objective standard is that of a reasonable person has been settled, as far
as common law concerned, since the case of Vaugham v. Menlove32 in 1837. In this
case, a person imprudently stacked hay so that it was liable to over-heat. It went on
fire and damaged his neighbour's property. He had acted in good faith to the best of
his ability, but he is still held liable in damages. The principle which Tindal CJ had in
mind in this case is that even if a person does his best, if a prudent or reasonable
person would have done better and avoided harming his neighbour, he is liable for
his negligent acts.33 An almost identical formulation was laid down, a year later, in
the medical negligence case of Lanphier v. Phipos,34 in which Lord Tindal C.J. directed
the jury by defining negligence on the part of a surgeon and apothecary as 'the want
of a reasonable and proper degree of care and skill in the defendant's treatment.'35
These seem to support the view that the test is, and should be, want of reasonable
care as defined by the court rather than by expert witnesses. In this case, Tindal CJ
directed the jury that

'Every person who enters into a learned profession undertakes to bring
to the exercise of it a reasonable degree of care and skill,'36

and it is clear that he saw negligence as being injury occasioned by the want of a
'fair, reasonable, and competent degree of skill.' 37 Erle CJ in Rich v. Pierpont38 made

29 (1837) 3 Bing. N. C. 468.
30 (1838) 8 Car. & P.475.
31 (1862) 3 F. & F. 35.
32 (1837) 3 Bing. N. C. 468.
33 Vaugham v. Menlove (1837) 3 Bing. N. C. 468 per Chief Justice Tindal,
'Instead of saying that the liability for negligence should be coextensive with the judgment of
each individual—which would be as variable as the length of the foot of each individual- we
ought rather to adhere to the rule which requires in all cases a regard to caution, such as a
person of ordinary prudence would observe.'
34 (1838) 8 C. & P. 475.
36 (1838) 8 Car. & P.475. 479.
37 Ibid.
it clear that the decision as to whether there had been negligence was a matter for
the jury. A doctor was 'bound to have that degree of skill which could not be
defined, but which, in the opinion of the jury, was a competent degree of skill and
knowledge.' Clearly, if the degree of skill 'could not be defined,' Erie CJ did not
conceive of defining it in terms of the expert evidence supporting the defendant, and
there is no question of regarding conformity to an approved practice as being
conclusive evidence against negligence.

In R v. Bateman, a case decided in 1925, Lord Hewart CJ adopted a similar
approach as that in Rich v. Pierpont. He took the view that the standard of care
required in a civil negligence action was 'the standard of reasonable care,' and
repeated Tindal CJ's comment that the law requires 'a fair and reasonable standard of
care and competence.' Like Erle CJ, in Rich, he did not envisage a judicial abdication
of standard-fixing in favour of expert witnesses, declaring that: 'It is for the Judge to
direct the jury what standard to apply and for the jury to say whether that standard
has been reached.'

No different standard is visualised as being applied to the medical man from
that to be applied to anyone else. Similarly, this standard was adopted by Lord
Hewart CJ when he directed the jury in the criminal case of R. v. Bateman, a legal
authority of criminal negligence. He also identify the minimal standard of care which
every qualified doctor should possess. He stated,

'The law required a fair and reasonable standard of care and competence.
They are bound to show a reasonable amount of skill according to the
circumstances of the case and you have to judge them on the basis that they
are skilled, but not necessarily so skilled as more skilful men in the
profession; and you can only convict a doctor of causing a death by
negligence if you think he did something which no reasonably skilled
doctor should have done.'

The court has never clearly differentiated between medical profession and all other
professions when issues involve customary practice. For the medical practitioner, the

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40 (1925) 19 Cr. App. R. 8
41 Rich v. Pierpont (1862) 3 F. & F. 35
42 Ibid.
43 Ibid. This part of Lord Hewart's judgment was quoted with approval in the Scottish case of
44 (1925) 19 Cr. App. R. 8.
practical questions are: ‘What is negligence?’ ‘What does the law say I can do safely, and what can I not do without being negligent?’ One solution is to turn every case to evidence of common practice. Yet the courts reserve the right to reject this standard. This has been most apparent in cases of employers’ liability, but it is also evident in some cases involving professional liability. Indeed, outside the medical sphere, judges have been more readily disposed to find professional practice negligent, notwithstanding its acceptance by expert opinion, especially on matters which they do not consider unduly technical or in which they are well versed. However, in conformity with general negligence principles, the court has been reluctant to impose standards between differing schools of thought.

One of the early cases to raise issues of customary practice as the evidence of the exercise of reasonable care was Morton v. William Dixon Ltd. A miner sued his employers, alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage. Lord President Dunedin said:

‘Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault or omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.’

This formula clearly singles out two conditions of customary practice, one is when the practice is common and as well as reasonable. The other one is that when the practice is not reasonable, even if it may be commonly adopted. In Lloyds Bank v. Savory & Co., for example, Lord Wright rejected the proposition that a bank is not negligent if it takes all the precautions usually taken by bankers ‘in cases where the

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48 1909 S.C. 807.
49 Ibid, at p.809.
ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking.'

According to the frequently cited opinion of Lord Alness in *Vancouver General Hospital v. McDaniel*, 'a defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.' In this case, the plaintiff had been awarded damages by the Canadian courts because she had been cross-infected with smallpox while being treated in the hospital for diphtheria. Lord Alness, delivering the Privy Council's judgment, declared that the medical evidence showed that the hospital's procedures for treating smallpox and preventing cross-infection were in accordance with general practice in Canada and the U.S.A., and that being so, it was 'difficult to affirm that negligence on the part of the appellants is proved.' This view was to be expressed in a number of subsequent cases. In *Marshall v. Lindsey County Council*, Maugham L.J. said:

>'the defendant Council ....have acted in accordance with the recognised practice and are therefore free from liability on the ground of negligence...An act cannot, in my opinion, be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind. What is reasonable in a world not wholly composed of wise men and women must depend on what people presumed to be reasonable constantly do. Many illustrations might be given and I will take one from the evidence given in this action. A jury could not, in my opinion, properly hold it to be negligent in a doctor or a midwife to perform his or her duties in a confinement without mask and gloves, even though some experts gave evidence that in their opinion that was a wise precaution. Such an omission may become negligent if, and only if, at some future date it becomes the general custom to take such a precaution among skilled practitioners... I do not doubt the general truth of the observation in *Vancouver General Hospital v. McDaniel* that a defendant charged with negligence can clear himself if he shows that he has acted in accord with general and approved practice.'

As a general rule within the tort of negligence, where the defendant has acted in accordance with the common practice of others in a similar situation this will be a strong evidence that he has not been negligent. People do not normally adopt systematic practice that pays scant regard to the safety of others. Following a common practice is only evidence, however, it is not conclusive, since the court may

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50 [1933] AC 201, 203.
51 [1934] 4 DLR 593 (P.C.) at 597.
52 Ibid.
find that the practice is itself negligent. There may be many reasons, such as convenience, cost, or habit, why a particular practice is commonly followed, which have nothing to do with reasonable prudence to protect against causing potential harm to others.

The general principle embodied in Maugham LJ’s dictum apparently received the imprimatur of the House of Lords in the case of Whiteford v. Hunter.55 In that case, a surgeon was held not to have been negligent in not having used a cystoscopy or performed a cystoscopy to verify a diagnosis of cancer of the bladder because his actions were in accordance with approved practice in England at the time, although both performances were standard practice in the United States.

The difficulty is that the law has developed from a simple ‘reasonable person’ test to a test based on the views of expert witnesses because the increasing complexity of modern medicine means that judges can no longer establish for themselves what is reasonable in medical practice. Furthermore, a court or jury may not be able to tackle the practices of a professional group of which it has little or no knowledge. The professed inability to assess properly the adequacy of a custom has dampened any eagerness for imposing standards upon industries that are superior to the practices followed. In Mahon v. Osborne56 where a surgeon put six surgical swabs into the patient’s abdomen and only removed five after the operation, Lord Justice Scott asked ‘How can the ordinary judge have sufficient knowledge of surgical operations to draw such an inference (of negligence)?’57 In McLeod v. Roe,58 Justice Rand expressed the view that judges ‘must accept the standard so established rather than the individual opinion of any judge’.59 At least one judge has contended that courts are ‘in no position to say that the expert evidence was wrong in stating that the usual practice among surgeons was followed and reasonable care was exercised’,60 and another has had misgivings that a jury had ‘exceeded its province’ in this regard.61 The customary practice of a profession or an industry must by

55 (1950) W.N. 553.
56 [1939] 2 KB 14.
57 Ibid. at 23, per Scott LJ.
58 McLeod v. Roe (1947) S.C.R. 420
definition be feasible; consequently, nonconformity can be termed negligence without imposition of an onerous economic burden upon those who deviate. However, to demand more of an industry than compliance with its practices may be to dictate impossible standards or, at least, economically unfeasible ones. Because this may have negative effects on business, the courts are therefore very cautious to brand customs as negligent.

Where the case does not involve difficult or uncertain questions of medical or surgical treatment, or abstruse or highly technical scientific issues, but is concerned with whether obvious and simple precautions could have been taken, the question of the practice of experts should be largely irrelevant. The courts do not rely on expert rally drivers, for example, to say whether a motorist was negligent. It was stated clearly in Anderson v. Chasney,

'Ordinary common sense dictates that when simple methods to avoid danger have been devised, are known, and are available, non-user, with fatal results, cannot be justified by saying that others also have been following the same old, less careful practice; and that when such methods are readily comprehensible by the ordinary person, by whom, also, the need to use them or not is easily apprehended, it is quite within the competence of court or jury, quite as much as of experts to deal with the issues; and that the existence of a practice which neglects them, even if the practice were general, cannot protect the defendant surgeon.'62

In Anderson v. Chasney,63 a sponge was left in the patient by the defendant during a tonsil and adenoid operation. It was argued in the Court of Appeal that one of two existing security methods, namely, sponge counting or the use of sponges with tapes, should have been employed, although it was not proved that it was customary to do this. The Courts, noting that there were too many instances of sponges being left behind after surgery, decided that these two methods should have been used since 'neither is impractical.'

There are strong arguments in favour of the customary practice test, but the courts have not given up their duty to evaluate customs, as negligent conduct cannot be countenanced, even when a large group is guilty of it as a matter of course. If these common practices were blindly adhered to, warned Coyne J. in Anderson v. Chasney, the 'expert witnesses would, in effect, be the jury to try the question of negligence. That question, however, must continue to be one for petit jury

empanelled to try the case, if it is a jury case, and the court, where it is not.64 Consequently, no professional group may legislate itself out of civil liability by the adoption of an unreasonable customary practice.

Since the early 1950s there have been cases in which the court has itself fixed the standard of care to be attained, and fixed that standard on the basis of what it conceives ought to have been done in the circumstances of the case being litigated. The expert evidence as to medical practice as well as general practice in business have not been treated as conclusive on the issue of negligence.

Paris v. Stepney Borough Council65 has some relevance to the present discussion since it was there argued by the employers that reasonable care, as reflected in customary practice, did not require the provision of goggles for workmen with normal sight, therefore they were not negligent in failing to provide goggles for a one-eyed workmen. There, however, the House of Lords was able to avoid the problem by pointing out that whether or not it was negligent to fail to provide goggles for normal workmen -- as to which custom might have relevance -- it was negligent to fail to make such provision for the one-eyed workmen.66 In this case, Lord Oaksey observed that it was 'a simple and inexpensive precaution to be taken to supply goggles....'67

In General Cleaning Contractor Ltd v. Christmas,68 after concluding that the defendants had not been proved to be negligent in failing to provide ladders or safety belts for their employers, Lord Tucker dealt with the question of feasible precautions:

'My Lords, I have felt considerable doubt on this matter. It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject, but in a case like the present it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff. The provision of a block or wedge for insertion in defective windows would not, on the plaintiff's evidence, have prevented this accident, since he had not discovered that the window in question was in any way defective and accordingly would have had no occasion to use

64Ibid., at 81.
66Ibid., per Lord MacDermott, at pp.390-391.
On the other hand, in a case where there are difficult, uncertain, highly technical scientific questions requiring information not ordinarily expected of a practitioner, and where the state of medical knowledge may vary between scientists, public health authorities and different medical bodies, it is not appropriate for the court to find that a practice, which conforms to what other similarly situated practitioners follow, is negligent. In these circumstances the court should confine itself to the prevailing standards of practice.

It is essential that before any question of complying with accepted practice can arise the court must be satisfied on the evidence presented to it that there is a responsible body of professional opinion which supports the practice. It is always open to the court to reject expert evidence applying the ordinary principles of credibility that would be applied in any courtroom, for example, that the evidence is internally contradictory, or that the witness was acting as an advocate rather than an impartial and objective expert.

In cases where following the customary practice is not a conclusive defence to a negligence action, the court is taking a much more active role in the promotion of quality professional services. However, in most cases, the court is prepared to rely on institutions within and surrounding the profession to dictate the appropriate standard of competence and to limit itself to assessing whether or not the standard has been bettered. To the extent that the courts adopt the customary practices of the profession as the standard of care, professionals are indeed a privileged group in civil liability actions. Perhaps the most significant examples of this approach are the decisions in Hunter v. Hanley in 1955, and Bolam v. Friern Hospital Management Committee in 1957.

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69 Ibid., 198. And see Roe v. Ministry of Health, per Denning LJ. [1954] 2 All ER 131, at 139. ‘If the hospitals were to continue the practice after the warning, they could not complain if they were found guilty of negligence. But the warning had not been given at the time of this accident. Indeed, it was the extraordinary accident to these two men which first disclosed the danger. Nowadays it would be negligence not to realise the danger, but it was not then.’

70 See discussion below in Maynard and Belknap at 3.5. Moving on from Bolam.

71 See below 3.5.2., Lord Bwrowne-Wilkinson’s speech in Bolitho.
3.3. The Hunter and Bolam Test

It will be recalled that in *Bolam v. Friern Hospital Management Committee*, McNair J. directed the jury that:

'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'

This is the leading authority on the standard of care to be expected of a medical practitioner in England, echoing the Scottish decision *Hunter and Hanley* which was decided two years before. The Court of Appeal clearly indicated that the test was not restricted to doctors, but also was of application to any profession or calling which required special skill, knowledge or experience.

3.3.1. Hunter v. Hanley

In *Hunter v. Hanley* the action arose out of an intra-muscular injection of penicillin given to Mrs Hunter by her doctor, Dr. Hanley. He selected a fairly thin hypodermic needle which broke as the injection was being performed, part of the needle remaining in Mrs Hunter's right hip. She brought an action for professional negligence against Dr. Hanley, alleging that the needle was not suitable for giving an intra-muscular injection and insufficiently strong for the purpose. She maintained that a stronger serum needle should have been used instead. It is Lord President Clyde's judgment on the standard of care to determine whether Dr. Hanley departed from a normal practice. In a famous passage, he said,

'In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor

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72 [1957] 2 All ER 118.
73 [1957] 2 All E.R. 118, 122; *Holmes v. Board of Hospital Trustees of the City of London* (1977) 81 DLR (3d) 67, 91, *per* Robins J (Ont. H. C.): 'Where in the exercise of his judgment a physician selects one of two alternatives, either of which might have been chosen by a reasonable and competent physician, he will not be held negligent'; *Darley v. Shale* [1993] 4 Med. LR 161 (N.S.W.S.C.)
75 *Gold v. Haringey Health Authority* [1987] 2 All E.R. 888, 894.
because he has displayed less skill or knowledge than others would have shown.\textsuperscript{77}

He continued,

'The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.'\textsuperscript{78}

He then suggested that there were three requirements to establish liability where deviation from normal practice is alleged: first, it must be proved that there is a usual and normal practice; secondly, it must be proved that the doctor has not adopted that practice; and thirdly, it must be established that the course which he adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. This, he conceded, placed a 'heavy onus' on any pursuer, but to allow mere evidence of negligence would be disastrous, as all incentive to innovation and progress in medical science would be removed, and indeed a barrier to that progress would be set up.\textsuperscript{79}

3.3.2. Bolam v. Friern Hospital Management Committee

\textit{Bolam v. Friern Hospital Management Committee}\textsuperscript{80} related to the use of electro-convulsive therapy. The plaintiff had signed a consent form allowing this treatment to be administered to him, but the doctors had not fully advised him of the risks involved in the treatment, and in particular the risk of fracture. The plaintiff suffered severe pelvic injuries, and sued for damages on the ground that these injuries were due to professional negligence on the part of those doctors who had failed to inform him fully of the risk of the fracture, and who had administered electro-convulsive therapy without the use of manual restraints or relaxant drugs. The evidence showed that medical opinion was divided on the advisability of using manual control and drugs during electro-convulsive therapy, and also upon how fully a patient should be informed of the risk of injury.

McNair J. directed the jury on the \textit{standard of care} required of a doctor which is now commonly known as the \textit{Bolam} test:

\textsuperscript{77} \textit{Ibid}, at pp. 204-5.
\textsuperscript{78} \textit{Ibid}, at p. 205.
\textsuperscript{79} \textit{Ibid}, at p. 206.

\textsuperscript{80}
Where you get a situation which involves the use of some special skill or competence ... The test is the standard of the ordinary skilled man exercising and professing to have that special skill... It is well-established law that it is sufficient if he [the defendant] exercises the ordinary skill of ordinary competent man exercising that particular art.\textsuperscript{81}

In a case of medical practitioner, 'negligence means failure to act in accordance with the standards of reasonably competent medical man at the time, remembering that there may be more than one proper standard, and that compliance with any one of these excludes negligence.'\textsuperscript{82} McNair J. considered a suggestion put to him by counsel that Lord President Clyde's test for negligence, qualified by the words 'in all the circumstances' of the case, represented the law of England, but he preferred an alternative formula:

'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art... a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.'\textsuperscript{83}

One consequence of the \textit{Bolam} test is that where there are two competing responsible bodies of professional opinion and the defendant adheres to one view, but carelessly fails to follow his own normal practice, with the result that he complies with the alternative approach, he will not be held negligent because he will have conformed to a practice accepted as proper by a responsible body of professional opinion. Thus, where the doctor fails to give a warning about the risks of treatment which he would usually give, but there is a responsible body of medical opinion which, as a matter of policy, would not warn the patient of the particular risks, the defendant will not be liable since, though he has departed from his own clinical practices, he has conformed to a practice accepted as proper by a responsible body of professional opinion, although he had done so accidentally. The \textit{Bolam} test has been approved in

\textsuperscript{80}[1957] 2 All ER 118.
\textsuperscript{81}[1957] 2 All ER 118, at p. 121.
\textsuperscript{82} \textit{Ibid}, at p. 121.
\textsuperscript{83} \textit{Ibid}, at p. 122.
many cases. It consists of two parts: the standard of the ordinary competent professional, and the defence of acting in accordance with a body of responsible professional opinion.

In the course of his judgment in Greaves & Co. v. Baynham Meikle & Partners, Lord Denning said that the standard of care expected of a professional man is 'reasonable care and skill in course of employment,' the test laid down by McNair J in Bolam. The Bolam test is also echoed in the leading formulation of the standard of care in solicitors' cases. In Midland Bank v. Hett, Stubbs & Kemp, Oliver J said:

>'Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession...'

The dictum would appear to be more generous to the solicitor than an earlier formulation in Simmon v. Pennington, where the judge said:

>'having regard to the degree of skill held out to the public by solicitor, does the conduct of the solicitor fall short of the standard which the public has been led to expect of the solicitor?'

Referring to the Bolam test, the decision of the House of Lords in Whitehouse v. Jordan seems to rely on expert evidence as an important factor of the exercise of due care. Lord Edmund-Davies, 'to avoid any future disputation of a similar kind,' declared the true doctrine on the standard of care to be enunciated by McNair J in Bolam - 'the standard of the ordinary skilled man exercising and professing to have that special skill.' Lord Fraser regarded negligence as being 'a failure ...to exercise the standard of skill expected from the ordinary competent specialist having regard

85 [1975] 3 All ER 99.
86 Ibid, at pp. 104-5.
89 [1981] 1 All ER 267
90 Ibid, at p. 276, per Lord Edmund-Davies.
91 Ibid, at p. 277, per Lord Edmund-Davies.
to the experience and expertise that specialist hold himself out as possessing.'92 And in discussing errors of judgment, he said, 'If...it is an error that a man, acting with ordinary care, might have made, then it is not negligence.'93

If the Bolam test is applied to specialist, a higher level of skill will be demanded than that expected of a general practitioner. Lord Bridge contended in Sidaway v. Bethlem Royal Hospital Governors94 that this rule is to be inherent in the Bolam test.95 Medical practitioners are judged by the standards of the specialism they profess, although doctors will be at fault if they undertake work beyond their competence. Such distinction is easier to draw in a profession with recognised ranks, and in the case of lawyer the absence of such formal differentiation makes it less practical. However, any lawyer who carries out specialist work is to be judged by the standards of the specialist, not by the standards of the ordinary practitioner. In Duchess of Argyle v. Beuselinck Megarry J. said:

'But if the client employs a solicitor of high standing and great experience, will an action for negligence fail if it appears that the solicitor did not exercise the care and skill to be expected of him, though he did not fall below the standard of a reasonably competent solicitor? If the client engages an expert and doubtless expects to pay commensurate fees, is he not entitled to expect something more than the standard of the reasonably competent. I am speaking not merely of those experts in a particular branch of the law, as contrasted with a general practitioner, but also of those of long experience and great skill as contrasted with those practising in the same filed of the law but being of a more ordinary calibre and having less experience.'96

However, in Locke v. Camberwell Health Authority, it was held that a solicitor who was not experienced in medical negligence litigation is not expected to 'have the specialised expertise of a partner in a firm specialising ... He is expected to have the competence and the skill to be expected of a solicitor engaged in litigation in general practice.'97

92 Ibid., at p. 280. per Lord Fraser.
93 Ibid, at p.280. per Lord Fraser.
94 [1985] A.C. 871
95 [1985] 1 All E. R. 643, 660, 'The language of the Bolam test clearly requires a difference degree of skill from a specialist in his own special field than from a general practitioner. In the field of neuro-surgery it would be necessary to substitute for the ...phrase 'no doctor of ordinary skill', the phrase 'no neuro-surgeon of ordinary skill'. All this is elementary, and firmly established law.'
97 (1990) 140 NLJ 205, at 205. The case was reversed on further facts coming to light, but
While adopting the *Bolam* test in most cases, the court is still trying to emphasise that the determination of reasonableness is a matter for the law, not for the profession. This was an interpretation of the *Bolam* test that was not accepted by Lord Bridge in *Sidaway* who said:

'...the issue whether non-disclosure in a particular case should be condemned as a breach of the doctor's duty of care is an issue to be decided primarily on the basis of expert medical evidence, applying the *Bolam* test...Of course, if there is a conflict of evidence whether a responsible body of medical opinion approves of non-disclosure in a particular case, the judge will have to resolve that conflict. But, even in a case where, as here, no expert witness in the relevant medical field condemns the non-disclosure as being in conflict with accepted and responsible medical practice, I am of opinion that the judge might in certain circumstances come to the conclusion that disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it.'

In *Hills v. Potter* Hirst J. also cautiously denied that the *Bolam* test allows the medical profession to set the standard of care:

'In every case the court must be satisfied that the standard contended for ... accords with that upheld by a substantial body of medical opinion, and that this body of medical opinion is both respectable and responsible, and experienced in this particular field of medicine.'

But this is not different from any other person exercising a professional judgment and is just as amenable to analysis under an ordinary private law principle of negligence. Nonetheless, it will be rare for the courts to condemn as negligence a commonly accepted practice. Only where the risk was, or should have been obvious to the defendant (so that it would be folly to disregard it) will the courts take this step.

98 [1985] 1 All ER 643, at pp.663.
100 Ibid, at p. 728.
3.3.3. Hunter and Bolam Compared

It has been argued that there is a difference between the Hunter v. Hanley formulation and the Bolam test - a distinction between a test of negligence based on the standards of the ordinary skilled person and one based on the reasonably competent person. The former places considerable emphasis on the standards which are in fact adopted by the profession, whereas the latter makes it clear that negligence is concerned with departure from what ought to have been done in the circumstances, measured by reference to the hypothetical 'reasonable doctor' determined by the jury. It is for the court to determine what the 'reasonable person' would have done, not the profession. Of course, what the profession does in a given situation will be an important indicator of what ought to have been done, but it should not be determinative.

Comparison of the Hunter and Bolam tests highlights the difference in regard to evidence of adherence to common practice. In England the 'reasonableness' of the care afforded by the physician seems to be a matter of some importance - McNair J. directed the jury in Bolam that a doctor could not defend his adoption of a technique simply by reference to his belief in its superiority. He had to have reasonable grounds for following it.102 Lord President Clyde, however, makes no mention of reasonableness at all. The only question he would ask is whether no doctor of ordinary skill would do what the defender did if acting with ordinary care.

According to Bolam, a doctor can avoid a finding of negligence against him if he can show that he acted in accordance with a responsible body of opinion; but in Hunter, the doctor is apparently not responsible unless no doctor of ordinary skill would have done the same as the defender. It would seem that the onus to be met by a pursuer in Scotland is rather higher than that faced by an English plaintiff. Although there is linguistic distinction between ordinary skilled persons and the reasonable competent persons which are declared in these two cases, in the vast majority of cases this distinction is widely ignored.

There is no clear demarcation between the ordinary doctor and the reasonable doctor. The assumption is that the terms express essentially the same standard. These epithets - 'the reasonable' person, the 'average' person and the 'ordinary' person - were used interchangeably at the time when judges had to give the jury guidance as

102 [1957] 2 All ER 118, 121.
to the appropriate standard to apply in deciding whether conduct was negligent.103
The vast majority of cases have contained references to the standard of 'reasonable
care' or the care 'reasonably to be expected of a doctor in the circumstances.' In many
cases, the phrase 'reasonable care' could bear either meaning - it could mean
'ordinary' care, which would make common practice evidence very important if not
conclusive, or it could merely mean 'reasonable,' in which case such evidence can be
much less important.104

103 Norrie, K. McK. 'Common Practice and the Standard of Care in Medical Negligence' 1985
JR 145-165.
104 Laurie, G., Review of Medical and Dental Negligence, (Robert H. Dickson, Edinburgh: T & T
3.4. ‘Unreasonable’ Professional Practice

As mentioned above, the standard of care in medical negligence provided considerable scope for objective evaluation of professional judgment. Under the Bolam test, however, determining the standard was seen by the courts as essentially a matter for the medical profession, to be resolved by expert testimony with minimal court scrutiny. However, in non-medical cases, courts are more willing to probe such testimony and challenge the credibility of non-medical experts. A few leading cases on unreasonable customary practice will be discussed in this section.

3.4.1. Morris v. West Hartlepool Steam Navigation Co. Ltd

A noteworthy House of Lords decision in Morris v. West Hartlepool Steam Navigation Co. Ltd. It was decided in 1956, a year before Bolam v. Friern Hospital Management Committee. In this case, the plaintiff, an inexperienced seaman, claimed damages for injuries he sustained in falling thirty or forty feet down an uncovered and unfenced 'tween deck hatch. The defence to this action was that the employer was merely following the invariable practice adopted at sea within the experience of witnesses, which covered a period of some forty years, during which time no accident of this nature had occurred. Whether the practice was good or bad, it was argued, the defendants were entitled to rely upon it.

The House of Lords decided in favour of the employee, reinstating the decision of the trial court. In doing so, they tended to favour the view that evidence of conformity to custom is admissible, although not conclusive, evidence of due care. But once again the case cannot be regarded as clear authority for this view. In order for custom to have any significance in this type of case, the circumstances in the places as to which evidence of such custom is given must be similar to those prevailing in the defendant’s place of business. In this case, the House of Lords did not appear to be satisfied as to the similarity of circumstances - in the case of most ships, it seemed to be unusual to send men to the ‘tween decks after cleaning and repairing was finished, and in any event the hatch covers would usually be replaced, whereas in this particular type of ship it was not practicable to replace the hatch.
covers because a ‘feeder’ used for loading grain was placed across the hatch. Although therefore they cannot be regarded as forming part of the ratio decidendi, there are some useful statements in the speeches on the question of the effect of evidence of practice. Lord Cohen expressed the view that ‘when the court finds a clearly established practice ‘in like circumstances’ the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one.’ Lord Reid also commented that:

‘the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution.’

This use of evidence of practice was also mentioned in this case. For instance Lord Reid observed:

‘It was argued that, whether the practice of leaving the hatches unprotected was good or bad, the respondents were entitled to rely on it because it had gone on a long time and no one had heard of an accident arising from it. I would agree that, if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly.’

It is true that ‘neglect of duty does not cease by repetition to be neglect of duty,’ and that it is possible for a whole industry to be negligent. However, it is also right that, in test cases, the imposition of liability on the defendants will require the whole industry to revise its system. This consideration seems to have affected much of the judicial discussion of the importance of conformity evidence, and there are cases where it has been the subject of express emphasis. Lord Reid, for example, has observed:

‘A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade

106 [1956] AC 552.
107 Ibid, at p. 574.
109 [1956] AC 552, at p.575, per Lord Tucker: ‘The risk was obvious, its consequences were likely to be calamitous, and the remedy was simple and available’ and at p. 580, per Lord Cohen: ‘the risk...could easily have been avoided...’
110 [1956] AC 552, 574.
undertakes a heavy onus: if he is right it means that all, or practically all, the numerous employers in the trade have been habitually neglecting their duty to their men..."  

3.4.2. Cavanagh v. Ulster Weaving Co. Ltd.

The question of the effect of evidence of practice ‘in like circumstances’ which the courts had hitherto been able to avoid, was raised in Cavanagh v. Ulster Weaving Co. Ltd. that evidence of adherence to common industrial practice does not preclude a finding of negligence against an employer.

In actions brought by employees for negligent failure to provide a safe system of work, employers frequently introduce evidence that there was a system which customarily prevailed in that particular industry. The issue of admissibility, relevance and effect of such evidence which then arise produced different answers in various case, but clarification was provided by the House of Lords in Cavanagh v. Ulster Weaving Co. Ltd., the leading House of Lords decision on custom in negligence law. The plaintiff fell from a roof-ladder while carrying a bucket of cement in the course of his employment. There were no hand-rails to assist him and he was given rubber boots to wear since it had become wet that morning. The plaintiff did not allege that the defendants were negligent in that system adopted by them was contrary to the general practice of the trade. Although the plaintiff argued that it was negligent not to have hand-rails, he led no evidence that this was in violation of the custom in the trade. At the trial, the defendant, however, called as an expert a civil engineer who was asked the question: ‘How far does this set-up accord with good practice?’ He answered: ‘For this type of access to building work I would say that it is perfectly in accord with good practice. I have very considerable experience of such work on roofs for over twenty years.’ Nevertheless the trial judge left detailed issues to the jury, which found in favour of the plaintiff.

In allowing the defendant’s appeal and setting aside the jury’s verdict, the Court of Appeal in Northern Ireland had accorded conclusive effect to the evidence of practice. Accepting the Dunedin formula in Morton v. William Dixon Ltd, Curran

113 [1959] 3 WLR 262.
114 [1959] 3 WLR 262.
115 1909 S.C. 807.
LJ thought the evidence of conformity to practice was 'clearly relevant and once it is established it is my opinion that a finding by the jury that it was folly in the defendants to neglect to provide something else cannot be justified.'

The House of Lords reversed the decision of the Court of Appeal, holding that the trial judge had properly left the issue to the jury, since evidence of conformity to custom was not conclusive of due care. As Viscount Simonds put it, 'the error of the majority of the Court of Appeal lay in treating as conclusive evidence which is not conclusive, however great its weight...'

Lord Tucker, after expressing his agreement with the proposition stated by Lord Cohen in Morris's case, also held that the jury's verdict should not have been disturbed.

The case also contains some useful passages discussing the formula enunciated by Lord President Dunedin in Morton. Lord Normand in Paris v. Stepney B.C. had said that the formula 'does not detract from the test of the conduct and judgment of the reasonable and prudent man.' In Cavanagh, not Paris, Lord Keith contended that 'the ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle.' This passage is typical of much of the discussion in the Cavanagh case. In emphasising the inconclusive effect of evidence of conformity to practice, the House of Lords seems to have gone to the opposite extreme of minimising the importance of evidence of custom.

This has led some to think that evidence of custom should be conclusive in favour of the defendant, since it shows that he took 'average care' in relation to the practice in question. But in these cases we are not concerned with current activities and the failure of an individual to measure up to average abilities in performance, so much as with the failure to introduce a precaution which would render safer a whole series of activities involved in an industry. In competitive industrial situations, where the employer is tempted to cut costs, it is not justifiable to allow industry to set its own standards. To give conclusive effect to conformity evidence

118 [1956] AC 552, 579 per Lord Cohen.
119 1909 S.C. 807.
120 [1951] AC 367.
121 [1951] AC 367 at 382.
122 [1959] 3 WLR 262 at 273.
would have this effect. Yet such evidence does have practical significance; it is not, and indeed cannot be, completely redundant.

Another important decision, along with *Cavanagh*, on general practice in industry is *Brown v. Rolls Royce Ltd.* In this case, the House of Lords had occasion to consider a deviation of customary practice. A workman who contracted dermatitis from exposure to oil during his work sued the defendant relying upon its omission to supply barrier cream to its employees, although this was alleged to be the common practice elsewhere. The trial court's decision for the plaintiff was reversed on two grounds: firstly, there was no proof that the barrier cream would have prevented dermatitis, so evidence of causation was lacking; secondly, since evidence of non-compliance with custom was not conclusive and since the defendant relied on competent medical evidence in not supplying the cream, he could be exonerated. Lord Denning stated that

> 'if the defenders do not follow the usual precautions, it raises a prima facie case against them in this sense, that it is evidence from which negligence 'may' be inferred unless the contrary is proved. At the end of the day, the court has to ask itself whether the defenders were negligent or not'.

Lord Keith contended that 'a common practice in like circumstances not followed by an employer may no doubt be a weighty circumstance in the case, yield an inference of negligence on the part of the employers.' However, 'the ultimate test is lack of reasonable care for the safety of the workman in all the circumstances of the case.'

### 3.4.4. Hucks v. Cole

The basis of the expert medical evidence might have appeared so tenuous as to cast doubts on its objectivity, but until the 1990s, the only notable example of a judicial attack on these lines at appellate level was that of Sachs LJ in *Hucks v. Cole*, a medical professional negligence case decided in 1969 but not reported until 1993. The onset of puerperal septicaemia had occurred because penicillin had not been administered to the patient. The plaintiff sued the defendant, Dr Cole for negligence,
alleging that he should have treated her with penicillin as soon as he read the bacteriologist’s report. Lord Denning MR appears to have held Dr Cole to have acted unreasonably in that he did not take every precaution against the risk of an outbreak of puerperal septicaemia. Diplock LJ was similarly unmoved by the expert approval of Dr Cole’s handling of the case. But he arrived at this conclusion which at the same time expressing sympathy for the defendant, ‘who was lulled into the sense of security as other general practitioner might have been by the normal effect of antibiotics.’ It would seem from this that even in clinical judgment cases the courts are willing to apply the test of reasonable care - in the sense of taking care to adopt that method of action which will probably lead to the least danger - in preference to deciding the case in accordance with expert evidence as to whether the defendant acted in accordance with approved practice. Dr. Cole was negligent because he did not take ‘every precaution’ to prevent an outbreak of puerperal fever, and it mattered not, as Diplock LJ conceded, that other doctors would have done that which he had done. In *Hucks v. Cole* Sachs LJ concluded that the fact that other practitioners would have done the same thing as the defendant was a weighty factor to be put in the scales on his behalf, but it was not conclusive. The court had to be vigilant to see whether the reasons given for putting a patient at risk were valid in the light of well-known advances in medical knowledge, or whether they stemmed from a residual adherence to out-to-date ideas.

A departure from accepted practice may provide overwhelming evidence of a breach of duty, particularly where the practice is specially designed as a precaution against a known risk and the defendant has no good reason for not following the

130 *Ibid*.
134 'When the evidence shows that a lacuna in professional practice exists by which the risks of grave danger are knowingly taken, then, however small the risks, the court must anxiously examine that lacuna — particularly if the risks can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence. In such a case the practice will no doubt thereafter be altered to the benefit of patient.' *per* Sachs LJ.
135 Teff, Harvey, 'The standard of Care in Medical Negligence - Moving on from Bolam?' OJLS Vol.18. 474-484, at p.477.
normal procedure. If the risk should materialise, the defendant will have great difficulty in avoiding a finding of negligence. For example, in Chin Keow v. Government of Malaysia\textsuperscript{135} a doctor gave a patient an injection of penicillin without making an enquiry about the patient's medical history. Had he done so he should have discovered that she was allergic to penicillin. The patient died due to an allergic reaction to the drug. The doctor was held liable because he was aware of the remote possibility of this risk arising yet he carried on with his routine practice of not making any enquiry. All the medical evidence was to the effect that inquiries, which would have taken no more than five minutes, were necessary. Similarly, in Cryderman v. Ringrose\textsuperscript{136} the defendant performed a biopsy at a time when there was a 'presumptive pregnancy'. The normal practice would have been to alert the plaintiff to the possibility of pregnancy and wait until a more certain diagnosis could be made. In the circumstances the biopsy was not medically justified since it could cause an abortion, and the defendant was liable. Codified standards of professional conduct may constitute significant evidence of what constitutes reasonable care. In Lloyd Cheynham & Co. Ltd v Littlejohn & Co. Woolf J said of accounting and audit standards that:

'While they are not conclusive, so that a departure from their terms necessarily involves a breach of duty of care, and they are not... rigid rules, they are very strong evidence as to what is the proper standard which should be adopted and unless there is some justification, a departure from this will be regarded as constituting a breach of duty.'\textsuperscript{137}

In Clark v McLennan\textsuperscript{138} for example, the plaintiff developed stress incontinence soon after the birth of her first child. Conservative treatment failed to improve the plaintiff's condition, and so a month after the birth the defendant gynaecologist performed an anterior colporrhaphy operation. The defendant followed a rather unusual procedure. As a result, the operation was not a success because a haemorrhage caused the repair to break down. The defendant was held liable.

Peter Pain J. said that a doctor owes a duty to his patient to observe such precautions as normal in the course of the treatment that he administers.

\textsuperscript{135} (1967) 1 W.L.R. 813.
\textsuperscript{136} (1977) 3 WWR 109; aff'd [1978] 3 WWR 482 (Alta. S.C. Appellate Division).
\textsuperscript{137} (1985) 2 P.N. 154.
\textsuperscript{138} [1983] 1 All E. R. 416.
Where 'there is but one orthodox course of treatment and he chooses to depart from that...[O]ne has to inquire whether he took all proper factors into account which he knew or should have known, and whether his departure from the orthodox course can be justified on the basis of these factors.'  

His Lordship went further, however, suggesting that where there it is the general practice to take a precaution against a specific risk but the defendant fails to take that precaution, and the very damage occurs against which the precaution is designed to be a protection, then the burden of proof lies with the defendant to show that he was not negligent and that if he was the negligence did not cause the damage. This view, that negligence can be established merely by showing that some step which is designed to avert or minimise a risk has not been taken, was disapproved by Mustill LJ in Wilsher v. Essex Area Health Authority, though the decision in Clark v. MacLennan was described as generally satisfactory.

Thus, although the burden of proving negligence remains with plaintiff, in a case where the defendant has departed from the single orthodox procedure he will probably be found liable, unless there is evidence before the court which would justify the departure. Some instances of departure from accepted practice are quite clearly negligent even where they are performed consciously and routinely.

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139 Ibid. at p.425.
140 Ibid. at p.427
141 [1986] 3 All E. R. 801, 814-5. The House of Lords also disapproved this approach to the proof of causation in Wilsher [1988] 1 All ER 871.
3.5. Moving on from Bolam

In recent years, it has become clear that judges are persistently faced with the tension on the role of expert evidence and the role of the court. Expert evidence can be a vital function in cases of medical negligence. But it sometimes may obscure its real function which is to provide the evidence upon which the court decides whether or not there has been negligence. However, the courts frequently find it difficult to determine negligence when there is a case involved two equally 'competent' but contradictory medical opinions.

In Belknap v. Meakes,\textsuperscript{143} for instance, Mr Belknap was obliged to show that his injury was the result of a negligent act or omission on the part of Dr. Meakes. He failed to show that his injury was caused by an act or omission of Dr. Meakes. Whether or not to put in an arterial line to measure blood pressure is a matter of judgment, not care or skill, on which competent doctors may disagree.\textsuperscript{144} It was quite clear from the evidence that there were several schools of thought in this and other issues in this case. The court held that it was not the issue before judges which school of thought was the better one.

3.5.1. Maynard v. West Midlands Regional Health Authority

In Maynard v. West Midlands Regional Health Authority,\textsuperscript{145} the House of Lords dealt with a case in which medical experts disagreed as to the wisdom of the steps taken by the defendants. Lord Scarman, delivering the judgment of the House of Lords, expressed the position in the following terms:

'A case which is based on an allegation that a fully considered decision of two consultants in the field of their special skill was negligent clearly presents certain difficulties of proof. It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.'\textsuperscript{146}

\textsuperscript{144} Wilson \textit{v} Swanson (1956), 5 DLR (2d) 113 SCR 804, particularly at 120-121.
\textsuperscript{146} [1984] 1 WLR 634, 638.
After approving Lord President Clyde's statement in *Hunter v. Hanley*, however, Lord Scarman appears to take the view, with which all of their Lordships agreed, that compliance with accepted practice will absolve a doctor from liability:

‘...Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other: But that is no basis for a conclusion of negligence.’

He continued,

‘...a judge’s ‘preference’ for one body of distinguished professional opinion to another also distinguished professional is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully, honestly held, were not preferred. If this was the real reason for the judge’s finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary.

Here, the ‘seal of approval’ of a distinguished body of professional opinion, held in good faith, acquits the defendant of negligence. Lord Scarman seems to equate a competent (or ‘responsible’) body of professional opinion with ‘distinguished’ or ‘respectable’ opinion. He thus conflates accepted practice with the absence of negligence. This interpretation is repeated by Lord Scarman’s speech in *Sidaway v. Bethlehem Royal Hospital Governors*, where he said:

‘The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care; but the standard of care is a matter of medical judgment.’

It is also apparent from earlier passages in his Lordship’s speech in *Sidaway* that he considered the Bolam test required the determination of whether there has been a breach of a doctor’s duty of care to be conducted ‘exclusively by reference to the current state of responsible and competent professional opinion and practice at the

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148 [1984] 1 WLR 634, 638
149 [1984] 1 WLR 634, 639.
150 [1985] 1 All ER 643, 649.
time.'\(^{151}\) As Lord Scarman himself recognised, 'the implications of this view of the law are disturbing. It leaves the determination of a legal duty to the judgment of doctors'. It was this point which led Lord Scarman to dissent in Sidaway on the question of the risks of treatment, but he was apparently content to apply the standard of 'responsible medical judgment' as his Lordship had identified it to diagnosis and treatment.\(^{152}\) Lord Diplock in Sidaway v. Bethlem Royal Hospital Governors\(^{153}\) also stated that the court must be satisfied by the expert evidence that a body of opinion qualifies as a 'responsible' body of medical opinion.

In Bolitho v. City and Hackney Health Authority\(^{154}\) Farquharson LJ tried to reconcile the contradiction between Hucks v. Cole and Maynard. He observed:

> 'There is of course no inconsistency between the decision in Hucks v. Cole and Maynard's case. It is not enough for a defendant to call a number of doctors to say what he had done or not done was in accord with accepted clinical practice. It is necessary for the judge to consider that evidence and decide whether that clinical practice puts the patient unnecessarily at risk.'\(^{155}\)

Dillon LJ, commenting in the same case\(^ {156}\) on Hucks v Cole,\(^ {157}\) said that the court could only adopt the approach of Sachs LJ and reject medical opinion on the ground that reasons of one group of doctors does not really stand up to analysis 'if the court, fully conscious of its own lack of medical and clinical experience, was nonetheless clearly satisfied that the views of that group of doctors were Wednesbury unreasonable, i.e., views such as no reasonable body of doctors could have held'.\(^ {158}\)

Recently, the decision of Hucks v. Cole\(^ {159}\) was referred to again in Gascoine v. Ian Sheridan & Co.\(^ {160}\) Mitchell J. said, 'I need not (as it were) stand idly by and accept uncritically a body of expert evidence called in support of the course of conduct complained of.' After referring to Lord Diplock's speech in Sidaway,\(^ {161}\) he continued,

\(^{151}\)[1984] 1 All ER 643, 645.

\(^{152}\)[1984] 1 All ER 643, 649.

\(^{153}\)[1985] 1 All ER 643, 659.

\(^{154}\)(1993) 4 Med L.R. 381


\(^{159}\)(1993) 4 Med. L.R. 393


\(^{161}\)Sidaway v. Bethlem Royal Hospital Governors [1985] AC 871, at p.895. ..In matter of diagnosis and the carrying out of treatment the court is not tempted to put itself in the
As a matter of common sense that, simply because a number of doctors gave evidence to the same effect, that does not automatically constitute an establish and alternative ‘school of thought’ if, for example, the reasons given to substantiate the views expressed do not stand up to sensible analysis: see Hucks v. Cole (per Sachs LJ).162

Following accepted practice, or one of several such practices, is strong evidence of the exercise of reasonable care, but ultimately it is for the court to determine what constitutes negligence. It is submitted that this is the proper approach in cases involving accepted professional practice. It will be rare for the court to conclude that a common practice is negligent, but when this does happen it will be through a finding that the practice was not ‘responsible’. Once the practice followed by the defendant is acknowledged to be a ‘responsible’ practice it is not open to the court to hold that it was negligent, even where another body of ‘responsible’ professional opinion is critical of the practice. There is, of course, no reason to confine this approach to risk disclosure since the majority of their Lordships in Sidaway v. Bethlem Royal Hospital Governors said that the Bolam test applied to all aspects of the doctor’s duty of care: diagnosis, advice and treatment.163

3.5.2. Edward Wong Finance Co. Ltd. v. Johnson, Stokes and Masters
In Edward Wong Finance Co. Ltd. v. Johnson, Stokes and Masters 164, the defendant solicitors had conducted the completion of a real property transaction in ‘Hong Kong’ style rather than in English style. Completion in Hong Kong style provides for money to be paid over against an undertaking by the solicitors for the borrowers subsequently to hand over the executed documents. A dishonest solicitor for the

surgeon’s shoes; it has to rely upon and evaluate expert evidence, remembering that it is no part of its task of evaluation to give effect to any preference it may have for one responsible body of professional opinion over another, provided it is satisfied by the expert evidence that both qualify as responsible bodies of medical opinion.’

162 (1994) 5 Med. L.R., 437 at 444, per Mitchell J.
163 Gordon v. Wilson [1992] 3 Med. L. R. 401, 426 (Court of Session) where Lord Penrose appeared to suggest that Lord Bridge’s comment were confined to the disclosure of information to patients, and that ‘nothing in the speech of Lord Bridge was intended to qualify the Bolam test.’
164 [1984] AC 296; Roberge v. Boluc (1991) 78 DLR (4th) 666 (S.C.C.), where a notary was held liable in negligence despite following a general notarial practice because the practice was simply not reasonable.
borrower absconded with the loan money and left the mortgage still in place, so the borrower was left with a heavily mortgaged property on his hands.

The Privy Council accepted that the solicitor had followed the conveyancing practice in Hong Kong and did not want to discourage the continuance of the common practice. Nevertheless, they held that the practice as applied in that case was negligent because it had an inherent risk which would have been foreseen by a person of reasonable prudence, and there was no need to take this risk.

Lord Brightman's reasoning followed the classic and traditional formula of weighing the extent of the risk and the loss likely to be suffered if it materialised against the steps which would be needed to avoid or reduce that risk. He said that any risk in the Hong Kong practice could have been avoided by sending the draft to the mortgagee's solicitors instead of the vendor's and ensuring that they had authority to receive it on behalf of the mortgagee. In that case, whatever their solicitor did with the money, they could not afterwards say that the mortgage had not been repaid.

What Lord Brightman was primarily engaged upon was an allocation of risk. He made no moral criticism of the solicitors for conducting completions in a way which created a risk. It would be difficult to level such a criticism when everybody else in Hong Kong was doing completions in the same way. What he was saying was that if Hong Kong solicitors, for good or for bad commercial reasons, decided to carry on business in a way which involved this kind of risk, the risk should be borne by the solicitors and not by the clients. Put that way the decision is entirely rational and it avoids what might otherwise seem to be the problem of applying the test of standard of care in negligence which was in accordance with general professional practice.

Furthermore, the decision was also intended to have a disciplinary function. It pointed out how the risk could be avoided without sacrificing the advantages of the Hong Kong Style of completion. By imposing liability the decision probably ensured that all firms thereafter adopted the recommended method.

To introduce notions like risk allocation into decisions on the standard of care raises some difficult questions. What sorts of risks will the courts think ought to be borne by the solicitors and which by clients? However, it is better to try to explore these questions and have them out in the open than to leave them concealed under the Bolam test. For example, it is clear from the case that very different standards are
applied to the conduct of solicitors in giving advice (particularly in connection with litigation), and their conduct in carrying on conveyancing. The reasonably competent solicitor can give fairly unreasonable advice and still escape liability whereas in conveyancing it is very unlikely that any mistake will escape liability.165

However, in Duchess of Argyle v. Beuselinck166 – a claim based on the allegation that the solicitor had not given adequate advice about tax, the attitude of the court to the solicitor’s duties was clearly much more relaxed. Litigation is certainly regarded as an activity in which the client must accept risks. The inherently unpredictable nature of litigation is the reason why the courts are more generous to solicitors in fixing the standard of care than they are in conveyancing.

The ruling in Edward Wong was given in the context of a conveyancing case and I think it can only be understood only if it shifts from the reductionism of the Bolam test and looks at the question in terms of allocation of risk between the plaintiff and the defendant. If the sole test of liability is the Bolam test, how can a solicitor who has acted in accordance with the recommendations of the governing body of the profession be said to have been negligent? As soon as one recognises that there are other policies which underlie negligent liability it becomes clear that the defence of acting in accordance with a body of responsible professional opinion cannot be conclusive.

3.5.1. An Australian Perspective: Rogers v. Whitaker
The standard by which a doctor’s conduct should be measured has been shifted from that of the reasonably prudent doctor to that of reasonably prudent patient by the High Court of Australia in Rogers v. Whitaker.167 The Court held that a doctor is under a duty (except when disclosure would harm the patient) to inform patients of ‘material’ risks, and that a risk is material if a reasonable person in the patient’s position would be likely to attach significance to it or if the doctor is, or should reasonably be, aware that the particular patient would be likely to do so.

165 Simmons v. Pennington [1995] 1 WLR 183, in which solicitors were exonerated from liability for losing a contract of their client by reasons of the way they answered a requisition is an exceptional case. And see, G & K. Ladenbau v. Crawley [1978] 1 WLR 266.
The plaintiff in Rogers v. Whitaker consulted the defendant ophthalmic surgeon for a routine procedure for possible improvement to her bad right eye (in which she had little sight due to a childhood accident) and ended up by losing the sight in her good left eye as well due to a condition known as sympathetic ophthalmia. There was evidence that there was a one in 14,000 chance that such a result might occur, but the patient did not ask (because she did not know of this possible risk) and the defendant did not inform her of this risk (even thought he knew of it). The plaintiff’s action against the defendant succeeded at first instance. At the High Court stage the court took the opportunity not only to state the law applicable in Australia in relation to the scope and content of the duty of care which arises out of the doctor-patient relationship (particularly the content of the duty to provide information and advice concerning the risks of proposed medical treatment) but also to answer the difficult question whether a failure to warn of the risks of proposed medical treatment is to be regarded as a breach of duty, to be determined exclusively by reference to the current state of responsible and competent professional medical opinion, or whether the court can in appropriate circumstances demand a standard of care which is at variance with some body of responsible and competent medical opinion. Although what the High Court has to say about the content of the duty to provide information and advice concerning medical treatment is important and presented in a very clear manner, it is the Court’s declaration that in appropriate circumstances a court can demand a standard of care which is at variance with a body of responsible medical opinion that distances Australian law further from English. It is this view of the High Court that makes the Bolam test inapplicable in Australia at least in cases of non-disclosure of medical risks. Under the Bolam test,

'a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment."168

The rationale of the Bolam test is that in matters involving medical expertise there is ample scope for genuine difference of opinion and that a practitioner is not negligent merely because his or her conclusion or procedure differs from that of other

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168 This is Lord Scarman’s statement of the Bolam principle which is derived from the direction to the jury in Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118. See Siaway v. Governors of Bethlem Royal Hospital [1985] AC 871, 881.
practitioners. Of course, if the Bolam test had been strictly applied in Rogers the plaintiff would in all probability have failed because even though there was evidence from a body of reputable medical practitioners that, in the circumstances of the case, they would have warned the plaintiff of the risk of sympathetic ophthalmia; there was also evidence from similarly reputable medical practitioners that they would not have given such a warning.

By abandoning the Bolam test, the High Court, at least in relation to information and advice concerning medical treatment, is asserting the plaintiff’s right to make a meaningful choice as to whether he or she will undergo a particular treatment or procedure. That choice, says the High Court, will become ‘meaningless unless it is made on the basis of relevant information and advice’. The High Court thought it was illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the patient. In Rogers, the trial judge accepted the evidence of the plaintiff that she would not have agreed to undergo the operation if she had been informed that there was a risk of losing the sight in her good eye and hence becoming totally blind.

The effect of the decision of the High Court is that in relation to the provision of information and advice concerning the risks of proposed medical treatment, the courts will adopt the principle that, while evidence of acceptable medical practice ‘is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to ‘the paramount consideration that a person is entitled to make his own decisions about his life.’ It is not clear whether the courts will go further and extend that principle to the case of diagnosis and treatment (as distinguished from information and advice concerning the risks of

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In F. v. R., which was decided by the Full Court of the Supreme Court of South Australia in 1983, a woman who had become pregnant after an unsuccessful tubal ligation brought an action in negligence alleging failure by the medical practitioner to warn her of the failure rate of the procedure. The Court refused to apply the Bolam test. King CJ said that ‘the ultimate question, however, is not whether the defendant’s conduct accords with the practice of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.’ (1983) 33 SASR 189, at p.194.
proposed medical treatment). Certainly there are hints in the judgment in Rogers that the High Court does not disapprove of decisions which ‘even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner'\(^{171}\) have not always applied the Bolam test.

3.5.2. Bolitho v. City and Hackney Health Authority

Bolitho\(^{172}\) is an important recent authority in respect of the standard of care. A two-year-old boy who had a history of hospital treatment for croup, was admitted to a hospital run by the defendant health authority. He suffered two episodes during which he turned white and had breathing difficulty. During the first episode, a nurse summoned the doctor in charge of the child’s case by telephone. The doctor did not attend and in the event the child recovered. During the second episode, the nurse again reported to the doctor by telephone, but the child recovered without the doctor having attended. Half an hour later, the child suffered a third respiratory attack which resulted in cardiac arrest and subsequent death. The mother of the child brought an action in negligence against the defendant authority.

It was customary practice that prior to the third episode intubation to provide an airway would have prevented the cardiac arrest. The issue is whether the defendant would have intubated, or if she would not have, whether, applying the test laid down in Bolam v. Friern Hospital Management Committee,\(^ {173}\) such a failure would have been contrary to accepted professional practice. Counsel for the appellant advanced the submission (which had found favour with Simon Brown L.J.) that the Bolam test was not relevant to causation. Lord Browne-Wilkinson, delivering the judgment of the House of Lords, observed that this was generally, but not always so.\(^ {174}\) While it was not relevant to deciding what the defendant would have done had she attended. A defendant could not escape liability by saying that the damage would have occurred in any event because he/she would have committed another breach of duty.

\(^{171}\) (1992) 175 CLR 479, at 487.

\(^{172}\) Bolitho v. City and Hackney Health Authority [1998] AC 232.

\(^{173}\) [1957] 2 All E.R. 118.

\(^{174}\) In recent years, the courts have been increasingly prepared to question medical conduct, and even on few occasions, override expert medical evidence. See Smith v. Tunbridge Wells Health Authority [1994] 5 Med. L.R. 334; Newell and Newell v. Goldenberg [1995] 6 Med. L. R. 371.
Counsel for the appellant also submitted that the judge had wrongly understood the Bolam test as requiring him to accept the opinions of the expert witness for the defence, even though the judge was not persuaded of their logical force. Lord Browne-Wilkinson agreed that a judge is not bound to acquit a doctor of negligence simply because the doctor leads evidence from medical experts that his conduct accorded with sound medical practice. The fact that the Bolam test refers to a responsible body of medical opinion showed that the court must be satisfied that the exponents of the body of opinion relied on can demonstrate that it has a logical basis. In particular, in cases involving the weighing of risks against benefits, the judge, before accepting a body of opinion as responsible, must be satisfied that the experts, in forming their views, have directed their minds to the question of risks and benefits and have reached a defensible conclusion. In the vast majority of cases, the fact that distinguished experts are of a particular opinion will demonstrate the reasonableness of that opinion. If, however, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion relied on is not reasonable or responsible.175

The present case was not one of those rare cases. In any event, it was clear that this was a case in which the expert evidence for the defence could be dismissed as illogical. However, Lord Browne-Wilkinson limits his comments only to diagnosis and treatment and does not include the disclosure of risks.

Bolitho is a significant decision to the extent that it moves away from the Bolam test.176 More recently, the Court of Appeal has considered a case which involved a qualitative analysis of the evidence of the expert practitioner called in support of the defendant's conduct. In Marriott v. West Midlands Health Authority177 a general practitioner left a patient at home despite (as was found) the fact that he knew of a history of head injury and increasing symptoms of drowsiness and headache. After subjecting the expert evidence in support of the defendant's conduct to analysis, the

trial judge concluded that the defendant’s conduct fell below the appropriate standard of case. She said that although the risk of an intracranial lesion was very small, ‘... the consequences, if things go wrong, are disastrous to the patient. In such circumstances, it is my view that the only reasonably prudent course ...is to re-admit for further testing and observation.’ The Court of Appeal upheld the trial judge’s determination, but divided two to one as to the method to be employed. Beldam LJ (with whom Swinton Thomas LJ agreed) argued that the trial judge is entitled to weigh the relatively small risk of an intracranial lesion against the seriousness of the consequence, whereas Pill LJ did not consider it necessary to apply Bolitho test, since a slightly different approach would have enabled that expert report to be discounted without the need of further analysis. Nevertheless, it may be reasonable to anticipate that the judicial trend in the future will be towards a more searching analysis of a defendant’s contention that his conduct was in accordance with a responsible body of medical opinion.

3.6. Conclusion

Is there really an ‘objective’ answer to the question when customary practice as the evidence of reasonableness is satisfied? We may conclude that customary practice has strongly influenced the reasonable person test, while the courts have retained the power to control these practices if they do not measure up to the standard of reasonableness from the adjudicator’s viewpoint. In other words, although there may be a considerable degree of inter-subjective criteria in the test of customary practice as evidence of reasonableness, it can be applied only as mediated through the judge who decides whether reasonable care was shown. The ‘reasonable person’ test remains whether the defendant acted with reasonable care in all circumstances, and the significance of compliance with or deviation from common practice lies its evidential value. After all, common practice is only one of the factors that the courts should have to take into account in determining the reasonable standard of care.

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180 Greenawalt, Kent, Law and Objectivity, at pp.216-228.
4.1. Introduction

The analysis of 'duty' concept used in negligence law is an important methodological point, because the understanding of negligence law based upon insufficient analysis of key terms such as 'duty' may lead to the whole understanding falling into a morass of ambiguity. The kind of analysis offered in this chapter depends heavily on careful attention to varying content of 'duty of care' in different legal context for the purpose of conceptual clarification. Generally speaking, there are two senses, that is, 'general duty' and particular duty', that can be given to the phrase 'duty of care', and judges may interchange these two different senses of the phrase without seeming to appreciate that they are doing so. It is therefore important to clarify what is being meant when the phrase is used.1 On the other hand, the 'duty of care' is used as part of a legal context to draw a legal conclusion. Julius Stone classifies it as a category of illusory reference', and one whose circularity makes it meaning as an additional requirement of negligence liability.2 The duty concept used in this sense shows abounding vitality.3 The usefulness of this concept in this sense is to establish a control device over the area of actionable negligence on grounds of public policy.4

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2 Stone, J., Legal System and Lawyers' Reasonings (1964) Chap.7.
4 'There is always a large element of judicial policy and social expediency involved in determination of the duty-problem.' Nova Mink Ltd, v. Trans-Canada Airlines [1951] 2 DLR 241, at pp.255, per MacDonald.
It would be over-simplistic to say that the only enquiry for the court is as to the existence of a duty-relationship without also having to define what that duty, if any, is. Is it a duty to take affirmative action or merely to refrain from acting in a certain way? The question is thus not only 'Did the defendant owe a duty?' but also 'What kind of duty?' and 'What is its extent?' The content varies in accordance with different legal context in which they arise. As we shall see in this chapter, there may be many factors which in any given situation have to be considered and assessed in establishing the duty of care in its concrete context. For this reason and in this sense, 'duty of care' is a concept of variable content.

In traditional analysis, the tort of negligence has three basic elements: a legal duty owed by the defendant to exercise case towards the plaintiff, a breach of that duty, and its resulting damage to the plaintiff or his property.5 Although these elements may be difficult to separate in specific instances, they provide a dominant basis for the issues involved in the cases. Without a duty owed by one party to the other, there can be no recovery for the damage caused to the latter by the former's want of care. The question of the existence of a duty of care is thus central to tort. There can be no liability, it is said, for 'negligence in the abstract';6 a man's negligence does not infringe another man's rights until it affects another by damaging him. A duty to be careful as against the other man is an essential element of negligence, but even if that duty is infringed the cause of action is not complete until there has been damage to the plaintiff.7 As I drive on the highway, every other driver owes me the duty of being careful not to collide with me, but I have no cause of action against the negligent driver who passes me and endangers my safety unless his negligence results in actual injury.8

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5 Dorset Yacht [1970] AC 1004, 1052, per Lord Pearson. "The form of the order (directing argument of a preliminary question of law) assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question of the existence of a duty of care in isolation from the elements of breach of duty and damage..."


8 I am disregarding questions of criminal liability for negligence, as I have discussed it in Chapter 1. There are other causes of action in which the cause of action is incomplete in the absence of damage, such as deceit and conspiracy and so on. There are also many other torts
Most modern texts on the law of negligence follow this fairly standard pattern. Whether tort law is seen as being underpinned by a discernible juridical coherence or whether it is viewed as ‘a loose federation of causes of action’ is a distraction.\(^9\) It diverts attention from Cane’s argument that the formulary approach to tort ‘make it difficult to explain [the subject] as a system of ethical precepts ... and to think clearly about when tort liability ought to be imposed as contrasted with when it has been or might be imposed.’\(^{10}\) By this he means that tort law is typically presented as a series of formulae - that is, technical rules which define the preconditions for success in litigation. As Cane puts it, ‘the formulary approach to tort law limits the creative ability of the courts to the point whether they may not feel able to protect people’s interests even in cases where doing so would receive very wide support in society at large.’\(^{11}\)

It is worth noting that the notion of ‘duty of care’ originated at the time when liability for negligence was restricted to a few special situations: carelessness in the carrying out of certain ‘common callings’, such as, the innkeeper and the common carrier, the surgeon or apothecary, the attorney, the ferryman, barber and carpenter and so on.\(^{12}\) It simply meant that the artisan was responsible only to those for whom he had undertaken to perform his services, not to the public at large.\(^{13}\) The plaintiff cannot succeed in his action unless he can show facts from which the court can deduce a legal duty on the part of the defendant towards the plaintiff to take care, before going on to the question of whether the defendant had in fact behaved unreasonably in the circumstances and thereby injured the plaintiff. Whether there is such a duty it is always for the court to say, for it is always a question of law. The judge would simply say to the plaintiff: ‘Prove that the defendant has harmed you by not acting as a reasonably careful man would have behaved in similar circumstances, and thus there is a legal duty owed to you.’

In reaching his conclusion, the judge may frame his problems in a variety of forms: (1) was the defendant under a duty, and if so, was he under a duty to the

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which do not involve physical injury to properties or persons which have their own problems in the matters of damages. I disregard questions of these matters as well.


\(^{10}\) Cane, P., *Anatomy of Tort Law* (Hart Publishing: Oxford, 1997) at p.9

\(^{11}\) Ibid., at p.73.

\(^{12}\) Winfield, P.H., ‘Duty in Tortious Negligence (1934), 34 Col. Law Rev. 41 at p.45.

plaintiff? or (2) was the plaintiff's interest protected against the defendant's conduct? or (3) the plaintiff having invoked some general rule, was such rule designed to give protection to the plaintiff's interest? or (4) was such rule designed to protect the plaintiff's interest against such a risk as the defendant's conduct in the particular case? In another type of case it may take the form of whether the defendant's conduct makes a prima facie case for the plaintiff, or whether the defendant's conduct was privileged or justifiable. But however framed, the issue is the same: the court must say whether there is any 'legal' justification which would require the defendant to bear the risk or whether the plaintiff must bear his own loss. Assuming it is not a pattern case, how does the judge know whether there is any such 'legal' justification? How does he know how to render judgment? How does he know what protection to give to the plaintiff's interest? Inasmuch as this enquiry has come to be normally expressed in terms of 'duty' let us think of this problem in these terms. Was the defendant under a duty to the plaintiff? We shall be fortunate if we do not lose our direction at the outset even in this small run-way of words.

Furthermore, how does the problem in terms of duties enable a judge to reach a conclusion? Where may he find the source of duties? Do judges assume their existence? The enquiry would be carried out by posing a series of questions: (1) Does the law recognise in the abstract a duty of care in such a situation? (2) If so, was there a duty of care on the particular facts? (3) If so, what concrete measures did it require?

The 'duty' concept in negligence operates at two levels. At one level, the fact-based duty of care forms a part of enquiry whether the defendants' behaviour was negligent in the circumstances. On the other hand, the policy-based duty of care is an organic part of the tort.\textsuperscript{14} Here is a concept governed by policy factors. Policy factors to which the court will take into account are administrative, economic, moral, justice and public interest factors. The role of public policy in tort cases is not often acknowledged by the courts. Policy issues have been skilfully deployed under the concept of duty of care. An attempt to pin the concept of duty down more narrowly than this is bound to be frustrated. We need to recognise that when we try to examine the grey area between general duties and specific duties, we must expect our judgments to reflect the vagueness and indeterminacy afflicting propositions about duties in general. While legal duties are not always coextensive with moral

\textsuperscript{14} Millner, W.A., \textit{Negligence in Modern Law} (Butterworth: London,1967) at p.25, Kamba, W.J.,
duties, they have many similarities in respect of terminology and topics of concern, such as duties to refrain from causing injury, and so on. For instance, to say that a highway authority owes a duty to maintain the road condition necessarily raises the question of what it is for a duty to be owed to some in particular. Does the highway authority owe pedestrians a duty as well as motorists? How does the idea of a duty to X differ from the simple concept of a duty? And how are we to infer specific duties from general duties? The courts themselves have stumbled in the course of this enquiry. We are clearly dealing with the very processes by which law is generated, and doubtless the question as to the justification of these duties brought forth in case after case is highly complex and involves a range of diverse arguments.

My purpose in this chapter is to ask how the idea of ‘duty of care’ is formulated within the discourse of the tort of negligence. Where does this idea come from and what sort of idea is it? What is its relationship to other fundamental sub-concepts such as, ‘foreseeability’, ‘reasonableness’, ‘special relationships’? And how, if at all, does it yield normative propositions? How, too, can it escape the charge that such accounts substitute for experience a useless abstract aphorism, which cannot really resolve any practical dilemma? Analysing these questions in some detail will contribute, it is hoped, to understanding negligence law. So a clear focus on these issues may shed light on the larger question: is there any coherent way of establishing a foundation for our concept of liability in negligence.\textsuperscript{15} The duty enquiry consists of two closely related issues, which will be analysed separately in the following order in this chapter: (1) the existence of the duty: does the defendant owe any duty of care in the circumstances? (2) The extent of the duty: to whom and for what loss does that duty extend?

4.2. The Existence and Nature of the Duty of Care

4.2.1. General Duty

If a man behaves carelessly and thereby damages myself or my property I have an action in negligence. This is an essential general principle laid down by Brett LJ in Heaven v. Pender,\(^\text{16}\) rejected by the other judges, and adopted by Lord Atkin in Donoghue v. Stevenson. Brett LJ adheres to the principle that there must be a duty to the person injured, holding that there is a duty to anyone who might reasonably be expected to suffer.

The achievement of Donoghue v. Stevenson is said to furnish a principle linking different categories where liability in negligence has been established. This rationalisation has weighty consequence for future litigation because it signifies 'the introduction of the more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care.'\(^\text{17}\) Brodie rightly claims that it does not purport to detail the specific factors and circumstances from which the existence of a duty can be inferred in concrete instances.\(^\text{18}\) At the same time, the neighbour principle offers a coherent framework that emerges a pattern of liability as diversified as befits the society which it serves.\(^\text{19}\)

Further, it is important to note that the ultimate judgment would be, did the defendant exercise reasonable care to avoid the harm. It is at this point that the 'acts' and 'omissions,' by supplying the details of the defendant's conduct, may, and usually do, become important. The negligence concept by its very nature is failure to exercise care at some stage of an undertaking assumed by the defendant. Whether the conduct is characterised by positive action or by doing nothing to avoid the consequences in question, it is in either case a constituent part of the overall undertaking. The distinction between 'acts' and 'omissions' is of no importance other than to indicate the details of conduct which resulted in the failure to exercise care.

If one looks carefully at Lord Atkin's judgment in Donoghue v. Stevenson, one will see that the judge is talking throughout about conduct or action, and when in his statement of the 'neighbour principle' he refers to 'acts or omissions which are called in question'; the omissions are in the context of actions, such as the failure to

\(^{16}\) Heaven v. Pender, [1883] 11 Q.B.D. 503, 509, per Brett LJ.

\(^{17}\) Caparo Industries plc. v. Dickman [1990] 2 AC 605, at 616, per Lord Bridge.

\(^{18}\) Brodie, D., 'In Defence of Donoghue' 1997 JR 65, at p.67
take precautions when acting in such a way that a risk of harm is created. The ‘acts or omissions which are called in question’ must be taken to refer to the allegations of negligence in the context of the conduct which caused the harm. This would cover omissions such as failing to unload a gun which is placed in the vicinity of children, or failing to adequately inspect a product that is negligently manufactured and placed on the market. It is noteworthy that the word ‘omissions’ in the context of the ‘neighbour principle’ refers to omissions as part of an action, and not to merely letting something happen.\(^{20}\)

The beginning of all tort liability is affirmative conduct (this includes an omission), and the first step in establishing a defendant’s liability is to identify him and connect his conduct with the plaintiff’s injury. Somewhere in the course of the defendant’s conduct the doing of something which contributed to the plaintiff’s injury must be identified. At common law there is no liability for doing nothing unless there has been some undertaking which imposes an obligation upon the defendant to do something.\(^{21}\) The undertaking may involve the defendant’s own conduct or that of someone who stands in some relation to him, for example, as his employee.

Under the framework of Lord Atkin’s ‘neighbour’ principle, omissions to act are considered as incidents in the course of affirmative conduct. For example, a person while driving a car may put his foot on the accelerator and collide with the plaintiff, or he may fail to put his foot on the brake, or simply fail to stop, with the same result. In establishing a causal relation between the plaintiff’s loss and the defendant’s undertaking, the detailed acts, or omissions to act, after the undertaking is put in operation are important only to indicate the course of conduct. The affirmative undertaking to drive the car is the important factor in causing the plaintiff’s injury. Pressing the accelerator, or failing to use the brake, or simply failing to stop in time, are significant only as details which give colour to the driver’s conduct and which may render it negligent. The driving of the car and the collision are a sufficient ground to resolve the causal relation issue in favour of the plaintiff.

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19 Ibid., at p. 67.  
We have seen that the term ‘omissions’ in the framework of negligence refers to omissions as part of an action, we now turn to the question whether a workable principle, applicable to negligent acts and omissions, can be established. Such a principle might take the following form, ‘Everyone is under an obligation to take positive action to prevent causing harm to others.’ This position is well stated in Donoghue v. Stevenson where the causing of harm through negligent action is the foundation of liability. So this case can be the source of a general principle for all negligent causing of harm. The ‘general duty’ can be stated in the form of a single proposition such as, ‘Everyone is under an obligation to take care in their action to avoid causing harm to others without proper justification. ’If this kind of ‘general duty’ position is interpreted to mean simply that a prima facie duty of care lies whenever it can reasonably be foreseen that damage will follow an act or a failure to act, then a duty to prevent harm would no longer have to be justified and the defendant would have to show that he fell under an exception. Duties and rights are correlative in the sense that, if one person owes a duty to another to do or refrain from doing a particular act, then the person to whom the duty is owed has a right that the act be done or not done against the person who has the duty.22 If we limit such a statement to negligent acts only, a statement such as the following can be formulated: ‘Your neighbours prima facie have a right that you take reasonable care in your actions so as to avoid acts or omissions which you can reasonably foresee would injure them.’ If however, we expand the statement of a prima facie right to include omissions as well, we would have to add a further provision such as and that ‘you take such action as you can reasonably foresee will prevent harm from happening to them.’ But since in the past there has been no general duty to take positive action, there has been no basis for developing a list of exceptions. Instead, the imposition of duties to take positive action are the exceptions to a ‘general rule’ that one is not to be held responsible for risks which he did not create.

22Hohfeld, Wesley N., Fundamental Legal Conceptions (New Haven: Yale Univ. Press, 1919) at p.38

"Recognising... the very broad and indiscriminate use of the term "right" what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative "duty" for it is certain that even those who use the word and the conception "right" in the broadest possible way are accustomed to thinking of "duty" as the invariable correlative. As said in Lake Shore & M. S. R. Co. v. Kurtz ((1894) 10 Ind. App., 37 N. E., 303, 304.): "A duty or a legal obligation is that which one ought or ought not to do. "Duty" and "right" are correlative terms. When a right is invaded, a duty is violated."
It is argued that the rationale of the 'neighbour principle' is derived from the right which people have not to be injured or harmed by the action of others, which is the correlative of the duty which people have to take responsibility for their actions and to act with care.\(^{23}\) It has nothing to do with non-action, and consequently cannot furnish a theoretical foundation for a general duty in regard to omissions. There is no *prima facie* duty to prevent harm by taking positive action to remove risks, because there is no single justification applicable to all cases where action by one person could prevent or alleviate harm happening to someone else. Taking care in acting is different from taking positive action to prevent or relieve harm. Omissions, or failing to act, therefore, cannot be governed by the 'general duty' principle because they simply do not fall under the general rule. In regard to negligent acts, the plaintiff must show that the defendant by his actions created a reasonably foreseeable risk of harm by failure to take care, which risk materialised resulting in the plaintiff's suffering damages. If, however, it is assumed that the *prima facie* duty of care doctrine also applies to omissions, the plaintiff, in regard to omissions, need to show only a causal link, that the defendant was in a position in which he could by acting have prevented the plaintiff's suffering a loss and that the defendant was aware of that position or ought reasonably to have foreseen that if he failed to act the plaintiff would suffer a loss. Risks of harm can arise in a wide variety of ways, and the costs of removing the risk or giving relief to suffering can range from little to a great deal. It is unreasonable to expect individuals to meet such a widely drawn duty as to interfere with the pursuit of their own goals. The application of a general duty of care doctrine to omissions, however, avoids the necessity of finding some reasoned basis for a legal obligation and consequent liability. Such duties as we have to prevent or alleviate harm must be justified on a more individual or specific basis.

Although the judgment in *Donoghue v. Stevenson* has permitted cases to be brought under the umbrella of negligence where there are good grounds for a legal obligation in terms of the causing of damage through action, it cannot be used, however, to impose liability where there are no justifiable grounds to support legal liability, or in place of articulating those grounds if they do exist. A grave injustice will result if a person is penalised or forced to pay damage by way of compensation for a failure to act, where there are no proper grounds for a duty to act. The

\(^{23}\) Neil MacCormick, *The Obligation of Reparation* in *Legal Rights and Social Democracy*,

requirement to act under those circumstances will result in a deprivation of liberty. As the result, the application of the *prima facie* duty doctrine will take the place of sound reasons for judgment. The decision as to liability or no liability will be shifted from the legal question of the existence of a *duty* of care to a factual question of *standard* of care. Judgment, therefore, will become more discretionary and the outcome of an action will be even less predictable than it already is.

When a person negligently causes damage through his action, there is a *prima facie* presumption of responsibility unless it can be excused or justified. Consequently, all cases of causing damage through action can fall under a single principle of 'general duty'. However, it is exceptional for people to be considered responsible for failing to act. There is, therefore, a *prima facie* presumption of no responsibility for a failure to act. There must first be shown any obligation or duty to act before there can be a duty to compensate for damages which could have been prevented had there not been a failure to act. The reasons for the existence of a duty to act will be of a kind different from those for the existence of a duty to take care when acting.

4.2.2. Particular Duty

In dealing with the doctrine of negligence law, we must make a distinction between damage caused by a positive act and damage caused by a pure omission, and between physical and pure economic loss. The effect of this doctrine is that the defendant is under no liability unless he owed to the plaintiff a duty of care. In negligence law, certain relationships such as employer and employee, teacher and pupil, doctor and patient, give rise to a duty of care; on the other hand, there is no duty in respect of damage caused by omissions or pure economic loss unless there is sufficient relationship between two parties. The real difficulty arises in relation to pure economic loss, and it is clear that liability will be imposed only where there is a relation between the parties which imposes on the defendant a duty of care. The same is true of omissions. Before the defendant can be made liable for an omission causing physical damage to person or property, the plaintiff must establish that he was under a duty to act and that duty is always specific.

One cause of confusion is that the courts use the word ‘duty’ in different senses.24 In cases where a negligent omission is alleged, they treat the question as being whether the defendant had a duty to act which he failed to do. For example, in a famous Scottish case Muir v. Glasgow Corporation25 Lord Macmillan said that there was no duty incumbent on a manageress to ‘take precautions against the occurrence of such an event.’26 But the other judges in the House of Lords assumed that the relationship between the manageress and the children on her premises gave rise to a duty of care and for them the question in the case was whether the failure of the manageress to take precaution was a breach of that duty.27

In another Scottish appeal case dealing with non-feasance, Smith v. Littlewoods Organisation Ltd,28 five judges in the panel expressed different views on the ‘duty’ issue. In Lord Brandon’s view the case raised two issues: (a) whether a general duty was owed by the defendant to the plaintiff to ensure that their premises did not become a source of danger and (b) whether “the general duty encompassed a specific duty to exercise reasonable care to prevent young persons obtaining unlawful access to the cinema, and having done so, unlawfully setting it on fire.”29 There are two further questions related to these two issues, namely, (a) is there a notional duty of care? (b) is that duty owed to the plaintiff? In his speech, Lord Brandon was not opting for a blanket exclusion of liability through the denial of a notional duty of care. Lord Griffith also took the view that the appeal turned upon the evaluation and application of the particular facts of the case.30 Because of this emphasis on fact-situation, unlike Lord Brandon he seems to equate the ‘duty of care’ with ‘standard of care.’ Lord Keith of Kinkel concurred with the opinions of both Lord Mackay and Lord Goff. Since they base their conclusions on different grounds - this is especially so, in views between Lord Mackay and Lord Goff - the final ratio remains uncertain. Lord Goff found the policy argument against liability convincing. In his words ‘to impose a general duty on occupiers to take reasonable care to prevent other from entering would impose an unreasonable burden on

26 Ibid., at 11, per Lord MacMillan.
27 Ibid., per Lord Wright, at p.12, per Lord Romer, at p.18.
29 Smith v. Littlewoods Organisation Ltd [1987] 1 AC 241 at 250, per Lord Brandon
30 Ibid. at p250. per Lord Griffith.
ordinary enjoyment of their property’.31 Throughout his speech, the analysis is devoted to the issue that ‘there is no particular duty owed to the plaintiff.’ Unlike Lord Goff, Lord Mackay bases his conclusion on the degree of knowledge of the risk by the occupier and this, in turn, would vary from case to case. He also uses duty language to reinforce his argument in the following manner: because the defendant did not know of these risks, there is no basis on which it can be alleged that they ought to have known of them unless they had a duty to inspect.32 This case shows that when a judge says ‘X owes a duty to Y,’ it could mean that X owes either a general duty or a particular duty to Y.

Another example can be found in the speeches in Dorset Yacht Co. Ltd v. Home Office.33 In this case seven Borstal boys who were working on an island under the control and supervision of three prison officers were left unguarded at night. They boarded the plaintiff’s yacht to leave the island, causing damage to the yacht. The Dorset Yacht Co. sued the Home Office for negligence in failing to keep the boys from escaping. It appeared that Dorset Yacht would establish a causal link between the escape and the damage done by the boys. So the question arose: was it negligence to allow the Borstal boys on this island to escape? Negligence might have consisted either in the adoption of a regime of detention that carried a risk of boys escaping or in the degree of surveillance maintained by the officers who were keeping the boys in custody. Dorset Yacht raises two important issues. The first issue is about statutory immunity, namely, when a statute confers a power on a public authority to do something that causes damage, the doing of the thing without negligence founds no cause of action. However, if the doing of the thing causes damage that the public authority, whether by exercise of its statutory powers or otherwise, could have avoided by using reasonable care, the public authority is liable for the damage so caused.34 The first issue involved in Dorset Yacht is whether the adoption of the training regime or the particular degree of surveillance something is within the immunity conferred by the statute? The second is that of whether the immunity conferred as an incident of statutory power would not go so far as to eliminate the common law duty of care, a duty derived from undertaking work involving a foreseeable risk of damage, unless the risk is within the exercise of the

31 Ibid., at 280, per Lord Goff.
32 Ibid., at 258, per Lord Mackay.
power conferred by the statute. However, if the alleged negligence consists merely in the exercise of a statutory discretion without giving sufficient weight to the protection of a plaintiff’s interests, the repository of the discretion incurs no liability unless the purported exercise of the discretion is invalid. The House of Lords held that the defendant, through its officers, owed a duty of care to the owners of yachts moored at the island, to prevent boys under its control from escaping and causing damage to those yachts. Since the nature of the issues in *Dorset Yacht* is complex, judges, could, indeed have approached the matter from various perspectives of the case. The irreconcilable differences of their Lordships’ views in *Dorset Yacht* show how the tension between general rule and specific rule plays an important role in reaching the conclusion in hard cases.

Lord Reid saw the case as one concerned with liability for damage caused by the carelessness of the officers and the knowledge that their carelessness would probably result in the trainees causing damage of the kind that occurred. He thought the question was really one of remoteness of damage. Lord Morris held that there was a special relationship between the plaintiff and the defendant in that its officers were entitled to exercise control over boys who to their knowledge might wish to escape and who might do some damage to property near at hand. He said that it was no duty to prevent the boys from escaping or from doing damage, but there was a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the plaintiff. Lord Pearson said that the defendant did not owe to the plaintiff any general duty to keep the boys in detention. The duty of care was one to take reasonable step to prevent interference with the plaintiff’s boat. Lord Pearson also thought that there was a special relationship between the parties which gave rise to a duty of care. Lord Diplock said that the conduct of the defendant differed from the kind of conduct discussed in *Donoghue v. Stevenson* in that the damage sustained was the direct consequence of a tortious act done by a third party and in that there were two separate neighbour relationships for the defendant involved. One was with the plaintiff and one with the trainees. These were capable of giving rise to conflicting duties of care.

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Lord Diplock pointed out that the risk of sustaining damage from the tortious acts of criminals is shared by the public at large. To give rise to a duty in that case, there had to be a relationship between the custodian and the person to whom the duty was owed. Moreover, this relationship must be that exposed that person to a particular risk of damage in consequence of an escape. Hence, this relationship was different in its incidence from the general risk of damage from the criminal acts of others which the plaintiff shared with all members of the public. His Lordship limited the duty owed by the defendant as one of reasonable care to prevent a Borstal trainee from escaping and causing damage to persons who it could reasonably be foreseen had property situated in the vicinity of the place of detention of the detainee which the latter was likely to steal or to appropriate or damage in the course of evading immediate pursuit and recapture. Although Lord Reid’s statement concerning the approach to the duty of care gave new emphasis to the notion of general duty, the reasoning of Lords Morris, Pearson and Diplock shows that the decision did not depend merely upon the reasonable foreseeability of harm but was brought about by the special relationship between the parties or the activities of the defendant in bringing about an increase in the risk of harm. However, it was Lord Reid’s speech which proved most influential.

4.2.3. Conclusion: Interaction between General Duty and Particular Duty
Although Lord Atkin sought to generalise the idea of the duty relationship by establishing a general relationship of proximity or foreseeability, this does not mean that particular duty categories (such as surgeon and patient) were no longer of any importance. Indeed, Donoghue v. Stevenson itself established that a particular duty relationship existed between a manufacturer and a consumer of its goods even though there was no contract between them. The neighbour principle embodied a relationship of proximity of which the particular duty categories were examples or illustrations or sub-categories.\(^{35}\) And the result of applying the general duty principle is usually the creation of a new particular duty category. One of the most recently recognised categories is the one between mortgagees’ valuer and

\(^{35}\) Deane J in Jaensch v. Coffey (1983) 155 CLR 549, 584 refers to such categories by the phrase ‘circumstantial proximity’. 
prospective mortgagors.\textsuperscript{36} These particular duty categories are simply applications or illustrations of the general principle of proximity.

As shown above, an examination on the interaction between general duty approach and particular duty approach may shed light on the court’s consideration of whether a duty of care ought to be recognised in a particular case. But it only provides a methodical framework, in order to fill in the structure of the law of negligence we must also examine the extent of the duty, the type of injury for which the compensation can be obtained, and the types of interests which the tort protects. These are important issues which will be discussed in next section.

\textsuperscript{36} Smith v. Bush [1990] 1 AC 831
4.3. The Extent of Duty of Care

It is necessary to emphasise that the relationship between the plaintiffs and the defendants may be of many different types, and different relationships give rise to different kinds of duty. As Oliver J. observed:

"The classical formulation of the claim in this sort of cases as 'damages for negligence and breach of professional duty' tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client's business that reasonable care and skill to be expected from a normally competent and careful practitioner as if that obligation were not only a compendious, but also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But, of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one."37

The phrase 'duty of care' is an elusive concept, giving rise to a mistaken assumption that all defendants owe the same sort of duty in all circumstances. In fact, there is a range of qualifications of duty of care.

Under the principle in Donoghue v. Stevenson as enunciated by Lord Atkin, a person is under a duty of care to take reasonable steps to avoid causing harm to another, that harm which is reasonably foreseeable, provided that the parties are within the relevant degree of proximity to each other. It is only if all of these elements are present that there is such a duty of care. Furthermore, in order to determine whether a duty of care has been breached, it is necessary to look to the standard of care which is required, and in the classical formulation of the doctrine this has been set at that which is reasonably foreseeable in the circumstances. Accordingly, the extent of duty of care is independent of proximity and remains just as important in its own right.

The distinction was noticed by the House of Lords in Peabody38, and was further discussed by Gibb J. in Sutherland, where he observed,

'the true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty depend on all the circumstances of the case.' 39

38 [1985] AC 210 at 240.
39 (1985) 157 CLR 424 at 441, per Gibb J.
This distinction is further illustrated in the decision in the House of Lords in *D. & F. Estates Ltd. v. Church Commissioners for England*. The House of Lords took the view that the distinction must always be made between the contractual obligations of the builder to the owner of the house and his tortious liability to the owner and any other person taking through him. Hence, the existence of a duty of care is not the same thing as the extent of that duty of care.

In the following section, I will then examine two frequently debated issues in the law of negligence, namely, (1) whether and if so to what extent actions against public authorities are not subject to ordinary principles of tort liability, and (2) the concurrent duty of care in law of contract and tort in the following section.

From this survey one can see how important it is to distinguish the features which apply to two distinct, but sometimes confused, elements of a claim in negligence, that is, whether there is an existence of a duty of care, and if so the extent of that duty. With an understanding of that distinction will come freedom from confusion and a correct attribution of authority and principle in these closely related areas.

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40 [1989] 1 AC 177
Historically, the court took the view that a statutory body could not be liable at common law for a failure to exercise its powers (as opposed to injury or loss caused by an active exercise of its powers) in East Suffolk Catchment Board v. Kent. A series of cases, some of the most important of which involved the liability of public authorities, culminated in Lord Wilberforce’s formulation in Anns v. Merton LBC to restate the basis for a finding of a duty of care, and to state the particular basis upon which a public authority exercising powers under a statute may be subject to a duty of care. Recently, much is made of the distinction between private and public law as it affects the liability of public authorities in X(minors). There the House of Lords recognised that if a public authority exercised its statutory powers carelessly, there could be liability at common law in negligence. However, the courts would be reluctant to impose a pre-existing duty of care on a public authority to exercise its statutory powers carefully.

The statutes conferring powers on public authorities usually do not expressly or impliedly impose affirmative duties to act. They usually leave it to the public authority to decide, in the exercise of its wide discretion, how best to perform its functions within the constraints of its resources. It is arguable that the fact that a public authority has been endowed with statutory powers and resources for the protection of the public and the advancement of the public good, militates against the application of the traditional common rule to public authorities. The issue is, in what circumstances, if at all, will the court impose a common law duty (as distinct from a statutory duty which is entirely a creature of statutory interpretation) such that a failure to act (usually to exercise a statutory power) will give rise to a remedy in damages to a person who has suffered loss as a consequence of the failure to act?

It is often argued that a duty of care of Donoghue v. Stevenson kind is deduced from the facts relied on, so that a public authority’s liability in negligence arises from

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46 A plaintiff’s right to recover damages in consequence of the public authority’s negligent act or omissions of a function is a matter of private law to be distinguished from actions in public law, brought by way of judicial review, to enforce the performance of statutory duties. X(Minors) v. Bedfordshire CC [1995] AC 633, at 730. per Lord Browne-Wilkinson.
what the authority did rather than its power to do it. Therefore, the cause of action arises from breach of statutory duty is distinct from common law negligence. There are no doubt that public authorities may be held liable in damages for breach either of a common law duty of care or a statutory duty.

In Sutherland Shire Council v. Heyman, Brennan J., thought that one simply could not derive a common law ‘ought’ from a statutory ‘may’. But he is in the minority in adhering to such formal reasoning. What has become realistic, however, is the question about how a common law ‘ought’ may co-exist with a statutory ‘may’. One should always be aware of the fact that some statutory powers, of their natures, are less susceptible to a concurrent common law duty than others. As Lord Wilberforce once said in Anns, ‘the more operational a power or duty may be, the easier it is to superimpose upon it a common law duty of care.’ Contrariwise, where statutes contained a large area of policy, the decision was one for the public authority to take, and not for the courts to re-assess in a negligence action. Although Anns was formally overruled in Murphy v. Brentwood District Council, the policy/operational distinction was not explicitly covered. It appeared to have escaped the judicial disapprobation.

The use of the policy/operational distinction as a control mechanism upon the scope of public authorities has played a key role in X (minors). This does not mean that powers are capable of being categorised. Indeed, there are no clear boundary lines here. The blurred distinction between policy and operations as a tool with which to discover whether it is appropriate to impose a duty of care or not would add little help to clarify this area of law. Recent judicial authority has been doubtful of the utility of the distinction. First, the distinction is considered to be ‘elusive’. Secondly, even if the distinction is clear cut and there is no element of discretion involved, such as in relation to a statutory duty, Lord Hoffman contended that it does not follow that the law should necessarily superimpose a common law duty of

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48 157 CLR 424, 483.
49 Ibid.
care. The use of the policy/operational distinction as a control mechanism upon the scope of public authorities has played a key role in X (minors)55.

Indeed, it is more problematic whether there is an expectation that the law should impose on a public authority a duty owed to and enforceable by individuals to perform its functions fully and carefully. The distinctive feature of public authorities is that they have exclusive functions that call for the exercise of powers. As these powers are usually conferred for the benefit of the public in general, their exercise is governed primarily by public law, not by the law of negligence which gives rise to an individual's cause of action. Yet, in considering a public authority's liability in negligence, it is necessary to consider the effect of the statute that confers its powers. The liability of public authorities in negligence is also concerned with a failure to exercise of their statutory powers. It does not seek to cover inability in respect of the exercise of prerogative power, nor to canvass the vicarious liability of public authorities for the negligence of their servants or agents where that negligence has no special relationship with the powers of the public authority.

Nevertheless, we are interested in the principles governing the application of duty/immunity in such statutes, for they closely affect the principle of negligence. It is, thus, helpful to examine the issues of statutory immunity with which most cases would be concerned before we start to analyse the liability of public authorities in negligence.

In cases where the defendant is a public authority, a condition precedent to the establishment of any duty of care is that the acts or decisions challenged are not within the ambit of any statutory discretion. But a public authority defendant cannot simply contend discretion and expect to be immune from the jurisdiction of the court. It must be explained why the immunity should apply, and it is open to the court to reject the explanation if it is found to be compelling. This proposition was established by the influential case of Geddis v. Properties of Bann Reservoir,56 decided in 1878. The defendant was authorised by statute to construct a reservoir and was under a duty to discharge into the River Bann a volume of water impounded by the reservoir. The defendant company discharged such a volume that a stream carrying the water to the River Bann overflowed and inundated the plaintiff's farm. The

56 (1878), 3 App. Cas. 430 (HL); Lord Advocate v. N.B. Railway Co. 1898 2 SLT 71.
defendant company was held liable in negligence, Lord Blackburn expounding his famous rationale on this issue:57

"It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." 58

The Geddis principle can be understood in the following way: the public authority will have no defence to an action in negligence if the public authority did act negligently. The speeches in this case do not suggest that the statute was a source of liability rather than a source of immunity. Liability was imposed because the company, which would have been able to by the exercise of reasonable care to prevent damage from the carrying out the works, failed to exercise that care. It was not the statute that imposed the duty of care but the doing of work that would foreseeably cause damage unless reasonable care was used.

The spirit of Geddis can also be found in the words of Lord Browne-Wilkinson in X (minors) v. Bedfordshire,

"Where parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it can (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist."59

57 Ibid., at 455-56
58See also in another case, Port Glasgow and Newark Sail Cloth Co. v. Caledonian Railway Co.(1893), S.C. (H.L.) 35., a railway company whose locomotives emitted sparks was held liable when it failed to do what it could to avoid the emission of sparks, not because the running of spark-emitting locomotives was something done in exercise of a statutory power, but simply because the running of spark-emitting locomotives created an obvious risk of fire which the company was bound to take reasonable care to avoid.
Even if the case is within the realm of justiciability, whether there is a common law duty to be established by applying the ordinary principles of negligence, his Lordship noted further that,

'the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done....A common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.'

It is quite absurd to contend that there is any need to import the restrictive public law principle applied on application for judicial review into the private law concept of negligence. His Lordship also questions this in X (Minors),

"I do not think that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence."61

According to Lord Browne-Wilkinson in X(minors), it was necessary in these cases to ask a series of questions. The first is whether the act or omission of which complaint is made relates to the manner in which the authority (a) exercises a statutory discretion or (b) implements a statutory duty in practice. An example of (a) would be a decision whether to close a school; an example of (b) would be 'the actual running of a school pursuant to the statutory duties,' illustrated by the common law duty to take reasonable care for the safety of pupils.62 Secondly, if the case does concern the exercise of a statutory discretion, it is then necessary to ask if the decision complained of is so unreasonable that it falls outside the ambit of that discretion. If it is not, then no action will lie as the authority 'cannot be liable in damages for doing that which Parliament has authorised.'63 Thirdly, in considering whether a decision is unreasonable in this sense, a further distinction arises between (a) policy matters and (b) non-policy matters which the authority has taken into account. This is because 'it is established that the courts cannot enter upon the assessment of such policy matters' and therefore 'cannot reach the conclusion that the decision was

61 X (minors) [1995] 2 AC 633, at 736, per Browne-Wilkinson
63 Ibid., at p. 736.
outside the ambit of the statutory discretion.'64 Examples of ‘policy matters’ include ‘social policy, the allocation of finite financial resources between the different calls made upon them or (as in the Dorset Yacht case) the balance between pursuing desirable social aims as against the risk to the public inherent in so doing.'65

Yet, the question of whether the public authority is in breach of its statutory duty or its common law duty remains unclear, as there are divergent views among decisions in major commonwealth jurisdictions. For instance, it is suggested in the dictum of Mason J. in Sutherland,

> 'a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so...[b]ut an authority by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. ’66

This proposition reflects the speeches of the majority in East Suffolk Rivers Catchment Board v. Kent.67 In that case, Mr. Kent suffered the continued inundation of his dairy farm when the East Suffolk Rivers Catchment Board was dilatory in repairing a tidal wall that had been breached and had let the floodtide in, and unsuccessfully sued the board for negligence in the exercise of its powers. Lord Romer stated the principle:

> 'Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing.'68

Under this principle, the plaintiff founds the cause of action either on a duty imposed by statute or on a common law duty arising from the facts, but not on a duty that conflates the bases of statute and facts. A mere omission to exercise a power - nonfeasance- creates no liability unless the statute imposes a duty to exercise the power and that duty is owed to a class of which the plaintiff is a member. Breach of statutory duty apart, there must be some conduct on the part of the public

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64 Ibid., at pp.737-738, see above, note 59.
65 Ibid., at p.737.
66 Sutherland (1985) 157 C. L. R. 424, at 459-60, per Mason J.
68 Ibid., at 102, per Lord Romer.
authority in order to give rise to a common law duty that calls for the exercise of a discretionary power.

Common law obligations to take positive action may arise in tort. Familiar examples are parent and child, employer and employee. The established categories are useful, but these categories are no more closed than any other categories of negligence. One of the established categories is that of occupiers of land and their neighbours. An occupier is under a common law duty to take positive action to remove or reduce hazards to his neighbours, a duty which lies between nuisance and negligence. The relationship between nuisance and negligence is one of most obscure issues in the modern law of torts. In the first place, negligence and nuisance are said to be two separate torts, which perhaps means no more than that there are identifiably distinct and different sets of rules recognised by the law which may apply to the same, or very similar fact situations, but which focus on different elements of those fact situations in deciding whether the defendant ought to be held liable. The two sets of rules are not mutually exclusive; so a defendant may be held liable in both negligence and nuisance on the same facts. Further, in some cases it is possible to say that if an action in negligence would fail, so would an action in nuisance. The courts have become unwilling to distinguish between nuisance and negligence. One clear distinction between them is that the plaintiff in nuisance does not have to prove that the defendant owed him duty of care. At the same time, the idea of reasonableness which lies at the heart of the tort of nuisance is very similar to the concept of reasonableness in negligence. The main difference is that in negligence the question is whether particular acts of the defendant were reasonable, whereas in nuisance the question is whether the defendant’s activity – his use of land – was reasonable. The tort of nuisance was not dependent on the carelessness of the defendant’s behaviour. Indeed, the criteria of unreasonable use do not include with the probability of harm or the cost of precautions to prevent it. The only context in which the probability of harm is relevant is that of injunctive relief which is not

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73 Spicer v. Smee [1946] 1 All ER 489, 493.
74 Sedleigh-Denfield v. O’Callaghan [1940] AC 880 at 904.
available in a negligence action. The factors relevant to reasonableness of use are the nature and seriousness of the anticipated harm in question and the social value of the relevant land use.

However the overlap between negligence and nuisance is brought up in the rule that the possession or control of property give rise to a ‘duty of care’ not merely to abstain from creating a nuisance, but also to take positive steps to terminate a nuisance of which the occupier knows. Since control of property is the relevant factor, it is not immaterial that the occupier is to blame for the origin of the hazard. Once he knows of it or has means of knowledge, he incurs a duty to take suitable protective action. It does not matter whether the source of the nuisance is ‘human’ or ‘natural’. The law of nuisance is seen to move away from the immunity which was supposed to clothe the defendant if the nuisance arose ‘naturally’ on his land, without act on his part, and to impose upon him a duty to take reasonable protective action. The issue is then a negligence issue rather than a nuisance issue.

This point is illustrated in Hargrave v. Goldman, in which a fire, originated by lightning on the defendant’s land, spread to his neighbour’s land, causing extensive damage. The defendant’s failure to take adequate measure to prevent this was held to constitute negligence. When this case was heard in the High Court of Australia, Windeyer J. contended that judicial development of the law of negligence to be tending towards the founding of a common law duty of care either on ‘some task undertaken, or [on] the ownership, occupation, or use of land or chattels.’

In Sutherland Mason J. identified some of the categories of conduct that might impose a common law duty of care: conduct that creates a danger to the plaintiff, occupation of premises, ownership or control of a structure in a highway or a public place, and significantly, conduct by which a public authority ‘may place itself in such a position that others rely on it to take care for their safety so that the authority comes under a duty of care calling for positive action.’

75 Cambridge Water [1994] 2 AC 264, 300 per Lord Goff.
76 Ibid.
77 Hargrave v. Goldman [1966] 2 All ER 989 (PC)
78 Hargrave v. Goldman (1963) 110 CLR 40
79 Ibid., at p.66.
80 Sutherland (1985) 157 CLR 424, at 460-1.
81 Ibid., at p.461.
Mason J. also said,

‘a public authority is liable for negligent failure to perform a function when it foresees or ought to foresee that: (a) the plaintiff reasonably relies on the defendant performing the function and taking care in doing so, and (b) the plaintiff will suffer damage if the defendant does not take care.’

Deane and Brennan JJ. accepted that a public authority that engaged in conduct leading a plaintiff to rely on its full and careful performance of its functions might be liable for loss flowing from its failure to perform those functions. A public authority that has led a plaintiff to rely on its continued performance of a statutory function cannot, without warning, discontinue the performance of its function when the discontinuance will foreseeably cause damage to the plaintiff. For example, a lighthouse authority that has maintained a lighthouse to mark a danger to navigation is in breach of its duty to mariners if it douses its light without giving reasonable warning.

In *Shaddock & Associates Pty Ltd. v. Parramatta City Council (No.1)*, a local authority that was accustomed to answering inquiries made in conveyancing transactions as to planning proposals, carelessly responded to a solicitor’s enquiry by indicating that there were no road widening proposals in existence that would affect a parcel of land. After the conveyance, when part of the land was taken for road widening, the local authority was held liable for the loss incurred by the purchaser in reliance on the information provided. Following a number of Canadian cases, Mason J. said:

'The specialised nature of the information, the importance which it has to an owner or intending purchaser and the fact that it concerns what the authority proposes to do in the exercise of its public functions and powers, form a solid base for saying that when information (or advice) is sought on a serious matter, in such circumstances that the authority realises, or ought to realise, that the inquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice.'

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84 *Shaddock & Associates Pty Ltd. v. Parramatta City Council (No.1)* 1981, 150 C.L.R. 225.
In Murphy, Lord Bridge referred to "the critical role of the reliance principle as an element in the cause of action which the plaintiff sought to establish"\(^86\) in Sutherland. Agreeing with the view of the majority in the latter case, Lord Bridge held that the approval of plans and the inspection of buildings that had been features of the Anns building cases were not circumstances in themselves sufficient to introduce the principle of reliance.\(^87\) Lord Oliver also referred to the notion of reliance as a source of liability for economic loss and agreed that neither Anns nor Murphy was a reliance case.\(^88\) For the House of Lords, there is a distinction to be made between awarding damages when a plaintiff has been induced to rely on a public authority's continued and careful exercise of a statutory power, and awarding damages to a plaintiff when the public authority's responsibility consists in its failure to exercise its powers to protect the plaintiff in circumstances where the failure may be likely to cause damage.

A similar approach has been taken when a local authority has failed to use a statutory power which it was not obliged to exercise under the legislation as that in cases of careless exercise of statutory power. In Stovin v. Wise,\(^90\) the House of Lords held by a majority of three to two that a highway authority did not owe road users a duty to exercise its statutory powers to reduce the height of a mound of earth that hampered visibility at a road intersection within its jurisdiction. Lord Hoffmann made clear in Stovin that there are sound reasons of public policy for the common law distinction between misfeasance and non-feasance.\(^90\) It follows that the analysis is more complicated when it is suggested that a public authority is liable for a failure to exercise its powers to prevent harm occurring, in particular, harm attributable to the fault of a third party for whom it is not responsible. It is clear from the majority judgement given by Lord Hoffmann in Stovin that the courts will only rarely impose a duty of care on a public authority in the context of a claim concerning failure to exercise a statutory power. In determining whether a public authority was liable for a negligent omission to exercise a statutory power the court had to decide in the light of the statute conferring the power whether the authority was not only under a duty in public law to consider exercising the power, but also under a private law duty to

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\(^88\) Ibid., at 486, per Lord Oliver.
\(^89\) Stovin v. Wise [1996] AC 923
act, which might give rise to a claim in damages.\(^91\) There are two conditions for basing a duty of care on the existence of a statutory power in respect of an omission to exercise the power. It must have been irrational for the authority not to have exercised the power, so that there was in effect a public law duty to act; and there must be exceptional grounds for holding that the policy of the statute conferred the right to compensation on those who suffered loss if the power was not exercised.\(^92\)

The fact that parliament had conferred discretion on the public authority, rather than a duty, was some indication that the policy of the statute was not to create a private law right to compensation.\(^93\)

One effect of a statute that confers powers is that they impose a duty to exercise those powers. Although I am not primarily concerned with the separate tort of breach of statutory duty here, tortious liability of public authorities has been a complex area of law which lies two separate torts – negligence and breach of statutory duty.\(^94\)

One relevant question needs clarification, that is, whether a statutory duty gives rise to a private cause of action is a question of construction. Although the private cause of action does not only arise out of the statute itself, the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson contended in \(X\)\(\text{(Minors)}\) that the existence and nature of common law duty of care ‘must be profoundly influenced by the statutory framework.’\(^95\) He added that a common law duty of care cannot be imposed that would be ‘inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.’\(^96\)

In jurisdictions that recognise a nominate tort of breach of statutory duty, the cause of action arises only when a statute creates a duty to be performed for the benefit of the plaintiff (or, for the benefit of a class of which the plaintiff is a member), and only when, on its true construction, the statute confers on the plaintiff or on members of the plaintiff’s class a right to recover damages for loss occasioned

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\(^91\) Ibid., at 949-950.

\(^92\) Ibid., at 953.


\(^95\) 1995] 2 AC 633, 739, per Lord Browne-Wilkinson

by the breach. The existence of a private right of action does not depend on a judicial imputation of a duty owed to an individual, but on the language used by the legislature. Although it has been said that a cause of action for damages for breach of statutory duty is a creature of the common law, the right on which the cause of action is based is a creature of statute. The duty is created by the statute and its nature and scope are ascertained by construing the statute; by contrast, the duty of care of which Lord Atkin spoke in Donoghue v. Stevenson is ascertained by reference to the factual circumstances. One cause of action is based on statutes; the other on facts. However, the interests that the common law first protected by the tort of negligence - the person and property of the plaintiff - are interests that are favoured for protection by a private right of action where breach of statutory duty is likely to damage them. Typically, an action for breach of statutory duty protects persons or property against carelessness of some kind, although carelessness is not necessarily an element of the tort. So, there could be a cause of action for breach of statutory duty to exercise power to protect individuals from economic loss of a given kind. Instances of such a cause of action are few and usually arise only where the statute expressly creates the right to sue.

As a statutory duty enforceable by a private right of action exists antecedently to any circumstances that call for its performance, foreseeability of loss is immaterial to the existence of the duty. Indeed, the scope of the duty must be defined without reference to a particular loss in order to determine whether that loss is a consequence of breach of the statutory duty. If a public authority's failure to perform a statutory duty cannot give rise to liability in damages to a plaintiff unless the duty is owed to the plaintiff personally, a fortiori, a public authority's failure to exercise a mere statutory power can give rise to no liability in tort unless some other factors attract a duty of care. At all events, that was the view before Anns v. Merton London Borough

98 Kitto J. explained in Sover v. Henry Lane Pty. Ltd (1967), 116 C.L.R. 397 at 404-5 (H.C.), "The intention that such a private right shall exist is not...conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature. The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation."
Council. Something more than a mere power was needed to give rise to a duty of care.

However, the Supreme Court of Canada set its face against the recognition of breach of statutory duty as a nominate tort in *R. v. Saskatchewan Wheat Pool*.99 Dickson J., speaking for the Court, accepted the criticism that had been made of the fiction of an intention on the part of the legislature to create a private right of action for breach of what is expressed as a duty enforceable by criminal sanctions. He concluded:

"Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach."100

*Saskatchewan Wheat Pool* marks a radical difference in the approach to the law of negligence of the courts of Canada and the courts of most Commonwealth countries. In Canada, fact and statute were conflated as the basis of a common law duty of care and that conflation underlies the *Anns* doctrine. Apparently, *Anns* was not cited to the Supreme Court in *Saskatchewan Wheat Pool*, although it had earlier been accepted by that Court in *Barratt v. District of North Vancouver*.101

**Conclusion:**

The object of this section has been to identify the various lines of thought and concepts which have featured in the analysis of negligence claims arising out of the exercise of statutory functions. The picture which emerges is one of quite complex reasoning confused by a number of issues. In particular, some confusion over the significance of the distinction between misfeasance and nonfeasance in a public authority, the distinction between power and duty, the application of policy/discretion distinction and the introduction of the conception of *ultra vires*. The topic presents difficulty problems and it would be unreasonable to expect tidy and satisfactory solutions from judicial decision in this area of law.

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Furthermore, the development of the law in this area has coincided with and involved a reconsideration of the basis of the tort of negligence, the duty of care.\footnote{Dorset Yacht v. Home Office [1970] AC 1004, Anns v. Merton LBC [1978] AC 728.} It also involves a significant movement of the law of torts into areas previously the exclusive province of public law. This probably explains the theme of reasoning not normally found in tort cases.

Recently, in \textit{Osman v. UK},\footnote{Osman v. UK (1998) 5 B.H.R.C. 293, see also J. Thomson ‘Delictual Liability of State Agencies – Further Confusion?’ 1999 SLT 245.} the European Court of Human Rights held that police immunity from a broad range of negligence liability as to their efforts to detect and suppress crime breaches Art. 6.1. of ECHR. In \textit{Barrett v. Enfield LBC},\footnote{Barrett v. Enfield LBC [1999] 3 WLR 79.} the House of Lords has staked on claims against public authorities much like that adopted by the European Court of Human Rights in \textit{Osman}. Enactment of the Human Rights Act 1998 (UK) adds to the problems. The Human Rights Act will undoubtedly have a significant effect on issues affecting relationships between the citizen and public authority in this field of negligent liability.\footnote{Paul Craig and Duncan Fairgrieve, ‘Barrett, Negligence and Discretionary Powers’ [1999] Public Law 626.}
4.3.2. Concurrent Duty of Care in Contract and Tort

One issue which is relevant to tortious liability for pure economic loss is that of the existence of concurrent liability in contract and tort where a contracting party is guilty of negligence in causing pure economic loss. Earlier authority against this concurrent liability, including a decision of the House of Lords has now been consigned to oblivion. The law of tort has been forced to make up for the inadequacies of contract law. It is considered that one of the effects of the insistence on the ‘voluntary assumption of responsibility’ principle in recent decisions of the House of Lords is the revival of concurrent liability in tort. The debate whether to admit a concurrent duty of care in tort is closely related to the general debate about the appropriate test for a duty of care in tort to avoid economic loss, including between non-contracting parties. Henderson v. Merrett Syndicates Ltd considered the effect that the existence of a contract has on the imposition of a duty of care in the tort of negligence.

The same issue also arose as to whether economic loss could be recovered in tort in Junior Books Ltd. v. Veitchi Ltd. In this case, the House of Lords found that the subcontractors, who defectively laid the floor of the plaintiff’s factory, were liable for the pure economic loss the plaintiff sustained in replacing the floor. The plaintiff could not have sued the subcontractor in contract because of the absence of privity. To permit recovery in tort achieved the same result in substance. The decision could be described as one in which the limitations on recovery in contract presented by the doctrine of privity of contract were overcome by allowing recovery in negligence.

In D & F Estates Ltd. v. Church Comrs for England the plaintiffs were denied a remedy in tort against builders, who had been employed by their predecessors, for the damage to the building. In D. & F. it was not relevant for the court to consider what the position would have been if the plaintiffs had been in contract with the builders. However, Lord Bridge, commenting on Batty v. Metropolitan Realisations Ltd, drew a distinction between the developers in that case, who were in contract with the plaintiffs and the builders in that case, who were not. He called into question the liability of the builders, but pointed out that the liability in tort of the

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107 [1994] 3 All ER 506.
109 [1989] AC 177 (HL)
developers was held to arise from a breach of a duty corresponding to that which they had assumed to the plaintiffs in contract. The other four judges stated that they agreed with Lord Bridge's reasons. Thus the application of concurrent liability by the Court of Appeal in Batty\footnote{ibid.} was apparently accepted unanimously by the House of Lords in D. \& F.\footnote{ibid. [1989] AC 177 (HL)}

The tension between concurrent actions in tort and contract has been apparent in many judicial decisions. In Bell v. Peter Browne \& Co.\footnote{[1990] 3 WLR 510 at 524.} Mustill LJ contends that

\begin{quote}
I think it a pity that English law has elected to recognise concurrent rights of action in contract and tort. Other legal systems seem to manage quite well by limiting attention to the contractual obligations which are, after all, the foundation of the relationship between the professional man and his client: as for example, in the case of French law, via the doctrine of \textit{non cumul}. That precisely the same breach of precisely the same obligation should be capable of generating causes of action which arise at different times is in my judgment an anomaly which our law could well do without.
\end{quote}

However, he added, 'Nevertheless the law is clear and we must apply.' Yet, some judges hold different view, for instance, Lord Radcliff stated in \textit{Lister v. Romford Ice and Cold Storage Co. Ltd}\footnote{[1957] AC 555.}

\begin{quote}
'It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.'\footnote{ibid., at 587.}
\end{quote}

The position Lord Goff holds in \textit{Henderson}\footnote{[1994] 3 All ER 506.} is that where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.\footnote{Ibid., at 530.} It is considered that one of the effects of the insistence on the 'voluntary assumption of responsibility' principle in recent decisions of the House of Lords is the revival of concurrent liability in tort. The debate whether to admit a concurrent duty of care in tort is closely related to the general debate about the appropriate test for a duty of

\begin{footnotesize}
\begin{enumerate}
\item ibid.
\item [1989] AC 177 (HL)
\item [1990] 3 WLR 510 at 524.
\item [1957] AC 555.
\item ibid., at 587.
\item [1994] 3 All ER 506.
\item Ibid, at 530.
\end{enumerate}
\end{footnotesize}
care in tort to avoid economic loss, including between non-contracting parties. Henderson v. Merrett Syndicates Ltd\textsuperscript{118} considered the effect that the existence of a contract has on the imposition of a duty of care in the tort of negligence.

It raised the relevant problems of whether concurrent liability for breach of contract and in the tort of negligence is recognised by the law of negligence and of the effect of a contract on a duty of care alleged to be owed to a third party by one of the contracting parties. It was widely accepted in the early 1980s that the law of negligence recognises concurrent liability in contract and tort and that a plaintiff therefore has the right of pleading a professional negligence case in the alternative with all the advantages, particularly in relation to limitation of actions, the calculation of damages and the availability of defences which this can bring.

However, Lord Scarman's speech in Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank\textsuperscript{119} questioned the accuracy of this assumption and subsequent cases showed the law to have been reduced to a state of considerable confusion by this.\textsuperscript{120} The wide interpretation of Lord Scarman's speech in Tai Hing did not go completely unchallenged in professional negligence cases. In both Punjab National Bank v. de Bonville\textsuperscript{121} and Barclays Bank plc v. Quincecare\textsuperscript{122} (bankers) the courts continued to decide cases on the basis that concurrent liability was a feature of negligence law.

Since Oliver J.'s decision in Midland Bank trust Co. v. Hett, Stubbs & Kemp,\textsuperscript{123} professional negligence cases have generally been decided without the concurrent duty of care in tort being questioned.

The motivation for asserting the duty in tort has related to limitation of actions, contributory negligence and generally unsuccessfully, to maintain a duty wider in scope than could be maintained on the basis of contract. Both plaintiffs and defendants have found it to their advantage to assert a tortious duty, but for different reasons.

In tort, the occurrence of damage, which may be later than the contractual breach triggers the running of the limitation period. Thus a tortious cause of action becomes critical to a plaintiff if the contractual claim is time barred. Moreover, the

\textsuperscript{118} [1994] 3 All ER 506.
\textsuperscript{119} [1986] AC 80.
\textsuperscript{121} Punjab National Bank v. de Bonville [1992] 3 All ER 104, a case concerned the work of insurance brokers.
\textsuperscript{122} Barclays Bank plc v. Quincecare [1992] 4 All ER 363. (Bankers)
extended limitation period based on knowledge of damage introduced by the Latent Damage Act 1986 applies to causes of action based on tort but not to those based on contract. Under the Limitation Act 1980 s 14 A, the secondary three-year limitation period which runs from the date of discovery of damage is confined to actions brought in tort. This is likely to be of particular significance in those areas in which a cause of action has been held to accrue at much the same time as the cause of action in tort. It will obviously be of no assistance in areas such as construction industry claims in which English courts have held a cause of action for quality defects to be the exclusive preserve of contract.

The concurrent duty of care in tort will also work to a defendant’s advantage insofar as it enables him to raise the defence of contributory negligence under the Law Reform (Contributory Negligence) Act 1945, thus permitting a court to reduce the plaintiff’s damages on account of his ‘fault’. The latter is defined as ‘negligence, breach of statutory duty or other act or omission which gives rise to liability in tort,’ but does not include breach of contract. However, concurrent tortious liability, even if not pleaded, has significance for certain claims based on contractual liability. Thus in a claim against insurance brokers,124 Hobhouse J. formulated a tripartite categorisation of contractual duties:

(1) Where the defendant’s liability arises from some contractual provision which does not depend on negligence on his part.
(2) Where the defendant’s liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
(3) Where the defendant’s liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.125

He concluded that the Act applied so as to permit a reduction on account of contributory negligence in the case of (3) and in the particular case the plaintiff’s damages were reduced accordingly. His decision was upheld on appeal.126

A concurrent duty of care in tort has other consequences. It may provide the basis of a claim for damages in tort which is more generous in scope than one based on contract alone owing to the different tests for remoteness in contract and tort.

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123 [1979] Ch. 384: Solicitor is owed to his client a duty of care arising both in contract and tort.
125 Ibid. p.508
126 [1989] AC 852 (CA). See the judgments of O’Connor LJ at 860-867, Neill LJ at 879 and Sir Roger Ormrod at 879. The Point was not considered on further appeal to the House of Lords.
Moreover, insofar as breach of duty results in a tort committed within the jurisdiction, it provides a ground for leave to serve proceedings out of the jurisdiction.127

**Conclusion**

It is often thought that tort law aims to protect life and property, whereas the law of contract is to allocate the risks between contracting parties. The traditionally cautious approach to permitting recovery for economic loss is largely associated with a concern to preserve tort and contract as separate fields of liability. To establish a distinction between the basis of tortious and contractual liability may be helpful to explain the uneasy evolution of concurrent liability in tort and contract. However, this distinction has been blurred.128 Attempts have been made to assimilate the rules on remoteness of damage in recent case129. Furthermore, the recent tendency of allowing plaintiffs a choice between the contractual or tortious remedies could also be regarded as a move towards attenuating the difference between contract and tort.130

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4.4. Duty of Care, Breach of Duty and Damage

A person's negligence does not infringe another person's rights till it affects him by damaging him. A duty to be careful as against the other person is an essential element of negligence, but even if that duty is infringed the cause of action is not complete until there has been damage to the plaintiff. 'Duty' and 'remoteness of damage' may be just aspects of a single question, and the division into 'duty-breach-damage' is simply one of the tools to determine whether, on the facts of a particular case, a defendant ought to be made to pay for the plaintiff's loss. However, it is reasonable to expect some link between the test of 'duty' and 'remoteness of damage'. Indeed, the leading case on the test for remoteness of damage in the law of negligence, The Wagon Mound (No.1), drew the line for recovery at damage which is of such a kind as the reasonable person should have foreseen.131 As Viscount Simonds said,

'If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit?'

The Privy Council was clearly unhappy with the notion that a defendant whose duty of care rested on what he could reasonably have foreseen should then be responsible for unforeseeable consequences of his breach of that duty. And, if the existence of a duty of care did follow from the defendant's reasonable foreseeability of damage, it would of course make little difference whether one approached a damages claim as an issue of 'duty' or 'remoteness'. In either case, the question would be identical, namely, 'could the defendant reasonably have foreseen the plaintiff's damage?'

However, matters are not so simple. In Sutherland Shire Council v. Heyman,132 the High Court of Australia unanimously held that the Council was not liable to the subsequent owner of the house but it was divided in its reasons. A local authority was alleged to have been negligent in failing to carry out an inspection of a building in the course of construction in order to ensure that the footings in the foundation were constructed in accordance with the plans and specifications which it had approved. The builder had neglected to comply with them and the foundations failed causing a subsequent purchaser to suffer loss because of the reduced value of

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131 The Wagon Mound (No.1) [1961] AC 388 at 423, per Viscount Simonds.
the building and the cost of restoration. The purchaser had not made any enquiry of
the Council and was not shown to have relied generally upon its performance of its
duties under the relevant regulations.

Two of the members of the court held that while the Council was under a duty
of care to the purchasers there was simply no breach of duty because the duty did
not extend so far as to require it to inspect the premises. Thus, Gibb CJ said:

‘In deciding whether the necessary relationship exists, and the scope of
the duty which it creates, it is necessary for the court to examine closely
all the circumstances that throw light on the nature of relationship
between the parties... If the relationship of neighbourhoold is found to
exist, then it is necessary to proceed to the second stage of enquiry. None
of this process will be necessary if the facts fall into a category which has
already been recognised by the authorities as attracting a duty of care,
the scope which is settled - e.g. no trial Judge need enquire for himself
whether one motorist on the highway owes a duty to another to avoid
causing injury to the person or property of the latter, or what is the scope
of that duty.’

The other three members held that in the absence of any reliance or assumption of
responsibility there was no duty upon the Council towards a person of the
subsequent buyer, that is, that there was no sufficient proximity between them. In
addition, Brennan J held that apart from the issues referred to, the standard of care
required of a person does not extend to avoiding the omission of an act for the
protection of another where the party has done nothing to cause the need for that
protection. This is an example of the distinction between the existence of duty of care
and the scope of that duty if it exists.

However, the nature of damage, was a crucial point in otherwise identical
circumstances. It may be difficult to understand how proximity can be altered by the
accidental factor whether the damage is caused to the property itself or to other
property. The explanation is provided in passing by Brennan J in Sutherland Shire
Council where he said:

‘The corollary is that a postulated duty of care must be stated
in reference to the kind of damage that a plaintiff has suffered
and in reference to the plaintiff or a class of which the plaintiff
is a member... It is impermissible to postulate a duty of care to
avoid one kind of damage - say, personal injury - and, finding
the defendant guilty of failing to discharge that duty, to hold
him liable for the damage actually suffered that is of another
and independent kind - say, economic loss. Not only may the

133 (1985) 157 CLR 424, at 441.
respective duties differ in what is required to discharge them; the duties may be owed to different persons or classes of persons. That is not to say that a plaintiff who suffers damage of some kind will succeed or fail in an action to recover damages according to his classification of the damage he suffered. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage suffered is relevant to the existence and the extent of any duty to avoid or prevent it.  

Some guidance is also given in Caparo - and in particular in Lord Oliver’s speech\textsuperscript{135} - on how to identify and distinguish different categories for which duties of care exist. In particular, criteria relevant to identify a category will include the activity concerned (such as, negligent acts or omissions? Or negligent statements?) the types of loss suffered by the plaintiff (such as, personal injury? psychiatric injury? property damage? pure economic loss?), and the link between these two (direct infliction, indirect infliction either with, or without, the intervention of third parties?). What this guidance shows is that foreseeability of the particular kind of damage suffered by the plaintiff is an indispensable element in the search for the existence of the duty of care. Lord Bridge was explicit about this:

'It is never sufficient to ask whether A owes B a duty of care. It is always necessary to determine the scope of duty by reference to the kind of damage from which A must take care to save B harmless.'  

This idea draws on the judgment of Brennan J in Sutherland Shire Council v. Heyman, where he said:

'Liability in tort is for damage done, not for damage merely foreseeable or threatened or imminent. The principle was stated by Viscount Simonds in delivering the judgment of the judicial committee in Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No.1)) [1961] AC 388 at p. 425. It is no doubt proper, when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until damage has been done. It is not the act but the consequences on which tortious liability is founded...It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for

\textsuperscript{134} (1985) 157 CLR 424 at 487, per Brennan J.
\textsuperscript{135} [1990] 2 AC 605, at pp.635-636. See also Lord Bridge at p.618 and Lord Roskill at p629.
\textsuperscript{136} Ibid., at 618, per Lord Bridge.
The issue is illustrated neatly by reference to a case which is generally seen as the leading case [The Wagon Mound (No. 1)] on remoteness of damage in negligence. Brennan J emphasised that the tests for both the duty of care and remoteness of damage hinge on the same idea: that a defendant's liability (duty) is in respect of a particular kind of damage suffered by the plaintiff. Duties are owed in respect of a particular kind of damage, and the court cannot decide whether a duty was owed without asking whether the defendant could reasonably have foreseen that carelessness on his part might result in damage of the kind which the plaintiff has suffered.

Under this approach, there is no need for a separate test of remoteness at all within the law of negligence. If the defendant's duty was not owed in respect of the kind of loss which the plaintiff suffered, the analysis proceeds no further than denying the existence of the duty. If the duty was so owed, then it seems pointless to ask the further question of whether the damage suffered was of a foreseeable kind - unless, of course, one were to think that 'foreseeability' or 'kinds' of damage were different within the duty and remoteness tests. That would not only be a confusing use of language, but would contravene the underlying principle which was applied in both The Wagon Mound (No.1)\textsuperscript{138} and Caparo v. Dickman,\textsuperscript{139} that is, it is wrong to make a defendant liable for damage which is beyond the risk by reference to which the duty was imposed.

This approach within the context of negligence law emphasises that duties are imposed to protect identifiable interests, that is, it is possible to recover for that damage which is physical or economic, caused directly or indirectly by the defendant's act, statement or omission, or by third parties. But the reasons for imposing a duty - and so for allowing recovery - for each category have to be looked at in the light of the considerations relevant to that particular category. The question of whether the defendant could reasonably have foreseen the kind of loss suffered by the plaintiff must always be asked. However, we should consider whether, in


\textsuperscript{138} [1961] AC 617

\textsuperscript{139} [1990] 2 AC 605
relation to the various categories of duty, the courts should be asking the foreseeability question in precisely the same way.

Here we see how the nature of one element of negligence, that is, the damage, while a distinct element in itself, may be such as to affect the quality of other elements, in this case more particularly the existence of the duty.

A broader and more pervasive approach, however, is to look to the interest protected by the duty, breach of which has given rise to the claim. The damage recoverable is inextricably linked to the cause of action in respect of which it arises. This is an approach which expects consistency and integrity within the body of rules governing a claim for breach of a duty.

The next - and crucial - question is what degree of 'foreseeability' or 'contemplation' is required. A discussion of this issue can quickly degenerate into a semantic exercise which purports to embody an analysis of differing degrees of probability of result.

The question, 'how foreseeable?' cannot be separated from the question of on what ground we use a test based on foreseeability: the content of a rule must fulfil the policy of the rule. In The Wagon Mound (No. 2), Lord Reid said that a question in tort is whether the risk is one which would occur to the mind of a reasonable man and which he would not brush aside as far-fetched. Clearly the Privy Council and the House of Lords had in mind a general principle that a defendant should normally be responsible only for the foreseeable consequences of his act. This is the 'default' rule which is most clearly shown by the judgment of The Wagon Mound (No. 1) where Viscount Simonds mentioned Hadley v. Baxendale in his argument that there is a common principle in tort and contract, that a person is responsible 'for the probable consequences of his act.'

We can now reanalyse the logical operation of the rules and policies in the law of negligence. In the law of negligence, the courts appear to take the view that the range of damages for which the defendant is responsible is linked to the underlying policy pursuant to which the duty itself is imposed. In the context of negligence law, the duty itself is defined, under the approach adopted in Caparo v. Dickman, by reference to particular kinds of loss. No separate remoteness test need therefore be

140 The Wagon Mound (No.2) [1967] 1 AC 617, at 642, per Lord Reid.
141 (1854) 9 Ex 341.
142 The Wagon Mound (No.1) [1961] AC 388, at 421, per Viscount Simonds.
applied, although in any event the recoverable losses are limited to those which the defendant could have foreseen at the time of his breach of duty. A distinction must, however, be drawn. In those cases where the duty arises only because the courts characterise the situation as one of an assumption of responsibility on the model of contract, the extent of the defendant's duty (and consequent liability) is limited by reference to a relatively high level of foreseeability, in similar fashion to the contract test of remoteness set out in The Heron II.144

Another way of looking at this distinction might be from the point of view of the different kinds of damages. One possible policy was that physical harm, for example, might be treated more leniently than economic harm. It is indeed possible to rationalise the negligence cases along this line, since it is in cases of physical harm caused by careless acts that the courts more readily hold the defendant to owe a duty based on a relatively generous test of foreseeability; in the line of Hedley Byrne authorities though the most recent cases in the House of Lords, in particular Henderson v. Merrett,145 is now clearly the line of authority as to when a duty of care is owed in negligence in respect of purely economic loss. In Parson v. Uttley Ingham146 Lord Denning M.R. sought to emphasise that the dividing line between the stricter test of remoteness (serious possibility of the loss occurring) and the more generous test (reasonable foreseeability but including losses which were only 'a slight possibility') in contract, as well as tort, is between cases of recovery for economic harm (strict test) and physical harm (generous test). In the law of negligence, this approach is indirectly reflected in the cases: it is in cases of economic loss that the House of Lords have imposed a stricter test for the existence of a duty based on the assumption of responsibility. And even though physical damage tends to be viewed more generously than economic loss,147 liability for physical harm does not depend simply on foreseeability; sometimes further factors are relevant and have to be weighed in the balance. The line is therefore in reality drawn not by reference to the physical/economic distinction, but by whether the loss falls within the scope of the risk assumed by the defendant.

143 [1990] 2 AC 605.
A different principle might link the recoverable losses to the defendant’s culpability. Instead of asking, ‘why should the plaintiff be able to recover?’, this would ask, ‘how far is it fair to make the defendant liable?’ It would be rational to have a general rule that a defendant who is a deliberate wrongdoer should be treated differently from one who is only negligent or inadvertent; and this is in fact adopted in criminal law. This also plays a part in the law of negligence, in that the use of a test of remoteness/duty based on reasonable foreseeability is designed to hold the careless defendant liable only for consequences he could have foreseen - although, where the loss is physical, the results of this can sometimes be rather hard on a defendant since a relatively low threshold of foreseeability can be used which makes the defendant responsible for losses which he might not in reality have had in mind.

Economic considerations are, in a sense, more neutral, that is, these might ask which party is better placed to bear the loss which flows from the wrongful act - and, for example, which party can insure against such loss. This approach would also consider whether the choice of a particular remoteness rule would promote more desirable policy objectives. The remoteness rule thus serves as an effective means to restricting the expansion of liability in negligence cases. It is essential to realise that it serves to determine whether the risk of harm to the plaintiff was within the reasonable contemplation of the defendant. Secondly, assuming that the risk was within the reasonable contemplation of the defendant, it serves to determine whether he was bound to guard against or; in other words, to differentiate those situations in which a person is required to advert to the possibility of harm to others from those in which he is not always required. Thus the untenable view that all foreseeable harm is prima facie actionable overlooks the second aspect of the requirement.

The starting point for any control device is that a line must be drawn somewhere: it would be unacceptably harsh for every wrongdoer to be responsible for all the consequences which he has caused. In The Wagon Mound (No.1), Viscount Simonds took the view that

‘it is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more
These words were spoken in a case discussing remoteness of damage in negligence, but they are general and appear to reflect the idea that the minimal boundary of liability is determined by reference to the foreseeable consequences of one’s acts. This is a position based explicitly on a moral view of the law of obligations, and take the starting point as being from the defendant’s position: we should normally limit the defendant’s liability to that which he could have foreseen.

*The Wagon Mound (No.1)* was an example of the paradigm case of liability in the law of negligence: physical damage to property caused by a negligent act. It was therefore natural for the Privy Council not only to see link between ‘duty’ and ‘remoteness’, but also to see that link in the concept of reasonable foreseeability.

Lord Oliver took the view that foreseeability may be the only requirement for the creation of the duty of care in relation to some cases of directly inflicted physical damage in *Caparo v. Dickman*. Since 1961, however, much has changed - and the most significant development came shortly afterwards, in *Hedley Byrne v. Heller*, which accepted that a duty of care could arise not only in respect of making a statement, but also in respect of economic losses which flowed from the failure to exercise appropriate care. Simply to adopt a test of reasonable foreseeability of damage as the test of liability would have been too wide. Lord Reid was careful to point out that statements must be treated differently from acts, since the potential consequences are more wide-ranging, he therefore thought that *Donoghue v. Stevenson* had no direct bearing on the case.

It should be noted that recent developments have taken *Hedley Byrne* explicitly beyond its original context of economic loss caused by statements, to economic loss caused by carelessness in performing other services (by both commissions and omissions). But again, the extent of the duty includes a consideration of the loss sustained. Once the defendant assumes a responsibility for

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particular services, the duty is owed in respect of the losses which (foreseeably) flow from the failure to take care. As Lord Goff said in *Henderson*:

> ‘if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services.’

Lord Goff’s view entails that if it is right, in the law of contract, to draw the line for recoverable damage at the foreseeable consequences of the breach on the ground that the defendant has agreed to undertake a liability within the scope of that risk, then it ought to be equally right to draw a similar line in the law of negligence where the existence of the duty of care depends on a similar notion of a risk assumed voluntarily by the defendant.

It is consistent with the arguments advanced earlier that the extent of the duty should be defined by reference to the factors which give rise to the duty itself. If the reason for saying that a defendant owed a duty to a particular plaintiff is that he has, on the facts, assumed a responsibility towards him in the provision of certain services, it makes sense to say that the duty extends to the losses of the kinds for which he can be taken to have assumed the responsibility.

However, we need to consider what the courts mean by ‘foreseeability’ of loss in this context. The discussion of the remoteness test in contract is relevant here. The House of Lords in *The Heron II* assumed that the remoteness test in contract should be set at a realistic level, on the basis that the defendant is to bear responsibility for risks which he undertook in agreeing to the contract; but that tort can be more generous to the plaintiff (in setting a lower threshold for recovery of damage) because the relationship between the parties is inherently different. In the law of negligence based on the development of *Hedley Byrne*, however, the relationship between the parties is recognised by the judges as being ‘equivalent to contract’. The reason for the duty’s existence is not that the law imposes such a responsibility by virtue of the very act being done, or statement being made; it is because the defendant has, or can be taken (objectively) to have, undertaken a responsibility

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154 See above 4.2. The Extent of Duty of Care
155 *The Heron II* [1969] 1 AC 350.
towards the plaintiff in respect of particular activities. Lord Goff in *Henderson v. Merrett* made it clear that this principle is quite different from the typical case of tort where physical damage is caused by a negligent act of the defendant: in that case there is no ‘assumption of responsibility.’\(^\text{158}\) As Lord Reid said in *The Heron II*,

> ‘But in tort there is no opportunity for the injured party to protect himself in that way, and the tort-feasor cannot reasonably complain if he has to pay for some unusual but nevertheless foreseeable damage which results from his wrongdoing.’\(^\text{159}\)

Clearly, where the existence of the duty is based on an assumption of responsibility, the dynamics of the relationship between the plaintiff and defendant are different from the case of the negligent car driver. In this context, then, we can expect that, for reasons similar to those used in relation to the remoteness test in contract, a narrower and more realistic form of foreseeability of consequences should be used to determine the extent of a defendant’s liability. The courts, in applying the *Hedley Byrne* line of authority, have required a relatively high degree of likelihood of damage before the defendant can be said to have undertaken a duty in respect of it. In *Caparo v. Dickman*, for example, the House of Lords made clear that the duty in respect of economic losses flowing from careless statements is only owed when there is a likelihood (and not merely a possibility) of the plaintiff suffering loss by relying on the statement in a particular way.\(^\text{160}\).

In summary, although the concept of duty of care is crucial to an understanding of nature and scope of the tort of negligence, Lord Denning has

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159 *The Heron II* [1969] 1 AC 350, at 386, *per* Lord Reid.

‘The defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances, the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it... The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no specific reason to anticipate.’
rightly taken the view that, ultimately, questions of duty, breach and remoteness of
damage really turn upon the same question.\(^1\) They are interrelated as facets of a
single enquiry before the court: was the defendant negligent? Judgments are
frequently couched in a mixture of duty of care, negligent conduct and causation
arguments. The relevant issues examined will be those relating to the type of harms
suffered, the manner of its infliction, the respective position of the defendant and the
plaintiff and the nature of their relationships. It is therefore unhelpful to consider the
duty question in isolation from other elements of negligence law.\(^2\)

4.5. Conclusion

When speaking of 'duty of care' it is always necessary to distinguish different senses
in which that concept is used. The existing use of words 'duty of care' seems, \textit{prima
facie}, a lack of correspondence between its form and its content. As put earlier in this
chapter, the concept of 'duty of care' covers a range of variable extent in accordance
with the particular topic of concern in different areas of law. Hence, the issue of the
existence of duty of care should be distinguished from the issue of the extent of that
duty. Moreover, the concept of 'duty of care', as a control device – a mechanism of
keeping the negligence principle within practical bounds, may also be the
embodiment of various policy factors, and it is measured in terms of the extent to
which it ensures that the substance of policy is achieved.\(^3\) For this reason 'duty of
care' is indeed a notion of variable content.

\(^1\) \textit{Roe v. Minister of Health} [1954] 2 QB 66 at p.85 \textit{per} Denning L.J.


\(^3\) Fleming, John, 'Remoteness and Duty: The Control Devices in Liability for Negligence' 31
PART II

CONTEXTUAL INTERPRETATION
CHAPTER 5

JUDICIAL ATTITUDES TOWARDS PRINICLED APPROACH
OF NEGLIGENCE LAW

The search for a unifying formula by which the adjudication of the duty problem can be made predictable and simple has been a feature throughout the history of the tort of negligence. Yet the attempts at defining a unifying principle never find permanent acceptance. I will examine, in this and the ensuing chapters (Chapters 5-7), how the courts deal with the tension when they are formulating rules in the context of continuing tension between generality and specificity, complexity and simplicity. It is contended that most of the debate is concerned with the adoption of two main approaches in establishing the existence of duty of care.

There are two different legal rules governing the law of negligence. One is that the law of negligence consists of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of specific justification (e.g., Lord Atkin’s ‘neighbour’ principle, Anns test and proximity test). The other is that there are discrete pockets of duties prohibiting certain kinds of harmful activity, leaving all the rest outside the sphere of legal responsibility (e.g., Brennan J’s incrementalism and Murphy). The principled approach derived from Donoghue v. Stevenson represents a challenge to incremental development of common negligence law. It is a principle which has the potential of applying to previously uncharted areas of activity. Lord Atkin’s neighbour principle and Lord Wilberforce’s formulation in Anns introduced a distinctive methodology to the tort of negligence by offering a principled approach whereby duty of care issues could be determined. The three-stage test continues this tradition in a more cautious style.

Therefore, it would be helpful to summarise the changes in the judicial attitude in order to grasp the nature of the whole development in last two decades in this chapter. It starts with that most influential of the general duty tests, now rejected, the general formulation of Lord Wilberforce in Anns v. Merton London Borough Council.
However, as Lord Goff reminds us, ‘the principle, though generalised, will always be subject to exception, to accommodate situations where the imposition of liability is felt to be individually or socially unjust.’ In Australia in recent years the test of ‘proximity’ out of sufficiently close relationship has been seen as the unifying principle which determines whether the common law of negligence will admit the existence of a duty of care. It is argued that no generalisation can solve the problem upon what basis the courts will hold that a duty of care exists. Everyone agrees that a duty must arise out of some ‘relationship’ between the parties, but no one has ever succeeded in capturing in any precise formula what that relationship is.

After the Anns’ two-stage test, the growth of the principle of negligence has led to a substantial extension of liability, and therefore of protection of interests, founded on that principle, subject to exception. A retreat began from Anns and other cases refused to follow Junior Books, the case of D. & F. Ltd v. Church Commissioners for England Ltd stands out. In Murphy, the House of Lords, rejecting Lord Wilberforce’s two-stage test, preferred that the law should develop incrementally and by analogy with established cases. The incremental approach adopted in Murphy is a reflection of the view that general theories of tort liability lack the capacity to produce the precise results called for by particular fact situations. The process of judicial development of the law of negligence may well involve striking a balance between the conflicting interests of different parties which the principled approach derived from formalistic application of the Donoghue v. Stevenson and Anns principles cannot achieve.

4 [1989] 1 AC 177.
5.1 Principles Capable of Serving as Rules

The effect of requiring a duty of care is to identify and circumscribe those situations where carelessness resulting in harm leads to a legal obligation to compensate. Unless it can be shown that the defendant owed a duty of care to the plaintiff, no matter how gross the carelessness or how great the loss which results, the plaintiff will be unable to recover. 'Duty of care' is a sine qua non of negligence. At its broadest and least explicit the criterion for determining the existence of a duty of care can be found in Lord Atkin’s ‘neighbour principle’ in Donoghue v. Stevenson:

‘You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called into question.’

The concept of negligence, as embodied in Lord Atkin’s ‘neighbour principle’, is inconsistent with the notion that duties of care arise only from special relationships; it postulates a general duty of care owed to everyone who can be reasonably foreseen to be adversely affected by the defendant’s conduct. Since, as Winfield and Buckland argued, reasonable foreseeability is also employed in determining whether the defendant was negligent, and whether the damage was too remote, the ‘duty question’ would seem, logically, to have become otiose.

The phrase ‘reasonably foresee’ does not limit necessary relationships with clarity. What is considered reasonably foreseeable to one judge might be considered quite unforeseeable to another. As Atiyah observes that ‘it is fashionable to regard the whole concept of foreseeability as meaningless - or perhaps, more accurately, as meaning whatever it is desired to make it mean’ In this sense ‘reasonable foreseeability’ taken out of context is one of legal categories of indeterminate reference.

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7 See, Winfield, 'Duty in Tortious Negligence' (1934), 34 Colum. L.R., 41 at pp.59-66; Buckland, 'The Duty to Take Care' (1935), 51 LQR 637 at p. 639.
8 See discussion in 2.1.5. Problems of the Foreseeability Test
Even if reasonable foreseeability could be ascertained objectively, it would require a judge to decide, _ex post facto_, what he could reasonably have expected a defendant to have reasonably foreseen would be the result of his contemplated act upon people who might be affected, if the defendant had foreseen the accident itself - which in most cases he almost certainly did not. In other words, the judge places himself in the position of a reasonable defendant who would (or should) have considered the very possibility which the actual defendant probably failed to consider.\(^\text{11}\) The _Donoghue v. Stevenson_ expression of principle, that a neighbour in law is one who is so closely and directly affected by the defendant's acts that the defendant ought reasonably to have them in contemplation, thus begs the question and does not in fact provide a clear guidance. It is argued by many judges as well as academic lawyers that the ruling of _Donoghue v. Stevenson_ is confined only to the cases of injury to person and property of the plaintiff.

Other factors may weigh with the court in establishing the duty which is owed. This becomes clear when we consider the cases on negligent misstatement and economic loss. The cases in question concerned the use of the principle of _prima facie_ 'duty of care' in conjunction with policy considerations, and it is the compromise\(^\text{12}\) of these policy factors involved which establishes the duty.\(^\text{13}\) We did not see the courts in the nineteenth century suddenly introduce a generalised principle of liability in negligence for physical damages to persons and property, despite the drastic change of social conditions after the industrial revolution. It was a gradual development of the law over a period of nearly a century, culminating in the decision of a bare majority of the House of Lords in _Donoghue v. Stevenson_ in 1932.

Indeed, over the ensuing years the courts have gradually shifted their approach from that of ascertaining a specific duty of care for each kind of situation or class of relationships, to that of starting from the position of the general duty of care as enunciated in _Donoghue v. Stevenson_. The process of change culminated in the

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\(^{11}\) _Ann v. Merton LBC [1978] AC 726_, per Lord Wilberforce.

\(^{12}\) I borrow this term from Demogue in Cardozo, J.'s work _The Paradoxes of Legal Science_, it is said, "The goal of juridical effort," says Demogue, 'is not logical synthesis, but compromise." (emphasis added), Cardozo, B., _The Paradoxes of Legal Science_, N.Y.: Columbia U. Press. 1928, p.5. See also, ibid., at p.56. where Cardozo J. qualified the term as follows, 'What has been spoken of as a compromise is perhaps more accurately described as a concordance.' _Demogue, Analysis of Fundamental Notions Vol. 7. Modern Legal Philosophy Series_, p.570.

House of Lords' authoritative statement first expounded by Lord Reid in *Dorset Yacht* where he stated:

"*Donoghue v. Stevenson* [1932] AC 562 may be regarded as a milestone, and the well-known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion..."\(^{14}\)

However, what we are still seeing today is a further gradual exploration of the possible principled structure which may govern liability in negligence for purely economic loss. With the decision of *Murphy*, the current characteristic of judicial attitude toward economic loss is legal formalism. It used to be thought as a result of the rule in *Derry v. Peek*\(^ {15}\) that there was the 'general rule that liability in the tort of negligence did not extend to purely economic loss.'\(^ {16}\) *Hedley Byrne v. Heller*\(^ {17}\) was an additional exception to those recognised historically as arising from a special relationship. Given the development of applications of *Hedley Byrne v. Heller*,\(^ {18}\) it is now an open question which cases represent the general rule, and which the exception.\(^ {19}\) Indeed, it can be quite incomprehensible in the context of doctrinal argument against denying tort liability for economic loss, if one does not understand the principle of privity, the rule against the third party benefits as well as other rules in the contract law at the same time.\(^ {20}\)

Once it became generally settled in law that, at least in some circumstances, recovery could be had for the economic loss suffered as a consequence of negligent misrepresentation,\(^ {21}\) the question arose whether purely economic loss might not be recoverable in other types of actions based on a formal (or principle-based) analysis of negligence. The only general principle recognised by the House of Lords, with


\(^{15}\) [1889] 14 App Cas 337 (HL).

\(^{16}\) Atiyah, P. 'Negligence and Economic Loss' (1967) 83 L.Q.R. 248. However, Professor Feldthusen argues that no such general rule exists in his *Economic Negligence*. Feldthusen, Bruce, *Economic Negligence*, (The 3rd edition, Toronto: Carswell, 1994)

\(^{17}\) [1964] AC 465

\(^{18}\) Ibid.

\(^{19}\) The more restricted view of the boundaries of the rule in *Hedley Byrne v. Heller*, taken by the Privy Council in *Mutual Life and Citizens Assurance Co. v. Evatt* [1971] 2 WLR 23


reference to the House of Lords' recent decisions,\textsuperscript{22} for extending the range of liability in negligence case is that of 'proximity', a concept with no content. Perhaps, the proximity test is the best way to be insured against Cardozo's fear of 'unlimited liability to an unlimited class of persons for an unlimited period of time.'\textsuperscript{23} Although some of the leading cases are well-known, it may be helpful to set out briefly the evolution of legal discourse on the legal principles that govern in the area of liability for purely economic loss.

5.1.1. Spartan Steel & Alloys, Ltd. v. Martin & Co.
The judgment of the Court of Appeal in Spartan Steel & Alloys, Ltd. v. Martin & Co.\textsuperscript{24} is a convenient starting point for examining the flurry of judicial and academic concern over the issue of when economic loss may be recovered. In Spartan Steel, the defendants' employees severed a power cable. The plaintiffs, who were the owners of a nearby factory, incurred some physical damage when molten metal in their furnaces cooled. The defendants conceded that they were liable for this damage. The plaintiff, however also sought to recover the loss of the profits they would have made if they could have fabricated the metal that was spoiled and sold it as finished goods. They further sought recovery for the lost profits for metal that they would have been able to melt and fabricate during the time that their factory was inoperative owing to the negligent conduct of the defendants. The trial court allowed all these items of damages. The defendants appealed against that portion of the trial court's judgement which allowed any damages for loss of profits.

The Court of Appeal allowed the claim for loss of profits on the metal that was damaged but a majority of the court denied recovery for any other loss of profits during the period that the factory was inoperative owing to absence of electric power. Lord Denning MR, found unhelpful analyses which would deny recovery for the loss of profits on the basis that there was either 'no duty' or that the damage was 'too remote'. He thought that such tests should be discarded and that the time had come 'to consider the particular relationship in hand, and see whether or not, as a

\textsuperscript{22} Marc Rich v. Bishop Rock Marine Co. Ltd and others, (The Nicholas H) [1996] 1 AC 211.
\textsuperscript{23} Ultramares v. Touch, 174 NE 441 (1931) per Cardozo C.J.
\textsuperscript{24} [1973] QB 27 (CA).
matter of policy, economic loss should be recoverable.\footnote{Ibid., at 37.} He thus concluded that the loss of profit on the metal that the plaintiffs would have been able to process and fabricate but for the fact that their power was cut off could not be recovered 'because that was economic loss independent of the physical damage'.\footnote{Ibid., at 39} Edmund-Davies LJ. disagreed on this point. He noted that it was common ground that the lost profits on the metal that was ruined in the process of fabrication and the lost profits on the metal that the plaintiffs were unable to process and fabricate were equally foreseeable and equally direct consequences of the defendants' admitted negligence. Admittedly, the former profit was loss as a result of physical damage done to the material in the furnace at the time when the power was cut off. 'But what', he asked, 'has that purely fortuitous fact to do with legal principle?'\footnote{Ibid.} In answer to his own question he replied: 'In my judgment, nothing'.\footnote{Ibid.}

5.2. High-water Mark of the Foreseeability Principle

5.2.1. Anns v. Merton London Borough Council

Whatever the appeal of Lord Denning's conclusion, that whether and in what circumstances there may be recovery for economic loss ultimately depends on policy considerations, developments in the House of Lords soon raised the question whether Lord Denning's approach was in point of fact the correct one. \textit{Anns v. Merton LBC},\footnote{[1978] AC 728.} decided in 1977, involved a group of plaintiffs who were the long-terms lessees of a group of flats in a housing development that had been completed in 1962. Two of plaintiffs were original lessees, but the others acquired their leases by subsequent assignment. The block of flats had been constructed with inadequate foundations.\footnote{Ibid., at 760.} Although some aspects of Anns approach have been discussed above,\footnote{See discussion above 4.2.1. The Existence and Nature of 'Duty of Care'.} it is nevertheless relevant in the present context. What gave fuel to the controversy with which we are concerned was not so much this fairly narrow holding but Lord Wilberforce's statement, citing among other authorities Lord Reid's
speech in Home Office v. Dorset Yacht Co.,32 that 'the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.'33 This is indeed a generalised principle laid down in Donoghue v. Stevenson, with the restatement of Lord Wilberforce in Anns.34 Instead Lord Wilberforce, thought, one had to ask two questions, First, was there 'a sufficient relationship of proximity or neighbourhood' such that it was 'in the reasonable contemplation' of the defendant that carelessness on his part would be likely to cause damage to the plaintiff, 'in which case a prima facie duty of care arises'.35 Secondly, if that in fact were the case, one would then have to consider 'whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise'.36 Among the examples which he gave of situations where such limitations might be appropriate was that of negligent misrepresentation.37

Although Anns involved physical damage to property, Lord Wilberforce's speech obviously raised the question whether the traditional distinction between purely economic loss and other sorts of loss was about to be discarded and replaced by a 'more principled' mode of analysis. This was heavily criticised by the House of Lords in Murphy. However, the most revealing significance of the Anns formulation perhaps was to create a very heavy burden of persuasion on the defendant, namely, anyone who is negligent can be found to be in breach of duty unless there are conflicting considerations of policy.38

5.2.2. Junior Books Ltd. v. Veitchi Co.

33 Anns, [1978] AC 726 at 751.
36 Ibid., at 752.
37 The House of Lords had of course declared that an action for negligent misrepresentation might be brought, even in the absence of some 'special relationship', Hedley Byrne & Co, v. Heller & Partners, Ltd. [1964] AC 465, but had not yet spelled out, and may perhaps still not have the limits of that liability.
In 1983, *Junior Books* turned out to be the high-water mark of the attempt to 'rationalise' the law of tort concerning the recovery of economic damages by application of the 'reasonable foreseeability' principle. In *Junior Books Ltd. v. Veitchi Co.*, the defendant was a subcontractor who had installed a defective floor in a factory. The owner of the factory was permitted to bring an action sounding in negligence, not only for the cost of correcting the defect but also for the foreseeable loss of profits suffered as a result, despite the lack of privity of contract. There was no allegation that the defective flooring created any danger to life or limb or to any other physical property. Except for Lord Brandon, all of the judges in *Junior Books* expressed agreement with the speech of Lord Roskill. To the argument that allowing recovery in such cases would 'open the floodgates', Lord Roskill responded that although 'policy considerations have from time to time been allowed to play their part in the tort of negligence since it first developed...', yet today I think its scope is best determined by consideration of principle rather than of policy'.

He cited, with approval, the speeches of Lord Reid in *Dorset Yacht* and of Lord Wilberforce in *Anns*. Applying the criteria laid down by Lord Wilberforce in *Anns* to the facts before him, he saw 'nothing whatsoever to restrict the duty of care arising from the proximity of which I have spoken.' In the same case Lord Fraser and Lord Roskill rejected the floodgates argument as unattractive, because it involved drawing an 'arbitrary and illogical line just because it had to be drawn somewhere.'

Lord Roskill claimed here that the House of Lords was merely extending an existing principle to a new situation, but when the House of Lords had to consider what implications this had for the classic *Spartan Steel* type situation, they left this for future judicial interpretation. In dissent, Lord Brandon insisted that the only duty the subcontractor had to the owner of the factory was to install the floor so as to insure that there was no danger to persons or property, excluding the property in question, i.e. the floor itself. Lord Roskill in *Junior Books* also cited a number of Commonwealth cases of which the most well known is *Caltex Oil (Australia) Pty. Ltd.*

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39 [1983] 1 AC 520
40 Ibid. at 539.
41 Ibid. at 546.
42 *Ultramares Corporation v. Touche*, 174 NE 441, 447, per Cardozo CJ
43 per Lord Fraser, [1983] 1 AC 520 at 532.
In that case, the dredge had damaged a pipeline owned by an oil refining company. The pipeline connected the refinery on one side of a bay with an oil terminal owned by the plaintiff on the other. The plaintiff’s terminal depended on the pipeline to receive oil from the refinery. The High Court of Australia held that the plaintiff was entitled to recover the foreseeable expenses incurred in finding alternative means of getting oil to its terminal. The High Court of Australia stressed that liability was ‘controlled’ both as regards claim and loss. The defendant knew of the risk to Caltex as a specific individual rather than as a general class, and the loss claimed was not of profits but of an expenditure necessarily incurred by someone who, to their knowledge, relied directly on the use of the pipe, which itself was within the scope of their duty of care.

In Caltex, a number of different approaches were taken. Gibbs and Mason JJ were prepared to allow recovery because, on the facts, the defendant ought to have foreseen damage to the plaintiff individually and not merely as a member of a general or unascertained class of persons, as would be sufficient under Lord Atkin’s neighbour principle. Stephen J thought that what was required, and present in this case was a high degree of proximity between the defendant’s act and the plaintiff’s loss – there was a direct or foreseeable causal connection between the loss and the negligent act. The difference between these two approaches seems to be that Gibbs and Mason JJ required the plaintiff to be specifically foreseeable whereas Stephen J seems to have required that the specific economic loss which he suffered (as opposed to economic loss generally) be foreseeable.

The judges in Caltex each attempted to formulate general principles which, apart from foreseeableability, would limit the persons, or class of persons, to whom a duty of care may be owed in respect of pure economic loss. Although the approaches of the various members of the High Court in Caltex have been criticised by English judges, the critics have themselves been unable to offer a solution to the problem. It should be noted that in Caltex Stephen J expressed the view that ‘in the general realm

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46 The High Court of Australia tried to limit the sweep of its decision by declaring that reasonable foreseeability of economic loss was not enough. There had to be a sufficient relationship of ‘proximity’ between the parties. (1976) 136 CLR 529 at 574-5 (Stephen J.) at 553-6 (Gibbs J.).
47 The issue of ‘remoteness of damage’.
of negligent conduct it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment.49 It may well be the case that Stephen J’s approach in Caltex was influential in sowing the seed for the development of Deane J’s extended notion of proximity in Jaensch v. Coffey.50

5.2.3. McLoughlin v. O’Brien

The points made about the development of duties in the law of negligence in relation to economic loss apply elsewhere in the same tort. The attempt to find coherence for the law through classifying the factors that will give rise to the recognition of a duty of care and the correlative right in the plaintiff is as much a difficult exercise generally, as it is for economic loss. This can be related to the uneasy interaction between general rules and specific rules. In McLoughlin v. O’Brien,51 the House of Lords allowed recovery of damages for emotional distress by a mother who had not witnessed the serious injury to her children and husband in an automobile accident, but first saw them a few hours later in a battered condition in the hospital where she was also informed that one of the children had been killed. Lord Bridge and Lord Scarman concluded that, with regard to the question of the limits of liability for the infliction of nervous shock, there were ‘no policy consideration sufficient to justify limiting the liability of negligent tortfeasor by reference to some narrower criterion than that of reasonable foreseeability.’52

The speeches in the House of Lords reveal a divergence of opinion on the role of policy and its relationship to reasonable foreseeability in the field of nervous shock. There is a debate between Lord Wilberforce and Lord Edmund-Davis on the one hand and Lord Scarman and Lord Bridge on the other hand over the appropriate application of Lord Atkin’s neighbour principle to the issue of liability for nervous shock. Lord Wilberforce, supported by Lord Edmund-Davies, applies the two-stage test he had devised in Anns. However, Lord Bridge, supported by Lord Scarman appears to differ in accepting that the test of reasonable foreseeability is itself sufficient.

49 (1976) 136 CLR 529, at 575, per Stephen J.
50 (1984) 155 CLR 549, 578-611. Also see discussion in 5.4. Proximity Defined: An Australian Experience.
51 [1983] 1 AC 410
52 [1983] 1 AC 410, at 443, per Lord Bridge.
The apparent difference is heightened by the exchange between the two viewpoints. Lord Edmund-Davis disagreed with the conclusion of Lord Scarman, who in a brief speech expressing his agreement with Lord Bridge asked, ‘Why then should not the courts draw the line, as the Court of Appeal [which denied recovery on policy grounds] manfully tried to do in this case?’ To which question Lord Scarman declared ‘simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.’ To which Lord Edmund-Davis replied that this proposition was as novel as it is startling. Lord Edmund-Davies’s insistence that policy in the development of law appears as a reflection of the fact. No one can deny that policy factors never influence judicial decision-makers. Indeed, the insistence that the foreseeability be ‘reasonable’ is itself capable of bringing in policy factors. On closer examination it is clear that both Lord Bridge and Lord Scarman do leave room for policy in applying the neighbour principle; it is simply a matter of rejecting any policy issue as being capable of rebutting the outcome of the foreseeability test in these circumstances.

53 Ibid., 431, per Lord Scarman
54 Ibid.
55 Ibid., at 427, per Lord Edmund-Davies.
56 Ibid., at 431, Lord Scarman speaks of applying it ‘in circumstances where it is appropriate’ and identifies ‘factors to be weighted ...when the test of reasonable foreseeability is to be applied. Lord Bridge considers policy issues before rejecting them (at 441).
5.3. Retreat from Anns:

5.3.1. Peabody v. Sir Lindsay Parkinson & Co.

The first retreat took place in Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co.\(^5^7\) In this case, The Governors of the Peabody Donation Fund (Peabody) decided to develop a building site for a large number of houses in the London Borough of Lambeth (Lambeth). They engaged contractors, architects and consulting engineers for carrying out the building work. Because of possible movement in the subsoil the architects and engineers designed a drainage system incorporating flexible joints between the pipes at various critical points. The flexible drainage system was shown on the building plans which were submitted to Lambeth as required by statute (the London Government Act 1963, sch 9 para 13) and which were duly approved. However, when construction work was ready to begin the site architect agreed with the council drainage inspector that the drainage system should be of a different, rigid, design and contractors proceeded with the work on that basis. The departure from the approved design subsequently came to the notice of a different drainage inspector but he did nothing and in particular did not inform his superiors. When the drains were tested two years later it was discovered that many had broken and needed to be reconstructed and completion of the whole project was delayed while the work was done. Peabody suffered substantial losses and sued the local authority alleging negligence in the discharge of their statutory functions in that they failed to ensure that flexibly jointed drains were installed as required by the approved plans. The claim succeeded at first instance but failed by unanimous decisions in both the Court of Appeal and the House of Lords.

Lord Keith, delivering a judgment with which Lords Scarman, Bridge, Brandon and Templeman concurred, identified two reasons why Lambeth was under no liability to indemnify Peabody for their disastrous loss. First, he pointed out that Peabody as owners of the site themselves bore a statutory responsibility to ensure that the drains conformed to the design approved by Lambeth, and should for this reason be regarded as having caused their own loss. Secondly, the purpose for which the statutory powers of approval and inspection had been conferred on Lambeth was not to safeguard building developers against loss resulting from their failure to comply with approved plans but was to safeguard occupiers of houses and the

public generally against dangers to their health from defective drainage installations. The provisions were public health measures. Lambeth owed no duty to Peabody to activate their statutory powers, notwithstanding that they might reasonably have foreseen that failure to do so might result in economic loss to Peabody, because the purpose of avoiding such loss was not one of the purposes for which these powers were vested in them.

In Peabody, the judgment of Lord Keith demonstrates a disenchantment with Lord Wilberforce’s two-stage test. He cautioned against treating Lord Wilberforce’s words as being of a definitive character and said that the true question in each case was whether the particular defendant owed to the particular plaintiff a duty of care of the scope which was contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. He drew upon the opinion of Lord Morris in Home Office v. Dorset Yacht Co. Ltd.58 where the test was put in terms of whether it was fair and reasonable that a duty of care should exist and of where ‘reason and good sense’ should point, and concluded that in determining whether or not a duty of care was incumbent upon a defendant it was material to take into consideration whether it was ‘just and reasonable’ that it should be so.59

The following year, in Candlewood Navigation Corp. v. Mitsui O.S.K. Lines, Ltd., 60 a time charterer sought to recover the economic loss sustained when the ship it had chartered had to be taken out of service for repairs after a collision with defendant’s negligently navigated vessel. Although the case arose in Australia, the Privy Council refused to accept the reasoning of the Australian judges in the Caltex Oil case. Instead, citing English precedent and Justice Holmes’ opinion in the case, the Privy Council reaffirmed the traditional view that the time charterer could not recover its economic loss consequent to the damage of property owned by another. This was then shortly thereafter also reaffirmed by the House of Lords in Leigh & Sillavan Ltd. v. Aliakmon Shipping Co.61 It is noteworthy that when Leigh was in the Court of Appeal, Robert Goff LJ suggested that Lord Wilberforce’s speech dictated a reconsideration of overdue attitudes, especially in cases of economic loss, and required a search for

58 [1976] AC
59 [1985] AC 210 at 240
60 [1986] AC 1 (PC).
reason or principle or policy which could justify a denial of recovery when the defendant had inflicted foreseeable damage upon the plaintiff.⑥²

5.3.2. Yuen Kun Yeu v. AG of Hong Kong

Whatever its significance, Lord Wilberforce’s two-stage test has since been implicitly or explicitly rejected, most notably by Lord Keith in Yuen Kun-Yeu v. AG of Hong Kong⑥³, a decision of the Privy Council.⑥⁴ The disillusionment with the Anns formula began some years before Yuen Kun-Yeu v. AG of Hong Kong, after the decision in Junior Books v. Veitchi⑥⁵ expanded recovery of ‘pure economic loss’ in negligence to a hitherto unprecedented extent. Because Lord Roskill, delivering the leading judgment in Junior Books, relied heavily on Lord Wilberforce’s dictum in Anns v. Merton LBC⑥⁶, and because the extension of liability in Junior Books was generally received disapprovingly as a departure from tradition, the Anns formula fell into judicial disrepute culminating in Lord Keith’s outright assault in Yuen Kun Yeu.

This was an action by depositor against the Commissioner for Banking in Hong Kong represented by the Attorney-General. One of his duties, derived from a statutory ordinance, was to compile a register of licensed deposit-taking companies. The plaintiff had deposited large sums of money with a company on the Commissioner’s register. The company subsequently went into liquidation and the plaintiffs lost their money.

The Plaintiffs argued that they had made the deposits in reliance upon the company’s registration and that the Commissioner knew or ought to have known had he taken reasonable care in carrying out his duties in relation to registering and licensing the company.

The question as to whether the Commissioner owed the plaintiffs a duty of care arose. In the course of finding that no duty arose in this instance, the Privy Council closely examined Lord Wilberforce’s two-stage test in Anns. Lord Keith

⑥² [1985] QB 350 at 395, per Goff LJ.
⑥³ Yuen Kun-Yeu v. AG of Hong Kong [1988] AC 175.
⑥⁴ Decisions of Judicial Committee of Privy Council are not part of the binding precedent structure in England.
emphasised, in particular, that mere foreseeability of harm did not by itself create a duty in the absence of a relationship of ‘proximity’.

‘Proximity’ was not synonymous with foreseeability but rather a composite concept which embraced a number of factors relevant to the determination of whether the relationship at issue was sufficiently close and direct to give rise to a duty of care. In one sense this seems to be no more than a different expression of same argument. After all the Anns test recognises the relevance of ‘other considerations’ in the second limb of its two-stage formulation. But Lord Keith did not like the two-stage formulation, perceiving it as giving too great a weight to foreseeability as the determinative criterion. Thus, to diminish its importance, Lord Keith widened the meaning of ‘proximity’ to include factors which might ordinarily be considered under the second limb of the Anns formulation.
5.3.3. D. & F. Estates Ltd v. Church Commissioners for England

In 1988, the House of Lords decided D. & F. Estates, Ltd. v. Church Commissioners for England, 67 a case involving a block of flats in which the plaster work had been done negligently by one of the subcontractors. 68 It was held that, in the absence of a contractual relationship between the parties, the cost of repairing a defect in physical property that was discovered before the defect had caused personal injury or physical damage to other property was not recoverable in a negligence action by a remote purchaser or lessee. In this case, Lord Bridge of Harwich refers to the argument that subcontracting in the building industry 'has given rise to great problems: financially irresponsible contractors, and their employers, may leave an injured person without remedy. So there was a distinct tendency to hold that the developer of a housing estate cannot delegate his duties to men of straw or shell companies, but this is now doubtful.'69

5.3.4. Caparo Industries plc v. Dickman

In the aftermath of Yuen Kun-Yeu v. AG of Hong Kong, the courts engaged in the formulation of a new concept of duty to replace the Anns approach. In a series of cases, culminating in the Court of Appeal decision in Caparo Industries plc v. Dickman70, the court developed the ‘three-stage’ approach to the determination of duty, consisting of the following criteria: firstly, was the harm reasonably foreseeable? Secondly, was the relationship between the plaintiff and the defendant sufficiently proximate? And thirdly, was it ‘just and reasonable ’ to recognised duty of care in these circumstances? The third enquiry, in allowing the court to consider the fairness or justice of imposing or failing to impose a duty of care was also regarded by some courts as embracing considerations of policy.71

Did the shift from a two-stage to a three-stage formulation produce anything other than a superficial change to the formulation of the duty of care? It is arguable that the three-stage approach in Caparo tells us very little and indeed will seldom dictate a particular result. It seems clear that, with regard to the duty of care, any of

68 See discussion above in 4.3.2. on D. & F. Estates Ltd. v. Church Commissioners for England.
69 Ibid, at 209, per Lord Bridge
the leading cases which have been so critical of Lord Wilberforce could perfectly easily have been decided as they were by using his formulation. In *Yuen Kun Yeu v. AG of Hong Kong* 72, clearly the first part of Lord Wilberforce's test was satisfied. The Commissioner could reasonably have foreseen that if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit money with it would be at risk of losing that money. But having decided that a *prima facie* duty of care arose, the court could have held further that here, clearly, there existed those other considerations mentioned by Lord Wilberforce which ought to negative, reduce or limit the scope of the duty or the class of persons to whom it is owed. In particular the factors which led Lord Keith to decide that no duty of care was owed might have been regarded as sufficient to negative any *prima facie* duty of care owed.

Similarly, the decision in *Caparo v Dickman* 73 could have been reached by the route which was consistent with Lord Wilberforce's formulation. The House of Lords might just as cogently have argued either (as did Bingham LJ in the Court of Appeal), that the relationship between shareholders and auditors was indeed one which came within proximity or neighbourhood since it must be obvious even to the meanest auditory intelligence that shareholders may well rely on a company's audited accounts in taking investment decisions, or it might have been argued that notwithstanding proximity there were good reasons for not transferring the plaintiffs' loss to the defendant. The central point is that in either case the result would not have been dictated by Lord Wilberforce just as it was not dictated by any new formulation.

The recognition that the definition of duty remains flexible is made abundantly clear in the judgment of Lord Oliver in *Caparo* when he says:

> 'Thus the postulate of a simple duty to avoid any harm ... becomes untenable without the imposition of some intelligible limits to keep the law of negligence within the bounds of common sense and practicality. Those limits have been found by the requirement of ... a 'relationship' of proximity between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which occurred be 'just and reasonable.' But although the cases in which the courts have imposed or withheld liability are capable of an approximate character of categorisation, one looks in vain for some common denominator by which the

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72 *Yuen Kun Yeu v. AG of Hong Kong* [1988] AC 175.
73 *Caparo Industries plc v. Dickman* [1990] 2 AC 605.
existence of the essential relationship can be tested. Indeed it is
difficult to resist a conclusion that what has been treated as three
separate requirements are...merely facets of the same theory.\textsuperscript{74}

To Lord Oliver, the essence of the imposition of a duty of care is dictated by the
tenets of ‘common sense and practicality.’ The court’s task is to decide this with
reference, among other considerations, to what is ‘fair and reasonable’. But
obviously these terms - ‘common sense and practicality,’ ‘fair and reasonable’ -
depend very much for their interpretation upon the court’s own particular
perspective. Although proximity forms a central element in the three-stage test for
determining the existence of a duty of care, it is far from free of difficulty. Lord
Oliver was being sceptical when he stated in \textit{Caparo} that

‘Proximity is no doubt a convenient expression so long as it is
realised that it is no more than a label which embraces not a
definable concept but merely a description of circumstances from
which pragmatically the courts conclude that a duty of care exists.’\textsuperscript{75}

It is also apparent in Lord Bridge’s judgment in the same case. Commenting on the
three-part approach to duty which the Court of Appeal applied in \textit{Caparo}, he
remarks:

‘The concepts of proximity and fairness embodied in these
additional ingredients are not susceptible of any such precise
definition as would be necessary to give them utility as practical
tests, but amount ... to little more than convenient labels to attach to
the features of particular specific situations ...which... the law
recognises pragmatically as giving rise to a duty of care of a given
scope. While recognising, of course, the importance of the
underlying general principle common to the whole field of
negligence, I think the law has now moved in the direction of
attaching greater significance to the more traditional categorisation
of distinct and recognisable situations as guides to the existence, the
scope and the limits of the varied duties of care which the law
imposes.’\textsuperscript{76}

Thus the approach to duty pioneered in \textit{Yuen Kun Yeu v. AG of Hong Kong} in 1987 is
later refined in \textit{Caparo v. Dickman} in 1990 to act not as a ‘practical test’ but as a
‘guide’ or a ‘label’. The concept of duty is not to be captured by a single principle or
principles but is ‘varied’, composed of ‘distinct and recognisable situations.’ The task
of the court is to proceed ‘pragmatically’ and ‘incrementally by analogy’ paying

\textsuperscript{74} Ibid., at 633.
\textsuperscript{75} Ibid.
\textsuperscript{76}
particular attention to the configuration of facts in individual cases. It is important to recognise that the three considerations which the House of Lords proffer as a guide to determining the duty question should not be regarded as three necessary and separate requirements (contrast the approach of the Court of Appeal in the same case), nor should they be viewed as having fixed and mutually exclusive meanings. There is a perceived shift away from a blueprint which captures the essential meanings of duty towards a case-by-case approach which is sensitive to specific situations.

Given this chronological survey on how the House of Lords has applied the expansion and limitation of duty of care, with particular reference to the House of Lords' decisions in Caparo Industries PLC v. Dickman, a negligent misrepresentation case, that the only general principle (which is debatably to be regarded as a principle) recognised by the House of Lords for organising the extent of liability in negligence cases is that of 'proximity', a concept that is lacking in substance.78

76 Ibid., at 618 per Lord Bridge.
5.4. Proximity Defined: An Australian Experience

In Caparo, both Lord Bridge and Lord Oliver adopted the ‘proximity’ approach which is, to a considerable extent, derived from Australian sources. It is therefore of some interest to examine how this approach has been developed within the High Court of Australia since it was initiated by Deane J in Jaensch v. Coffey. Until the judgment of Deane J in Jaensch v. Coffey the generally accepted view in the legal profession was that the terms ‘neighbourhood’ and ‘proximity’ were interchangeable and that both were to be adjudged by reasonable foresight of harm. However, in Caltex Oil (Australia) Pty Ltd v. The Dredge ‘Willemstad’ Stephen J spoke of the need ‘for some control mechanism based upon notions of proximity between the tortious act and resultant detriment’. He went on to say that some guidance in determination of the requisite degree of proximity will be derived from the broad principle that liability for negligence ‘is no doubt based upon a general sentiment of moral wrongdoing for which the offender must pay.’ Stephen J said that such ‘a sentiment will only be present when there exists a degree of proximity between the injury such that the community will recognise the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victim of his negligence’. The notion of proximity was taken up by Deane J in Jaensch v. Coffey who declared:

'The requirement of a relationship of 'proximity'...should...be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care.'

In Sutherland Shire Council v Heyman Deane J again returned to the role of proximity in determining the existence of a duty of care. After declaring that the approach in Anns might be a convenient one in cases involving ordinary physical injury, he said:

'Vee approach is, however, inappropriate in cases in the less developed areas of the law of negligence such as where what is alleged is a negligent omission

79 [1990] 2 AC 605, at 618 per Lord Bridge.
80 [1990] 2 AC 605, at 633, per Lord Oliver.
81 (1984) 155 CLR 549
82 (1984) 155 C.L.R. 549
83 (1976) 136 C.L.R. 529 at 574, per Stephen J.
84 [1932] AC 562 at 580, per Lord Atkin.
85 (1976) 136 CLR 529, at 575, per Stephen J.
86 (1984) 155 CLR 549 at 583-584, per Deane J.
87 (1985) 157 CLR 424
or failure to act or where the damage sustained has been merely economic in its nature. In such cases, as has been said, the mere fact that it is reasonably foreseeable that carelessness on the part of a person may be likely to cause damage to another person is not in itself sufficient to give rise to a *prima facie* duty of care: a relevant duty of care will arise only if the requisite element of 'proximity' in the broad sense in which Lord Atkin used the term in *Donoghue v. Stevenson*, is satisfied. In any general formulation of the ingredients of a cause of action in negligence which is intended to encompass cases involving mere omissions or mere economic loss, 'proximity' of relationship in this broader sense should be seen as a distinct general requirement which must be satisfied before any duty of care to avoid reasonably foreseeable injury will arise.'

In *Steven v. Brodribb Sawmilling Co. Pty. Ltd*[^97], Deane J again said that the duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to cause injury must necessarily be restricted by the overriding control that the duty is only owed to a neighbour in the sense of a person who is for relevant purposes in a relationship of proximity.

The requirement of proximity as a control on the foreseeability test has now been accepted by the High Court of Australia. In *San Sebastian Pty. Ltd v. The Minister*[^90] Gibbs CJ Mason, Wilson and Dawson JJ said: ^[91] 

> The relationship of proximity is an integral constituent of the duty of care concept. We refer to that relationship in its broader sense, namely, as embracing a general limitation upon the test of reasonable foreseeability.

The High Court of Australia again applied the proximity requirement in *Cook v. Cook*[^92] and *Hawkins v. Clayton*.[^93] It is openly accepted that the 'proximity' requirement is a label, not a test. It is a control device with no content in order to determine the existence or absence of the duty of care in any possible circumstance. And this requirement has also been generally accepted by the House of Lords[^94] and by the Privy Council.[^95] It is therefore worth examining what was the Deane J's original idea of 'proximity' approach. In *Jaensch v. Coffey*[^96] Deane J explained the notion of proximity. He said: ^[97] 

[^97]: (1985) 157 CLR 424 at 501, per Deane J.
[^88]: (1985) 157 CLR 424 at 501, per Deane J.
[^99]: (1986) 160 CLR 1
[^100]: (1986) 162 CLR 340.
[^102]: (1986) 162 CLR 376
[^103]: (1988) 62 ALJR 240
[^104]: Peabody v. Sir Lindsay Parkinson & Co. Ltd (1985) 1 AC 210, at 240
[^106]: (1984) 155 CLR 549
'It is directed to the relationship between the parties insofar as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by another. It involves the notion of nearness or closeness and embraces physical such as overriding relationships of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness and directness of the relationship between the particular act or cause of action and the injury sustained... The identity and relative importance of the considerations relevant to an issue of proximity will obviously vary in different classes of case and the question whether the relationship is 'so' close that the common law should recognise a duty of care in a new area or class of case is, as Lord Atkin foresaw, likely to be difficult of resolution in that it may involve value judgment on matters of policy and degree.'

Deane J denied that there was scope for decision in a particular case by reference to individual predilections ungoverned by authority or that it was a proper approach to the requirement of proximity for it to be treated as a question of fact to be resolved merely by reference to the particular relationship between a plaintiff and the defendant in the circumstances of particular case. He said:98

The requirement of a 'relationship of proximity' is a touchstone and a control of the categories of case in which the common law will admit the existence of a duty of care and, given the general circumstances of a case in a new or developing area of the law of negligence, the question whether the relationship between plaintiff and defendant with reference to the allegedly negligent act possessed the requisite degree of proximity is a question of law to be resolved by the processes of legal reasoning by induction and deduction. The identification of the content of the criteria or rules which reflect the requirement in developing areas of the law should not, however, be either ostensibly or actually divorced from the considerations of public policies which underlie and enlighten it.'

In Sutherland Shire Council v. Heyman99, Deane J again explained the meaning of proximity in terms similar to his explanation in Jaensch v. Coffey100. But he added:

'It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party upon such care being taken by the other in circumstance where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case.101

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98 Ibid. at 585.
100 (1984) 155 CLR 549.
In the same case, he repeated that this conception of proximity did not mean the matter had to be determined by idiosyncratic notions of justice or morality or that it could be dealt with as a question of fact. He concluded:

‘Given the general circumstances of a care in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is ‘fair and reasonable’ ...or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.’

Cook illustrates how the notion of ‘proximity’ might be used to transform the law of negligence as it has hitherto been practised, even if the approach to the standard of care suggested in this case has not been subsequently taken up by other courts.

The issue in Cook was whether a driver, known to be unqualified and to lack skill, owed a duty to a passenger to exercise the degree of skill required of a reasonably experienced and competent driver. The traditional approach would be to hold that the driver owed a duty of care to her neighbour, the passenger, and then ask what was the standard of care required to discharge the duty. In the determination of that question the knowledge of the passenger of the driver’s lack of skill would clearly be a relevant factor. The onus would be on the defendant to establish the lack of ordinary skill and the plaintiff’s knowledge of it. This was the approach of Brennan J in Cook. However, Mason, Wilson, Deane and Dawson JJ approached the issue in Cook differently. They said that the ‘more detailed definition of the objective standard of care for the purposes of a particular category of case must necessarily depend upon the identification of the relationship of proximity which is the touchstone and control of the relevant category’. Later they said:

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102 Ibid., per Deane J.
103 (1986) 162 CLR 376.
104 The rationale of Cook v. Cook has not transformed the negligence law in the matter of standard of care.
105 (1986) 162 CLR 376
107 Ibid., at 382.
108 Ibid., at 383-84.
'It would be contrary to common sense and the concept of what is reasonable in the circumstances (considerations which are basic to the common law of negligence) to measure the content of the duty of each of such an instructor and such a pupil by the standard to be expected of the ordinary experienced, skilled, and careful driver, with the result that the degree of skill required of each of them toward the other was the same. Where such special and exceptional facts transform the relevant relationship, questions of the requisite proximity of relationship and of the standard of any duty of care must be determined by reference to the more precisely confined category into which the particular relationship falls. Assuming that the requirement of proximity remains satisfied, the standard of care, while remaining an objective one, must be adjusted to the exigencies of the relevant relationship in that it will be the degree of care and skill reasonably to be expected of the hypothetical reasonable person of the law of negligence projected into that more precisely confined category of case.'

Despite the expressed disagreement between Brennan J and the majority of the court in Cook over the proximity approach, as the concurrence of Brennan J shows, the proximity approach to the standard of care will usually lead to the same result as the traditional approach.

5.4.1. Weakness in the Concept of 'Proximity'

Although the courts have highlighted the central place that proximity holds in determining whether a duty of care exists, the use of the concept of 'proximity' as the criterion of duty has not increased the predictability of judicial decisions or given a real explanation of the grounds upon which a duty of care is imposed in many negligence cases. The difficulty with the notion of proximity is that it is a legal rule without specific content and merely records the outcome of a finding reached on other grounds. Brennan CJ pointed out in San Sebastian Pty Ltd v. Minister:

'The variable content proposed for the notion denies its applicability as a particular proposition of law. True it is that some legal rules import broad community standards, for instance, a rule expressed in terms of what is reasonable. Such a rule nevertheless requires determination of an issue of fact... But proximity is not a community standard by reference to which issues of fact can be determined, nor is it a particular proposition of law excluding a right to relief otherwise open on the fact

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110 (1986) 162 CLR 340, at 368.
of a case. If proximity were misunderstood as being a particular proposition of law expressing a touchstone for resolving a particular case, the judge would be required to define its legal content according to some notion of whether it was appropriate to impose a duty of care in that case. A rule without specific content confers a discretion. The discretion might be described as a judicial discretion and the discretion might be reviewed on appeal but such a rule nonetheless confers a discretion. Damages in tort are not granted or refused in the exercise of a judicial discretion.'

In *San Sebastian Pty Ltd v. The Minister*\(^{111}\) Brennan J declared that he had understood Lord Atkin's general conception in a different way from that now followed by the High Court of Australia. Like the late Professor Julius Stone,\(^{112}\) Brennan J. had understood the neighbour test was satisfied by reasonable foreseeability of loss. He said:\(^ {113}\)

'T beg leave to doubt whether proximity, if it is understood as having a wider connotation than reasonable foreseeability of loss, will prove to be a unifying rationale of particular limiting propositions of law. The particular propositions have not hitherto revealed a common element. If it should appear that the particular propositions can be subsumed within the generic description of proximity, then the stage will be set for a further simplification and development of the law of negligence. Until that stage is reached, I would find in foreseeability of loss the unifying rationale of the occasions when the law recognises the existence of duties of care and I would find that appropriate limitations in particular propositions of law, applicable to differing classes of case.'

In *Leigh and Sillivan Ltd v. Aliakmon Ltd* Robert Goff criticised the expanded concept of proximity saying that once 'proximity is no longer treated as expressing a relationship founded simply on foreseeability of damage, it ceases to have an ascertainable meaning; and it cannot therefore provide a criterion for liability'\(^ {114}\) Deane J, himself, in referring to this criticism by Robert Goff LJ of the proximity requirement, has said that proximity is not to be regarded as a fixed rule of law which leads to a logical conclusion. In *Steven v. Brodribb Sawmilling Pty Ltd*. He said,

'It must be acknowledged that such criticism would have undoubted force if the requirement of proximity of relationship had been propounded as some rigid formula which could be automatically applied as part of the syllogism of formal logic to determine whether a

\(^{111}\) (1986) 162 CLR 340.

\(^ {112}\) Julius Stone has also strongly criticised the concept of 'proximity' as expounded in *Jaensch v. Coffey*. See Julius Stone, *Precedent and Law: Dynamics of Common Law Growth*, (Sydney: Butterworth, 1985.) at Appendix.

\(^ {113}\) (1986) 162 CLR 340 at 368-369.

duty of care arises under the common law of negligence in a particular category of case. The 'general conception' of proximity if relationship was, however, neither propounded by Lord Atkin nor accepted in judgments in this court in that sense. Its acceptance involved neither question-begging nor the introduction of undesirable uncertainty into the common law.'

In *Sutherland Shire Council v. Heyman* Deane J had also referred to the criticism of Robert Goff LJ and said that there was 'an incontestable element of truth in that statement in that the notion of proximity is obviously inadequate to provide an automatic or rigid formula for determining liability'. But he went on to say that to dismiss the general conception on the ground that it did not provide a criterion of liability or that it lacked ascertainable meaning was to 'ignore its importance as the unifying rationale of particular propositions of law which might otherwise appear to be disparate. More important, it is to disregard its substance and true function.'

Deane J's contention, with respect, is questionable, as the notion of 'nearness or closeness,' which is at the heart of proximity, gives no real assistance to a court called upon to determine whether a duty exists. In many cases the parties may be in different parts of the world and yet a duty of care will exist. On the other hand the parties may be in a close and direct relationship yet proximity may not exist at all or, as in *Cook v. Cook*, may be the subject of two or more distinct and separate duties. When a court holds that there was or was not 'nearness or closeness,' it is obviously to make the decision on the grounds outside that concept. If the references to legal reasoning, induction, deduction, fairness and public policy in *Jaensch* and *Heyman* are the real criteria of proximity, then the concept of 'proximity' adds nothing to the solution of the problem if duty and its use is unnecessary.

Moreover, it seems clear from the approach of the High Court of Australia in cases where proximity has been examined that, in a particular case, it will consist of one or more elements such as the ownership, occupation or control of property or chattels, the carrying on of an activity, the assumption of responsibility, the right to control an activity or person, actual or imputed knowledge that the plaintiff relies on the defendant taking care. However, the doctrine of 'proximity' gives no guidance as to which one or more of these elements is determinative of the existence of a duty in a particular case or why the presence of one or more of them does not lead to a duty

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in a particular case. Nor does the doctrine of proximity explain why the duty of care in relation to negligent words or nervous shock, for example, should be defined in the way that it is.

Despite Brennan J's persistent criticism of Deane J's extended concept of proximity, the concept appears to have the support of a majority of the members of the High Court and so duties of care must be developed using his concept of proximity, which not only includes within its conceptual basket his narrower notions of proximity (physical, circumstantial and causal) but also notions of what is fair and reasonable as well as considerations of public policy.\textsuperscript{118} However, there are signs on the horizon that that support might not as solid as it was before the decision of the High Court of Australia in Gala v Preston.\textsuperscript{119}

In that case, the plaintiff and the defendant consumed the equivalent of 40 scotches in a Maryborough Hotel during the course of an afternoon, stole a car and drove North sharing the driving. About four hours after they began their drunken journey the car veered off the road and struck a tree causing the plaintiff to be injured. Subsequently both the plaintiff and defendant were convicted of the theft and unlawful use of a motor vehicle contrary to section 408A of the Criminal Code 1899 (Queensland). The plaintiff sued the defendant in negligence in respect of his personal injuries. At first instance, judgment was entered against the plaintiff on the ground that the plaintiff and the defendant were engaged in a joint illegal enterprise in which the standard of care owed by the defendant to the plaintiff could not be determined. On appeal, the Full Court of the Supreme Court of Queensland held that a standard of care could be determined, the ordinary duty of care applied and the only reasonable inference from the facts was that the defendant had breached that duty of care. The High Court, in allowing an appeal from the Full Court's decision, held unanimously that the defendant as driver of the car owed no duty of care to the plaintiff as his passenger.

A majority of the High Court (Mason CJ, Deane, Gaudron and McHugh JJ) held the defendant owed the plaintiff no duty of care using Deane J's wider concept of proximity. As they expressed it:

\textsuperscript{117} (1986) 162 CLR 376.
\textsuperscript{119} (1991) 172 CLR 243.
When attention is given to the circumstances of the present case it is difficult to see how they can sustain a relationship of proximity which would generate a duty of care'.

They did not specifically identify the consideration or considerations which negated the duty of care, preferring merely to say that

in determining whether the requirement of proximity is satisfied in a particular category of case in a developing area of the law of negligence, the relevant factors will include policy considerations. Where, as in the present case, the parties are involved in a joint criminal activity, those factors will include the appropriateness and feasibility of seeking to define the content of a relevant duty of care.'

Brennan J rejected that approach. As he pointed out, in this case the parties were driver and passenger in a car and there are few more familiar examples of a proximate relationship. If the relationship is to be held not to give rise to a duty of care:

'It must be on account of some consideration which can, and should, be identified. One may say that that consideration denies to the relationship of driver and passenger the character of proximity and that accordingly no duty of care arises. Or one may say directly that that consideration precludes a duty of care from arising. Whether the proposition be put in one way or the other, 'proximity' is surplus to the reasoning... Better to identify the consideration which negates the duty of care than simply to assert an absence of proximity.'

For Brennan J that consideration was that the normative influence of section 408A of the Criminal Code 1899 (Queensland) would be destroyed by admitting a duty of care in the circumstances of this case. Toohey and Dawson JJ also identified the considerations which for them negated the existence of a duty of care. Toohey J held a duty of care not to exist, not because of the difficulty of defining a standard of care, but because the law refuses to set a standard of care and hence to erect a duty where to do so would be to condone a breach of the criminal law by granting a civil remedy. In a case like Gala v. Preston, Dawson J thought it was necessary to seek what lay behind the law’s reluctance to set a standard of care to be observed by the participants in a joint criminal enterprise. In such an exercise he said that he did not derive ‘any great help from the notion of proximity as it has been developed in

120 Ibid., 254.
121 Ibid., 253.
122 Ibid., at 261, per Brennan J.
recent decisions of this court'.\textsuperscript{123} As the relationship of driver and passenger is in other circumstances a textbook example of a proximate relationship Dawson J thought that it was important to identify the underlying principle why the law did not recognise a duty of care in the circumstances in which the plaintiff sustained his injuries in this case; 'merely to describe it as a matter of proximity is to mask the problem.'\textsuperscript{124}

Three of the seven judges in \textit{Gala v. Preston} rejected, then, the value of using Deane J's wider notion of proximity, preferring to base their decision to refuse to erect a duty of care in that case on clearly articulated principles of policy. This is clearly the correct approach because, to pose a hypothetical problem, if the plaintiff in \textit{Gala v. Preston} had chosen to bring his action in the tort of negligent trespass rather the tort of negligence, the judges who relied on the notion of proximity would not have been able to hide behind the mask of proximity (to use Dawson J's words in \textit{Gala v. Preston})\textsuperscript{125} and would have been forced to articulate their policy reasons for denying recovery to the undeserving plaintiff. It is unnecessary to point out that in Australia at the present, unlike in England, the tort of negligent trespass is still available for injuries which are caused directly and negligently.\textsuperscript{126} In actions for negligent trespass 'duty' questions are irrelevant and the notion 'proximity' for solving questions of liability would consequently also be irrelevant. In those actions for personal injuries which can be brought either as an action in negligent trespass or as an action in the tort of negligence, the notion of proximity in its wider sense is unlikely to provide a working criterion of liability as its use could so easily be prevented by the plaintiff. It might be wise, therefore, not to attempt to shoehorn actions for personal injuries as in \textit{Gala v. Preston} into Deane J's extended notion of proximity just for the sake of theoretical consistency (as the majority attempted to do in that case) but to confine that notion only to cases involving recovery of damages for pure economic loss and cases involving damages for nervous shock. This appears to be Dawson J's suggestion in \textit{Gala v. Preston}.\textsuperscript{127} The judgments of Brennan, Dawson

\textsuperscript{123} \textit{Ibid.}, at 276, \textit{per} Dawson J.
\textsuperscript{124} \textit{Ibid.}, at 277, \textit{per} Dawson J.
\textsuperscript{125} \textit{Ibid.}, at 276, \textit{per} Dawson J.
\textsuperscript{126} The High Court in \textit{Williams v. Milotin} (1957) 97 CLR 465, decided that the plaintiff, who was struck from behind by a motor truck while riding a bicycle along a public road and who relied upon the negligence of the defendant to bring an action, could lay his cause of action either as a negligent trespass to the person or as an action for the tort of negligence.
and Toohey JJ in Gala v. Preston have effectively undermined Deane J’s notion of proximity.

No doubt those who contend that the doctrine of ‘proximity’ is the touchstone of the duty of care will reply that the answer in any new area involves ‘value judgments on matters of policy and degree’ and that proximity cannot be divorced from what is ‘fair and reasonable’ or ‘from the considerations of public policy which underlie and enlighten it’. But this reply only seems to indicate that proximity is really another name for duty of care and that the real criteria are concealed and indeterminate in nature.

Although the judges who have adopted the notion of ‘proximity’ are presumably under no illusion of the importance which policy plays in the determination of the duty question, the exposition of the notion in the judgments of the courts has frequently not disclosed why the line was drawn where it was in individual cases or why different criteria are used in different categories of negligence. Why is nervous shock actionable if arising out of the accident or its aftermath but not later? Why was causal proximity in Jaensch ‘better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interests and claims than is a requirement based merely on mechanical considerations of geographical temporal proximity’? The answer that Deane J gave was that “the general underlying notion of liability in negligence is ‘a general public sentiment of moral wrongdoing for which the offender must pay’”. But this invites the further question why does the moral wrongdoing of the defendant stop with those injury results from the impact of matters which themselves formed part of the accident and its aftermath?

Why in Hawkins v. Clayton where a solicitor was held liable for failure to advise the executor of a will of the death of the testatrix, for example, were the elements of reliance by the testatrix and assumption of responsibility by the solicitors rather than the assumption of responsibility and loss to the estate the critical factors in the relationship of proximity between the solicitors and the executor? Would there have been no duty to the executor in Hawkins if the court had found that the testatrix had not relied on the solicitors to inform Mr. Hawkins, the executor, of the existence of

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the will? On the evidence, this was a finding which was open. Why in *Yuen Kun-Yeu* 132 was reliance not sufficient when the Commissioner must have known or foreseen that investors would rely on his act of registration in depositing their moneys?

It is not suggested that any of these cases was mistakenly decided. My point is that the invocation of proximity notion tends to prevent discussion of the policy factors which are determinative. This makes it difficult for the judges of the lower courts to know how to decide similar but not identical cases. Except for foreseeability of harm or loss, none of the established categories of duty has any common element which can be referred to ‘proximity’ as a criterion. The notion of proximity is in fact to record the conclusion of a finding of duty rather than a criterion for determining duty. 133

5.4.2. Open-endedness of ‘Proximity’

One of the most powerful policy consideration in modern time in negligence is known as the ‘floodgates’ argument, which holds, that if liability is imposed in a particular type of situation, the floodgates would be opened to a torrent of new litigation. The arguments was summed up in classic words by Cardozo CJ in *Ultramares Corp v. Touche* 134. He denied liability for economic loss in tort on the ground that to decide otherwise would be to impose ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class.’ The reference to the ‘proximity’ requirement is centred on the relationship between the parties which involves the notion of nearness or closeness and embraces physical proximity as well as causal proximity. 135 It is a general abstract test which is aimed to be a control device upon the factual enquiry of reasonable foreseeability test. 136 Although Julius Stone criticised the ‘proximity’ approach strongly, it is one of the ‘categories of

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134 (1931) 255 NY 170, at 179, 174 NE 441, at p.444 *per* Cardozo J.
indeterminate reference' expounded by him as one of the pragmatic characters of the common law in dealing with the constant changes in law.¹³⁷

Lord Nicholls in Stovin v. Wise, said 'The Caparo tripartite test elevates proximity to the dignity of a separate heading. This formulation tends to suggest that proximity is a separate ingredient, distinct from fairness and reasonableness, and capable of being identified by some other criteria. This is not so. Proximity is a slippery word. Proximity is not legal shorthand for a concept with its own, objectively identifiable characteristics. Proximity is convenient shorthand for a relationship between two parties which makes it fair and reasonable one should owe the other a duty of care. This only another way of saying that when assessing the requirements of fairness and reasonableness regard must be had to the relationship of the parties.'¹³⁸ In Canada, McLachlin J. of the Supreme Court holds the similar view, she said in Norsk v. CNR that: 'the concept of proximity may be seen as an umbrella covering a number of disparate circumstances in which the relationship between the parties is so close that it is just and reasonable to permit recovery in tort.'¹³⁹ The term 'proximity' so defined is therefore subjectively determined by how close the relationship is in terms of the status between the parties in the eyes of the deciders.¹⁴⁰

It is understandable why the majority of judges would not attempt a definition of 'the closeness of relationship between the parties', because 'the closeness of relationship between the parties' so defined is a condition - it is a thing which is, not which can - be regarded as an agglomeration of substantive rights and duties. Therefore, there is no question as to exercise the relationship. We must then differentiate two quite separate, albeit relevant, things: 'proximity', the condition which gave rise to a certain duty of care, and the rights themselves which are derived from the existence/absence of the duty of care.

But what constitutes 'proximity' in contemplation of law? It is plain that anybody, with a little ingenuity, may indulge his fancy by dividing society into an almost infinite number of classes. The mere fact that a plurality of persons engage in

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¹³⁹ (1992) 1 SCR 1021, at 1152.
the same activity, or possess common characteristics, constitutes them, in one sense, a class. We may, if we choose, divide up the whole community into these infinite classes. Legal consequences do not necessarily flow from the mere fact of belonging to any of these groups of persons. Therefore, when we say that legal consequences flow from membership of a certain class, it is necessary to distinguish between rights and duties on the one hand and capacities and incapacities on the other hand. Just as it is possible to atomise the population into an infinite diversity of classes, so it is possible to distinguish an infinite diversity of specific rights and duties which attach to different groups of persons. For example, a large number of persons own a television set, each of them is under a duty to pay for a license, and has the right to receive broadcasts. Another large class of persons owns automobiles; they are all under certain duties of registration, license and taxation. Yet we should at once feel an absurdity in speaking of the status of a TV receiver, or a car owner. These individuals possess in common certain specific rights and duties in regard to a particular kind of thing; their capacity is not affected in any general way. Or again, there is a very large class of person who hold shares in limited companies; they have certain specific rights and duties in respect of a particular corpus of property - their general contractual capacity is no way influenced by the mere fact that they belong to the class of shareholders. This example shows how overlapping the ‘proximity’ approach relating to the area of relationship can be.

Howarth criticises ‘proximity’ on the grounds that it is an example of a normative concept masquerading as a factual one and causing nothing but confusion as a result.141 Why exactly should it make difference, in normative terms, that the plaintiff investor in a case such as Caparo is or is not someone to whom the defendant knew that his statement would be communicated, either as an individual or as a member of an identifiable class?142 And what independent normative argument, an argument that does not use the word ‘proximity’ or any of its synonyms, can explain why the public authorities should not be liable to the investors who were carelessly misled in the cases such as Yuen Kun Yeu?143

The point is not that questions about the normative relevance of ‘proximity’ could not sometimes, or even always, be satisfactorily answered in some way. The

140 Bryan v. Maloney (1995) 182 CLR 609, per Toohey J.
142 [1990] 2 AC 605, at 621, per Lord Bridge.
point is that, in practice, answers are impossible, with the result that judgments based on 'proximity' seem at best off the point and at worst arbitrary.

It is an obvious aspect of the law of negligence that judges are seldom willing to discuss openly the normative premises that they are relying on to justify their conclusions about whether a 'situation' is a 'duty situation'. Frequently, judges are content to give the impression that 'duties' emanate out of the situation itself. Even cases that come close to stating an underlying normative premise never quite admit to what they are doing. But, in order to establish a duty of care arises in a given case, it is necessary to bring the relevant facts of that situation within those of previous situations in which a duty of care had been held to exist. In Caparo Lord Bridge said:

'I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.'

And then Lord Bridge refers to Brennan J's dictum in Sutherland Shire Council v. Heyman, 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories.' If the only justification for saying that a situation was a duty-situation is that it had been declared to be such on a previous occasion, the question arises as to what justified the decision to treat the situation as a duty-situation the first time that it arose. By definition, the first time that it arose, there was no specific authority for the decision 'on those precise facts', and if such authority is the only justification for a decision that a duty exists, the first case must therefore have been wrongly decided. But according to Murphy a case may be overruled if it was not supported by precedent at the time it was decided. The consequence is thus that every case that declares that a duty of care exists is ex hypothesi liable to be overruled at any moment.

Yet unpredictability is an important drawback of the concept of 'proximity' as well as 'duty of care'. One of the apparent attractions of the 'duty of care' approach is that it gives the impression that the law of negligence imposes on defendants duties that can be known by them in advance and to which, therefore, they can adjust their behaviours in order to avoid liability. In other words, the duty of care

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144 [1990] 2 AC 605 at 618, per Lord Bridge.
formulation appears to keep the law within the bounds of the maxim, *nulla poena sine lege*. But, for such a consequence to follow, it is essential that the content of the duty (frequently called the standard of care) be formulated independently of the investigation of whether the duty was breached. If this is not done, if, that is, the duty of care is capable of being characterised as a duty to refrain from doing precisely what it was that the defendant did, the investigation of whether there has been a breach becomes superfluous. In the former case, there is always liability, in the latter case there can never be liability. In consequence, the notion that the duty is something knowable in advance and something that one can fulfil by adjusting one’s conduct becomes impossible to support.
5.5. Formalistic Reasoning in Murphy

Finally, in 1990, the House of Lords was presented with *Murphy v. Brentwood District Council*,146 a case even more similar to *Anns* because the plaintiff was an individual who sought recovery for the loss he suffered in selling his house for a lower price than he would have received if it had not been defective. The trial court specifically found that, in its defective state, the house had posed an imminent danger to the plaintiff during the time he occupied it. In reversing the judgment of the Court of Appeal, which had affirmed the trial court's award of damages, the House of Lords held that *Anns* had been wrongly decided and that the subsequent cases relying on it should be overruled.

Lord Keith of Kinkel, with whose speech all the other judges expressed agreement, expressly declared that 'although the damage in *Anns* was characterised as physical damage by Lord Wilberforce, it was purely economic loss.'147 Lord Keith of Kinkel concluded that 'it is clear that *Anns* did not proceed upon any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place.'148 He noted that the logical implication of what he thought was 'a somewhat superficial examination of principle’ in the *Anns* case collided ‘with long established principles regarding liability in the tort of negligence for economic loss.’149

As Lord Rodger rightly singles out that the formal character of legal reasoning running through the speeches in *Murphy* makes it harder to criticise the implicit policy reasons enshrined.150 Some of the debate in *Murphy* has an arid character, appearing to do little to get to the heart of the real issues. For example, if a house subsides and parts crack because of defective foundations, is there much profit in arguing about whether this should be classified as physical damage or purely economic loss? No one seems to doubt any longer that, if a builder negligently

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147 Ibid., at 466.
148 Ibid., at 471.
149 Ibid. The *Murphy* case was then applied in *Department of the Environment v. Thomas Bates and Son, Ltd.*, [1991] 1 AC 499.
constructs a house with a hidden dangerous defects, he will be liable for personal
injuries suffered by the occupants in consequence before the defect is reasonably
discernible. All the judges who delivered full speeches in Murphy evidently so
accept;\textsuperscript{151} and it is also entirely clear that the mere fact that the builder was the owner
makes no difference.\textsuperscript{153}

Perhaps even more fundamental is the debate about the complex structure
concept - whether a house is one whole item of property or an assembly of
integrated parts.\textsuperscript{153} As a touchstone for answering practical question it may not turn
out to be reliable. A result suggested, though possibly not actually decided, by
opinion in Murphy is that if a contractor supplies only part of a house, such as the
electrical system or boilers or steel framing, he owes a duty of reasonable care to
successive owners to safeguard them from economic loss caused by damage to other
parts of the building; yet not if he supplies the whole house. It is questionable
whether such a distinction can survive.

Duncan Wallace observes that ‘Until the D. & F case, and in particular Lord
Oliver’s speech in that case, there seems to have been little or no understanding or
discussion in the English appellate or other courts of the fact that the presence of
physical damage may be technically as well as legally entirely irrelevant to the
existence of even the most serious physical defects in a building, or indeed of non-
compliance with bye-laws... Bad workmanship, such as carelessly placing steel
reinforcement in the wrong position, or a poor design specifying inadequate
reinforcement, may mean that a beam will be mechanically incapable of carrying its
full designed working load, though as yet it may not have failed...’\textsuperscript{154} When one
contemplates such facts, it is easy to see that a distinction between liability for
economic loss and liability for personal injury in this context is very thin. Yet in
Murphy, Lord Mackay, Lord Keith, Lord Jauncey, Lord Bridge and Lord Oliver all
treat this distinction as a plausible one which should be a basis of legal justification.

\textsuperscript{150} Alan Rodger, ‘Some Reflections on Junior Books’ in The Frontiers of Liability, (ed.) Birks, P.,
(Oxford: OUP 1994) p.64.
\textsuperscript{151} [1991] 1 AC 398, at p.462 (per Lord Keith), at p.476 (per Lord Bridge), p.484 (per Lord
Oliver), p.496 (per Lord Jauncey).
\textsuperscript{152} D. & F. Estates [1989] 1 AC 177 at p.213, per Lord Oliver.
\textsuperscript{153} [1991] 1 AC 398, at pp.476-479 (per Lord Bridge), 484 (per Lord Oliver), 496-497 (per Lord
Jauncey).
\textsuperscript{154} Wallace, Duncan, I. N., ‘Negligence and Defective Building’, 105 L. Q. R. at p.57.
The notion running through the speeches in *Murphy* is encapsulated in the Lord Bridge’s contention in *D. & F. Estates*:

‘but if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the *Donoghue v. Stevenson* principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.’

Of course, it is accepted in *Murphy* that ‘pure’ economic loss is compensable when there has been reliance or representations made negligently in breach of duty of care, as in *Hedley Byrne* and perhaps in *Junior Books* and *Pirelli*. But that is revealing. It brings out the fact that no inexorable logic compels the conclusion that a defect in quality is not redressible in negligence. The fact that the detriment is recoverable in contract, if there is a contract, has no necessary connection with the tort issue. The difficulty in seeking to dispose of the issue by the proposition that ‘pure’ economic loss is not recoverable in tort, although caused negligently, is that major exceptions have to be made. The conventional rationale for the negligent advice exception in *Hedley Byrne* is that the duty stems from reliance and a special relationship of proximity. Yet the liability of a local authority for a building inspector’s negligence has been based, by courts which uphold it, on control. There seems nothing unsound in saying that purchasers of houses rely on the local authority that controls building in the district to exercise its power responsibly and with reasonable care. If the argument then becomes that the relationship is nevertheless not sufficiently proximate, this is to introduce an elusive reasoning, as pointed out by Lord Oliver - who adds that there are other cases, such as *Ross v. Caunters* which was recently approved by the House of Lords in *White v. Jones*, not explained by the reliance theory. A further shortcoming of the ‘pure’ economic loss criterion is brought out by

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155 *D & F Estates* [1989] 1 AC 177 at p.206 per Lord Oliver.
156 [1964] AC 465
157 [1983] 1 AC 520, see also *Murphy* [1991] 1AC 398 at 481, per Lord Bridge.
158 [1983] 2 AC 1
159 [1964] AC 465
160 [1991] 1 AC 398 at 466, per Lord Keith, at 480-481, per Lord Bridge.
Lord Bridge of Harwich in *Murphy* when he expresses the opinion that a building owner ought to be entitled to recover in tort from a negligent builder expenditure necessarily incurred in obviating damage so as to protect himself from liability to third parties outside the property. He states that this is so ‘in principle,’ and it would not seem easy to devise a principle that would distinguish convincingly between the owner’s liabilities to his neighbours and to his tenants or visitors.\(^{164}\) Indeed it may not be nonsensical to say that, if the owner is entitled to recoup the cost of saving from harm people on adjoining properties and in the street, the same should apply to the cost of protecting himself and his family.

The House of Lords in *Murphy*, rejecting a test for duty of care based on proximity and policy, preferred that the law should develop incrementally and by analogy with established cases. The binding part of a case is the ruling based on the ‘relevant facts’ which leads to the result in the case.\(^{165}\) The idea of rule of law (deciding like cases alike) involves an irreducible element of classification and qualification, that is of saying that a given characteristic is more relevant than another. As Montrose pointed out\(^ {166}\), the ‘relevant facts’ of a case can be pitched at a variety of levels of generality, from the detail of steel reinforcement up to reasonable reliance on the skill or judgment. As a matter of formal logic, it is not impossible for the judge to limit the binding part of the case to rules about, for example, steel reinforcement. As long as the precedent decision can still be justified by the newly stated rule, then there is logically possible scope for distinguishing as obiter statements of general principle in that previous case. However, mere formal logic possibilities do not provide acceptable legal arguments in the real world. Even a fairly elementary understanding of the purpose of tort law would reveal that there is no tenable distinction between the rules of liability governing steel reinforcement and those governing electrical wiring, and so the judges’ arguments do not amount to reasoning according to law. The process of legal reasoning can only be properly understood when account is taken of the limits imposed by standards of what counts as a reasonably acceptable legal argument. However, those who tend to be interested in principles of law may be perhaps in danger of overlooking the fact how the fact-finding processes would affect the stability of legal principle. Indeed, Lord Oliver

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\(^{165}\) A. Goodhart ‘Determining the Ratio Decidendi of a Case’ (1930) 40 *Yale Law Journal* 161.

\(^{166}\) ‘The Ratio Decidendi of a Case’ (1957) 20 *MLR* 587, 591.
expressed clearly that although the House of Lords has been very careful to limit the expansion of liability for economic negligence, the limitations have tended to become more eroded as other cases on slightly different facts have been decided. On this issue, one should be reminded of Lord Diplock's classic comments on duty question in *Dorset Yacht*, he said,

'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. The policy decision will be influenced by the same general conception of what ought to give rise to a duty of care as was used in approaching the analysis. The choice to extend is given effect to by redefining the characteristics in more general terms so as to exclude the necessity to conform to limitations imposed by the former definition which are considered to be inessential. The cases which are landmarks in the common law, such as *Lickbarrow v. Mason*,* Ryland v. Fletcher*,* Indermaur v. Dames*,* Donoghue v. Stevenson*, to mention but a few, are instances of cases where the cumulative experience of judges has led to a restatement in wide general terms of characteristics of conduct and relationships which give rise to legal liability.'

As the illustration shows, the logic of legal reasoning cannot be adequately explained in terms of deduction from settled premises. Indeed, once the premises are agreed or determined, the conclusions can be made by deduction. It may be that, in some circumstances, such a process may adequately characterise the legal arguments. But there are limits to this. In most instances, findings and inferences from facts, and the determination and application of legal rules will require value-judgments to be made. The process of reasoning is thus not a smooth deduction of

168 (1787) 2 Term Rep, 63; 100 ER 35.
169 (1868) LR 3 HL 330.
170 (1866) LR 1 CP 274
171 [1932] AC 562
what is entailed in a premise, but what is called 'rational reconstruction'.

The reading of the Murphy judgment is taken as supporting a rule which will make the electrical subcontractor liable to the successive owner. Other readings of the case are logically possible, so the connection between it and the electrical wiring case is not simply one of entailment. A 'reconstruction', albeit a minor one, has occurred. Once legal reasoning is seen in this way then the central question becomes what 'reconstruction' can be justified, and by what criteria it can be justified. Weinrib argues that the private law should be based upon Aristotelian corrective justice. This involves more than simply demonstrating the entailment of an argument from certain premises. It essentially involves providing a coherent system of reasons capable of convincing others of the rightness of one's conclusions.

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173 See Neil MacCormick, 'Reconstruction after Deconstruction' OJLS 1990, 539 at 548 'a determinatio or concretisation of a principle for a specific class of cases is not a deduction from it, nor a discovery of some implicit meaning, it is the act of setting a more concrete and categorical requirement in the spirit of the principle...'

5.6. Conclusion

What exactly is behind the changes of judicial attitude? If the same results could have been achieved with Lord Wilberforce’s formulation, why have the courts, and the House of Lords in particular, been at such pains to limit its significance? At all events, what follows is an attempt to show that the structure which is D. & F. Estates,175 Murphy176 and Department of the Environment v. Thomas Bates & Sons Ltd.177 may be for some clues of legal formalism. The problem which always confronts the courts is not only to decide cases but also to justify those decisions in a way that appears impartial, coherent and comprehensive.178 Judges are unwilling to fall back upon reasons of policy to justify a decision not least because such an approach indicates that a policy-oriented compromise is being made. The retreat from Lord Wilberforce’s formulation helps to play down the role of policy in judicial decision-making by broadening the notion of proximity or neighbourhood so that policy reasons for excluding liability become simply legal considerations which negative the required relationship. As Lord Keith observed in Yuen Kun Yeu v. AG of Hong Kong179 the policy considerations involved in the second part of Lord Wilberforce’s formulation will be rarely of relevance, arising only in a limited category of cases where, notwithstanding that a case of negligence is made out on a proximity basis, public policy requires that there should be no liability.180 The notion of public policy implies a consideration that is uncontroversially in the interests of all, although in the particular cases he instances181, it might be speculated that a much narrower range of interests is protected. However, policy reasons are not justification with which the courts feel comfortable, not least because it blows the ‘black-letter’ separation of law and politics wide open. ‘Proximity and neighbourhood,’ or ‘just and reasonable’ are phrases which the courts are much more prepared to invoke although their use is normally pre-emptive.182 The point is, whether or not the courts deny the existence of a duty for policy reasons, or whether or not they justify the

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175 [1989] 1 AC 177.
179 Yuen Kun-Yeu v. AG of Hong Kong [1988] AC 175 (PC).
180 Ibid., per Lord Keith.
refusal on the grounds that it would not be 'just and reasonable' to impose a duty, they are essentially engaged in the subjective evaluation. But the rhetoric of 'fairness, reasonable and justice' has a much more attractive appeal and command than the language of policy-based choice. It is as if 'fairness, reasonableness, and justice' is somehow separable from questions of policy in relation to loss allocation.

While judicial inclination to avoid the appearance of openly playing the role of policy-making may in part explain the change in approach to the formulation of duty questions, it is not the whole story. For example, it might be speculated that the Anns formulation was regarded with judicial suspicion because of its allegedly liability-expansive tendencies particularly in the aftermath of Junior Books v. Veitchi. In late 1980s expressions of concern about the expansion of negligence-based liability have increased with rising insurance premiums. The widening net of tort liability has been perceived by some as a threat to principles of individual freedom and responsibility which tort law is supposed to reflect. The imposition of negligence liability for structural defects in real property, the expansion of liability for nervous shock and the recognition of a duty of care in relation to the acts of others can all be regarded as manifestations of a general tendency to impose weighty obligations on individuals in relation to the well-being of others, obligations which both encroach upon individual freedom and, at the same time fetter the ability to pursue self-interest. So viewed, Anns is politically objectionable as an unjustifiable state encroachment on individual liberty.

For some, the slippery slope towards social responsibility which the liability-expansive tendency is perceived to reflect, begins with the decision in Donoghue v. Stevenson, extending a positive invitation to widen liability. The search for such a generalising principle can be traced back to the nineteenth century, in particular to the judgment of Lord Esher in Heaven v. Pender. Reflecting particular intellectual trends of the time, the approach in Donoghue quickly began to replace the previous pragmatic, case-by-case recognition or denial of 'duty-situations' according to the

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184 Junior Books v. Veitchi [1983] 1 AC 520, although, as mentioned above, Lord Wilberforce’s approach does not necessarily compel a liability expansive interpretation.
judicial opinions. Thus, if the case law from Donoghue v. Stevenson in 1932 to Anns v. Merton LBC in 1978 witnessed a change in direction away from a case-based approach towards the application of a universal principle of liability, the cases from Yuen Kun-Yeu v. AG of Hong Kong\textsuperscript{190} onwards signify a reversal of this trend. Junior Books v. Veitchi\textsuperscript{191}, expanding liability for economic loss, though not expressly overruled, has been implicitly rejected. McLoughlin v. O’Brien\textsuperscript{192}, extending nervous shock recovery, has been qualified in Alcock v. Chief Constable of South Yorkshire\textsuperscript{193} and Anns has been overruled by Murphy v. Brentwood D.C.\textsuperscript{194} The leading cases of the moment almost all indicate circumstances where a duty of care will not arise, rather than pointing to situations where one will.

The trend towards liability restriction and the rejection of a universal principle are related. Close attention to the particular facts facilitates the drawing of fine and distinct lines in deciding in what circumstances a duty will arise. The court is not so easily bound by a precedent which places particular weight on the facts at hand. The overall effect is to free the courts from any constraint which a principled approach might impose and allow for a much wider range of reasons for finding or denying liability. At the same time, the invocation of concepts of ‘proximity’, ‘foreseeability and justness and reasonableness,’ furnish, where appropriate, sufficient continuity of language to provide the necessary legitimisation of the judicial process in terms of abstract rules of conduct whose content varies in accordance with the context in which they arise. Fleming argues that there is no coincidence that the change in judicial rhetoric in the 1980s negligence cases echoes the political philosophy of Thatcherism.\textsuperscript{195} It is surely not accidental that the courts eschew liability expansion and the admittedly limited concept of social responsibility which it reflects at the time when the government of the day is ideologically committed to the promotion of individual responsibility. It also reflects upon that the doctrinal debate in legal context in the decade of cases running from Anns v. Merton LBC\textsuperscript{196} through to Yuen

\textsuperscript{190} Yuen Kun-Yeu v. AG of Hong Kong [1988] AC 175.
\textsuperscript{193} Alcock v. Chief Constable of South Yorkshire [1992] 1 AC 310
\textsuperscript{194} Murphy v. Brentwood DC [1991] 1 AC 398.
\textsuperscript{195} Fleming, John, The Law of Torts, (The 8th editon, Sydney: The Law Book Company, 1992) at v. “The last, to which the current, the eighth, edition bears witness, was marked by retrenchment, compelled by a strained economy and inspired by the pervasive message of Thatcherism.
\textsuperscript{196} Anns v. Merton LBC [1978] AC 728.
Kun-Yeu v. AG of Hong Kong\textsuperscript{197} and Caparo v. Dickman,\textsuperscript{198} Murphy v. Brentwood DC\textsuperscript{199} does not take place in a vacuum, but rather interacts with political debate about the very themes.

\textsuperscript{197} Yuen Kun-Yeu v. AG of Hong Kong [1988] AC 175.
\textsuperscript{198} Caparo Industries plc v. Dickman [1990] 2 AC 605.
\textsuperscript{199} Murphy v. Brentwood DC [1991] 1 AC 398.
6.1. Reliance as a Touchstone of the Proximity Test?

Only until quite recently the concept of reliance, except in the cases of negligent misstatement and non-feasance, was rarely seen as an important factor in determining whether a duty of care arose. In recent years, however, there have been a number of statements to the effect that the element of reliance will be found in most situations where a duty of care exists.¹

In *Junior Books Ltd v. Veitchi*, Lord Roskill said that the 'concept of proximity must always involve, at least in most cases, some degree of reliance'². In *Sutherland Shire Council v. Heyman³* Mason J also said that the concept of proximity as explained by Stephen J in *Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad'*⁴ and by Deane J in *Jaensch v. Coffey* 'involves in most cases a degree of reliance.'⁵ Mason J said that reliance has always been an important element in establishing the existence of a duty of care.

Certainly, in the case of negligent misstatement, purely economic loss and affirmative duties, reliance has been an important element. But reliance is not sufficient to create a duty relationship between a defendant and plaintiff without a further element such as an assumption of responsibility by the defendant or the doing of an act or failing to do something which the defendant is required to do. In *Sutherland* Deane J. said that proximity may reflect 'reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought

¹ *Junior Books Ltd v. Veitchi* [1983] AC 520 at 546 per Lord Roskill.
³ *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424
⁴ *Caltex Oil (Australia) pty Ltd. v. The Dredge 'Willemstad'* (1976) 136 CLR 529, per Stephen J.
to have known of that reliance.6 But it is clear that Deane J. was not suggesting that in that situation proximity must exist.

In Hawkins v. Clayton Gaudron J pointed out: 'Reliance and assumption of responsibility are not the sole or necessary determinants of proximity.'7 Thus in Curran v. Northern Ireland Co-ownership Housing Association Ltd,8 the plaintiff failed to establish a duty even though they asserted that they had bought the premises in reliance on the belief that the extension to the premises had been the object of an improvement grant by the appellant and that the extension had been properly constructed. Likewise, in Yuen Kun-Yeu v. Attorney-General (Hong Kong)9 the plaintiffs failed to establish a duty of care even though they asserted that they had made their deposits in reliance upon the company's registration by the Commissioner of Deposit-Taking Companies.

In the field of negligent misstatement, the element of reliance has had its greatest influence.10 However, in Ministry of Housing v. Sharp11, the plaintiff may recover for economic loss result from the defendant's negligent misstatement or act even if the person who relied on the statement or act was a third party not the plaintiff.12 If the decision in Ministry of Housing v. Sharp13 is correct, reliance is not a necessary element in every case of negligent misstatement.

In the area of economic loss, the element of reliance has also been of considerable importance. However, Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad'14 shows that economic loss caused by negligent acts may be recovered in the absence of reliance of word by the plaintiff on the defendant.15 In Hawkins v. Clayton16, where a solicitor was held liable for failure to advise the executor of a will of the death of the testator. Deane J said that in cases of economic loss proximity will be characterised in addition to reasonable foreseeability of harm 'by some additional element or elements which will commonly (but not necessarily) consist of known

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6 Sutherland Shire Council v. Heyman (1985) 157 CLR 424, 498 per Deane J.
9 Yuen Kun-Yeu v. Attorney-General (Hong Kong) [1987] 3 WLR 776.
12 But see Murphy v. Brentwood DC [1991] 1 AC 398, at 486, per Lord Oliver.
14 Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad' (1976) 136 CLR 529.
15 See discussion on Caltex in Ch. 5.
reliance (or dependence) or the assumption of responsibility or a combination of the two." Recently, in Bryan v. Maloney, Mason CJ, Deane and Gaudron JJ recognised the importance of reliance as a factor to determining proximity. However, they noted, as did Lord Oliver in Murphy, that while reliance is a common element, it is not necessarily to establish proximity.19

In the area of physical damage, reliance is rarely a decisive factor except in the affirmative duty cases. Recent cases indicate that reliance may also be an important, though not decisive, element in public authority cases. In Sutherland Shire Council v. Heyman members of the court noted that there was no assertion by the plaintiffs in that case that they had relied on any inspection by the council of the premises before they purchased the premises containing defective foundations.

In Sutherland Shire Council v. Heyman, Brennan J., thought that a statutory power could never generate a common law duty of care unless the public authority had created an expectation that the power would be used and the plaintiff had suffered damages from reliance on that expectation. A common example is the lighthouse authority which, by the exercise of its power to build and maintain a lighthouse, creates in mariners an expectation that the light will warn them of danger.22 In the same case, Mason J distinguished between specific reliance where the plaintiff had acted to his detriment in reliance on a public authority acting and a case where he did not. He said that there was no 'a priori reason why the existence of a duty of care should necessarily be conditional upon the defendant's positive conduct. The same comment may be made about detriment." Hence, Mason J. suggested that a different basis upon which public powers might give rise to a duty of care. He said,

17 Hawkins v. Clayton (1988) 62 ALJR 240, per Deane J.
19 Ibid., at 620-622.
20 (1985) 157 CLR 424
21 (1985) 157 CLR 424, 483
22 Brennan J. said: "I would not doubt a public authority, which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for a subsequent omission to exercise its powers, or a subsequent inadequate exercise of its powers, if the plaintiff has relied on the expectation induced by the authority and has thereby suffered damage provided that damage was reasonably foreseeable when the omission restricting a cause of action for negligence occasioning damage of that kind is satisfied." (1985) 157 CLR 424, 483
23 (1985) 157 CLR 424, 464, per Mason J.
'there will be cases in which the plaintiff’s reasonable reliance will arise out of a general dependence on an authority’s performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of the power...'  

This ground for imposing a duty of care has been called 'general reliance.' At this point it is necessary to make a distinction between what might be called 'general' and 'specific' reliance. 'Specific reliance' refers to some action (or omission) of the plaintiff which causes him detriment or loss and which is a response to some conduct of the defendant, such as a statement or an act which leads the plaintiff to believe that the defendant will act in a particular way. 'General reliance' has little in common with the doctrine of 'specific reliance'; the plaintiff does not need to have relied upon the expectation that the power would be used or even known that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared. A widespread assumption may take into account the expectation that statutory powers of inspection or accident prevention will ordinarily prevent certain kinds of risk from materialising. Another way of putting this is to say that 'general reliance' exists where one person is dependent on another to protect him from injury or loss. A person may rely on another in this sense even though he has neither acted nor refrained from action on account of the other’s skill, power or knowledge. Thus the doctrine of general reliance requires an inquiry into the role of a given statutory power in the behaviour

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24 (1985) 157 CLR 424, 464, per Mason J.
25 Other member of the court recognised the importance of reliance in cases concerned with public authorities failing to exercise a power. e.g., Deane J. said, "as Mason J demonstrates in his judgement in this appeal, it is likely that the existence of the requisite element of proximity will reflect among other things reliance by the plaintiff upon care being taken by the defendant to avoid or prevent injury, loss of damage to the plaintiff or his property in circumstances where the defendant had induced or encouraged such reliance or (depending on the particular combination of factors) was or should have been aware of it." (1985) 157 CLR 424, 508.
26 Sutherland SC v. Heyman 157 CLR 424, 461-4, per Mason J.
of members of the general public, of which an outstanding example is the judgment of Richardson J. in Invercargill City Council v. Hamlin.  

In Parramatta City Council v. Lutz the concept of general reliance was used by the Court of Appeal of New South Wales to hold the council liable for breach of duty in failing to exercise its powers under s. 317B of the Local Government Act and demolish a dangerous and dilapidated building which caught fire and destroyed the plaintiff's home. After referring to what Mason J had said in Sutherland County Council v. Heyman, Kirby P in his judgment said:

'That duty might be expressed as a duty to exercise its powers in such a way as reasonably to protect Mrs. Lutz and her property from damage of a foreseeable kind arising out of the state of the property at 19 New York Street. It also included a duty not to mislead her about the activity of the council in the discharge of its powers, so as to lull her (and other relevant persons) into reliance on the council and to neglect to other courses of action which would have diminished that risk.'

Mahoney J.A. found a duty of care owed because the council had made statements to the plaintiff that it had the matter under control and because he had acted to her detriment in not taking other courses of action which would have been available to her. McHugh J found that the evidence did not justify a conclusion that the plaintiff would have taken any other steps to avoid the danger to her home. But by applying the general reliance theory expounded by Mason J, also found that a duty of care was owed and breached. By reliance it is generally meant that the authority can reasonably foresee that the plaintiff will reasonably rely on the authority acting in a particular way. Reliance is a useful aid here, as in the field of negligent misstatement, because it leads easily to the conclusion that the authority can be fairly be taken to have assumed responsibility to act in a particular way. Lord Goff's recent emphasis on imposing negligent liability based on the concept of voluntary assumption has brought the important issue of 'reliance' back into the central part of the negligence framework. It is therefore important to examine whether the concept of 'reliance' can stand by itself as a sufficient determinant of negligent liability.

27 [1994] 3 NZLR 513, 526
30 Parramatta City Council v. Lutz (1988) 12 NSWLR 293, at 307, per Kirby P.
6.1.1. Hedley Byrne and the Reliance Principle

Perhaps the greatest impetus for development in the modern law of tort came with the judgment of the House of Lords in Hedley Byrne & Co. Ltd v. Heller & Partner.\(^{32}\) The decision opened the door to the actionability in tort, in certain circumstances, of negligent advice and opinions: more contentiously it paved the way of some recovery of negligently inflicted purely economic loss.

The basis of the decision was that there was a special relationship between parties; special in the sense that it was neither contractual nor fiduciary, and in the sense that it was not based simply on the concept of foreseeability as enunciated by Lord Atkin in Donoghue v. Stevenson.\(^{33}\) The basis of the special relationship was that the defendant had voluntarily undertaken to give advice in circumstances such that it ought to have realised that the plaintiff was relying on it to exercise care, and such that it was reasonable for the plaintiff so to rely. Yet both the basis and scope of the principle to which the case gave rise remain shrouded in difficulty. The limitation of the concept of reliance as a touchstone of liability under the Hedley Byrne principle have been well illustrated by both academic lawyers\(^{34}\) and by members of the judiciary.\(^{35}\)

The House of Lords has returned to the Hedley Byrne principle three times in recent years. In Spring v. Guardian Assurance\(^{36}\) it was held that a person who negligently gave an unsound character reference which damaged the employment prospects of the person who was the subject of the reference owed a duty of care to that person. The House of Lords thus imposed a duty owed to a person who was not a recipient of the reference and who, in most accepted senses of the term, had not relied upon it.\(^{37}\)

Although the majority in Spring\(^{38}\) resolved the case by the application of the three stage test for the existence of a duty of care which considers in turn the questions of foreseeability, proximity and whether it is fair, just and reasonable to a

\(^{33}\) [1932] AC 562.
\(^{34}\) Stapleton, J., 'Duty of Care and Economic Loss' (1991) 107 LQR 249.
\(^{36}\) [1995] 2 AC 296.
\(^{38}\) [1995] 2 AC 296.
duty of care, Lord Goff regarded the duty recognised as following from an application of the *Hedley Byrne* principle. On this reading that principle is operating beyond the area of negligent misstatements which have been relied on. The potential importance of Lord Goff’s approach was emphasised by *Henderson v. Merrett Syndicates Ltd* in which the House of Lords held that agents who had managed the affairs of Lloyd’s ‘names’ owed a duty of care to such persons whether or not they had been in a direct contractual relationship with them. In doing so the House of Lords accepted that negligence law in relation to professional negligence recognised concurrent liability in contract and the tort of negligence. Of even more significance was the fact that the duty of care recognised in *Henderson*, which was for negligent acts which had damaged the plaintiff’s economic interests, was squarely based on Lord Goff’s interpretation of *Hedley Byrne* as a principle not confined to negligent misstatement.

If the relevance of *Spring* could be talked down on the basis that it was a species of misstatement case, this was not possible in *Henderson* which was a clear example of *Hedley Byrne* principles applying to a case of professional misfeasance. Finally, in *White v. Jones*, The House of Lords affirmed the result, if not the reasoning, in *Ross v. Caunters* when it held that a disappointed beneficiary under a will which failed to fulfil the testator’s wishes as a result of the negligence of the testator’s solicitor is owed a duty of care by the solicitor. The authority of *White* goes beyond that of *Henderson* because it was actually a case of nonfeasance; the solicitor have accepted instructions from a client had failed to implement them before the client’s death. The majority of the House of Lords in this case regarded the imposition of liability as based on an incremental extension beyond standard *Hedley Byrne* principles of liability.

The *Hedley Byrne* principle has therefore been central to the decision in all of these cases to expand the scope of tortious recovery of pure economic losses. However, the version of the principle which has emerged seems to be a far more dynamic one than that which was being used a few years ago in cases such *Caparo Industries plc v. Dickman*. Substantial advances have been made in terms of: breaking down the artificial barriers between negligent words and negligent acts;

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39 [1994] 3 All ER 506.
40 [1995] 1 All ER 691.
permitting limited recovery for nonfeasance; recognising the availability of concurrent liability in contract and tort and in questioning the role of the concept of reliance which are relevant of all professions.  

42 [1990] 2 AC 605.
43 Many of the developments which have now taken place were foreshadowed when, in Murphy v. Brentwood District Council, the Hedley Byrne principle, in the form of reliance upon advice, was regarded by Lord Keith as supplying the justification for the continued authority of Junior Books Ltd v. Veitchi & Co. [1990] 2 All ER 908 at 925, per Lord Bridge and Pirelli General Cable Works v. Oscar Faber and Partners. [1992] IRLR 173. If Hedley Byrne was capable of supporting liability in tort when negligent acts resulted in defects of quality in the fabric of a building it was clearly not a principle which was to be confined to negligent misstatements which had been reasonably relied upon by a person who was closely proximate to the person who made the statement.
6.1.2. Lord Goff's Re-Interpretation of the Hedley Byrne Principle

Lord Goff has, through his speeches in *Spring v. Guardian Assurance plc*,44 *Henderson v. Merrett Syndicates Ltd*45 and *White v. Jones*,46 attempted to put 'assumption of responsibility' back at the centre of *Hedley Byrne* principle. He regards the *Hedley Byrne* principle as resting upon:

'an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill.'47

The authority upon which this approach is based are the speeches of Lord Delvin and Morris in *Hedley Byrne* to the effect that the recognition of a duty of care depends upon 'the application of a special skill for the assistance of another who relies on such skill'48 and 'on the existence of a relationship equivalent to contract'49 which itself depends upon an assumption of responsibility for the interests of another. In the latest incarnation the notion of assumption of responsibility is not limited to misstatements and can therefore justify the imposition of a duty of care in relation to the performance of other services such as professional misfeasance.

The passage of Lord Goff's speech in *Henderson*50 in which he makes an attempt to develop the analysis of *Hedley Byrne* principle, with respect, is riddled with difficulties.51 He first meets the criticism of Lord Griffiths52 and Roskill53 head on by asserting that it occurred in cases in which the problem of containing the extent of the duty of care within reasonable bounds was at issue. He brushes the criticism aside by saying that in cases in which there is no such difficulty (as in *Henderson* itself) 'there seems to be no reason why recourse should not be had to the concept.'54

The later decision of the House of Lords of *White v. Jones*55 contains considerable evidence that the notion of assumption of responsibility is proving to be troublesome

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44 [1994] 3 All E.R 129.
46 [1995] 2 AC 207.
48 *Hedley Byrne* [1964] AC 465
49 Ibid.
50 *Henderson* [1995] 2 AC 145.
53 *Caparo v. Dickman* [1990] 2 AC 605, 628, per Lord Roskill.
55 [1995] 1 All ER 691.
in application. In his speech Lord Goff doubted whether a solicitor can be treated as having assumed responsibility under mainstream Hedley Byrne principles to a third party beneficiary of a will as the direct assumption of responsibility will have been to the client. On this basis the contractual nexus is dictating the issue of assumption of responsibility. However, to meet the needs of justice he was prepared to take the step of extending the assumption to protect a third party. Lord Browne-Wilkinson, who agreed with this approach as a legitimate incremental development of the duty of care, commented further that the notion of assumption of responsibility should be understood as relating to the task undertaken rather than to legal responsibility. Whatever force might be thought to lie behind this distinction is undermined by the fact that he apparently regarded legal responsibility as following directly from the assumption of responsibility for a task. Lord Nolan’s speech cites the act of driving car as an example of an assumption of responsibility. At this point assumption of responsibility is effectively equivalent to misfeasance and the notion is revealed as failing to provide a workable test with which to determine those characteristics of a relationship which give rise to a duty of care in the context of professional activities. It is not that the members of the House of Lords which decided White were unaware of these issues; they expressly considered whether duties might be owed to members of a class of beneficiaries who could not be identified by name at the time that the will was drafted and were at pains to exclude inter vivos gifts from the rationale of White. It is simply that the notion of assumption of responsibility is incapable of providing a test which can resolve these issues. Potter J openly accepted this, when, in Aiken v. Stewart Wrightson Members’ Agency Ltd, he regarded assumption of responsibility as an inappropriate test for deciding whether a duty admittedly owed by a managing agent at Lloyds to effect reinsurance cover to protect a syndicate of names extended to provide a remedy to persons who joined the syndicate after the policy had been taken out.

56 After the decision in Henderson it had seemed relatively safe to assume that an assumption of responsibility would be found (or inferred) in the disappointed beneficiary case. A solicitor in such a case is consciously contracting to undertake work for his client which is directed to providing a positive benefit to a third party. It is surely a limited incremental step to this point from the case under which a Lloyd’s broker contract to manage the assets of an ‘indirect name.’ However, White shows that this is too simple an assumption.
6.1.3. Henderson v. Merrett Syndicates: Agent and Indirect Names

In Henderson v. Merrett Syndicates it was held that Lloyd's members' agents owed to their Names a duty of care in tort running concurrently with a like duty in contract. It also held that Lloyd's managing agents owed a duty of care to third party Names. As between a contractual relationship between two parties, the decision of the House of Lords in Hedley Byrne v. Heller provided the major basis for recognising a concurrent duty of care in tort, and in particular the principle, as expressed by Lord Morris:

'if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise.'

Only recently, however, did the House of Lords consider a direct challenge to the proposition that a contracting party owed to another a concurrent duty of care in tort.

Lord Goff's speech in Henderson accepts the reasoning in Oliver J's decision in Midland Bank Trust Co. Ltd v. Hett, Stubbs and Kemp to the effect that the Hedley Byrne principle cannot be confined to advice and services provided gratuitously. In the absence of authority, Lord Goff would have still regarded this result as a logical application of Hedley Byrne and Esso Petroleum Co. Ltd v. Mardon. Lord Goff supported this conclusion by referring to the fact that the operation of the Latent Damage Act 1986 is confined to tortious negligence, a result which derives from the fact that the Law Reform Committee, on whose proposals the Act was based, had assumed that English Law recognised concurrent liability. He also noted that recognising concurrent liability would avoid the possibility that a recipient of gratuitous advice might have a more favourable limitation period available to him than someone who had purchased the advice. He saw no reason why, as concurrent

57 [1995] 3 All ER 449.
60 Midland Bank Trust Co. Ltd v. Hett, Stubbs and Kemp [1979] Ch. 384, per Oliver J. He declined to follow earlier cases supporting the proposition that a professional person's duty to his client lay in contract only, assisted by the Court of Appeal's disapproval (based on Hedley Byrne) of such cases in Esso Petroleum v. Mardon [1976] 1 QB 801.
liability had long been recognised in cases of physical injury, it should not also apply when financial losses are at issue.

The House of Lords affirmed the basis of the duties of care in terms of the assumption of responsibility principle, its origin being ascribed to *Hedley Byrne*. The existence of a contract was consistent with the assumption of responsibility and a concurrent duty. Lord Goff abjured 'the startling possibility that a client who has had the benefit of gratuitous advice from his solicitor may be better off than a client who has paid a fee.' Following an extensive review of case law, foreign law and academic articles, he rejected solutions based on confirming the plaintiff to either tortious remedies or contractual remedies in favour of a solution giving him a choice of remedies according to which seemed to be the most advantageous. Notable in his reasoning is the primacy accorded to tort. He rejected the approach of:

'regarding the law of tort as supplementary to the law of contract, i.e., as providing for a tortious liability in cases where there is no contract. Yet the law of tort is the general law, out of which the parties can, if they wish, contract: and as Oliver J demonstrated, the assumption of responsibility may, and frequently does, occur in a contractual context. Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it.'

Although he recognised that a concurrent duty of care in tort would not be admitted 'if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the impugned act or omission.' This is a remarkable development considering that the contract is the origin of the relationship between the parties. It contrasts with earlier judicial perception which accorded primacy to the contract.

Argument to the effect that the duty of care in tort operated to require more than contractual duties has widely been rejected, as mentioned above, usually on the basis of inconsistency. This explanation, however, oversimplifies the varieties of

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65 Henderson v. Merrett Syndicates [1995] 2 AC 145 at 193. see also Forsikringsaktieselskapet Vesta v. Butcher [1986] 2 All ER 488 at 510 per Hobhouse J. (in rationalising the availability of the defence of contributory negligence in the case of certain contracts.)
reasoning as to the significance of the contract.\textsuperscript{67} The parties to the contract in principle have the equal opportunity to define their relationship in a particular way, including by inclusion of a term corresponding to the alleged wider duty in tort. Thus in a building case English Court of Appeal rejected a claim in tort formulated with a view to circumventing contractual provision limiting liability which were fatal to a contractual claim.\textsuperscript{68} Even the mere fact of a contract has been regarded as negating a concurrent duty of care in tort. The famous passage for this position was Lord Scarman’s statement in Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd,\textsuperscript{69} a banking case:

‘Their Lordships do not believe that there is anything to the advantage of the law’s development in searching for a liability in tort where the parties are in a contractual relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. limitation of action.’\textsuperscript{70}

This passage was relied on by the unsuccessful appellants in Henderson, but did not find favour. Lord Goff detected in it ‘the temptation of elegance’ and noted that the issue in Tai Hing was whether a tortious duty of care could be established which was wider in scope than the contractual duty. While that is correct, it is evident that Lord

\textsuperscript{67} Contractual duty of care and skill is only one of number of duties as Oliver J observed in Midland Bank Trust v. Hett, Stubbs & Kemp [1979] Ch. 384 at 434. ‘The classical formulation of the claim in this sort of case as ‘damages for negligence and breach of professional duty’ tends to be a mesmeric phrase. It concentrates attention on the implied obligation to devote to the client’s business that reasonable care and skill as if that obligation were not only a compedius, but also an exhaustive, definition of all the duties assumed under the contract created by the retainer and its acceptance. But of course, it is not. A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one.’

\textsuperscript{68} William Hill Organisation Ltd. v. Bernard Sunley & Sons Ltd. (1982) 22 Building L.R. 1 (CA), see particularly, at 29-30. ‘...In principle, we can see no reason why on the fact of this case, the obligations of the parties extended more widely than those which they had expressly agreed between them...’

\textsuperscript{69} [1986] AC 80 (PC) at 107. See also Lee v. Thompson (1990) 6 PN 91.

\textsuperscript{70} [1995] 2 AC 145 at 186.
Scarman favoured the contractual analysis alone even though it meant denying a claimant a longer period of limitation for an action in contract.71

It is noteworthy that the actual result reached by the Privy Council in Tai Hing is not rejected in Henderson; the objection to recognising a tortious duty of care in the former case was that the existence of an implied contractual duty of care covering the facts had been denied. If the Privy Council was not prepared to countenance a contractual duty of care owed by a customer to its bank it is not surprising that it was not prepared to recognise a tortious duty covering the same ground. As Lord Goff points out in his speech in Henderson the issue in Tai Hing was whether the Privy Council was prepared to recognise a more extensive obligation in tort than it would countenance in contract. However, that decision is irrelevant to the question of the existence of a tort duty as an alternative cause of action to the well-established contractual obligation on a professional person to take reasonable care and skill in conducting work on behalf of a client.

Cases like Henderson - readily 'equivalent to contract,'72 and its reliance upon Hedley Byrne, were highly conducive to the identification of assumption of responsibility as the appropriate test for a duty of care in tort. Nevertheless other contexts highlight the limitations of the test. In White v. Jones73 a firm of solicitors were held to owe a duty of care to intended beneficiaries of a will who would reasonably foreseeably be deprived of their intended legacies as a result of the negligence on the solicitor's part. Lord Goff recognised that assumption of responsibility as a test did not support the conclusion that the defendant solicitors owed a duty.74 Nevertheless, he concluded that:

'your Lordship's House should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary.'75

However, deemed assumption of responsibility (for that is what it amounts to) is not a reason for the conclusion of a duty of care but another way of expressing the same

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71 See the last sentence of the passage quoted above from Tai Hing.
73 [1995] 2 AC 207.
74 Ibid. at 268.
75 Ibid. [1995] 2 AC 207 at 268.
conclusion. It begs the question why, and brings one back to the kind of considerations which are perhaps better analysed by reference to Lord Wilberforce's two-stage test in *Anns* or the later test based on foreseeability, proximity and reasonableness.

In such a case the tortious duty is not inconsistent with the contractual structure of the relationship. This was made clear by Lord Goff when he approved Le Dain J's dictum in *Central Trust Co. v. Rafuse* 76

'A concurrent or alternative liability in tort will not be admitted if its effect would be to permit a plaintiff to circumvent or escape a contractual exclusion or limitation on liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability exists the plaintiff has the right to assert the cause of action that appears to him to be the most advantageous to him in respect of any particular legal consequence.'

To this extent contractual principles retain their primacy and it seems certain that the logic of *Norwich City Council v. Harvey* 77 and *Pacific Associates Inc v. Baxter* 78 concerning the impact of exclusion clauses in relation to non-parties to the contract is accepted. 79. The proceedings brought by indirect names in *Henderson* raised the question of whether the decision to structure the relationship in a way which kept the name out of privity with the managing agents blocked the recognition of a tort duty. Lord Goff accepted that in many cases a decision to structure relationships by means of a chain of contract will raise the inference that direct actions between remote parties were not intended. However, this cannot be taken as the invariable result as the House of Lords held that, on the facts of *Henderson*, the recognition of a tort duty owed by a managing agent to indirect names would create no inconsistency with the contractual relationships which the parties had entered into. As a result in the later decision of *White v. Jones* showed, a professional person is

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79 In the context of professional negligence litigation implied or express limitations on the scope of the retainer in the form of definition of contractual duties are likely to be of more importance. It is difficult to believe that they would not also operate to exclude a tortious duty of care in relation to activities beyond the scope of the retainer. see, the refusal of Potter J in *Aiken v. Stewart Wrightson Members' Agency Ltd.* [1995] 3 All ER 449, to recognise a tortious duty owed by a member's agent at Lloyds to take reasonable care in supervising the work of managing agents because the basic relationship between the parties did not require this level of supervision supports this contention.
capable of assuming responsibility to more than one party with respect to a particular transaction.

The importance of concurrent liability to the development of the law of negligence relating to professional liability was made clear by Lord Nolan in White v. Jones when he rejected an argument that the form of loss suffered by the disappointed beneficiary could not be recovered in tort as it was of a contractual nature. He argued that the recognition of concurrent liability proves that contractual and tortious forms of loss cannot be regarded as mutually exclusive.80

Lord Nolan's approach is a rejection of the arid form of conceptual formalism which appeared to be dominating decisions in the past. In the context of construction industry litigation the retreat of the duty of care which was seen in the House of Lords decisions in D & F Estates Ltd v. Church Commissioners for England81 and Murphy v. Brentwood DC82 was based on firm preconceptions as to the forms of loss which were to be recoverable in contract and under the tort of negligence. A defect of quality in a purchased item is seen to be protected exclusively by contract. The different bodies of doctrine are seen to provide protection against different forms of loss and the area susceptible to contractual principle is not open to tort. Lord Bridge summarised this approach in the following words:83

'But if a manufacturer produces and sells a chattel which is merely defective in quality, even to the extent that it is valueless for the purpose for which it is intended, the manufacturer's liability at common law arises only under and by reference to the terms of any contract to which he is a party in relation to the chattel; the common law does not impose on him any liability in tort to persons to whom he owes no duty in contract but who, having acquired the chattel, suffer economic loss because the chattel is defective in quality.'

If the arguments in these cases is to remain valid, Lord Nolan's approach suggests that their continued authority may no longer rest on a rigid categorisation of the forms of loss recognised by the two bodies of doctrine. It seems more likely that the explanation for the 'no duty' result will now have to be found elsewhere; possibly in a finding that the relationships in issue in those cases failed to exhibit an adequate degree of proximity. If this approach is adopted, the law will have an explanation for

80 [1995] 2 AC 207, 293.
83 [1990] 2 All ER 908 at 925, per Lord Bridge.
the continued authority of *Junior Books Ltd v. Veitchi Co. Ltd*\(^8\) as an exception to the doctrinal assertions of the provinces of tort and contract which are restated in *Murphy*.

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\(^{8}\) [1983] 1 AC 520.
6.1.4. Spring v. Guardian Assurance: Duty to be Honest

The current position on the criteria of assumption of responsibility, reliance and proximity will be discussed in this section. I will analyse two cases successively: Spring v. Guardian Assurance, where the defendant was held liable on the ground of having assumed the responsibility with known reliance, and White v. Jones, where the disappointed beneficiary are entitled to claim recovery of economic loss on the basis of an extension of assumption of responsibility although the disappointed beneficiaries did not rely upon solicitors' duty of care and skill.

In Spring v. Guardian Assurance, the House of Lords considered the question of negligence and purely economic loss once again. Until recently, it appeared that the courts were likely to dismiss such claims unless the facts fell within an established category of liability. Yet in Spring, the House of Lords held that an employer owes a former employee a duty to prepare a reference with reasonable care. But Spring does not merely confirm the trend in these other cases; it also shows that there is no unanimity on the test for the duty of care. White v. Jones and Henderson v. Merrett Syndicates rely extensively on Hedley Byrne v. Heller and the 'voluntary assumption of responsibility' as the source of the duty of care. Lord Goff has gone so far to say that, in general, there can be no liability in negligence for pure economic loss unless there has been a voluntary assumption of responsibility. By contrast, three of the judges in Spring based their speeches on Lord Bridge's test, found in Caparo Industries plc v. Dickman.

In Spring, the plaintiff had been an insurance representative for the defendants, Guardian Royal Exchange Assurance, and several associated companies. The defendants dismissed him and he subsequently failed to get a position as a representative with other insurance companies. He attributed his failure to get a position to a reference supplied by the defendants which accused him of fraudulent selling practices.

At trial, Judge Lever found that the reference was incorrect; the plaintiff was not guilty of fraud, although he was guilty of incompetence. The accusation of fraud was clearly defamatory, but the plaintiff did not bring an action in libel. Instead, he sued in malicious falsehood, negligence and breach of contract. The case eventually

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86 [1995] 2 AC 207.
87 [1990] 2 AC 605.
reached the higher courts because Judge Lever also found that the defendants prepared the reference carelessly, which left a difficult issue to be resolved: did the defendant owe the plaintiff a duty to prepared the reference carefully, in either negligence or contract?

Judge Lever upheld that the claim in negligence and dismissed the claim in contract. The Court of Appeal dismissed the claims in both negligence and contract. Glidewell LJ, delivering the Court's judgment, held that liability for statement made to a third party is a 'field of its own,' in which plaintiffs can claim for purely economic loss only in defamation or malicious falsehood. The House of Lords reversed the decision of the Court of Appeal. Lords Slynn, Lowry and Woolf held that a duty of care arose under the three stage test set out by Lord Bridge in Caparo v. Dickman,89 because (1) it was foreseeable that the harm would occur, (2) the parties were in sufficient degree of proximity and (3) it was fair, just and reasonable' to impose the duty of care. Lord Goff also found that there was a duty of care in negligence, but he looked to Hedley Byrne and the voluntary assumption of responsibility for the source of the duty of care. This may seem out of place in Spring, since neither the arguments of counsel nor the judgments of the lower courts referred to it. However, it is consistent with the approach taken by the majorities in Henderson v. Merrett Syndicates90 and White v. Jones.91 It also reveals that Lord Goff may be using the test in a much broader sense in Spring than in these other cases.

Lord Goff's decision to base his theory of professional liability on assumption of responsibility has also brought the issue of the role of reliance back into the picture as his formulation speaks of an assumption of responsibility coupled with 'concomitant' reliance by the plaintiff on the defendant. On occasions, reliance has been seen as the key concept which makes the Hedley Byrne principle available and thus opens the door to the recovery of pure economic losses.

In Pirelli General Cable Works Ltd. v. Oscar Faber & Partners92 it was held that the defendant builders were liable for economic loss in tort since the defendants have been employed to advise on the choice of the material and design structure of the

89 [1990] 2 AC 605.
90 [1994] 3 All ER 506.
91 [1995] 1 All ER 691.
chimney. In Murphy,93 Lord Keith explained away Pirelli by saying that the plaintiffs were building 'the chimney as they did in reliance on that advice. The case would be accordingly within the principle of Hedley Byrne & Co Ltd v. Heller & Partners Ltd.94 I regard Junior Books Ltd v. Veitchi Co. Ltd95 as being an application of that principle.' The limitations of the concept of reliance as a touchstone of liability under the Hedley Byrne principle is that it can have more than one meaning. The courts have commonly failed to define the sense in which they are using the term.

As mentioned above, Lord Goff turned to Hedley Byrne and found the source of the duty of care in 'an assumption of responsibility by [the defendants] to the plaintiff in respect of the reference, and reliance by the plaintiff upon the exercise by them of due care and skill in respect of its preparation.'96 Counsel in Spring did not argue the case on this basis and, accordingly, Lord Goff said that his speech 'must be regarded as being of limited authority.'97 Nevertheless, it is still of value in determining the scope of the principle, especially since Lord Goff also used it in Henderson v. Merrett Syndicates98 and White v. Jones,99 as did Lord Browne-Wilkinson.100

There have been some questions concerning the precise meaning of the phrase 'voluntary assumption of responsibility.'101 Some judges have said that it is more accurate to describe it as a deemed assumption of responsibility, because the defendant, if asked, would almost certainly deny that he or she chose to assume legal liability.102 Lord Goff did not discuss the issue at length; however, in White v. Jones, Lord Browne-Wilkinson stated that it should refer to 'a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance.'103 This would apply to most employers, since they can choose not to provide a reference104 and they know that the reference

96 Spring, [1995] 2 AC 296, at 367.
97 Ibid.
98 [1995] 2 AC 145, per Lord Goff.
99 [1995] 2 AC 207, per Lord Goff
100 per Lord Browne-Wilkinson.
affects the plaintiff's employment prospects. But should it have applied in *Spring*? The defendants had no choice in the matter, for the LAUTRO rules required them to provide a 'full and frank' reference to any prospective employers in the insurance industry.

Lord Goff suggests that he did not limit the 'voluntary assumption of responsibility' to situations involving a 'conscious choice.' However, *Hedley Byrne* itself concerns not only choice, but also responsibility for special skills and knowledge. The power inherent in the possession of a special skill or responsibility almost invites the courts to impose responsibility for its use.\(^{105}\) It underlies Lord Goff's analysis in *Spring*, where the defendant's power over the plaintiff's economic well-being was so strong, and so obvious to the defendants, that a duty of care had to be imposed in respect of that power.

Similarly, Lord Browne-Wilkinson's analysis of the voluntary assumption of responsibility also has connections with the idea that power invites responsibility. In *White v. Jones*\(^ {106}\) and *Henderson v. Merrett Syndicates*,\(^ {107}\) he noted that *Hedley Byrne* was derived from *Nocton v. Lord Ashburton*,\(^ {108}\) which in turn was concerned with fiduciary duties.

But even if imposing responsibility for power is a valid purpose of the law of negligence, why is it necessary to use the voluntary assumption of responsibility test to achieve it? Choice and power do not necessarily coincide, as *Spring* illustrates. In tort law, there is no reason why the *Caparo v. Dickman* test should not justify imposing a duty where there is no voluntary undertaking. In *Spring*, given that neither party had any real choice concerning the provision of the reference, it would appear that the facts were more amenable to the proximity test. Indeed, Lords Slynn and Woolf were clearly just as concerned with protecting employees from the employer's power over their economic well-being; that they analysed the relationship in terms of employment does not detract from this. In some ways, it makes their reasoning more concrete.\(^ {109}\)


\(^{108}\) *Nocton v. Lord Ashburton* [1914] AC 932.

There has also been some doubt over the role of reliance in a voluntary assumption of responsibility.\(^{110}\) *White v. Jones* should make it clear that it is not necessary that the plaintiffs rely on the defendants to exercise care. However, in *Spring v. Guardian Assurance*, Lord Goff stated that reliance is essential; more specifically, he stated that an assumption of responsibility occurs 'where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular.'\(^{111}\)

Lord Goff may have meant only that reliance or trust could provide evidence that there was a voluntary assumption of responsibility. But not even this is clear, because it cannot be said that the plaintiff 'entrusted' the defendants with the preparation of the reference or, more generally, that he relied upon the defendants, because the LAUTRO rules negated any choice that any of the parties may have had in the matter. Moreover, the plaintiff never changed his conduct in any way as a result of the defendants' actions. If there was any reliance, it was only in the *general* sense that their carelessness affected his employment prospects.

The contrasting approaches were illustrated in *Spring v. Guardian Assurance plc*\(^{112}\) when Lord Keith was of the view that there was no question of the plaintiff having relied upon the defendant's reference,\(^{113}\) whereas Lord Goff was equally convinced that he had.\(^{114}\) The difference in perception almost certainly follows from the fact that Lord Keith was using a very tight definition under which a person would only be deemed to rely on words if his conduct was influenced by their content, whereas Lord Goff was using the term in a far broader sense to indicate little more than an assumption that the other person will perform a task carefully.\(^{115}\)

The cases concerning disappointed beneficiaries have consistently challenged the proposition that reliance in the narrow sense is an essential precondition to liability under the *Hedley Byrne* principle as opposed to a feature which is commonly present and is likely to be an essential component in the chain of causation in a misstatements case.\(^{116}\) The simple fact is that many disappointed beneficiaries may


\(^{111}\) *Spring*, [1995] 2 AC 296, at 369.

\(^{112}\) [1994] 3 All E.R. 129.


\(^{114}\) *Ibid.*, 143.

\(^{115}\) Lord Goff's previous criticism of this use of reliance as failing to provide a workable distinction between liability and non-liability cases in *Muirhead v. Industrial Tank Specialities* [1986] QB 507.

\(^{116}\) Lord Mustill in *White* was of the view that there could be no damage in a *Hedley Byrne* case.
not know of the proposed gift and few will actively change their conduct of the faith of it. The chain of causation flowing from misfeasance or nonfeasance in this area is therefore unlikely to feature reliance in anything other than its loosest sense; nonetheless, there are strong arguments of practical justice for allowing the beneficiary a claim in spite of the lack of reliance. Lord Goff has used the concept of reliance in a broader sense in Spring, whereas he sees the lack of reliance by the beneficiary as the main conceptual problem which stands in the way of a finding that the solicitor assumed responsibility towards the beneficiary in White v. Jones. 117

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117 [1995] 2 AC 207, at 262, per Lord Goff.

In the area of the law of negligence there will be many cases in which there is a tension between legal logic and practical justice. *White v. Jones*\(^{118}\) is a good example of a close-run contest. By a majority of three to two the House of Lords held that a solicitor who negligently fails to carry out a testator's instructions to execute a will may in principle incur liability in tort to an intended beneficiary who suffers loss as a result of such carelessness. Lord Keith and Lord Mustill demonstrated vigorously that deductive reasoning and the absence of any supporting analogy militated against admitting the claim. Lord Goff approached the matter differently. He recognised that consistency militated against admitting a remedy. But for Lord Goff (with whom Lords Browne-Wilkinson and Nolan in separate speeches agreed) the dictates of practical justice were decisive.

In this case, as a result of a family row, a Mr Barratt made a will which left nothing to his two children. He was soon reconciled with them, and wanted to change it. He therefore sent a letter to the defendant solicitors which gave instructions for a new will leaving £9,000 to each of them. The defendants made two appointments to see Mr Barratt, but did not keep them, and he died three days before a third one. Turner J held that the defendant solicitors owed no duty of care to the plaintiffs, but the decision was reversed by the Court of Appeal, whose decision was narrowly upheld by the House of Lords. Under the heading of 'the impulse to do practical justice', Lord Goff in *White v. Jones*\(^{119}\) gave four reasons for the decision. The first is put by Sir Robert Megarry V.-C. in *Ross v. Caunters*:\(^{120}\)

> The solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her.

> If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim. However grave the negligence, and however great the loss, the solicitors would be under no liability to pay substantial damages to anyone.\(^{121}\)

\(^{118}\) [1995] 2 AC 207.  
\(^{119}\) [1995] 2 AC 207. Lord Goff made the leading judgment, and his reasons were adopted by Lord Browne-Wilkinson and Lord Nolan.  
\(^{120}\) [1980] 1 Ch. 297  
\(^{121}\) [1980] 1 Ch. 297 at pp.302-303.
Lord Goff fastened on the middle sentence of the second paragraph, and describes it, of 'cardinal importance,' as a lacuna which needs to be filled. Yet, it does not seem convincing to Lord Mustill, who rejected both of the implied propositions: that the beneficiary should be compensated; and that the solicitors should pay. The one mention of the position of the solicitor himself was in Lord Goff’s third reason, which was a point that the solicitor could hardly complain if such a liability was imposed. Lord Goff adds two further reasons to explain the impulse to impose liability. He considered that the right to leave one’s assets to whoever one pleases is a significant one, and gifts under a will make a substantial difference to many of the recipients. The denial of liability would mean that such beneficiaries will suffer badly. Finally, Lord Goff referred to the importance of the social role played by solicitors in society, particularly in the context of wills. These two points may be of importance in determining whether the principle in White v. Jones should be extended to cases which do not involve either wills or solicitors.

6.1.5.1. Expectation Losses

It has been argued that disappointed beneficiaries have lost nothing economically, so he failed to meet the qualification that the tort of negligence compensates plaintiffs for the loss or damage they have sustained as a result of the defendant’s negligence, including economic loss or damage in some circumstances. He has not been deprived of his own money, because he has expended nothing as a result of the defendant’s negligence. He has not lost an interest which the law recognises, such as a contingent interest not even a spes successionis. His only loss is the expectation of a gain, a ‘loss’ which is compensated (if at all) in contract, not in tort, as argument goes.

There are four potential responses to this argument. The first is that common sense suggests that the plaintiff has suffered loss. Sir Robert Megarry V.-C. articulated this point of view in Ross v. Counters:

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124 [1995] 2 AC 207 at p.260, see to similar effect Lord Browne-Wilkinson at p276.
'I do not think that the expression 'loss' can be confined to deprivation. To me, a failure to receive an assured benefit is a loss. If a gift in transit to a donee is destroyed or stolen, I think both English usage and common sense would accept that the donee has suffered a loss even if the property had not passed.'

The point can be supported by the contention that the plaintiff's expectation is a legitimate and reasonable one which is justified by the testator's intentions.

Secondly, the characterisation of the loss as a mere *spes successionis* is not correct and begs the question. When the testator has died, then the intended gift would have crystallised, but for the solicitor's negligence. It would be odd to deny recovery on the grounds that the plaintiff has no crystallised interest, when that is the very point about which the plaintiff is complaining.

Thirdly, there are analogous types of loss that are compensated in tort. Expectation losses are protected in intentional torts, albeit that the recovery of such losses in negligence might be an extension of the law. In negligence, if a tortfeasor damages a profit-making chattel, then the victim can recover the loss of profit. The loss is a mere expected gain, to which he may have no contractual entitlement, and in which he may have no other interest. The fact that the loss flows from physical damage does not stop it being properly characterised as a lost expectation. However, the loss is recoverable because the plaintiff's interest in the chattel has been damaged, which functions as a control device limiting the circumstances in which there can be recovery.

However, there is always a fear that the beneficiary principle may imply that no rational limit can be placed on recovery of expectation losses. In the Court of Appeal in *White v. Jones* Steyn LJ justified and implicitly limited the extension of contractual duty to be effectively enforced. However Lord Goff could see no reason why damages for the loss of an expectation should not be recovered under the voluntary assumption of responsibility principle. The important question is whether there should be a limit on the recovery of expectation losses in tort, as there is no liability for other interests such as nervous shock, or pure distress.

126 Cane, Peter, 'Negligent solicitors and Doubly Disappointed Beneficiaries' (1983) 99 LQR 346 at 347.
6.1.5.2. Voluntary Assumption of Responsibility

White v. Jones has been relied upon in Penn v. Bristol and West Building Society. A husband instructed a solicitor to carry out the sale of a house which was owned by him and his wife. The wife was ignorant of the transaction and did not instruct the defendant solicitor. The conveyance was achieved by the forgery of the husband. However, as the solicitors should have been aware that the house was owned by the husband and the wife, and failed to check that she had given instructions too, a duty of care in tort arose. The judge referred to the proximity of the relationship, but by relying on White v. Jones he must have considered that there was a voluntary assumption of responsibility. While there was no reliance by the wife, the solicitor at least assumed that he was acting for her, and thus such a conclusion does not appear strained. However, an easier remedy would surely have been a contractual one: the husband had ostensible authority to act for the wife. Given the uneasiness to extending the voluntary assumption of responsibility test to encompass the beneficiary principle, it is not surprising that Lord Goff considered alternative remedies in some detail and with great erudition. He looked at the German solution of a contractual remedy being imposed by law to benefit the beneficiary, a tortious remedy by analogy with the doctrine of transferred loss (itself rejected in English law), and recovery by the personal representatives with them being accountable to the disappointed beneficiary. He rejected each as a matter of principle and authority.

127 Stapleton, J., ‘Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence’ (1995) 111 LQR 301 at p.325. She argues that there should be because there are ‘too many of these interests to make them sufficiently special to be actionable in negligence.’
128 The Times, June 1, 1995.
129 [1995] 2 AC 207 at 262-267, per Lord Goff.
6.1.6. Marc Rich: 'Fairness, Justice and Reasonableness'

6.1.6.1. Contextual Argument

In Marc Rich, it was clear that the House of Lords was more willing to base liability for negligence on policy issues openly rather than disguise the main issues with formal legal rules.\(^{130}\) This section is concerned with the implications of the possible development of the 'duty of care' qualified by the three-part test in the law of negligence after the decision of Marc Rich (The Nicholas H.).\(^{131}\) It is generally recognised that the 'Caparo test'\(^{132}\) is the general test in determining liability for negligence cases which is entrenched as the test of the existence of the duty of care - requiring consideration of whether injury to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence, whether there was a relationship of proximity between the parties, and whether it would be fair, just and reasonable to impose liability.

In this case, the Nicholas H developed a crack in her hull, and anchored off San Juan, Puerto Rico, pending the results of a survey by the vessel's classification society, NKK (Nippon Kaiji Kyokai), the third defendants. The surveyor employed by the defendant classification society (NKK) permitted the vessel to retain her class for the continuation of the voyage after temporary repairs. During the voyage the vessel sank with the loss of all its cargo soon after setting sail due to the failure of temporary repairs. The cargo owners sued the shipowners and the classification society. The plaintiff's claim against the ship-owners was settled subject to limitations imposed by statutory tonnage provisions and the Hague-Visby Rules. As a result, they sought to recover the balance of their loss from the defendant classification society.

The issue came before the House of Lords on the preliminary question of whether the defendant, a classification society, owed a duty of care to the plaintiffs, a third party, cargo owners, assuming that the damage suffered was physical damage caused by the defendant's negligence and that the facts were sufficient to give rise a duty of care owed by the classification society to the cargo owners.

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\(^{130}\) The judicial attitude has made particularly explicit in Lord Steyn's speech in Marc Rich which will be considered in detail below.

\(^{131}\) [1996] 1 AC 211.

Marc Rich belongs in a line of cases including Leigh & Sillivan Ltd. v. Aliakmon Shipping Co. Ltd\textsuperscript{133} and Candlewood \emph{v.} Mitsui OSK Lines Ltd.\textsuperscript{134} notwithstanding that those cases raised questions of pure economic loss while Marc Rich is a case of physical damage.

The leading speech was delivered by Lord Steyn, with which the majority of the House of Lords agreed. First, he held that it was necessary, even in cases of property damage, to establish a relationship of proximity between the parties and to consider whether it was fair, just and reasonable to impose a duty of care.\textsuperscript{135} He said,

\begin{quote}
'Since the decision in \emph{Dorset Yacht Co. Ltd \emph{v.} Home Office [1970]} AC 1004 it has been settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases whatever the nature of the harm sustained by the plaintiff'\textsuperscript{136}
\end{quote}

What Lord Steyn means in this passage is that the relevance of the 'three-part' test is not limited to cases involving pure economic loss. It is understandable why he implies that the three-part test will apply to all negligence cases including physical damage because Marc Rich is not a case of purely economic loss, but a case of physical damage.

Applying the invariant 'three-part' test to all negligence cases, Lord Steyn held for the majority that, even assuming that there was a sufficient degree of proximity between the defendant classification society and plaintiff cargo owners, it would, on balance, be 'unfair, unjust, and unreasonable' to impose a duty on the classification society and make it liable to the cargo owners.

Lord Steyn considered various factors which bore upon the issue of whether it was fair, just and reasonable to impose liability upon the classification society. Of the policy considerations that stood against the imposition of a duty, he focused particularly on two factors: the danger that the fear of liability might have an adverse effect upon the public role of NKK and other classification societies, and the adverse consequences of allowing the bargain between cargo owners and shipowner to be outflanked.

Lord Steyn's first policy factor is that no classification societies engaged contractually by shipowners to survey their ships have ever been held to owe third

\textsuperscript{133} [1986] AC 785.
\textsuperscript{134} [1986] AC 1.
\textsuperscript{135} [1996] 1 AC 211, at 235-236.
party cargo owners a duty of care and made liable in England or elsewhere in negligence over more than a century and a half. Secondly, making such societies liable to cargo owners would go against the arrangements between shipowners and cargo owners limiting recovery for loss or damage to cargo under the tonnage provisions of the Merchant Shipping Act 1894 and the Hague-Visby Rules, the internationally practised regime between shipowners and cargo owners. Lord Steyn said: ‘the international trade system tends to militate against the recognition of the claim in tort put forward by cargo owners against the classification society.’

The delicate balance achieved by enabling participants in the international trade system to anticipate their possible losses, and take out insurance against them, would be upset. The ability of the ship-owner to shift the risk of loss to the cargo owner would be rendered illusory as classification societies would demand indemnities from the ship-owner in respect of claims paid out to cargo owners. And the involvement of a third party, the classification society, would add unnecessary complication and expense to the hitherto simple system of setting cargo claims, under which the only claim was by the cargo owner against the ship-owner.

The public role of the classification societies formed the basis of Lord Steyn’s other main argument. He emphasised that the classification society was ‘an independent and non-profit-making entity, created and operating for the sole purpose of promoting the collective welfare, namely the safety of lives and ships at sea;’ it fulfilled functions which, in its absence, would have to be fulfilled by states. In his opinion, the threat of tortious liability might induce classification societies to adopt ‘a more defensive position,’ to the detriment of their ability to carry out these important functions. In particular, their possible exposure to claims of a wide-ranging nature gave rise to the danger that they might decline to take on high-risk business, where their services were most necessary, or divert their resources away from their primary task of saving lives and ships. But there was no evidence to prove that imposing liability upon classification would adversely affect their performance of important functions: Lord Lloyd, indeed, stated in his dissenting opinion that a decision in favour of the cargo owners would be welcomed by

136 Ibid., 235.
137 Ibid., 240.
139 Ibid., at 232.
members of the shipping community at large, who are increasingly concerned by the proliferation of sub-standard classification societies.\(^{141}\)

In the light of the above arguments, Lord Steyn considered that it would not be fair, just and reasonable to impose a duty of care upon the classification society. Although a number of factors lent support to the plaintiffs' case - the extent of the reliance in practice by cargo owners and others upon the recommendations of classification societies, the readily foreseeable risk of damage in the event of carelessness, the possibility that the recognition of a duty would promote safety at sea etc. Lord Steyn found that these were decisively outweighed by the matters that he had specified. It would be fairer to let the loss lie with the cargo owners rather than transfer it to the classification society.

At the core of Lord Steyn's speech is an analysis of identifiable considerations of policy whose importance and relevance is clear. It is noteworthy that Lord Steyn preferred openly to base his decision upon concerns of this nature, rather then exploring legal issues in a traditional analysis. Incidentally, when observing the inclination of judicial reasoning at the appellate level on other occasion, he points out that 'formalism in the sense of an exclusive reliance on formalist methods has not been exorcised...But it is on the wane.'\(^{142}\) Marc Rich is a good example. Full examination of the relevant policy factors may well reveal the need to limit liability; and if it does, then formal factors such as the directness of the loss or the nature of the plaintiff's reliance upon the defendant (mentioned by Lord Steyn, but not a central part of his analysis) may well prove useful as 'control devices'. Their bare invocation should never take the place of a reasoned analysis of the policy reasons which are advanced to displace the weighty presumption that wrongdoers should compensate for their wrongdoing.

\(^{141}\) Ibid., at p. 229, citing J. Lux Classification Societies London, 1993, viii.

6.2. Three Types of Legal Approach and their Interaction

6.2.1. The Three-stage Test

Three main approaches currently adopted by the judiciary, namely, (1) the three-stage test, (2) voluntary assumption of responsibility (3) incrementalism, which are not necessarily compatible with one another, have been prevalent over last few years.

The first approach, perhaps most frequently adopted as well, is the three-stage test developed in Smith v. Bush\(^{143}\) and Caparo v. Dickman\(^{144}\) of foreseeability, proximity, and whether it is just and reasonable to impose a duty of care. This principle was adopted by a majority of the House of Lords in Spring v. Guardian Assurance plc.\(^{145}\) This is also a problem for White v. Jones, because the disappointed beneficiary will rarely even be aware of the will or the solicitor's retainer in connection with it. Key issues become important when applying the three-stage test and on harmonising the three-stage test with other approaches currently adopted by the courts, such as 'reliance' test,\(^{146}\) 'voluntary assumption of responsibility' test,\(^{147}\) and the distinction between 'physical damage' and 'pure economic loss'. Marc Rich is a good case study to demonstrate the tension among inherently incompatible tests in the law of negligence. Questions will then be raised such as, (1) What is the relationship among 'proximity', 'foreseeability' and 'fairness' in the 'three-stage' test framework? (2) How to harmonise these three elements in the test? (3) How to make a consistent interpretation between the 'three-stage' test enunciated by Lord Steyn and the 'three-stage' test in Caparo? (4) What will the courts rely upon, under the incremental approach, if there is no previous authority from which analogy could be drawn? These issues which are not solved in Marc Rich, remain to be clarified in future cases.

The resurgence of assumption of responsibility as the theoretical justification for the imposition of a duty of care in professional negligence cases may, at first sight, appear to have been at the expense of decision making based on proximity.

\(^{143}\) [1990] 1 AC 831.
\(^{144}\) [1990] 2 AC 605.
Appearances may be misleading. The facts of cases such as *Spring*, [*Henderson*] and *White* were not likely to raise issues of proximity and it would be dangerous to assume that the concept has disappeared. Although proximity is a concept which is far from being free of difficulty, it is doubtful whether it can be regarded as completely irrelevant to determining the scope of professional duties of care. The fact that courts are now consistently asserting that a single common test of duty of care applies whatever the nature of the loss at issue is actually of limited significance once it is accepted that proximity bears a variety of meanings according to the context in which the issue is being considered. If this is the case, how could the test of voluntary assumption be adapted?

Criticism is to be found in Brennan J’s resistance in the High Court of Australia to that court’s move to centre its theory of the recovery of purely economic loss on a criterion of proximity. Brennan J has argued consistently that to treat proximity as a criterion of liability without defining the components which underlie the concept, must lead to the problem of there being a wide judicial discretion at the expense of the development of a readily identifiable criteria and rules of liability. Proximity, on this basis, is a vague and shallow general formula of liability which is not even subject to the constraints of policy derived from the second stage of the *Anns* test.

In spite of the criticism, proximity continues to play a major role in the negligence law. In England it survives as part of the three-stage test and in other Common law jurisdictions as part of a reformulated *Anns* test. The reason surely lies in the fact that, whatever conceptual mechanism is used, proximity allows a court to build in a consideration of the character of the relationship between the affected parties during the decision making process. In the absence of a contractual nexus this is an unavoidable consideration. The criteria laid down by members of the House of Lords in *Caparo* when determining the existence of sufficient proximity to justify the imposition of a duty of care in a misstatements case are likely to remain central to the development of the law concerning professional negligence. Lord Bridge identified the requirements in the following words:

'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him, directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'\[^{153}\]

Lord Oliver adopted a similar approach in slightly different terms:

'What can be deduced from the Hedley Byrne case, therefore, is that the necessary relationship between the maker of a statement or giver of advice (the adviser) and the recipient who acts in reliance upon it (the advisee) may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given, (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose, (3) it is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry and (4) it is so acted on by the advice to his detriment.'\[^{154}\]

The limits of this known reliance-based approach to defining proximity need to be appreciated. The technique has a part to play in identifying the existence of an adequate relationship, but it is more important as an exclusionary test. For example, it removes from the duty of care people who give advice to a wide, foreseeable, but undefined, class of person\[^{155}\] and those who find that advice which they have given has been passed, unknown to them, to others.\[^{156}\] However, it cannot serve on its own as a touchstone to liability, because even if the knowledge requirements are satisfied, an immunity based on public policy grounds (i.e. Barristers or advocates are immune from liability to their clients in respect of court work and associated activities, despite close proximity between barrister (or advocate) and client, for reasons having to do with the proper functioning of the judicial system rather than the relationship of the parties.) will be needed to cope with special circumstances such as those which produced the results in Rondel v. Worsely\[^{157}\] and Gran Gelato Ltd.

\[^{153}\] Caparo, [1990] 2 AC 605, per Lord Oliver
\[^{154}\] The decision of the English Court of Appeal in Galoo Ltd v. Bright Grakame Murray [1995] 1 All ER 16 is a good example of the defendant's knowledge of the use to which their work would be put being critical in determining the existence of a duty of care.
\[^{155}\] e.g., academic commentators.
Some differences exist in the way this test has been formulated by different courts. There is a strand of thinking in recent cases which has developed the test by requiring that the giver of the information should have intended reliance to be placed on the advice by the identified person. In Galoo Glidewell LJ observed:

'It follows...that an accountant and auditor of a company may owe a duty of care to a take-over bidder if he approves a statement which confirms the accuracy of accounts which he has previously audited or which contains a forecast of future profits, when he has expressly been informed that the bidder will rely on the accounts and forecast for the purpose of deciding whether to make an increased bid, and intends that the bidder should so rely.'

The Australian case of Lowe Lippmann Figdor & Franck v. AGC (advances) Ltd adopted a similar approach. In that case the auditor was informed that a copy of its forthcoming report would be sent to a creditor. Brooking J held that there could only be liability if it could be said that the auditor had made the report with the intention of inducing the creditor to extend further credit. If this were not the case

‘the auditor would face the danger of being sued by all sorts of third persons if, on the day before the report was signed, the company informed him of its intention to broadcast the audited reports by distributing them to all those with whom it had or hoped to have business dealings.’

Brooking J’s reasoning does not seem compelling. The simple act of informing the auditor that the report is to be distributed widely will not suffice to create the necessary proximity. Under the Caparo test, it requires knowledge of the particular transaction in which the information is to be used. A requirement that the defendant should have had specific knowledge of the plaintiff and the transaction in which the advice was to be used, is clearly much more strenuous than one which required the defendant merely to have foreseen the plaintiff either as an individual or as a member of a class. To go even further and require an identified intention on the part of adviser that the recipient should rely on him places a severe constraint on the circumstances in which a duty of care can be recognised. If this development is to be accepted, it is not difficult to envisage more liberal courts beings forced into a

159 [1995] 1 All ER 16, 36.
160 [1992] 2 VR 671, at 681, per Brooking J. (Supreme Court of Victoria, Appeal Division).
161 See also recent Australian case, Esanda Finance Corporation Limited v. Peat Marwick 188
meaningless exercise of searching for a principle of voluntary assumption of responsibility without specific known reliance.\textsuperscript{162}

In terms of relationship between 'proximity' and 'fairness, justice and reasonableness', Lord Steyn expressly approved the approach to that of Saville LJ, who made the decision in the Court of Appeal. In the Court of Appeal, Saville LJ had sought to respond to an argument that questions of 'proximity,' and 'fairness, justice and reasonableness,' were of no relevance to cases involving physical damage, having been developed in cases of purely economic loss. Referring to cases of purely economic loss, he continued:

'To my mind the law draws no fundamental difference between such cases and those where there is damage to person or property. Whatever the nature of the loss sustained, the court approaches the question in the same way.\textsuperscript{163}

Saville LJ was concerned only to reject the argument that questions of proximity and fairness were irrelevant outside the area of purely economic loss, but he did not argue that the nature of the loss was entirely immaterial. He raised an issue as to 'whether there was a difference in kind or merely in degree' (emphasis added) between cases of physical damage and those of purely economic loss. Saville LJ denied any 'fundamental' difference between the two types of cases, implicitly, but conceded that the cases were undeniably different in degree. That seems also to have been the view of Lord Steyn in the House of Lords. He made it clear that the two types of cases differed in a 'qualitative' fashion, yet, 'the materiality of that distinction is plain.'\textsuperscript{164} Although questions of 'proximity' and of 'fairness, justice and reasonableness' are relevant in all cases in negligence, it is safe to say that the qualification they present to the plaintiff may vary in weight from one case to another. Normally, the hurdle will be higher in cases of purely economic loss than in cases of physical damage.

Lord Steyn's treatment of the three-stage test is similar to Mason's contention, mentioned above. He, for the majority, held that the elements of 'foreseeability', 'proximity' and 'fairness' in the test are facets of each other:

\textsuperscript{162} See Cane, P., 'The Basis of Tortious Liability' in Essays in Honour of P. Atiyah, p.351, on reliance as basis of tortious liability.

\textsuperscript{163} [1994] 3 All ER 686, 691.

\textsuperscript{164} [1996] 1 AC 211, at 235.
‘whatever the nature of harm sustained by the plaintiff, it is necessary to consider the matter not only by inquiring about the foreseeability but also by considering the nature of the relationship between the parties; and to be satisfied that in all the circumstances it is fair, just and reasonable to impose a duty of care. Of course... these three matters overlap with each other and are really facets of the same thing... The three so-called requirements for a duty of care are not to be treated as wholly separate and distinct requirements...’ (per Saville L.J in the Court of Appeal, quoted by Lord Steyn as a ‘correct summary of the law as it now stands.’)

Lord Steyn’s interpretation of the three-stage test is therefore indistinguishable from Lord Wilberforce’s rejected the two-stage test of qualifying ‘foreseeability’ by ‘policy’ in Anns. When the Anns approach is applied it results in specially restricted relationships that are narrower in scope than what is indicated by the foreseeability criterion, equivalent to the variable ‘proximity’ element under the new test.

6.2.2. Voluntary Assumption of Responsibility and The Three-stage Test
A central feature of recent negligence cases of House of Lords has been the emphasis placed, particularly by Lord Goff, on the notion of assumption of responsibility as the central justification for imposing a duty of care in tort in relation to professional service. The question which this raises is whether assumption of responsibility is a concept which is capable of being developed as the touchstone of liability in tort or is unhelpful, and when examined found to be devoid of meaning and utility.

As mentioned above,166 in the decision in Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.167 the ‘voluntary assumption of responsibility’ is one of a number of formulae, alongside the ‘special relationship,’ the relationship equivalent to contract and knowledge of reasonable reliance, used to justify the decision that a duty of care in tort might be imposed in respect of negligently given advice which, when relied upon, results in purely economic loss. The concept is also often regarded as relevant to the ultimate decision in that case to recognise that the disclaimer of liability which had been used by the defendant negated the imposition of a duty of care on the facts.

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165 Ibid. at p.236.
166 See above, 6.1.1. & 6.1.2. (on the Hedley Byrne doctrine).
Barker has argued\textsuperscript{168} vigorously that neither the concept of 'reliance' nor of 'the assumption of responsibility' seems capable of providing a workable criterion for the imposition of a duty of care in tort. Lord Griffith shared the same point in Smith v. Bush\textsuperscript{169} where he first argued that 'the voluntary assumption of responsibility' is not a 'helpful or realistic test of liability' because it is unlikely that an express assumption of responsibility will ever occur. He accepted that a finding of an assumption of responsibility would often be based on a fiction. In effect, the notion will refer to those circumstances in which the law will deem the maker of a statement to have assumed responsibility for his work. When he turned to consider the definition of the circumstances in which this assumption of responsibility would be made he had recourse to the familiar three stage test of a duty of care, asking whether there existed foreseeability, proximity and whether it would be just, fair and reasonable to impose a duty of care. The assumption of responsibility can therefore be seen to be a fiction which expresses a conclusion that a duty of care is to be imposed. It is not a test which can be used to reach that conclusion and it says nothing about the circumstances which lead to the conclusion. Lord Roskill followed this lead in his speech in Caparo:

'I find considerable difficulty in phrases such as 'voluntary assumption of responsibility' unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability on a person making the allegedly negligent statement to the person to whom that statement is made, in which case the phrase does not help to determine in what circumstances the law will impose that liability or, indeed, its scope.'\textsuperscript{170}

It is important to remember the context in which the discussion in Smith v. Bush\textsuperscript{171} occurred. The supposed voluntary nature of the duty recognised by Hedley Byrne had been argued to mean that an explicit denial of responsibility in the form of a disclaimer resulted not in the availability of a defence but in there being no duty of care and thus no need for a defence. It was argued that the provision of the Unfair Contract Terms Act 1977 were directed to the control of defence and were irrelevant to cases in which no duty existed. These arguments, which had been accepted by the

\textsuperscript{169} [1990] 1 AC 831, 862, per Lord Griffith.
\textsuperscript{170} [1990] 2 AC 605, 628 per Lord Roskill.
\textsuperscript{171} [1990] 1 AC 831, 862, per Lord Griffith.
Court of Appeal in *Harris v. Wyre Forest DC,*\(^{172}\) were rejected partly as a result of the wording of the Unfair Contract Terms Act 1977 (particularly s.13) and partly because it was accepted that the *Hedley Byrne* principle cannot be regarded as a voluntary form of liability which can be accepted or denied at will. As Lord Griffith emphasised, tortious liability is imposed by operation of law if the circumstances justify it. The decision of the English Court of Appeal showed that there is real danger in mistakenly treating the voluntary assumption of responsibility as a useful test.

In *Marc Rich,* Lord Steyn also rejected Lord Goff’s test of voluntary assumption of responsibility stated in *Henderson v. Merrett Syndicates Ltd.*\(^{173}\) He took the view that the decisive question in this case was whether it was *fair, just and reasonable* to impose liability. It is submitted with respect that he should have found it necessary to determine whether the classification society had voluntarily assumed responsibility towards the cargo owners.\(^{174}\) That proof of such an assumption is only relevant insofar as it establishes a relationship of proximity in cases where proximity is *prima facie* lacking (e.g., cases of purely economic loss). Its existence cannot affect the quite distinct question of whether it is fair, just and reasonable to impose liability. However, he dismissed the argument that there was a voluntary assumption of responsibility. He rejected it on the ground that the cargo owners did not know of NKK’s examination of the vessel, and hence did not rely on it. But this fails to recognise the possibility that a voluntary assumption of responsibility may arise even in the absence of this form of reliance, as in the case of *White v. Jones.*\(^{175}\)

Nevertheless, under the influence of Lord Goff, a touchstone of the voluntary assumption of responsibility was adopted by all of the House of Lords in *Henderson v. Merrett Syndicates Ltd.*,\(^{176}\) a minority in *Spring v. Guardian Assurance plc,*\(^{177}\) and a majority in *White v. Jones.*\(^{178}\) It is submitted that two issues should be clarified in future cases. First, it is not clear when the three-stage test will be applied and when that of the voluntary assumption of responsibility. The second issue is that the principle can be interpreted widely. To give the concept of ‘voluntary assumption’ a

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\(^{173}\) [1995] 2 AC 145.  
\(^{175}\) [1995] 2 AC 207.  
\(^{176}\) [1995] 2 AC 145.  
\(^{177}\) [1995] 2 AC 296.  
\(^{178}\) [1995] 2 AC 207.
wider connotation is to deprive it of any real explanatory power as a basis of liability. It is also not clear whether the principle requires ‘general’ reliance, or ‘specific’ reliance on specific acts or omissions on the part of the defendant by the plaintiff.\(^\text{179}\)

It is noted that the rationale in *White v. Jones* cannot easily be reconciled with the ‘reliance’ test under ‘the voluntary assumption of responsibility’ framework. The difficulties are that the defendant assumed responsibility to the testator rather than the beneficiary, and the latter did not rely on the solicitor. It is questionable whether it is worthwhile to extend the voluntary assumption of responsibility concept in so far as that the unknown beneficiary is included within it, at the expense of making this touchstone of liability much weaker. While the extension might be made because of the special factors associated with the beneficiary principle, once the assumption of responsibility test has been distorted, it may be much more difficult to resist the imposition of liability in other cases. The alternative solution is that the slippery concept of reliance might be rejected as an essential element of the ‘voluntary assumption’ test, but only if other control devices are available. After all, it is unlikely to be a simple principle.

It is not entirely clear which of these choices were made by the House of Lords in *White v. Jones*, but it would appear that it is the second. Lord Goff considered that ‘the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary.’\(^\text{180}\) Lord Browne-Wilkinson appeared to adopt the second course,\(^\text{181}\) and so did Lord Nolan.\(^\text{182}\) Given the difficulties the House of Lords found in upholding the ‘beneficiary’ principle, the courts would likely not to loosen the voluntary assumption of responsibility test too far in future cases.

As was examined above, one of the striking impact of the decisions of *Spring*\(^\text{183}\), *Henderson*\(^\text{184}\), *White*\(^\text{185}\) and *Marc Rich*\(^\text{186}\) is that the importance of the distinction between misstatement and misfeasance when determining the duty of care in negligence cases has been substantially diminished. The major difficulty that the House of

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\(^\text{180}\) [1995] 2 AC 207 at p.268, per Lord Goff.

\(^\text{181}\) Ibid., at 275

\(^\text{182}\) Ibid., at 294.

\(^\text{183}\) *Spring* [1995] 2 AC 296.

\(^\text{184}\) *Henderson* [1995] 2 AC 145.

\(^\text{185}\) *White v. Jones* [1995] 2 AC 207.
Lords now has to clarify is how to reconcile the beneficiary principle with that of the voluntary assumption of responsibility, as well as other principles which dominate this area of law. Furthermore, the reaffirmation of the existence of concurrent liability, in these cases, has removed one of the major constraints on the imposition of a duty of care in respect of misfeasance by destroying the contention that particular forms of loss can be rigidly categorised as being of an exclusively contractual nature. I venture to suggest that if the rationale of Murphy is to survive it may well be that their justification will have to be found in the relationship of the parties under the umbrella of the ‘proximity’ test.

6.3. Conclusion: Internal Intelligibility among Rules

The law of negligence has often been criticised for its lack of coherence. The shifting emphasis of different judges in the analysis of the duty of care has been said to lead to 'confusion, complexity and high levels of litigation.' The critics are not limited to academics. Lord Lloyd once said that the law of negligence is disintegrating 'into a series of isolated decisions without any coherent principles at all.' The incoherence of negligence law is understandable. Since the law of negligence has to reflect the complexity of life, it is itself unavoidably complex, and the legal principles which gradually emerge from mists of doubt as the preferred principles are often the product of many judicial decisions on particular facts. However, the criticisms deserve to be taken seriously because coherence, that is, internal intelligibility of legal principles, is generally regarded as an important value in its own right. As shown in this chapter, in the context of negligence law, all legal principles inter-relate – proximity test, reliance principle, the two-stage test, the three-stage test and so on cannot be considered in isolation - so development in one may have an impact upon another. These principles must make sense when taken together.

Moreover, the law, in a sense of legal principle, is in a constant state of change. Generally speaking judges do not suddenly invent totally new principles. We did not, for example, see the judges suddenly invent a generalised principle of liability in negligence for physical damage to persons and property, despite all the pressures arising from the invention of the railways, the development of factories, and other consequences of the industrial revolution. What we saw was a gradual development of the law over a period of nearly 100 years, culminating in Donoghue v. Stevenson, and what we are still seeing is a further gradual exploration of the possible principles which may govern liability in negligence for purely economic loss.

CHAPTER 7

INCREMENTALISM
AND
THE DEVELOPMENT OF NEGLIGENCE LAW

7.1. Common Law as a Kaleidoscopic Mosaic

Law tends towards the general, to reduce human behaviour to general rules and principles and concepts for the purposes of social control. At the same time every event is in a sense unique and there is a tension between the generality of the laws and the exigencies of the particular situation. The development of negligence law reflects this tension. Negligence law, largely developed by common law, is the product of judicial reasoning in deciding cases in particular fact situations. As a source of law it is like a mosaic where the pattern emerges as the work develops. The hallmark of a common law system is the importance accorded to the decisions of judges, and in particular appellate judges, as sources of law, therefore the common law is a set of rules which it is within the province of the courts themselves to establish. The system is built on precedent, and centres on individual decisions and building up its principle by an ‘incremental’ accretion from case to case, whether one regards the common law as a system of judge-made law or as a system of customary law in the sense that it is a body of traditional ideas received within a caste of experts.¹ For Lord Goff, the continued vitality of law thus lies in its capacity to change as ‘a kaleidoscopic mosaic in the sense that it is in a constant state of change in minute particulars.’² He thus envisages common law as a dynamic and pluralistic structure rather than a single monolithic one. As Isaiah Berlin has reminded us, values are never perfectly compatible. Absolute freedom, for example,

is not compatible absolute equality. 'If you choose one value,' argued Berlin, 'you must sacrifice another.' The compromise of competing choices becomes an argument for pluralism. The great human delusion, Berlin thought, is monism: the proposition that there is a single, final solution, an ultimate and overarching truth, that harmonises all values and that justifies the sacrifice of living beings to grand abstractions. He argued that the 'right policy cannot be arrived at in a mechanical or deductive fashion: there are no hard-and-fast rules to guide us.'

The pursuit of perfect harmony is 'a fallacy, and sometimes a fatal one', although he conceded that to recognise the temptation of a monistic system is an abiding human trait.

In the foreword to John Fleming's most recent edition of *The Law of Torts*, Sir Anthony Mason argues that in the context of the law of torts, 'legal doctrine inevitably is the principled expression of the resolution of competing policy considerations.' Principles, therefore, have always to be seen in the light of the policies they serve. As a result, legal concepts such as 'proximity' are inevitably associated with notions of 'fairness' and 'reasonableness.' 'But what is fair and reasonable,' he says, 'in the context of the duty of care, may well depend in a given case on the policy choice or assessment to be made.' However, the resolution of competing policies cannot be brought to a common measure. Each policy will benefit some and not others. After all, both multiplicity of legal doctrines and principles on the one hand, and social policies on the other hand, do not free us from the need to weigh and balance competing interests and a multiplicity of legal consequences, and then to reach the acceptable judicial decision. The following section will then stress the pragmatic interaction between multiplicity of legal doctrines and choice of relevant social policies.

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4 Two other delusions Berlin believed are relativism and determinism. Relativism holds that all values are more or less equally valid, whereas, for determinism, the individual makes no difference to the course of history. Although these two outlooks are central to Berlin's thought, they are not directly relevant to the present discussion in this context. See Berlin, Sir Isaiah, *Four Essays on Liberty*, (Oxford: OUP, 1969).
7.2. Incrementalism

It is important to remember that general tests for determining the existence of a duty of care in negligence have had a limited short life. Lord Atkin’s ‘neighbour principle’ was overtaken by the two-stage test in *Anns.* The two-stage test was again rejected by the House of Lords in *Murphy v. Brentwood District Council.* The two-stage test has been replaced by the three-part test in *Caparo.* Lord Roskill acknowledges in *Caparo* that ‘there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the question whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability.’ The House of Lords has accepted the view of Brennan J that the law of negligence should develop novel categories of negligence incrementally and by analogy with established categories.

7.2.1. Brennan CJ’s Approach

In the High Court of Australia there are two schools of thought, epitomised by two terms, proximity and incrementalism. The incremental approach favoured by Brennan J raises a fundamental question as to the nature of the common law development. In *Sutherland Shire Council v. Heyman,* he held:

'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a mass extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed.'

This dictum has often been cited with approval by the House of Lords. The approach, with its emphasis on precedent rather than general principle, is more in keeping with the traditional mode of legal reasoning and represents a tentative

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9 [1990] 2 AC 605.
10 [1990] 2 AC 605, at 628, per Lord Roskill.
11 *Ibid.,* at 618, per Lord Bridge, at 628, per Lord Roskill.
12 (1985) 157 CLR 424, 481.
13 See *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 618 (per Lord Bridge), 628 (per Lord Roskill), and pp.633-634 (per Lord Oliver); *Murphy v. Brentwood District Council* [1991] 1 AC 398, 461 per Lord Keith of Kinkel.
return to the approach prevailing before Donoghue v. Stevenson,14 whereby it is necessary to assimilate the facts at hand to a recognised category of cases. However, there are difficulties with this approach. The haphazard and fortuitous way in which liability or the denial of it has evolved does not easily permit a rational and principled development of the law, nor can it provide much guidance on its own about how or why liability should be imposed in any particular circumstance. In the present context, there has been some doubt about whether the beneficiary principle was an ‘established category’, although White v. Jones impliedly suggests that it was not as it had to be reconciled with the ‘voluntary assumption of responsibility’ principle which the House of Lords recognised as established.

In an extra-judicial article by Lord Oliver, his Lordship understands the development of the common law in a similar way to that of Brennan J’s contention mentioned above. He argues that the law is basically developed through extension from what has gone before, each decided principle being used as the stepping stone to a further step forward by way of what at least is claimed to be a logical progression. His Lordship then says that ‘the process is essentially an incremental one, built up from case to case, the conclusion being reached by deduction from what has gone before.’15 While Professor Wilson emphasises the logical structure of applying rules to factual situation in question, he says,

‘it is important to establish what the logical possibilities are before determining the rules which are to apply to them. Analysis of factual situation is the first stage and evaluation of the possible rules and selection from them of what is to be the law is the second stage.’16

Incrementalism, as a form of legal reasoning by analogy,17 is a method of making sure that judges take only one step at a time.18 It is a debate that touches on the nature of the development of common law. However, this form of practical reasoning denotes an unstable class of disparate reasoning methods. First, as Brodie contends Brennan CJ’s incremental approach is ‘a plea for a conservative approach’.

and it merely licenses judges to take small steps. Secondly, a series of small steps can add up to a giant stride, although on the one hand moving incrementally gives judges a chance to stop as soon as experience demonstrates the error of their ways. Moreover, what is 'incremental' is to an extent in the eye of the beholder. Thirdly, arguments by analogy are often used to disguise change as continuity, making it difficult to evaluate or even to understand the judicial attitude to development in a given area of law. The last point illustrates the rhetorical function of citing previous cases in a judicial decision. Or, rather, rhetorical functions: citations of previous cases are used to disguise fiat as reason as well as to establish policies not in dispute. Case citations are often used to make an opinion look more persuasive than it really is. The distinction between legal precedent as information and as authority may seem to overlook the fact that the policy considerations and ethical insights found in previous decisions of the same or higher court are entitled to greater weight - are more authoritative - in the decision of the present case than are the values, considerations, and so forth that might be gleaned from other sources. No doubt, the principal rhetorical device used in law is the appeal to authority. In Scots law, for a long period of time, this was largely an appeal to the writings of jurists, in contrast to the civil law jurisdictions where although doctrinal writings are important, appeal is made primarily to the codes and other legislation. In English law the appeal to authority is an appeal to the previous decision of the courts and to legislation. Legal judgments, like any other piece of decision-making, are essentially

20 Bryan v. Maloney 182 CLR, 609, per Toohey J.
22 Hume, David, An Enquiry Concerning Human Understanding 308-309 (3rd ed., P.H. Niddith ed., 1975) App. 3. Hume's discussion of reasoning by analogy in law is apt as well pungent on this point, he said:

'If direct laws and precedents be wanting, imperfect and indirect ones are brought in aid; and the controverted case is ranged under them by analogical reasoning and comparisons, and similitudes, and correspondences, which are often more fanciful than real. In general, it may safely be affirmed that jurisprudence is, in this respect, different from all the sciences; and that in many of its nicer questions, there cannot properly be said to be truth or falsehood on either side. If one pleader bring the case under any former law or precedent, by a refined analogy or comparison; the opposite pleader is not at a loss to find an opposite analogy or comparison; and the preference given by the judge is often founded more on taste and imagination than on any solid argument. Public utility is the general object of all courts of judicature; and this utility too requires a stable rule in all controversies: but where several rules, nearly equal and indifferent, present themselves, it is a very slight turn of thought which fixes the decision in favour of either party.'
subjective and evaluative. After all, it is the judge’s decision primarily in the light of the facts and the law, but we shall also see that other variables may play a part.23

The point should be emphasised that it is the later court that creates the *ratio decidendi*. The later court decides whether to read the earlier decision broadly or narrowly and, if it cannot be narrowed sufficiently to distinguish the present case, whether to overrule it. The decision of how much weight to give the earlier precedent - whether to apply it at all, and if so, how broadly - is a pragmatic decision in which the uncertainty that will be created by a too casual attitude toward past decisions - and the additional work that such an attitude will create for the courts both by requiring more time on each case and, as a result of the greater uncertainty, engendering more cases - is compared with the increased risk of error in taking an uncritical view of past decisions.

According to Brennan J’s incrementalism, one has to know the existing sources of authority, the content of the particular case and the set of generalising rules for using authorities. Major premises are not given; they have to be chosen. Statutory propositions are reasonably straightforward but the formulation of a case-law rule or principle as a major premise involves a process of abstraction from the facts of the earlier case and the choice of the level of abstraction may be conditioned by reaction to the facts of the case to be decided. The minor premises – the facts - rest on a perception of probability and truth-description. This involves the use of categorisation, *genus et differentiam*, the *genus* and - the identification of members of the category - the species. Since determining the minor premises inevitably involves interpretation and evaluation in the broad sense, the process of categorisation is indeed an indeterminate one. The incremental approach relies heavily on the assumption that existing categories, which are factual circumstances, can generate legal outcomes, and this is what is and should be done when one focuses attention only on the facts of past cases. In this way, Stapleton believes that the incremental approach, 'can become a process akin to the tail wagging the dog, because the selection of the 'relevant' pocket can, at the outset, preclude consideration of factors

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or 'policies' which would provide a more coherent overall approach.\(^{24}\) For example, one well-established category of cases is the liability for pure economic loss arising from negligent misstatements under the principles in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd.*\(^{25}\) In England, a negligent surveyor whose report induces the purchase of a defective home is liable under *Hedley Byrne* reasoning,\(^{26}\) but a builder is not.\(^{27}\) It seems strange that the builder who was responsible for the initial damage should be immune from action whereas the surveyor is not: the builder escapes liability because he caused the plaintiff's loss by building the structure rather than making a negligent statement about it. The explicit reliance on facts rather than policies, which is involved in the fallacy, has the consequence of producing anomalies in the case law.

The initial selection of the relevant 'category', based on the factual similarity of the cases, can preclude resort to policy premises from factually dissimilar cases, which are nevertheless relevant. The source of a policy premise is irrelevant if the policy is applicable to the situation at hand. Judges have rightly applied Cardozo J's caution against imposing liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'\(^{28}\) to a wide variety of circumstances. It has been cited in economic loss cases of all types, including those between solicitors and beneficiaries under the wills of client-testators,\(^{29}\) auditors and investors,\(^{30}\) and builders and remote purchasers of houses.\(^{31}\)

Another main difficulty of the incremental approach becomes evident on close examination of the process of reasoning by analogy itself. Reasoning by analogy is an incomplete inductive process whereby a similarity between two concepts in one respect is inferred from a known similarity in other respects. It is not necessary to bring the facts of a later case completely within the earlier one, as long as they have 'sufficient' similarity for an analogy to be drawn. But this method is flexible, and


\(^{25}\) [1964] AC 465

\(^{26}\) *Smith v. Bush* [1990] 1 AC 831.

\(^{27}\) *D.& F. Estates v. Church Commissioners for England* [1989] 1 AC 177.

\(^{28}\) *Ultramarines Corporation v. Touche*, 174 NE 441, 444 (NY Ct App, 1931).

\(^{29}\) *Ross v. Caunters* [1980] 1Ch 297, 309.


\(^{31}\) *Bryan v. Maloney* (1995) 182 CLR 609, 618
implicitly evalutative. An analogy can always be drawn between two cases if the judge is willing to view them at a high level of generality. Depending upon the degree of generality with which one is willing to view the concepts, an analogy can be drawn between an orange and a lemon (because they are both citrus fruit); an orange and an apple (because they are both fruit); an orange and a steak (because they are both consumed by people). In one sense, *Hedley Byrne* could only be said to be analogous to *Donoghue v. Stevenson* if one views the earlier case at such a high degree of generality that the comparison is uncompelling to say the least. It follows that a judge’s willingness to draw an analogy will be determined by factors which remain hidden while discussion is focused on the compelling nature or otherwise of the analogy.

This point can be illustrated by examining judgments which have used the incremental approach in novel cases. In the recent case of *White v. Jones*, the question of a solicitor’s duty of care to beneficiaries under the wills of client-testators was considered by the Court of Appeal and the House of Lords. In a dissenting speech, Lord Keith of Kinkel declared that

‘there is, in my opinion, no decided case on the grounds of decision in which are capable of being extended incrementally and by way of analogy so as to admit of a remedy in tort being made available to the plaintiff.’

Where there is a refusal to impose a duty of care in a novel case, on the basis that there is not a sufficient analogy with a recognised category of cases, this can only be described as arbitrary. The incremental approach used in this way justifies legal formalism without requiring clear enunciation of the policy factors which underlie the decision to leave the plaintiff to his own devices. The question remains: given that the argument from authority is nugatory when framed in this manner, did Lord

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34 See *Home Office v. Dorset Yacht Co. Ltd* [1970] AC 1004, 1054, Lord Pearson said ‘to some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just. It seems to me that this case ought to, and does, come within the *Donoghue v. Stevenson* principle unless there is some sufficient reason for not applying the principle to it.’
36 See *Winterbottom v. Wright* (1842) 10 M & W 109, 114; 152 ER 402, 404: ‘If there had been any ground for such an action, there certainly would have been some precedent of it...That is a strong circumstance, and is of itself a great authority against its maintenance.’ per Lord Abinger.
Keith of Kinkel forward any other arguments in support of his refusal to impose a duty of care? Lord Keith of Kinkel drew attention to Hedley Byrne but distinguished it by saying 'in that case there was a direct relationship between the parties creating such proximity as to give rise to a duty of care' Furthermore, Henderson v. Merrett Syndicates Ltd was distinguished by noting a factual difference between the two cases. His Lordship clearly concentrated on labels such as 'incremental approach' and 'proximity' at the expense of articulating policy values. Professor Fleming once argued that there has been 'a pervasive failure to give reasons' in the law of negligence, a failure which 'has its roots in the embarrassment with which the British conservative tradition has generally treated the role of policy in judicial decision-making.'

7.2.2. Levi’s View

In fact, incrementalism has long been recognised by Edward Levi in his influential work, An Introduction to Legal Reasoning, where he argues that the common law is developed by 'example'. Edward Levi's model of legal reasoning is considered by many to be the definitive description of judicial reasoning in the common law system. His theory will be examined in this section.

He argues that reasoning by analogy in the common law sometimes consists simply of comparing similarities and differences between the cases, or of reasoning 'by example.' If this view is correct, reasoning by analogy is qualitatively different from reasoning from precedent or principle, which both turn on reasoning from the requirement of normative coherence. This view is, however, incorrect. As MacCormick rightly argues that 'analogies express the content or the implications of legal principles, whether principles already acknowledged and recognised in law or principles under construction in the justification process', reasoning by analogy is only different from reasoning from principle and precedent in form. He later adds that analogies are merely to add weight to a justification of the decision by

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exhibiting the principle that can be developed for the case under consideration and by indicating the value attaching to its implications in concrete cases.41

The error of the first conception - that reasoning by analogy in the common law consists simply of comparing similarities and differences between cases - can easily be shown. Assume that (1) on the 1st of January, 1999, (2) a manufacturer (3) of grouting machines (4) in Edinburgh (5) sells a grouting machine (6) to a machine-shop operator (7) in Glasgow (8) who on March 1 (9) injures his hand while using the machine (10) as a result of a defect in the machine. The court holds that the manufacturer is liable under the principle of strict liability. Now a second case arises, which differs from the first in only one way, but obviously the difference is decisive, and it would be decisive if ninety more similarities were added. Cases are not determined in the common law simply by comparing similarities and differences.42

The second conception - that reasoning by analogy in the common law consists of reasoning by example - is at the core of Edward Levi’s An Introduction to Legal Reasoning, which characterises not only reasoning by analogy but all common law reasoning in this manner. Levi attempts to illustrate this conception by the line of cases concerning a manufacturer’s liability for negligence that culminated in Donoghue v. Stevenson. In the early nineteenth century, the rule had emerged that the manufacturer of a defective product was liable for negligence only to his immediate buyer unless the product was of a type that was ‘inherently dangerous’ even if carefully manufactured. In the early twentieth century, English law, led by Donoghue, essentially dropped the special protection afforded to manufacturers and allowed suit for injuries resulting from negligently manufactured products without regard to whether the product were ‘inherently dangerous.’ Using this illustration as a case example, Levi argues that the common law develops through, and only through, ‘reasoning by example’ which is similar to Brennan CJ’s incrementalism,

‘The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; the rule of law is made applicable to the second case. This is a method of reasoning necessary for the law...

What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the

41 Ibid.
42 Raz, J., The Authority of Law (1979) at pp. 201-6.
community by making sure that the competing analogies are before the court.'43

Levi derided the idea that the law develops by reasoning from general principles rather than the comparison of examples:

'It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created...

The process...runs contrary to the pretence of the system. It seems inevitable, therefore, that...there will be the attempt to escape to some overall rule... The rule will be useless. It will have to operate on a level where it has no meaning... It is window dressing. Yet it can be very misleading. Particularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally ambiguous and meaningless, forgetting that the legal process does not work with the rule but on a much lower level.'44

Levi reserves special scorn for the concurring opinion of Brett, M.R., in *Heaven v. Pender,*45 which formulated a general principle that foreshadowed *Donoghue*: whenever a supplier of goods should recognise that unless he used ordinary care and skill with regard to the goods' condition there would be danger of injury to the user, a duty arises to use ordinary care and skill. The statement of this principle, Levi says, constituted a 'flight' by Brett 'toward a rule above the legal categories which would classify the cases.'46 The flight was 'concocted' by a judge so foolish as to think that "the logic of inductive reasoning requires that where two propositions lead to exactly similar premises there must be a more remote and larger premise which embraces both of the major propositions."47 A similar criticism is levelled against *MacPherson:

'It would be a mistake to believe that the breakdown [of the inherently dangerous rule] makes possible a general rule, such as the rule of negligence...A rule so stated would be equivalent to the flight of Brett. Negligence itself must be given meaning by the examples to be included under it. The process of reasoning by example will decide.'48

44 Ibid., at 8-9.
45 11 Q.B.D. 503, 506 (1883) (Brett M.R. concurring).
46 Ibid., at pp.16-17.
47 Ibid., at p.17.
48 Ibid. at p.27.
Levi’s position is misconceived. It may be that example has a part to play in the intuitive leap of discovery. Judges, however, cannot leave matters like that. Judges must justify their results by objective reasons that meet certain criteria, and must reject intuitive conclusions that they cannot justify in this way. In a normative context, justificatory reasoning can proceed only from the requirement of normative coherence, and ‘reasoning by example,’ as such, is virtually unacceptable. Reason cannot be used to justify a normative conclusion on the basis of an example without first drawing a maxim or rule from the example or, what is the same thing, without first concluding that the ‘example’ stands for a maxim or rule.

If reasoning by analogy in the common law does not consist of either comparing the similarities and differences between cases or of reasoning by example, of what does it consist? Essentially, reasoning by analogy in the common law is a special type of reasoning from the requirement of normative coherence, like reasoning from precedent and from principle. Like those processes, reasoning by analogy in the common law falls into several modes. At its core, reasoning by analogy is the mirror image of the process of distinguishing. In distinguishing, a court normally begins with a rule, announced in a prior case, that is in terms applicable to the case at hand, and then determines that there is good reason to treat the case at hand differently. The court therefore reformulates the announced rule (or, what is the same thing, formulates an exception) in a way that requires the two cases to be treated differently. In reasoning by analogy, a court normally begins with a rule, announced in a prior case, that is not in terms applicable to the case at hand, and then determines that there is no good reason to treat the case at hand differently. The court therefore reformulates the announced rule (or, formulates a new rule) in a way that requires the two cases to be treated alike.

In the passage back and forth among guiding purpose, relevant rules, and typical situation, formal, even syllogistic deductive inference may play a role. It may play a role encoded within the more inclusive dialectic of analogy. However, the minor premise of the syllogism - tricycles are (or are not) vehicles - is the whole work of analogy. The prehistory of the syllogism is the history that matters.

The second attribute of the family of practical reasoning through analogy is that the guiding interests or purposes on which the analogist draws are open-ended. They do not make up a closed list, nor are they hierarchically ordered in a system of higher- and lower-order propositions, the former trumping the latter. They reflect
the variety, renewal, and disorder of real human concerns. Analogical reasoning is not just some purist practice imposed upon these concerns from the vantage point of higher insight.
7.3. Incrementalism and Principle

Since a newly formulated principle is often justified in large part on the ground that it explains cases that seem anomalous under then-prevailing principles, it is tempting to believe that the formulation and establishment of a principle results solely in the application to such cases of the result-centred technique of establishing the rule of a precedent. This temptation should be resisted. A newly formulated principle draws sustenance from anomalous precedents only if the precedents draw conclusions from certain acceptable social policies as predicates. Anomalous precedents tend to appear when prevalent principles lose their social congruence because of a change in social policies as predicates. The court then reaches conclusions based on these predicates, but because these predicates are not yet reflected in the principles available to the courts as authority, the law follows an indirect path of development. The consequence is the creation of an implicit body of law in which social policy predicates find indirect expression. Eventually, this implicit body of law is metamorphosed into an explicit legal doctrine, in the form of a new principle, in which social policy predicates find direct expression. Thus new principles are formulated and established not only because they explain anomalous precedents in a way that prior principles cannot, but also because they reflect social policies in a way that prior principles do not. In contrast, if precedents are anomalous simply because of judicial error, no principle will be formulated to explain them. Such precedents will not provide the basis of an implicit body of law, but instead will be bound off from the body of the law and be allowed to atrophy.

What is true of principles that are explicitly formulated by theorists is also true of principles that emerge gradually through incremental extensions. All principles, however they emerge, draw vitality from social policy predicates and will not long persist if they lose the support of such predicates. MacCormick argues rightly that making lemonade is in principle the same as making ginger beer, hence the same legal consequence will be applied to both cases. He then concludes that 'argument from analogy falls within essentially the same logic as argument from principle.'

7.3.1. Why Principle?

A Legal System which has no doctrinal foundation must drift.50

The question that these analysts are asking is essentially the same: do judges merely ‘find’ the appropriate law and apply it to the case in hand or do they ‘make’ the law? The view to be found in such works as Joseph Raz’s The Authority of the Law51 and J. Bell’s Policy Arguments in Judicial Decisions52 is that a distinction must be drawn between ‘cases that can be decided solely on the basis of binding doctrinal principles without the employment of social policies and cases whose decision requires the employment of social policies’. The law, under this line of analysis, consists of the doctrinal principles found in its binding texts. Cases that can be decided solely on the basis of such propositions, without the employment of social policies (except insofar as the terms of a doctrine require the latter), are put into one category, sometimes called ‘easy’, ‘clear’, or ‘regulated’ cases. Here the judge is said to act as a law-finder. Cases in which the employment of social propositions figures in establishing (rather than merely applying) the deciding rule are put into another category, sometimes called ‘hard’, ‘indeterminate’ or ‘unregulated’ cases. Here the judge is said to act with the power of a legislator, making new law by employing those social policies he thinks best and adopting the rule he thinks best.

Another view is that expressed by Ronald Dworkin53 in Taking Rights Seriously. Those espousing this position maintain ‘that the judge always act as a law-finder’. This analysis also distinguishes between hard and easy cases, but on different grounds. Easy cases are those controlled by relatively specific doctrinal rules. Hard cases are those that can be decided only by the application of relatively general doctrinal rules. The judge is said to decide hard cases by ‘determining what general rule best fits prior institutional decisions and applying that rule to the case before him’. The view expressed in Ronald Dworkin’s Law’s Empire is ‘that the judge decides hard cases by determining what rules would satisfy some threshold test to fit with prior institutional decisions and then selecting, from among these, the rule

he thinks best on the basis of his own moral and political convictions. In so deciding, the judge determines rather than makes law.54

Under the institutional principles that govern the common law, policy considerations are relevant in all cases. To put this differently, all common law cases are decided under a unified method, and under this method social policy predicates always figure in determining the rules the courts establish and the way in which those rules are extended, restricted, and applied. The direct relationship between the principles and social policies also helps to explain the roles played by principles after they are originally formulated and established. One such role is to serve as a basis for new legal rules. At one level, principles serve as the basis for new legal rules in the sense that relatively general standards serve as the basis for relatively specific standards. At a deeper level, principles serve as a basis for new legal rules by mediating between legal rules and social policies. Because principles rest in substantial part on social policies, they have the effect of internalising those policies in the law and making them into institutional values. Accordingly, when the courts draw on a principle as the basis of a new legal rule they draw directly on a doctrinal proposition (the principle) and indirectly on social policies (which generate the principle). For instance, in cases like Anns and Murphy, to some, it may seem fair that the local authority should compensate the house owner for the economic loss suffered. To others, as to Lord Keith in Murphy,55 it may appear that no sound principle can be enunciated to allow such an extended liability for purely economic loss. After all, what is at issue is the broad and general principle underlying each of the cases.

Another role played by principles after they are originally formulated and established is to serve as a basis for re-examining and re-shaping previously established rules. In this role principles allow the courts to criticise, re-explain, and reformulate established rules in the light of institutionalised values. Because of the direct relationship between the principles and social policies, by using new principles to re-examine established rules the courts can re-shape relatively specific doctrinal principles that fail to satisfy the standard of social congruence through an appeal to relatively general doctrinal principles that do satisfy that standard. This

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use of new principles to critically re-examine and re-shape established rules is reflected in the concept of the law working itself pure.

Because principles are used by the courts both to shape new rules and to re-shape old rules, the reach of a new principle, like that of a new paradigm, will typically be extended over time well beyond its original justification. For example, strict product liability was doctrinally justified in its origin as an explanation of cases involving contracting parties, but was later extended to third parties. The career of a principle typically involves limitation as well as expansion. Often, limitations arise from a collision between two principles that both have spheres of action in which they admittedly govern but that point in different directions in a sphere in which they overlap. In some such cases the courts extend the reach of the more important of the two principles and correspondingly limit the reach of the less important. For example, in White v. Jones there is a collision between the beneficiary principle and the voluntary assumption of responsibility and known-reliance principle. In other cases, as Raz has pointed out, the courts may weigh the extent to which the goal of each principle will be advanced by its application, or defeated by its rejection, and apply the less important principle, because to do so will 'greatly advance the goal of that principle, while doing only little harm to the goal of the more important principle.' In still other cases, the court shape a rule that reflects both principles.

7.3.2. Dialectics between Principles and Social Policies

The result of collision between principles is that classes of transactions are gradually hived off from a principle's full force through the formulation of special rules. Hiving off may also occur through the formulation of special rules that reflect the direct interplay between the principle and social policies. Special rules of this kind will be formulated when social policies give rise to the perception that a type of transaction that falls within the stated ambit of a principle is sufficiently special that it should be exempted from the principle. For example, special rules have been formulated, on the basis of policy, to limit liability for negligence - that is, to limit the scope of the negligence principle - in cases involving the exercise of the judicial function by an advocate.57

Principles serve a number of roles in adjudicative reasoning. They explain legal rules. They are themselves binding legal rules, and directly determine the results in some undertakings. They mediate between social policies and legal rules.58 Ultimately, the career of a principle rests on its congruence with social policies. If social policies change in such a way that a principle ceases to be socially congruent, newly decided cases will begin to diverge from the principle as the courts respond to the new social policies. At first, the old principle is not abandoned and the new cases therefore seem anomalous. Eventually, however, a new principle is formulated that explains the anomalous cases and gives expression to the social policies that generated them. The reach of the new principle is likely to be gradually extended. Until then the old principle may co-exist with rules that are generated by the new. By the time the new principle has worked through the legal system pervasively, it may itself be in the process of being displaced. For example, it used to be thought as a result of the rule in Derry v. Peek59 that there was the 'general rule that liability in the tort of negligence did not extend to purely economic loss.'60 Hedley Byrne v. Heller61 was an additional exception to those recognised historically as arising from a special relationship. Given the development of applications of Hedley Byrne v.

57 Rondel v. Worsley [1969] 1 AC 191
59 [1889] 14 App Cas 337 (HL).
61 [1964] AC 465
Heller,\textsuperscript{62} it is now an open question which cases represent the general rule, and which the exception.\textsuperscript{63}

The development of principles involves not only extension but limitation. Limitation occurs as the courts formulate special rules whose effect is to hive off some transactions from the scope of a relevant principle. Such limitations may arise out of collisions between two principles, or as a result of the interplay between a principle and social policies. For instance, the neighbour principle in Anns\textsuperscript{64} was extended into generating a duty of care in local authorities to take care in exercising their duties of building inspection. However, Anns was later overruled by the House of Lords in Murphy on the ground that the precedent lacked any acceptable principle.\textsuperscript{65} A major and ongoing task of legal reasoning is to determine what kinds of transactions are sufficiently special, under social policies, to justify their exemption from the scope of an otherwise relevant principle. For example, in Spring \textit{v. Guardian Assurance}\textsuperscript{66}, a case concerned liability in negligence in respect of a reference in circumstances normally covered by the defence of qualified privilege, it was held that the tort of negligence was allowed to apply to references given in the circumstances of qualified privilege, albeit in strictly circumstances that remain undefined.

As a result of these various dynamics, over the course of time the reach of any given principle is likely to increase in some ways and decrease in others, as some transactions are covered by the principle’s extension and others which are hived off for special treatment are later re-absorbed. For example, the decision of Stovin \textit{v. Wise} shows the changes in judicial policies from ‘economic welfarism’ to ‘economic rationalism.’\textsuperscript{67} What was once seen as special under social policies, and therefore outside a principle, may later be seen as not special, and therefore within it, may even later be seen as special, and therefore outside it.

This is an ongoing dialectical process of interpretation. It reveals the way in which legal norms and rules are embedded in the social practice of a given

\textsuperscript{62} Ibid.
\textsuperscript{63} The more restricted view of the boundaries of the rule in Hedley Byrne \textit{v. Heller}, taken by the Privy Council in \textit{Mutual Life and Citizens Assurance Co. \textit{v. Evatt}} [1971] 2 WLR 23
\textsuperscript{64} [1978] AC 728.
\textsuperscript{65} [1990] 2 All ER 908, 923, \textit{per Lord Keith}.
\textsuperscript{66} [1995] 2 AC 296.
community. It presupposes that there must be shared understandings of rules which are assumed by the people in the community. As Fish argues, to be inside an interpretive community means to be already and always thinking and perceiving within the norms, standards, definitions, routines of that community and to share an understanding of the common goals that both define and are defined by that context. Judges have to know to what extent that shared understanding is accepted in the community. For, as Fish explains, 'a rule can never be made explicit in the sense of demarcating the field of reference independently of interpretation, but a rule can always be received as explicitly by someone who hears it within an interpretive pre-understanding of what the field of reference could possibly be.'

It is suggested that Fish's notion of interpretive community may contain seeds for the development of a notion of legal interpretive community; of those involved in the legal system, judges, counsel, and all affected partied sharing interpretive approaches. Such interpretive community is in essence constituted by institutional practices which may exist in the form of shared cultures, norms, goals and definition. However, different communities may not necessarily share the same kind of interpretive approach on the same social or legal problem. For example, although judges in common law countries welcome assistance from decisions of the higher courts in other Commonwealth jurisdictions, there has also developed a tendency for lawyers in some jurisdictions to identify and stress particular legal policies or principles as being distinctive of their own legal culture. This may well be a natural development, as countries gradually assert their independence from the past; but it does mean that lawyers in Australia, Canada and New Zealand apparently see advantages in establishing their separate legal identities. In the following section, I

69 Fish, Stanley, Doing What Comes Naturally, at, p.141. The notion of interpretive community suggested here draws upon that of Fish, who explains 'the idea of an interpretive community,' as 'not so much a group of individuals who shared a point of view, but a point of view or way of organising experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, in so far as they were embedded in the community's enterprise, community property. It followed that such community - constituted interpreters would, in their turn, constitute, more or less, in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act.' See also, Fish, S., Is There a Text in this Class? (Harvard, 1980).
71 Fish, S., Doing What Comes Naturally, at p. 125.
will examine how lawyers in major common law countries establish their own interpretive approaches in the context of negligence law.
7.4. Incrementalism and Divergence

What will the courts rely upon, under Brennan J's incremental approach, if there is no previous authority from which analogy could be drawn? This problem arises in *Marc Rich*, for the question of the classification society's liability to the plaintiff cargo owners was novel. There was no previous authority from which an analogy could be drawn. Here Lord Steyn finds the meaning of 'proximity', as an incremental approach, unhelpful; he says, 'none of the cases cited provided any realistic analogy to be used as a springboard for a decision one way or other in this case.' This illustrates the limit of analogical deductive reasoning in judicial decision-making.

On the other hand, it is still possible to see the law of negligence as a body of principles in the various jurisdictions. This comparativist approach to the law has played a large part in judicial exegesis of the law in recent times, particularly in Australia, Canada and New Zealand. One salient example may be the different judicial attitudes towards the rationale in *Murphy* among these jurisdictions.

The debate has been far from over since the decision of *Murphy* was made. In *Canadian National Railway Co. Norsk Pacific Steamship Co.*, and more recently in *Winnipeg Condominium Corporation No.36 v. Bird Construction Co. Ltd.*, the Supreme Court of Canada, following the *ratio of Kamloops*, rejects to adopt the decision of *Murphy*. In New Zealand, Lord Wilberforce's two stage test in *Anns* lives on. In *Stieller v. Porirua City Council*, a house purchaser who discovered that the weatherboards of the house did not conform to the standards prescribed by the Council's byelaw recovered damages from the council for its failure to discover the sub-standard material on inspection. In that case, the relevant regulations were held to be wider than those considered in *Anns* and *Peabody* and to extend to the...

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72 [1996] 1 AC 211.
73 [1996] 1 AC 211, at p.236
safeguarding of persons who may occupy...houses against the risk of acquiring a substantial residence.86 Similarly, in the New Zealand Court of Appeal, the plaintiff in Takaro Properties Ltd. v. Rowling87 succeeded in a claim against the Minister of Finance for failing 'to take reasonable care to ensure that he acted within his legal powers,'88 but the Privy Council allowed the Minister's appeal.89 In that case, Lord Keith of Kinkel said that their Lordships 'consider the question (whether a duty of care should be imposed) to be of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis.'90

The approach of the New Zealand Court of Appeal has been the widest in scope. The court has applied the principles set out in Anns as a single theory of negligence liability, using this as a basis for the imposition of a duty of care in all types of economic loss cases.91 More recently, in Invercargill City Council v. Hamlin92 the New Zealand Court of Appeal extended the recognition of a duty of care beyond cases of avoidance of physical damage or questions of health and safety to a wider category of products or buildings defective in quality. In this case, the court held both the building company and the local authority liable to the owners of a house for the economic loss sustained to repair the inadequate foundations of the house. Applying Lord Wilberforce's formulation in Anns, the Court reaffirmed that the linked concepts of reliance and control have been the underlying elements in proving a relationship of proximity in cases of defective products and buildings. It was pointed out that in New Zealand, home owners have traditionally relied on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws.93 The decision of the New Zealand Court of Appeal was affirmed on appeal by the Privy Council.

Recently, both the Canadian Supreme Court94 and Australian High Court95 have referred to the incremental approach to the development of negligent liability,

86 Stiellor [1986] 1 N.Z.L.R. 84, 94.
88 Takaro, at 68, per Cooke J.
93 Invercargill [1994] 3 NZLR 513 at 522 per Cooke P. See also at 530 per Casey J.
which was the crux of the decision in *Murphy*, albeit in passing. Incrementalism in *Murphy*, and indeed through to a lesser extent in the Australian High Court's own decision in *Sutherland Shire Council v. Heyman*\(^9\), from whence the term began, was seen as a conservative approach to limit the expansion of liability for negligence. Novel cases could only be established incrementally by reference to established categories of negligence. The principles governing liability for negligence diverges in these Common law jurisdictions.

In *Winnipeg*\(^9\) the Supreme Court of Canada took incrementalism to preserve the very flexibility of the common law which the House of Lords in *Murphy* found so disturbing. Where the House of Lords wished expansion of the bounds of liability to be a matter for the legislature, the Supreme Court of Canada regarded the development of common law as the responsibility of the judiciary. The broad 'exclusionary approach' to recovery in negligence represented by *Murphy* was not approved in the Canadian court.

Toohey J in *Bryan v. Maloney*\(^9\) devoted two short paragraphs to incrementalism, to point out that 'incremental' has developed a range of meanings. Incrementalism in the *Murphy* sense was a limiting tool, enabling certainty in the law at the expense of development. The Canadian decisions of *Kamloops v. Nielson*\(^10\) and *Canadian National Railway v. Norsk*\(^10\) were preferred by Toohey J on this point. In *Canadian National Railway* McLachlin J said:

"The incremental approach in *Kamloops* is to be preferred to the insistence on the logical precision of *Murphy*. It is most consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to the dangers of unlimited liability."\(^10\)

Whatever the House of Lords had intended by incrementalism in *Murphy*, it is clear that use of the term is imprecise and more likely to be the subject of real debate. Indeed it is arguable that English post-*Murphy* cases have not fully digested the

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95 *Bryan v. Maloney* 182 CLR 609.
100 [1984] 2 SCR 2
101 [1992] 1 SCR 1021
philosophy expressed in that case. As Toohey J observed in *Bryan v. Maloney* the very term ‘incremental’ invites inquiry because what is incremental is to an extent in the eye of the beholder. The acceptance of the incremental approach does not of itself provide an answer to the question of liability in any particular case.

In *Weir v. National Westminster Bank*, Lord President Hope points out that incrementalism is a sort of development of English common law which ‘prefers to develop the law on a case by case basis rather than by a reference to a principle.’ Indeed, labels such as ‘proximity’ and ‘incrementalism’ are perhaps more semantic than practically useful. On incremental approach a judge who leans against extending a duty of care to a situation not hitherto ruled upon can say that the addition would not be incremental, or not sufficiently so. Brennan CJ is the leading exponent of the approach in Australia, and his views have commended themselves in the House of Lords. A problem is that, if a judge prefers to hold - fundamentally for policy reasons - against the addition, he is likely to describe it in quite emotive language which a judge otherwise disposed would not employ. Thus *Sutherland Shire Council v. Heyman* Brennan J stigmatised the first stage of Lord Wilberforce’s *Anns* test as involving a massive extension of *prima facie* duty of care and in *Murphy* Lord Keith has spoken of the passage in Lord Denning’s *Dutton* judgment as involving an unacceptable jump.

The reality is that whatever formula is put forward for duty of care it will be comprised of elements of extension and limitation. The notion of reasonable

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104 *Bryan v. Maloney* 182 CLR 609.
105 *Weir v. National Westminster Bank* SLT [1994], Lord President Hope says, ‘Lord Bridge pointed out in *Caparo plc v. Dickman* at [1990] 2 AC, pp 617-618 the difficulties which have arisen from attempts to define a single general principle which may be applied to determine the existence of a duty of care. This led him to say at p618C that the law has now moved in the direction of attaching greater significance to what he described as the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. This, it must be accepted, is a tradition more in keeping with that of the English common law, which prefers to develop the law on a case by case basis rather than by a reference to a principle. But there can be no doubt that cases involving pure economic loss give rise to situation of particular difficulty, and that it is in this field especially that reliance on the general principle may produce results which are unreasonable.’
106 *Caparo Industries plc v. Dickman* [1990] 3 WLR 358 at 365 per Lord Bridge; *Murphy* [1990] 3 WLR at p.442, per Lord Keith; *Curran v. Northern Ireland Housing Association* [1987] AC 718 at 726 per Lord Bridge.
107 On an interpretation which, as explained, has not prevailed in New Zealand.
contemplation fulfils the former function. However, reasonable contemplation can function in an over-inclusive manner and further elements will likely exist by way of counter-balance. At this stage, it is inevitable that policy factors will be brought into play. The effect that such wider considerations have on a case in dispute is likely to be determined by how conservative or otherwise the judiciary are at that moment in time rather than where the onus is placed or whether a two- or three-stage test is deployed. The exercise of balancing the consequences of holding for or against the plaintiff will permit of more than one answer.^{109}

This is by far perhaps the most important question we should be concerned with, namely, the basic question of common law principle and approach. The inevitable separate development of the common law continues apace, but this subject is one of those described by Lord Keith of Kinkel in the judgment of the Privy Council in Rowling v. Takaro Properties Ltd.^{106}

"Upon which all common law jurisdictions can learn much from each other; because apart from exceptional cases, no sensible distinction can be drawn in this respect between the various countries and the social conditions existing in them. It is incumbent upon the courts in different jurisdictions to be sensitive to each other's reactions; but what they are all reaching for in others, and each of them striving to achieve, is a careful analysis and weighing of the relevant competing considerations."

This is the approach that has been attempted in Invercargill, Winnipeg, and Bryan v. Moloney in the appellate courts of New Zealand, Canada and Australia.

Winnipeg, Invercargill and Bryan v. Moloney all cast serious doubt on the viability of Murphy. These decisions cannot be ignored as common law jurisdiction mutterings of independence, more particularly as the rationale of Murphy purported to derive from a decision of the Australian High Court.

Both the Canadian and the Australian decisions recognise that defects in property constitute a loss which can be classified as economic loss, and that this type of economic loss is recoverable within the law of negligence. In Invercargill the issue of how the loss was to be classified was not fully addressed but the implication was that, as in Bowen, dangerous defects constituted physical damage. Whereas the Canadian and New Zealand decisions limit themselves to dangerous defects,

^{109} [1996] 1 All ER 756 at 766. It is so observed in Invercargill 'The decision whether to hold a local authority liable for the negligence of a building inspector is bound to be based at least in part on policy considerations.'
without excluding the possibility that non-dangerous defects might be recovered, the Australian case posits liability for both dangerous and non-dangerous defects.

The prerequisites for liability in all cases are foreseeability, which can be easily determined on such facts, and proximity, which has proved more problematic. Indicators of proximity might be assumption of responsibility, reliance on the builder’s skill, and the unique nature of the house as a single item of purchase. More significantly, all three Commonwealth courts were prepared to face the practical problems resulting from Murphy. These courts were sufficiently confident of the power and competence of the judiciary to find a solution to the tension between justice for the individual and the risk of indeterminate liability. The strongest support for Murphy came from the dissenting opinion of Brennan J in Bryan. Brennan J started from the same position of conservatism particularly with respect to the tort/contract distinction, as the House of Lords in Murphy, but even he was unable to sustain the very technical distinction between dangerous defect and damage that permeated the Murphy decision.

Perhaps the most overwhelming impression to be gained from Winnipeg, Invercargill and Bryan is the willingness of the courts to grasp the issues that arose in these cases. No court ducked the difficulties either of the defect/damage distinction, or of the significance of the separation of physical damage from pure economic loss. Yet the courts did not lose sight of the real problems faced by the subsequent owner of a defective premise, and the reality of the purchase arrangement. It was an overriding objective of the courts to find a solution which might best fit theories of jurisprudence but which as far as possible, meted out justice in the real world without sacrificing an internal consistency to the legal logic of their judgments. Each of these courts achieved that end in somewhat different manner.

The Invercargill case, and two other cases that have lately come before the highest appellate courts in Canada and Australia, Winnipeg Condominium Corp No. 36 v. Bird Construction Co. Ltd[11] and Bryan v. Maloney,[12] have underscored a dramatic division at the highest levels of the judiciary between these jurisdictions and that of England.[13] For the majority in the Murphy case, any right to recover economic loss

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that did not flow from either personal injury or physical damage to other property - once again Donoghue v. Stevenson\textsuperscript{114} - would be limited to contractual claims and the Hedley Byrne\textsuperscript{115} reliance or misstatement types of cases. Thus, the two-stage test of Lord Wilberforce from Anns\textsuperscript{116} was spent for the moment. Neighbours, in the judicial sense of the word, would no longer be presumed to be just anyone. According to Lord Keith, the ‘incremental approach ... by Brennan J ... is to be preferred to the two-stage test.’ However, even though there had been this reformation, the solution in borderline cases, as was later conceded by Lord Oliver, would remain a matter of policy. It is this discussion of the role that policy should play in subsequent Commonwealth cases that presents interesting question to the judicial methodology.

7.4.1. \textit{Invercargill City Council v. Hamlin}

In \textit{Invercargill},\textsuperscript{117} the Court of Appeal of New Zealand had to consider a typical defective premise case, rather indistinguishable on its fact from Anns or Murphy. However, the court held that Murphy did not represent the law of New Zealand in the instant case. The facts in \textit{Invercargill} may be given briefly. The plaintiff’s house was built in 1972. It suffered from some minor defects but it was not until 1989 that a report was sought and which recommended that the foundations be replaced. Proceedings were commenced against the local council which had inspected the foundations when the plaintiff’s house was originally built. At trial, the council was held to be negligent and the facts as reported concerned the appeal from that holding. The correctness of Murphy was placed squarely in issue on the appeal before the Court of Appeal. A special bench of five judges was convened for the hearing.

On liability, all the judgments emphasised strongly a quite different background of virtually exclusive reliance by house purchasers as a class in New Zealand on proper application of the statutory building controls by the housing authorities, with surveyors or other professional advisers not being engaged to investigate such matters. On limitation, four out of five judges held that in those cases where some physical damage had preceded discovery of the defect, time

\textsuperscript{114} [1932] AC 562.  
\textsuperscript{115} [1964] AC 465.  
\textsuperscript{116} [1978] AC 728.
would nevertheless not run until reasonable discovery of the defect, and refuse to follow Pirelli,\textsuperscript{118} preferring the English Court of Appeal case of Sparham-Souter\textsuperscript{119} and the Kamloops\textsuperscript{120} and Rafuse\textsuperscript{121} cases in the Supreme Court of Canada, notwithstanding very comparable ‘accrual’ wording to the English Limitation Act language in the New Zealand Statutes. The touchstone in Invercargill for the New Zealand Court of Appeal was Bowen \textit{v.} Paramount Builders (Hamilton) Ltd.,\textsuperscript{122} which was a case of a private defendant (in Bowen, a builder). The Invercargill judgments thus implicitly confirm a comparable economic loss liability of private defendants (e.g., contractors or architects) for the repair costs or reduced value of defective work, but do not appear to have appreciated that the special New Zealand inclination of reliance on housing control by local authorities given as the basis for their judgments against the Invercargill City Council could hardly apply to private defendants (as where a later purchaser seeks to sue the original builder or designer of the house). The rationale for disregarding the \textit{D. \& F. Estates} case in England and imposing an economic loss liability for defective work on private defendants remains, therefore, a matter for speculation in New Zealand.\textsuperscript{123}

In Invercargill, Cooke P emphasised particularly the unique context of housing construction and the marketing New Zealand as well as the absence of any limitation in the building legislation upon bringing claims in tort or for damages for negligent inspection in coming to his conclusion to find the city council liable toward Hamlin. Cooke P. contended:

\begin{quote}
'The upheavals in high level precedent in the United Kingdom which I have outlined have had no counterpart in New Zealand. The case law has been at least reasonably constant. Since Bowen in 1976, it has been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities.'\textsuperscript{124}
\end{quote}

Before the Privy Council,\textsuperscript{125} it was argued that as the Bowen case had been explicitly

\begin{footnotes}
\item[117] [1996] AC 624.
\item[118] Pirelli General Cable Works Ltd. \textit{v.} Oscar Faber \& Partners [1983] 2 AC 1.
\item[119] Spraham-Souter \textit{v.} Town and County Developments (Essex) Ltd [1976] QB 858.
\item[121] Rafuse, [1986] 2 SCR 147.
\item[122] Bowen \textit{v.} Paramount Builder (Hamilton) Ltd [1975] 2 NZLR 546.
\item[123] See Ian Duncan Wallace, 'No Somersault after Murphy' (1995) 111 LQR 285,
\item[125] Invercargill [1996] AC 624.
\end{footnotes}

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based on *Dutton v. Bognor Regis Urban District Council*\textsuperscript{126} and *Anns,*\textsuperscript{127} and as both *Anns* and *Dutton* were viewed as wrongly decided in England, the same result should now be said to follow *vis-à-vis* New Zealand. Moreover, other common law jurisdictions, particularly Canada and Australia, have declined to adopt the English approach enacted in *Murphy* and lend substantial support to the New Zealand position. The House of Lords, in its opinion in *Invercargill,*\textsuperscript{128} recognises the differences of values in common law jurisdictions. In response to this argument Lord Lloyd reasoned that it was not a case of the New Zealand court incorrectly applying the principles from these impugned cases, but of consciously departing from them.

In the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that the conditions in New Zealand are different. Were they entitled to do so? The answer must surely be ‘Yes.’ The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law courts learning from each other.\textsuperscript{129}

For Lord Lloyd the issue was not one which was amenable to only one solution but many solutions in the unique context of each jurisdiction. On this point and once again returning to Casey J. in the Court of Appeal, he concluded why *Murphy* would not be followed:

‘with respect, the circumstances of home buyers in New Zealand include factors going well beyond those described by his Lordship [Lord Bridge] and support a conclusion of reliance on the local body's inspectors doing their job properly. As well, other matters in local house-building practice can establish the degree of proximity appropriate to satisfy the criteria...in determining whether a duty of care exists.’\textsuperscript{130}

Thus, the key issue then taken to the Privy Council was whether the Court of Appeal was right in finding that a duty of care existed on this basis. In the result, notwithstanding *Murphy,* the Board of the Judicial Committee of the Privy Council held that it could impose liability. Lord Lloyd’s reasons in part sanctioned the

\textsuperscript{126} [1972] 1 QB 373.
\textsuperscript{127} [1978] AC 728.
\textsuperscript{128} [1996] AC 624.
\textsuperscript{130} *Invercargill* [1994] 3 NZLR 513, 530 *per* Casey J.
independent route that had been taken:

'the Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand (nor the Board from affirming their decisions) by the consideration that House of Lords in D. & F. Estates v. Church Commissioners for England and Murphy v. Brentwood District Council have not regarded an identical development as appropriate in the English setting. The particular branch of the law of negligence with which the present appeal is concerned is especially unsuited for the imposition of a single monolithic solution'131

This statement clearly echoes Cooke P's position in Invercargill in New Zealand Court of Appeal, he said, 'it is inevitable that the Commonwealth jurisdictions have gone their own paths...The ideal of a uniform common law has proved as unattainable as any ideal of a uniform Civil Law.'132 If the community of New Zealand has its own attitudes to housing or to the role of the local council, distinct of the circumstances which led to Murphy in England, then the Privy Council could recognise New Zealand common law which was not in accord with English law. Where a Commonwealth jurisdiction consciously chose to depart from English law then it was not the place of the Privy Council to interfere.133 We shall now turn to the next example where the Canadian Supreme Court also consciously distances itself from Murphy's position.

7.4.2. Winnipeg Condominium Corp. No 36 v. Bird Construction Co. Ltd.

In Winnipeg and Bryan, the highest appellate courts in both Canada and Australia have also moved significantly away from English authority in favour of much of the earlier jurisprudence.

In Winnipeg Condominium Corp No 36 v. Bird Construction Co. Ltd, the decision of the Supreme Court of Canada in 1995, involved the very commonly encountered defect of inadequately fixed cladding which later fell. The dispute in Winnipeg arose out of the construction of a fifteen-storey apartment building in the city of Winnipeg in 1972. An action was eventually brought in negligence for the cost of repairs for allegedly defective construction against the contractor (Bird Construction), the cladding subcontractor, and the architects. The Manitoba Court of Appeal had followed D. & F. Estates, and struck out the claim as disclosing no reasonable cause of action. The issue before the Supreme Court of Canada was whether the Manitoba Court of Appeal was correct in so holding. The Court of Appeal had followed the D. & F. Estates case and, thus, the applicability of that decision was directly in issue in the Supreme Court.

La Forest J of the Supreme Court agreed that this was a claim of economic loss, since neither damage to other property nor personal injury was yet involved. He rejected the English authority and underscored a Canadian approach to the duty of care issue which remains firmly rooted in the Anns tradition, notwithstanding that it had been rejected in Murphy. La Forest J, delivering the judgement of the Court, rejected the reasoning in D. & F. Estates, on the ground of that in this case the negligence posed 'a real and substantial danger', to the occupants of the building, and that the cost of putting the building back into a non-dangerous state was, for compelling policy considerations recoverable in tort by the occupants, the rationale being that persons participating in the construction of a large and permanent structure which has the capacity to cause serious damage to other persons or property should be held to a reasonable standard of care.

135 182 CLR 609.
138 Given the Canadian Supreme Court's adoption of reasonable discoverability in previous decisions, limitation was not a problem.
Much of this very important judgment emphasised the policy considerations arising from what may be described as the 'dissenting Rivtow'\textsuperscript{140} principle of Laskin J., namely that plaintiff discovering a dangerous defect should not be disadvantaged by its immediate repair before any accident occurs. \textit{Rivtow}\textsuperscript{141} was one of three main sources that La Forest J drew upon for policy grounds to support his reasons for judgment. The other two sources drawn upon were an analysis of economic loss put forward by Prof. Feldthusen where he outlined five different categories of cases involving economic loss,\textsuperscript{142} and an American decision \textit{Lempke v. Dagenais}.\textsuperscript{143} The \textit{Lempke} case itself yielded five policy grounds that militated against the rigid application of the doctrine of \textit{caveat emptor} in the area of tort claims for defective construction.

The judgment also emphasised its being limited to the liability of private defendants for dangerously defective work, and distinguished cases of shoddy or sub-standard work. The judgment, however, expressly left open the question whether contractors and others should be liable in tort for non-dangerous defects, noting shortly appellate cases in New Zealand and Australia and in numerous American states which had imposed liability on subsequent purchasers for the reasonable fitness and habitability of buildings. Interestingly, one of the cases noted in this context is the Full Court of Tasmania's decision in \textit{Bryan v. Maloney} in October 1993, the subject of an appeal of the High Court decision now discussed below.

Two clear aspects in La Forest J's judgment in \textit{Winnipeg} for not following \textit{D & F Estates} were the continued and growing support for \textit{Anns'} two-stage test in Canadian law, and the now general acceptance of concurrent duties in tort and contract. The Supreme Court has made its own 'U-turn' in adopting the much discussed dissent of Laskin J in \textit{Rivtow}\textsuperscript{144} which was adopted by Lord Wilberforce in \textit{Anns}.\textsuperscript{145} In \textit{Canadian National Railway Co. v. Norsk Pacific Steamship Co.}\textsuperscript{146} the Supreme

\textsuperscript{140} (1973) 6 WWR 692.
\textsuperscript{141} (1973) 6 WWR 692.
\textsuperscript{144} (1973) 6 WWR 692.
\textsuperscript{145} [1978] AC 728.
\textsuperscript{146} [1992] 1 SCR 1021.
Court had explicitly declined to abandon the test of duty of care in *Anns*, after it had been repudiated by the House of Lords in *Murphy*. Accordingly, Lord Wilberforce’s two-stage test was used as a framework for the Court’s analysis of the issues in *Winnipeg*.

It is noteworthy that the Supreme Court declined to follow *D & F Estates* on the basis that the decision rested largely upon the assumption by the House of Lords that liability in tort for the cost of repair of defective houses represents an unjustifiable intrusion of tort into the contractual sphere, a view inconsistent with recent Canadian decisions recognising the possibility of concurrent contractual and tortious duties. Given that the House of Lords in *Henderson v. Merrett Syndicates* has now adopted *Rafuse*, thereby opening the door to concurrent liability in tort and contract, the foundation of *D & F Estates* and *Murphy* may now rest only on a lack of sufficient proximity of relationship between parties.

### 7.4.3. Bryan v. Maloney

The last of the three Commonwealth cases to be referred to and which also marks the move away from English authority is the Australian case of *Bryan v. Maloney*, a case involving the defective construction of a house. The plaintiff, a subsequent owner of the house, sued the builder for the financial loss sustained in the reduction of the value of the house due to the need for repairs of structural defects caused by the builder’s negligence. *Bryan v. Maloney* was a case of non-dangerous defect in a building, but causing ‘reduced value equivalent to the cost of repair.’ It was equally clear that the reliance on the builder himself by a third owner who did not know him would not be a factor giving rise to liability. The issue on appeal was whether a contractor, Bryan, owed a duty of care in tort to a subsequent purchaser, Maloney. The Australian High Court held that a duty of care did exist in the circumstances and declined to follow both *D. & F. Estates* and *Murphy*, preferring instead the *Anns*

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149 *Central Trust Co. v. Rafuse*[1986] 2 SCR 147, 31 DLR (4th) 481.
155 Such as the role of control of New Zealand’s public authority which underlines the rationale of *Invercargill*.
approach as elaborated in the relevant Australian case law, particularly as regards economic loss. There was a principal joint judgment of Sir Anthony Mason CJ and of Deane and Gaudron J].\textsuperscript{156}

Setting out the basis for an Australian approach in the context of their own policy considerations the majority of the court noted that the question of whether the requisite degree of 'proximity' in a particular category of case existed was less likely to be answered by existing case law than in other areas of the law. After noting that under Australian law the existence of a contract would not necessarily preclude the existence of either a relationship of proximity or a duty of care itself, the court listed several factors to be considered. In considering them, it was noted that nothing turns on Maloney's status as a subsequent purchaser; that houses were the most significant purchases that most individuals will make; and that loss in such circumstances was foreseeable.

The majority of the High Court of Australia in Bryan\textit{ v. Maloney}\textsuperscript{157} found that the builder of premises does owe a duty of care to a subsequent purchaser for defects in those premises. There was no question of fictional categorisation of the loss as physical. It was accepted at the outset that the loss was economic and on this point the court did not dissent from\textit{ Murphy}. The starting point for the majority judges was in examining the duty of the builder to the first owner of the house. The fact that these parties were in a contractual relationship was thought to have no consequences for the existence of a duty in tort, but could well determine the extent of that duty. However, the nature of this particular contract was such that it contained no terms in exclusions which would have any bearing on the tortious duty. The contract was only relevant in reinforcing the proximity between the builder and first purchaser. It was clearly the case that given this proximity the builder owed to the first owner a duty with respect to any foreseeable physical damage. Whether that duty extended to foreseeable economic loss was found to depend on the nature of that economic loss. The case of\textit{ Caltex Oil v. The Dredge}\textsuperscript{158} was cited as authority for the proposition that different determinations of proximity might be required for different types of economic loss, and that 'the policy considerations which are legitimately taken into account in determining whether

\begin{itemize}
\item \textsuperscript{156} (1995) 182 CLR 609, with Toohey J. delivering a separate concurring judgment.
\item \textsuperscript{157} \textit{Ibid}.
\item \textsuperscript{158} \textit{Caltex Oil v. The Dredge} (1977) 136 CLR 529.
\end{itemize}
sufficient proximity exists in a novel category will be influenced by the court’s assessment of community standards and demands’.159

The majority judgment continues to proceed on the basis that, in determining the question of proximity between builder and subsequent owner, relevant factors were the common link between the builder and ultimate purchaser, namely the house itself. Could that duty of care be extended to persons other than those in a contractual relationship with the builder? Clearly a duty was owed to other persons at physical risk from the building defects. However, the imposition of a duty of care with respect to economic loss required a higher degree of proximity than for physical injury.160

The only connection between the builder and any subsequent purchaser was the house, but this connecting link was found to be significant. The house was a permanent structure. It was intended for indefinite use. It was likely to represent the most significant purchase the owner would make in his lifetime. There was a high degree of foreseeability by the builder that negligence would result in economic loss to a subsequent purchaser. There was no intervening negligence. The causal relationship between the builder’s negligence and the damage to the house was unaffected by time or change of ownership. Policy in such a case supported a duty of care. The contract between the parties indicated that the builder had assumed a responsibility with respect to the building of the premises, and there had been reliance by the first owner on the builder’s skill and competence.

One policy factor militated against the imposition of a duty of care; that is, from Cardozo J’s floodgate argument that the law must seek to avoid the imposition of liability in ‘an indeterminate amount for an indeterminate time to an indeterminate class’;161 however, the court felt that while Maloney’s class was large, the status of ‘subsequent purchaser’ was determinate.162 Moreover, the majority judges contended that the type of economic loss suffered was particularly significant. The distinction between the physical damage to property, and economic loss representing defects in property, was an artificial one. Indeed, this type of economic loss was more foreseeable than physical injury to strangers which the law compensates. There was

159 (1976) 136 CLR 529.
160 This reasoning substantially replicates that of the Full Court of Tasmania which was under appeal.
161 Ultramares Corp v. Touche (1931) 174 NE 441, per Cardozo J at 444.
162 Bryan v. Maloney 182 CLR 609.
again no conflict of interest with the builder’s legitimate trade. Nor was there any greater risk of indeterminacy of time, but this would be tempered by constraints of reasonableness, and created no greater indeterminacy than a duty with respect to physical injury.

_Dutton v. Bognor Regis_ was cited to support the point that legal analysis of the duty relationship was strongly supported by the more general consideration of policy that the builder is in the better position to avoid the loss. Nor was there any logical reason to distinguish between liability of the builder to a stranger with respect to physical harm resulting from the collapse of foundations, and liability to a building owner for remedial work to avert such damage.

As for English authority, and in particular _D. & F. Estates_ and _Murphy_, the cases was thought by the Australian High Court to rest on a narrow view of the scope of negligence, and a rigid compartmentalisation of tort and contract. The court preferred the course taken in Canada, as represented by _Winnipeg Condominium_ and the continued resistance to _Murphy_ in New Zealand.

While the majority judges note Denning MR's remarks in _Dutton v. Bognor Regis UDC_, to the effect that it was difficult to see why a negligent builder should be liable for ordinary physical damage to personal property and not liable for the cost of remedial work to avert the damage, this is only mentioned in passing in the principal judgment, and does not (and indeed on its stated facts could not) form the basis of the High Court's decision, as it had been in the _Winnipeg_ case. Moreover, Mason CJ was at pains to emphasise that the principal judgment depended in particular on the fact that the building was a permanent dwelling-house with defective footings and that the relationship between the parties was that of builder and later purchaser, and stated that the case should not be seen as determinative of questions between manufacturers and purchasers or later owners of chattels.

7.4.3.1. Brennan J.'s Dissenting Opinion

Brennan J delivered a forceful and elaborate dissenting speech. While approving the

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164 The basis is of Laskin J's 'dissenting _Rivilow_' rationale, akin to the extension of dangerous chattel liability, (1973) 6 WWR 692.
165 _Winnipeg_ was considered by the Australian High Court in _Bryan v. Maloney_.

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dissenting Rivtow rationale of Laskin J., and expressly approving the decision of the Canadian Supreme Court in Winnipeg Condominium, Brennan J., citing the well-known dissenting Junior Books judgment of Lord Brandon, considered that it would be wrong to confer on remote purchasers a cause of action in tort where the negligence merely affected the value or quality of the building or chattel, which it was conceded was the situation in the case before the High Court.

Brennan J. emphasised the distinction between dangerous and non-dangerous defects. His decision owed much to the dissenting judgment of Lord Brandon in Junior Books and in particular the insistence by Lord Brandon that the quality of work done was a matter of contract, determinable only by reference to the terms of the contract. Hence, where as a result of the builder’s negligence the plaintiff possessed a building of lower quality and less value than bargained for, that loss in value was not recoverable in tort. To this extent Brennan J agreed with the House of Lords in Murphy.

Nevertheless some building defects are not just issues of quality. Some kinds of economic loss suffered by a subsequent purchaser could be regarded as damage, which might be recoverable in negligence without offending the contract/tort distinction. Where the plaintiff can point to serious inadequacies in the house that need immediate repair, inadequacies which pose a real and substantial danger to the occupants, those inadequacies constitute such a damage recognised by the tort of negligence. Brennan J said:

‘An owner who knows that defects in the building pose a substantial risk of physical damage to person or property of another - that is, defects which are “likely” to cause such damage - is under a duty to take reasonable means to remove the risk... If the owner rectifies the defects in order to remove the risk of damage to person or property, the expense of removal can be seen as an economic loss incurred to remove the risk, rather than the consequence of physical defects.”

It was stressed that such a remedy in tort would only be available to an owner who had in fact spent money to remove the risk. On the fact of Bryan v. Maloney there had been no such expenditure. It had not, it seems, been established that the defects were

168 [1983] AC 520
169 Ibid.
170 Bryan v. Maloney 182 CLR 609, at 650, per Brennan J.
in fact dangerous. Hence Brennan J was not inclined to allow the plaintiff to succeed against the builder.

Quite clearly the judgment of Brennan J was very much at odds with that of the majority. The policy arguments relied upon by the majority based upon assumption of responsibility by the builder and reliance by subsequent purchasers on the builder’s skills, were found by Brennan J to be unconvincing. The protection of contractual interests, which carried little weight with the majority judges, underpinned the dissenting judgment. This was a judgment with a greater concern for consistent legal theory than with the pragmatism evinced by the rest of the court.

**Dangerous and Non-dangerous Defects**
The majority did not address the distinction drawn in *Anns*\(^{171}\) and *Junior Books* \(^{172}\) between defects that are dangerous and defects that are non-dangerous. The reasoning and policy considerations raised by the court apply equally to non-dangerous as to dangerous defects. The implication from the majority decision is that, where there are no problems of indeterminacy or conflict of interest, and where a close relationship of ‘proximity’ with respect to the building can be established, then all defects are recoverable against the builder by a subsequent purchaser.

While the three majority judges made no distinction between dangerous and non-dangerous defects, that distinction attracted the attention of the two remaining judges (Toohey J and Brennan J). On the facts of the case, the degree of danger presented by the defective house was unclear. Some judges referred throughout to the seriousness of the structural damage to the house. The dissenting judge proceeded on the assumption that it had not been proved that the defects posed any danger to the occupants or to other property. Toohey J did not dissent from the majority verdict as to the liability of the builder but chose to give a separate judgment. He found the distinction between physical and economic harm in defective premises ‘debatable,’ referring to academic critiques of the distinction, given that the plaintiff needed to underpin all the foundations of her house and replace the brickwork as a result of the inadequate foundations. However the plaintiff had not argued that her loss was anything other than economic, and so the decision had to proceed on that basis.

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7.4.3.2. Toohey J.’s Concurring Judgment

The judgment of Toohey J is overwhelmingly one of policy. Latent defects by nature do not manifest themselves for a considerable time. In a modern society the builder must expect the premises to change hands. A subsequent purchaser has little opportunity to inspect foundations. Confining liability to first owners might encourage sham first sales. The house is an extremely important commodity. There is a direct relationship between the builder’s negligence and the plaintiff’s loss, and it is only a matter of timing which led this plaintiff to suffer the loss rather than the first owner.

The policy approach was found to accord with the decision in Winnipeg. However the ratio of Winnipeg was limited to dangerous defects, and the issue of non-dangerous defects left open. Toohey J, without further reasoning, made clear that the judgment of this court related to both dangerous and non-dangerous defects. Supporting the majority, Toohey J. pointed out that while in the Winnipeg case La Forest J had confined his judgment to dangerous defects and excluded cases of shoddy work, he had also referred with approval to policy considerations which would extend liability to a wider class of defects identified in United States cases,173 also to authorities in New Zealand174 and Australia175 and expressed the view that ‘in that sense his judgment is supportive of the conclusion reached by the Full Court in the present case’.176 He did no more on this point than advert to some problems which might arise on non-dangerous cases. The passing of time could make causation more difficult to prove where the non-dangerous defect might be the result of wear or tear on the building, and the relevance of this judgment, particularly its imposition of liability for non-dangerous defects, to defective goods would need to be addressed at some later time.

173 e.g., Lempke v. Dagenais 547 A 2d 290 (1988)
175 Including Bryan v. Maloney in the Full Court of Tasmania.
176 Bryan v. Maloney 182 CLR 609, at 661 per Toohey J.
7.4.4. Conclusion

In Bryan v. Maloney,\textsuperscript{177} the Australian High Court’s majority judgment makes a clear distinction in law between defects which reduce value but call for repair, and defects posing danger to person or property. To that extent the High Court’s judgment is wider in scope than that of the Canadian, which yet has to rule on the liability of private defendants for the cost of repair of non-dangerous defects. Nevertheless, it should be noted that the defects considered by the Australian High Court in Bryan were structural and obviously serious, and of a kind which any owner would be likely to have to repair, although the court had agreed for the purpose of the argument to treat them as non-dangerous. Again, the majority judgment in Bryan significantly does not use any wider or generalised ‘non-dangerous’ or ‘quality’ language when describing the classes of defect which are to give rise to liability to later purchasers, but instead uses on a number of occasions the expression ‘decrease in value resulting from inadequate footings such as that suffered by Mrs Maloney’ to describe the damage for which there will be liability. It seems very possible that some categories of ‘shoddy work’; or mere quality defects may not in the future be thought appropriate to an action in tort against private defendants, and that the court, as highlighted by Brennan J’s dissenting judgment, may need to evolve some controlling definition such as ‘habitability’ in order to prevent abuse by plaintiffs of the new liability. On the other hand, there is no possible doubt that danger of physical damage to person or property has been rejected as too severe a criterion in the majority judgments.\textsuperscript{178}

Both courts stress that their decisions derive from the relationship between later owner or occupier of residential property and their builder or designers, and it remains an important practical question whether the later owners of other types of building, such as a factory or commercial building, can avail themselves of the remedy in tort. It seems clear that plaintiffs claiming economic loss in construction cases who are not owners or occupiers of residential property, such as contractors in a Junior Books\textsuperscript{179} situation, as also the owners of chattels like cranes, ships or aircraft, may well have great difficulty, absent a Hedley Byrne reliance element,\textsuperscript{180} in bringing

\textsuperscript{177} 182 CLR 609.
\textsuperscript{178} In New Zealand, public authorities have been successfully held liable for poor quality work to later owners: see Stieller v. Porirua City Council [1986] 1 NZLR 84.
\textsuperscript{179} [1983] Ac 520.
\textsuperscript{180} [1964] AC 465.
themselves within the principle of these decisions as they stand at present. Public defendants carrying out statutory functions appear to be in a different case from private defendants, since the common law jurisdictions, particularly New Zealand, they have found themselves liable for approving poor quality weather boards, gutter and drains,\textsuperscript{181} for failing to advise on the possibility of flooding,\textsuperscript{182} and even for loss of value by permitting obstructions of a view.\textsuperscript{183} Incidentally, Australia has yet to rule definitely on the Anns liability of public housing authority defendants. Given the previous presence of Mason, Deane, and Brennan JJ. on the High Court bench in Sutherland Shire v. Heyman,\textsuperscript{184} where an Anns affirmative duty of care by a housing authority to detect or prevent a contractor’s defective work was rejected in 1985, this will be awaited with interest should occasion for it arise under current Australian housing legislation.\textsuperscript{185}

In summary, while the Invercargill, Winnipeg, and Maloney cases confirm a deliberate move away from English authority, in particular D. & F. Estates\textsuperscript{186} and Murphy,\textsuperscript{187} all three jurisdictions which the cases represent ultimately strike their own balance on where the line for recovery will be drawn and the policy reasons upon which those limitations will be based. The extent of recovery increases from one jurisdiction to another. In Canada recovery will be allowed against a negligent contractor for removal of dangerous work but not the cost of remedial work or repair of defects alone. In Australia, one may recover both the costs of removal of the dangerous work and the repair of the defective work as well. In New Zealand, both set of costs may be recovered and whether against contractor or a negligent inspecting local authority. All judgements seem to be framed in policy terms and all of them are concerned with imposing some limits on recovery. These issues have become one of the most debatable issues in the law of negligence today, namely, how can recovery in tort be limited? and Should it be through exclusionary rules, strict application of the traditional tests, proximity, reliance, policy, the duty of care, or otherwise?

\textsuperscript{181} Stieller v. Porirua CC [1986] 1 NZLR 84.
\textsuperscript{182} Brown v. Heathcote C C [1987] 1 NZLR 70.
\textsuperscript{183} Craig v. East Coast Bays C C [1986] 1 NZLR 84.
\textsuperscript{184} [1985] 157 CLR 424.
\textsuperscript{186} [1989] AC 177.
\textsuperscript{187} [1991] 1 AC 398.
However, as mentioned above in Chapter 5, the tension between two competing judicial positions persists, namely, those who argue that the law of torts consists of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of specific justification (e.g., Anns\textsuperscript{189}) and the other those who argue that there are a number of specific rules prohibiting certain kinds of harmful activity, leaving all the rest outside the sphere of legal responsibility. (e.g., Lord Keith of Kinkel's speeches in Murphy\textsuperscript{190} and White v. Jones\textsuperscript{191}).

Although the courts, in Bryan v. Maloney\textsuperscript{192} particularly, took steps to try and limit the ambit of the rule in the case, it will likely also be referred to in other areas of law and across some of the other categories in terms of the doctrinal issues surrounding tort and contract, issues such as concurrent duty of care in tort and in contract, privity, third parties, and subsequent purchaser. Whether or not and to what extent, if at all, contractual outcomes can be preferred to those in tort will also be subject to much speculation. From the reasoning in all three cases it can be seen that policy considerations will play a larger and more explicit role than in the past which would contribute to dynamic development.

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\textsuperscript{188} See above Ch.5.
\textsuperscript{189} [1978] AC 728.
\textsuperscript{190} [1991] 1 AC 398.
\textsuperscript{191} [1995] 2 AC 207.
\textsuperscript{192} 182 CLR 609.
Negligence law is constantly exposed to the tension between the need for the law to be both sufficiently flexible to accommodate novel cases as they arise and sufficiently rigid to maintain its certainty. How can a judge be responsive to novel situations in a changing world without abandoning the foundations of an existing tradition? The principle of precedent, in negligence law as well as in other areas of law, presupposes continuity with the past that most common law jurisdictions have experienced. But it is often not just continuity of formal rules that is required for a system of precedent to apply, but also a continuity of interpretation of the values and the political regime in which they fall. This thesis has examined the evolution of negligence law by exploring the interpretation of negligence law in common law jurisdictions. It has been aimed at revealing the way in which legal norms and texts are embedded in the social practice of a given legal community.

Negligence law has to minimise the arbitrariness that can enter into such valuations in the absence of rules, precedents, and principles that can guide the judge in reaching a sound legal decision, in selecting what is to be given weight and what is to be ignored, in distinguishing one case from another, and in determining under what class a particular situation is to be subsumed. In the case of interpretative justification, this implies that the norm as interpreted has to be understood as applicable universally, not only for the special facts of a given case. However, as we saw, generalised formulae such as, the ‘neighbour’ principle, the

2 See above Chapter 5.
two-stage test, the proximity test, the general reliance principle, ‘voluntary assumption responsibility’ and so forth, however carefully devised, cannot provide a premise of universal application because the process of balancing the interests involved in the conflicts arising from human activity does not lend itself to being standardised or subsumed to a common determinant.

There is a place for deductive reasoning in negligence law, as has been discussed in Chapter 1. The courts do try to identify rules of law applicable to the case in hand, they do try to find the facts of the case in hand, and they do then subsume the facts under the law they have found to arrive at their conclusions. But in the vast majority of negligence cases the real arguments are never about the logical deductions themselves, for the canonical form (if x, then y) is relatively straightforward; they are always about the premises. Once the premises (x₁, x₂ or x₃) have been finally determined or agreed, the conclusions do follow inexorably. The courts often declare legal propositions to be sound or justifiable when they consider that they are consistent with other propositions, and equally they say something is unsound when they reject arguments of consistency or analogy in favour of different arguments. For instance, in *Hedley Byrne* Lord Devlin argues that the law should not distinguish between liability for physical injury and liability for financial loss because logically there is no distinction between the two. However, it is clear that the distinction has not yet been abolished. It is on practical grounds that the distinction seems to have survived, particularly because of the problems which would arise from creating what is virtually an indeterminate form of liability for an indeterminate number of plaintiffs. This demonstrates how pragmatic the common law of negligence is as to competing interpretations. In an adversarial process, one sometimes wins the case by showing that the other side’s case is unsatisfactory, by showing that one’s own is better.

This form of argument is the reductio ad absurdum. The argument moves by extracting contradictions or logical paradoxes from its material. It consists in deducing from a proposition or a complex of propositions consequences which are inconsistent with each other or with the original proposition. It shows that a

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3 See above Chapter 1., 1.3.1. Forming Rules
5 See above Chapter 1., 1.3.1. Forming Rules
proposition is illegitimate because it has logically absurd corollaries. The proposition under investigation is shown to be nonsensical. On first sight it will seem that the reductio ad absurdum can have only a destructive effect: it may be effective in demolishing untenable propositions, thus clearing the ground for subsequent constructive theory. As shown in Chapters 5-7, this type of argumentation plays a particularly significant part in interpretation in negligence law. However, it involves irreducible non-deductive elements of classification and qualification, that is, it involves saying that a given characteristic is more relevant than another. It is a process of considering the entire range of dynamic factors which ‘severally co-operate’ in favour of a particular conclusion, and balancing them against the factors which tell against that conclusion. In the end, the conclusion is to be reached on a balance of reasons rather than by inference from premises to conclusions.

This thesis has set out to demonstrate that to handle the problem of interpretation in negligence law is to engage in a complex moral task. Lord Kames once contended that the principle of reparation is made a species of a moral system for accomplishing two objectives, namely, ‘to repress wrongs that are not criminal, and to make up the loss sustained by wrongs of whatever kind.’ The law of negligence is the most constant and adventurous exercise of decision-making in circumstances of moral dilemma. On the one hand, it is an exercise tracing the elusive contours of two competing rights, one person’s right of action and another’s right to be free from injury. The law of negligence thus presents itself as a form of practical reasoning adjudicating between the defendant’s right of action or omission and the infringement of the plaintiff’s right. On the other hand, civil liability for negligence is not merely based upon moral fault. People can easily commit acts of negligence without being in a moral sense personally to blame for what has happened. It is true that in the early cases the formulation of liability rested heavily on the idea that the law of negligence should reflect moral principles. It is clear, however, that since the nineteenth century new factors have come into play in determining whether or not liability should be imposed. Liability seems in practice no longer to be imposed on the basis of moral fault. The matter is no longer simply a

moral question - the question as to whether the defendant's conduct was sufficiently reprehensible to make it morally proper that he should bear the loss. Interpretations of factors relevant to negligent liability are open-ended and indeterminate, and furthermore, the open-endedness of the interpretive approach is itself justified by the need to remain open to the discovery of novel categories of relevant factors in the process of appreciating the facts in particular cases.

It is the great range of the scope of legal interpretation and argumentation that makes the development of negligence law so dynamic.
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