

NEGLIGENCE, ECONOMIC LOSS AND THE AMBIT OF THE DUTY OF CARE

BY STEPHEN TODD, LL.M.

Lecturer in Law, University of Sheffield.

Visiting Lecturer in Law, University of Canterbury.

Difficulty in determining the true basis in law for allowing recovery of “pure” economic loss which is not consequential upon any physical damage suffered by a plaintiff has preoccupied the courts in a number of recent decisions.¹ If A relies on negligent information or advice given directly to him by B the case can simply be tested against the principles first laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*² as appropriate to financial loss caused by misstatements. But what if the information is given to C and *he* acts in a way which causes loss to B. Or suppose A by his negligent *act* or *omission* causes such loss either directly to B or through the instrumentality of C. Can *Hedley Byrne* apply in any of these cases? If not, can a test of foresight of harm based on *Donoghue v Stevenson*³ be applied in the face of long standing judicial reluctance to recognise that decision as of any direct relevance in the sphere of economic harm? While no clear answers to these questions have been given, the common features underlying the decisions where they have been in issue are quite apparent. What is lacking is any explicit formulation of principle which the courts may utilise in any case of economic loss caused by negligence.

The key to the formulation of such a principle may be found in a passage in the judgment of Lord Wilberforce in *Anns v Merton London Borough Council*⁴ which has already gained a wide currency. His Lordship said as follows:⁵

Through the trilogy of cases in this House, *Donoghue v. Stevenson*, *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* and *Dorset Yacht Co Ltd v. Home Office* 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. Rather, the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary 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 persons to whom it is owed or the damages to which a breach of it may give rise.

The first stage of this enquiry, in which foresight of damage to one’s “neighbour” in the sense explained by Lord Atkin in *Donoghue v Stevenson*,

¹ See in particular the judgment of Megarry V. C. in *Ross v Caunters* [1979] 3 All E.R. 580.

² [1964] A.C. 465, hereinafter referred to as *Hedley Byrne*.

³ [1932] A.C. 562.

⁴ [1978] A.C. 728.

⁵ *Ibid* at 751-752.

obviously provides the outer boundaries of liability. The question raised by the second stage recognises that there are many categories of negligence cases where the courts have declined to apply a pure foresight test. Particular matters of significance may be the status of the plaintiff⁶ or defendant,⁷ the way in which the harm was caused⁸ and the nature of the harm suffered.⁹ The policy factors lying behind these decisions are legion. In the particular case of economic loss, falling within the last-mentioned of these categories, it is clear that judicial inhibitions about the scope for recovery are founded almost entirely on the all pervasive fear of liability "in an indeterminate amount for an indeterminate time to an indeterminate class".¹⁰

This fact has been obscured somewhat because many of the "pure" economic loss cases have been decided in the context of negligent mis-statements. Where economic harm has been caused by words, this in itself has been treated as a reason for restricting the range of liability — for example because people may be less careful in words than in deeds,¹¹ because the immediate cause of the harm will be the plaintiff's own action in choosing to rely upon what was said to him¹² and because, in the nature of things, "words are more volatile than deeds, they travel fast and far afield, they are used without being expended".¹³ Thus there may in any particular case be good reasons for treating negligent words differently from negligent conduct. This conclusion, however, says nothing about the fact that the loss suffered may be economic.

Liability under the *Hedley Byrne* principle has been limited to occasions where there is a "special relationship" between the parties. As will be demonstrated, this relationship is based upon the close degree of proximity between plaintiff and defendant and in this respect the courts have required a relatively specific degree of knowledge on the part of the defendant of the identity of the plaintiff, of the transaction likely to be brought about or affected by the words and of the scale of the plaintiff's likely reliance. By these means it has been sought to reduce the ambit of liability to a determinate person or class suffering a relatively determinate loss. Other factors which are part of the same principle have no especial significance for the nature of the loss suffered. Thus the heart of the principle may be

⁶ *British Railways v Herrington* [1972] A.C. 877 (trespassers); *Murphy v Culhane* [1977] Q.B. 94 (criminals);

⁷ *Nakhla v McCarthy* [1978] 1 N.Z.L.R. 291 (judges); *Saif Ali v Sydney Mitchell & Co.* [1980] A.C. 198 (barristers); *Arenson v Casson, Beckman, Rutley & Co.* [1977] A.C. 405 (arbitrators); *Smith v Scott* [1973] Ch. 314 (landlords).

⁸ *Moch Co. v Rensellaer Water Co.* (N.Y. 1928) 159 N.E. 896 (omissions); *Takaro Properties Ltd v Rowling* [1978] 2 N.Z.L.R. 314 (negligence in the exercise of a statutory power); *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* supra (mis-statements).

⁹ *Pratt and Goldsmith v Pratt* [1975] V.R. 378 (nervous shock); *Spartan Steel and Alloys Ltd v Martin & Co. Ltd* [1973] Q.B. 27 (economic loss).

¹⁰ *Ultramares Corp. v Touche, Niven and Co.* (N.Y. 1931) 174 N.E. 441 per Cardozo C. J.

¹¹ *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] A.C. per Lord Reid at 482-483.

¹² *Woods v Martins Bank Ltd* [1959] 1 Q.B. 55 per Salmon J. at 59

¹³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. per Lord Pearce at 534.

found in the requirement that it be foreseeable by the defendant that the plaintiff would rely upon the information or advice¹⁴ and reasonable for the plaintiff to do so. It is axiomatic that the words must foreseeably cause the loss while the element of reasonable reliance or trust is simply of causal significance. Thus these two factors are obviously essential also in cases where negligent words cause *physical* harm.¹⁵ The lack of any duty in the case of statements made on social occasions may also be explained by reference to these factors. The further requirement imposed by the Privy Council in *Mutual Life and Citizens Assurance Co Ltd v Evatt*¹⁶ that the defendant should be in the business of supplying information or advice or let it be known that he claimed to possess the necessary skill to do so¹⁷ is apparently to be explained by the argument that there is an ascertainable standard of skill appropriate only for professionals.¹⁸

Once having isolated the features in the *Hedley Byrne* principle relevant only to the fact that the loss was economic, it then becomes apparent that they may also be applied where the economic loss is caused by *conduct*. Slight differences of wording may be necessary depending on the way in which the loss is caused but there need be no difference in substance. The true basis for recovery of economic loss thus lies neither in a straight-forward application of *Donoghue v Stevenson* or in *Hedley Byrne* simpliciter. The former is too wide and the latter as it stands will usually be inapplicable to conduct. Rather in any case the two stage enquiry formulated by Lord Wilberforce may be adopted. The first stage, founded on *Donoghue v Stevenson*, must be met in a *Hedley Byrne* case as in any other. In the second stage, the nature of the loss is a consideration which may "reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise", and the same or similar reducing or limiting factors may be employed in any case. These factors, based as they are on a relatively specific degree of knowledge of the plaintiff and of the nature and scale of the loss, occur more commonly in negligent misstatement cases which typically arise out of prior contact between the parties. Yet in the less common case where a negligent actor may be fixed with such prior knowledge, a "special" or "proximate" relationship may still be constituted.

¹⁴ This seems to be implicit in the notion that the plaintiff should assume responsibility for what he says.

¹⁵ See e.g. *Watson v Buckley, Osborne, Garrett and Co Ltd* [1940] 1 All E.R. 174; *Clay v A. J. Crump & Sons Ltd* [1964] 1 Q.B. 533; *Smith v Auckland Hospital Board* [1965] N.Z.L.R. 191 (where *Hedley Byrne* was specifically called in aid).

¹⁶ [1971] A.C. 793.

¹⁷ There may be an exception where the defendant has a financial interest in the advice he gives. See *W. B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All E.R. 850; *O'Leary v Lamb* (1973) 7 S.A.S.R. 159.

¹⁸ [1971] A.C. at 802-808. The minority (Lords Reid and Morris) point out that a duty to take care is not the same as a duty to conform to a particular standard of skill and there is no ground for saying that a specially skilled man must exercise care while a less skilled man need not do so. The case has lacked support in subsequent English decisions (*Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801 per Ormrod L. J. at 827; *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd* [1978] 1 Q.B. 574 per Lord Denning M.R. at 591 and Shaw L.J. at 600) and has been evaded to a large extent in New Zealand. See Smillie, "Liability for Negligent Misstatements; Continuing Uncertainty" (1976) 3 O.L.R. 512.

The courts have not yet overtly made this link between all the economic loss cases,¹⁹ but judging by results they are certainly on the way towards doing so. The argument will thus be amplified by examining the cases in the light of their suggested common features. The identified categories may often overlap or shade one into the other. Ultimately they constitute gradations on a scale of foreseeability of loss becoming less specific until one arrives back at Lord Atkin's neighbour test. Precisely where the courts will draw the line depends on where it is thought that the spectre of indeterminate liability becomes more compelling than the need to compensate a more or less identified plaintiff who has suffered a more or less specific economic loss.

FORESIGHT OF ECONOMIC LOSS TO AN IDENTIFIABLE PLAINTIFF

To hold a defendant liable for negligence causing economic loss in circumstances where he was able to foresee loss to an identifiable plaintiff entails no risk of liability to an indeterminate number of persons whereas liability in amount will usually be no more open ended than where physical harm is suffered. Thus where this feature has been present in the misstatement cases liability has not been denied simply because to recognise it would "open the floodgates". Leaving aside for the moment a consideration of how precise a degree of knowledge may be required, there has in fact been direct contact, or at least contact through an agent, in most of the reported cases. For example, bankers and persons enquiring as to the credit of customers,²⁰ estate agents and prospective purchasers of land,²¹ parties to pre-contractual negotiations²² and professional persons and their clients²³ have all been held to constitute relationships giving rise to a duty of care. Further, even in the absence of any contact there has usually been some degree of prior knowledge of who would rely upon the words.²⁴

Knowledge by the defendant of the plaintiff's identity is inherently less likely where the complaint is of negligent conduct rather than words. Some form of communication and conduct in reliance must take place before negligent words can cause any loss whereas negligent conduct will norm-

¹⁹ However Stephen J. did briefly advert to the point in his judgment in *Caltex Oil (Aust.) Pty Ltd v The Dredge 'Willemstad'* (1977) 11 A.L.R. 227 at 263.

²⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra; *Woods v Martins Bank Ltd* supra.

²¹ *Jones v Still* [1965] N.Z.L.R. 1071; *Dodds and Dodds v Millman* (1964) 45 D.L.R. (2d) 472; *Barrett v J. R. West Ltd* [1970] N.Z.L.R. 789; *Bango v Holt* (1971) 21 D.L.R. (3d) 66; *Richardson v Norris Smith Real Estate Ltd* [1977] 1 N.Z.L.R. 152; cf *Presser v Caldwell Estates* [1971] 2 N.S.W.L.R. 471.

²² *Dillingham Constructions Pty Ltd v Downs* [1972] 2 N.S.W.L.R. 49; *Morrison-Knudson International Inc. v The Commonwealth* (1972) 46 A.L.J.R. 265; *Sealand of the Pacific Ltd v Ocean Cement Ltd* (1973) 33 D.L.R. (3d) 625; *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; *Richardson v Norris Smith Real Estate Ltd* supra; *Capital Motors Ltd v Beecham* [1975] 1 N.Z.L.R. 577; *J. & J. C. Abrams Ltd v Ancliffe* [1978] 2 N.Z.L.R. 420. The last three cases have been superseded in New Zealand by the Contractual Remedies Act 1979, S6.

²³ *Elderkin v Merrill Lynch, Royal Securities Ltd* (1978) 80 D.L.R. (3d) 313 (stockbrokers); *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1978] 3 All E.R. 571 (solicitors); *Saif Ali v Sydney Mitchell & Co* [1980] A.C. 198 (barristers); *Sutcliffe v Thackrah* [1974] A.C. 727 (architects).

²⁴ Post pp.39-41.

ally lead to loss without any prior contact with or knowledge of the plaintiff. However in the relatively exceptional case where conduct may foreseeably harm an identifiable plaintiff then exactly the same principle may be applied. Indeed, if the conduct only causes loss because of the plaintiff's reliance on it, *Hedley Byrne* may be applied in the ordinary way. An example is *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp*²⁵ where solicitors were held liable to a client, G, for their failure to register an option held by G to purchase land owned by G's father, and subsequently sold by him in order to defeat the unregistered option.²⁶ Oliver J. recognised that the damage suffered by G was economic but held that it was nonetheless recoverable by extending the ambit of the *Hedley Byrne* principle to cover a negligent omission.²⁷ The defendants here made no negligent representation. It would be artificial in the extreme to regard the loss as caused by an implied representation that the option had been registered. The defendants' breach of duty took the form of nonfeasance yet Oliver J. felt able to conclude that "the instant case is one in which there was clearly between the defendants and [G] a relationship of the sort which gave rise to a duty of care under the *Hedley Byrne* principle".²⁸ Certainly the learned judge's path was smoothed by the fact that the plaintiff, in dealing directly with the defendants, reasonably relied on the defendants to carry out their professional duties with due care and skill. And presumably the same principle could likewise be applied if positive conduct—misfeasance—was the cause of the harm.²⁹ However once the "reliance" factor is removed the *Hedley Byrne* formula simply as it stands is hardly appropriate. On the facts it permitted recovery of a determinate loss by an identified plaintiff but it will not normally be applicable to negligent acts or omissions. Yet there is no reason why that part of the principle directed towards establishing a sufficiently proximate relationship between plaintiff and defendant should not be of general application in determining the extent of liability

²⁵ [1978] 3 All E.R. 571. See also *J. & J. C. Abrams Ltd v Ancliffe* [1978] 2 N.Z.L.R. 420 where the plaintiff sued for the balance owing for building work done by it and the defendant counter-claimed for damages for negligence by the plaintiff in failing to warn of changes affecting the reliability of its estimate for the cost of the work. Casey J. treated the failure to warn as a negligent act rather than a negligent misrepresentation by silence but here relied on *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* infra rather than *Hedley Byrne & Co Ltd v Heller & Partners Ltd* supra in holding that the plaintiff was liable for the pure economic loss suffered by the defendant in going ahead with the building work. The case well illustrates the need for a common principle governing recovery of economic loss whether caused by representations or conduct.

²⁶ In prior proceedings, *Midland Bank Trust Co Ltd v Green* [1978] 3 All E.R. 555, Oliver J. had held that the sale had rendered the option void. His decision on this point has been reversed by the Court of Appeal ([1979] 3 All E.R. 28). If this decision is right then the solicitors' negligence does not appear to have caused any loss. However the Court gave leave to appeal to the House of Lords and at the time of writing the appeal had not been heard.

²⁷ The action was brought in both contract and tort. Oliver J. held, after an exhaustive review of the authorities, that there was no rule of law which precluded a claim in tort for breach of a duty to use reasonable care and skill if there was a parallel contractual duty of care.

²⁸ [1978] 3 All E.R. at 610.

²⁹ The headnote states as much although the point was not specifically adverted to by the learned Judge.

for negligently inflicted economic loss. It will be seen that the courts in Canada, Australia and England have all countenanced developments in this direction, although their choice of a formula to achieve the desired result has differed and still remains somewhat obscure.

First to be considered will be the decision of the Supreme Court of Canada in *Rivtow Marine Ltd v Washington Iron Works*.³⁰ The appellant had chartered a log barge fitted with two cranes. In the busiest part of the logging season the appellant discovered dangerous defects in the cranes and had to take the barge out of service for repairs. The respondent manufacturers and distributors had become aware of these defects many months earlier but had negligently failed to warn the appellant at an earlier time when the cranes could have been withdrawn and repaired during the slack season. The court held unanimously that the additional loss incurred on account of the loss of use during the busy as opposed to the slack season was recoverable in tort even though it was purely financial. Ritchie J., delivering a judgment with which all members of the court concurred on this point, found there was a breach of duty to warn which constituted negligence on the part of both respondents and that the economic loss solely attributable to the interruption of the appellant's business during "coastal operations" was the immediate consequence of that breach.³¹ He concluded that he was satisfied that in the present case there was a proximity of relationship giving rise to a duty to warn and that damages were recoverable as compensation for the "direct and demonstrably foreseeable result of the breach of that duty".³² Although not specifically remarked in this conclusion, it may be that the key to discovering a sufficiently proximate relationship to allow recovery is found in the following passage:³³

This is not a case of a negligent manufacturer whose defective or dangerous goods have caused damage to some unknown member of the general public into whose hands they have found their way. These respondents knew that the cranes were going to be used by the appellant and the exact use to which they were to be put.

Ritchie J. also stressed this fact of knowledge elsewhere in his judgment.³⁴ It is thought that this was in fact the essence of the decision—that the defendants knew that *this plaintiff* would suffer the loss and also knew *how* it would arise.³⁵ The description of the loss as the "immediate" or "direct" consequence of a breach of duty seems an unhelpful formula. It is not

³⁰ (1974) 40 D.L.R. (3d) 530.

³¹ *Ibid* at 544.

³² *Ibid* at 547.

³³ *Ibid* at 534.

³⁴ *Ibid* at 536-537, 542.

³⁵ Stephen and Mason JJ. in *Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstad'* (1977) 11 A.L.R. 227 at 263, 274-275 certainly interpreted *Rivtow's* case in this way. Knowledge of the plaintiff's identity has since assumed a central significance in a number of recent Canadian cases. See *Hunt v T. W. Johnstone Co Ltd* (1977) 69 D.L.R. (3d) 639; *Star Village Tavern v Nield* (1977) 71 D.L.R. (3d) 439; *Gypsum Carrier Inc. v The Queen* (1978) 78 D.L.R. (3d) 175; *Bethlehem Steel Corp. v St Lawrence Seaway Authority* (1978) 79 D.L.R. (3d) 522; *Yumerovski v Dani* (1978) 83 D.L.R. (3d) 558; *Trappa Holdings Ltd v District of Surrey* (1979) 95 D.L.R. (3d) 107.

thought that such a test or tests provides a workable solution to the problem in hand.³⁶

A second important case, and one which has already attracted much comment, is *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*.³⁷ Although the facts are well known, they will bear repetition in a somewhat simplified form.³⁸ The dredge "Willemstad" was deepening a shipping channel in Botany Bay when it damaged an oil pipeline belonging to Australian Oil Refining Pty Ltd (AOR) which ran under the bay from an oil refinery operated by AOR to an oil terminal operated by Caltex Oil (Australia) Pty Ltd (Caltex). The operators of the dredge had been aware of the pipeline and caused the damage by their negligent navigation. The pipeline was used to deliver refined oil belonging to Caltex from AOR's refinery to Caltex's terminal.³⁹ Caltex had to arrange alternative means of transporting their oil to their terminal while the pipeline was being repaired and sued the dredge for the additional costs incurred by these special arrangements. The High Court held unanimously that the claim succeeded. The reasons given by each member of the court differ somewhat but the fact that the operators of the dredge were aware of the situation of the pipeline and that it carried petroleum products between the AOR refinery and the Caltex terminal was relied upon in three of the judgments and may, indeed, reasonably be regarded as having been fundamental to the decision. The point was made quite explicit by Mason J:⁴⁰

It is preferable . . . that the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the principal factor inhibiting the acceptance of a more generalized duty of care in relation to economic loss, that is an apprehension of an indeterminate liability. A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of persons; it ensures that liability is confined to those individuals whose financial loss falls within the area of foreseeability; and it accords with the decision in *Rivtow*.

Gibbs J. might be thought to be of the same mind as Mason J. His Honour took the view that notwithstanding the general rule limiting recovery for non-consequential economic loss, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes

³⁶ The matter is considered in detail post pp.51-53.

³⁷ (1977) 11 A.L.R. 227. See Cane "Recovery in the High Court of Purely Economic Loss caused by Negligent Acts" (1977) 13 U.W.A.L. Rev. 243; Partlett "Recovery of Economic Loss for Negligence in Australia" (1980) 9 Syd. L.Rev. 121.

³⁸ Only the issues in the case relevant to the present discussion will be considered here.

³⁹ Caltex suffered some minimal *physical* damage in the loss of oil actually in the pipeline when it was fractured. No importance was attached to the point because that loss of oil did not cause the economic loss which Caltex sought to recover: see Stephen J. at 250.

⁴⁰ (1977) 11 A.L.R. at 274-275.

the plaintiff a duty to take care not to cause him such damage by his negligent act. He declined to formulate a principle that would cover all cases in which such a duty would be owed but thought it would be material, although not in itself sufficient, that some property of the plaintiff was in physical proximity to the damaged property or that the plaintiff and the person whose property was injured were engaged in a common adventure.⁴¹

It may be noted that Gibbs J. does not comment directly on the case where conduct causes economic harm but no physical damage to anyone occurs. However he clearly does not rule out recovery in such a case. Further, it is not clear why the principle requiring knowledge of the plaintiff individually should not stand on its own. His Honour was clearly influenced by the "joint venture" cases.⁴² But it may be objected that economic loss may be suffered in the circumstances postulated yet the fact of physical proximity between property of plaintiff and defendant or of a joint venture and thus the actual identity of the joint venturer may and usually will be unknown before the event in question. Thus it may be that these circumstances will only be relevant when they can be foreseen by the defendant.

Stephen J. sought to put his judgment on a rather broader basis. He identified the need for insistence upon sufficient proximity between tortious act and compensable detriment and in the present case found five salient features which left him in no doubt that there existed such proximity to entitle the plaintiff to recover its reasonably foreseeable economic loss.⁴³ The first was the defendant's knowledge that the property damaged, a set of pipelines, was of a kind inherently likely when damaged to be productive of consequential economic loss to those who rely directly upon its use. While this factor may suggest that certain loss is foreseeable, it does not on its face appear to help in establishing any more proximate a relationship. It has, of course, been a feature of a number of cases where economic loss has been held irrecoverable.⁴⁴ Its significance here lies in restricting the recoverable damages to loss which arises in a foreseeable way and thus is of a foreseeable kind. This, in combination with the second feature, the defendant's knowledge or means of knowledge of the plaintiff as a user of the pipeline, was said by His Honour to lead to the conclusion that Caltex was within the reasonable contemplation of the defendants as a person likely to suffer economic loss if the pipelines were cut. Thus the foresight required is clearly of *that* plaintiff and of *that* kind of loss. Two further features, (i) the infliction of damage by the defendant to the property of a third party, AOR, as a result of conduct in breach of a duty of care owed to that third party, and (ii) the nature of the detriment suffered by the plaintiff in losing use of the pipeline, in context appear to be relevant only because the defendants could foresee damage to Caltex specifically and the form it would take if they caused property damage to the third party and so caused a loss of use of the pipeline. Otherwise it is not clear why these features should be of any greater significance than in, for example,

⁴¹ Ibid at 245.

⁴² Post p.51.

⁴³ (1977) 11 A.L.R. at 261-262.

⁴⁴ *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All E.R. 205.

Electrochrome Ltd v Welsh Plastics Ltd.⁴⁵ The last identified feature, the nature of the damages claimed as reflecting loss of use, not loss of profits arising because collateral commercial arrangements may be adversely affected, confirms the point that the manner of the loss must be foreseeable. His Honour does not, it should be noted, say such loss of profits are not recoverable. If they are in fact specifically foreseeable, they may be.⁴⁶

The above analysis demonstrates that the defendant's knowledge of the plaintiff's use of the pipeline was a factor central to Stephen J.'s reasoning. In fact His Honour specifically linked the requirement of special knowledge in the *Hedley Byrne* line of cases with the facts of the case before him,⁴⁷ an observation which serves to confirm the immediate significance of that knowledge.

Jacobs J. took a quite different approach and formulated a test based upon the physical effect of the defendant's act or omission on the person or property of the plaintiff.⁴⁸ This particular test, which would provide only the narrowest of bases for recovery, may more conveniently be considered under a different head. Finally, Murphy J. in a brief judgment cast doubt on the avoidance of multiple actions and of the payment of huge damages as valid reasons of policy for exempting from liability persons causing economic loss in breach of a duty of care.⁴⁹ His Honour found no reason for limiting recovery in the instant case but gave no further explanation for his conclusion. The implication appears to be that economic loss should stand on the same footing as physical loss. However there is little support elsewhere for this point of view.

The latest word on this topic may be found in the judgment of Megarry V. C. in *Ross v Caunters*.⁵⁰ where the choice of formula issue was once more squarely raised. The circumstances giving rise to the action were singularly straightforward. The defendant solicitors negligently failed to warn a testator that attestation of the will by a beneficiary's spouse would invalidate a gift to the beneficiary.⁵¹ The plaintiff beneficiary's husband attested the will, which fact remained unnoticed until after the death of the testator. As a consequence the gifts to the plaintiff were rendered void. The plaintiff thereupon sued the solicitors claiming damages in negligence for the loss of her inheritance. Megarry V. C. held that the plaintiff's claim should succeed but confessed to considerable difficulty in determining on what basis the duty of care owed to the beneficiary should rest.⁵²

⁴⁵ [1968] 2 All E.R. 205.

⁴⁶ Post pp.42-43.

⁴⁷ (1977) 11 A.L.R. at 263.

⁴⁸ Ibid at 278.

⁴⁹ Ibid at 285-286.

⁵⁰ [1979] 3 All E.R. 580.

⁵¹ Wills Act 1937 s.15 (U.K.).

⁵² In the United States, liability in this type of case is well established in California (*Biakanja v Irving* 320 P. 2d 16 (1958); *Lucas v Hamm* 364 P. 2d 685 (1961); *Heyer v Flaig* 74 Cal Rptr 225 (1960); *Bucquet v Livingston* App. 129 Cal Rptr 514 (1976) but not, apparently, in New York (*Maneri v Amodeo* 238 N.Y.S. 2d 302 (Sup Ct 1963)). In *Sutherland v Public Trustee* 1980 CL (NZ) para 113, a recent New Zealand case, the deceased made a will leaving his whole estate to his wife with no gift over. The wife predeceased the testator who died intestate. The plaintiffs, stepchildren of the deceased, alleged negligence by the Public Trustee

The learned Vice Chancellor referred to the reasoning of Aikens J. in *Whittingham v Crease & Co*⁵³ in the British Columbia Supreme Court as one means of reaching the right result. Here a solicitor had drawn up a will under which the plaintiff was the residuary beneficiary. The plaintiff and his wife were present when the testator executed the will and the solicitor pressed the wife to sign it as a witness, which she accordingly did. When it was discovered that this invalidated the gift to the plaintiff, he sued the solicitor's firm for negligence. Aikens J. held the solicitor was liable. He said that the solicitor had made an implied representation that the will would be effective and that the plaintiff had passively relied on this. Although the judge conceded that he had not been able to find a case in which the *Hedley Byrne* principle had been applied where the plaintiff had not acted on the representation, the plaintiff should nonetheless succeed, firstly because it was unnecessary for him to act on the representation in order to attract the loss which he suffered and secondly because the defendant could reasonably foresee that his own neglect in itself would cause the loss, without the plaintiff doing anything at all.⁵⁴

Adoption of the *Hedley Byrne* principle in such circumstances was a somewhat artificial method of achieving the desired result. Recognition that the solicitor's neglect in itself would cause the loss makes any reliance by the plaintiff causally irrelevant. This approach was in any event inapplicable in *Ross v Caunters* where there was no direct contact between plaintiff and defendant and where in no sense did the plaintiff rely upon anything the defendant did or did not do. Megarry V.C. therefore preferred to reach a similar result but by a somewhat different route. After an exhaustive review of the authorities he came to rely heavily on the decision of the Court of Appeal in *Ministry of Housing and Local Government v Sharp*,⁵⁵ observing that despite the factual differences between that case and the one before him, the two were closely similar in principle. *Sharp's* case will be examined in detail below. Of more immediate interest is Megarry V.C.'s reasoning. He specifically drew attention to the problems of indeterminate liability which are bound to occur by the application at large of *Donoghue v Stevenson* to cases of purely financial loss. While cases of negligent misstatements already have the restrictive *Hedley Byrne* test, for other cases the question was, therefore, what modification or form of application of the *Donoghue v Stevenson* basis should be applied in order to meet these problems. The learned Vice Chancellor recognised that a number of tests

in taking instructions from the testator, in failing adequately to inform the testator of the effect of leaving his estate to his wife in toto with no gift over and alleging but for the negligence of the Public Trustee they would have succeeded to the testator's estate. Jeffries J. held that the defendants had not in fact been negligent in advising the testator on the drawing up of the will and in any event, although there were indicators to suggest the testator wished to benefit the plaintiffs, that was not what his will said, notwithstanding he was given an opportunity to say so. To hold there was a duty of care to persons the testator deliberately refused to nominate himself would take the law very far beyond its present limits. The defendants did not take the point that the loss was purely financial and Jeffries J. therefore made no pronouncement on that issue.

⁵³ (1979) 88 D.L.R. (3d) 353.

⁵⁴ *Ibid* at 373.

⁵⁵ [1970] 2 Q.B. 223.

had been laid down⁵⁶ but felt it was unnecessary to explore this matter further:⁵⁷

Whichever test is applied, the facts of the present case seem to me to satisfy it. I can see no reason for excluding liability. There is clearly a high degree of proximity between the negligence and the loss. Plainly the defendants not only actually knew of the plaintiff individually (without any 'or ought to have known') but also knew that the negligence would be likely to cause her financial loss. Indeed, I find it difficult to envisage any test based on *Donoghue v Stevenson* that would be stringent enough to exclude the plaintiff. In my judgment both on authority and on principle the plaintiff ought to recover her financial loss. I am content, indeed happy, to leave it to other courts in other cases on other facts to evolve the test or tests that have to be applied . . . I shall indulge in no feats of prophecy beyond saying whatever is evolved will be wide enough to allow the plaintiff in the present case to succeed.

Notwithstanding Megarry V.C.'s expressed readiness to leave the evolution of an appropriate test to other courts, it is thought that he has in fact put his finger on the nub of the matter in this passage. From the preceding survey of cases, the importance of the defendant's prior knowledge of, or foresight of, the plaintiff's identity as a central feature limiting the range of the duty in any case of negligently caused financial loss is perfectly clear. That being so, it is necessary to turn to the question of how precise a degree of such knowledge will suffice to give rise to the duty. An authoritative starting point may be found in the judgment of Barwick C.J. in the Australian High Court in *Mutual Life and Citizens Assurance Co Ltd v Evatt*⁵⁸ where he said:⁵⁹

The information or advice will be sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person or on behalf of an identified or identifiable class of persons. The person giving the information or advice must do so willingly and knowingly in the sense that he is aware of the circumstances which create the relevant relationship. He must give the information or advice to some identified or identifiable person in the given circumstances of the implications of which he is, or ought to be, aware.

Thus if A gives information to B knowing that B has requested it on behalf of, and will pass it on to, C or to a particular class of persons that includes C and that C will rely upon it, A may be held to owe a duty of care to C. In this type of case B may be regarded as acting as agent for C.⁶⁰ However where A gives information to B and knows C may subsequently rely upon it even though it was not received on C's behalf, A may likewise be held liable. *Dimond Manufacturing Co Ltd v Hamilton*⁶¹ and *Toromont Industrial Holdings Ltd v Thorne*⁶² were both cases where the defendant auditors prepared company accounts for client companies which to the knowledge of the defendants were subsequently shown to the plaintiffs, in *Dimond's*

⁵⁶ Specific reference was made to the *Caltex Oil* case.

⁵⁷ [1979] 3 All E.R. at 597-598.

⁵⁸ (1968) 122 C.L.R. 556.

⁵⁹ *Ibid* at 570.

⁶⁰ As in *Hedley Byrne* itself.

⁶¹ [1969] N.Z.L.R. 609.

⁶² (1975) 62 D.L.R. (3d) 225.

case by one of the accountants,⁶³ who relied upon their accuracy and in each case it was held that the requisite "special relationship" was created as between plaintiff and defendant.⁶⁴ This principle has been extended further where accountants prepared financial statements for client companies in circumstances where they should have foreseen that a third party would rely upon them but did not actually know of that reliance. In this class of case the courts have still stopped short of applying a test simply of foreseeable reliance but have limited liability to where the accounts have been prepared for the guidance of a specific class of persons in a specific class of transactions.⁶⁵

In *Haig v Bamford*⁶⁶ the defendant firm of chartered accountants knew that the accounts they were asked to prepare were required by the company to show to potential investors in order to attract an infusion of capital. In fact the statements were said to be "required primarily for those third parties and only incidentally for use by the Company".⁶⁷ They were in fact shown to Haig who subsequently purchased shares in the Company. The Supreme Court of Canada held that in these circumstances a duty of care was owed by the defendants to Haig. It was specifically decided that a test requiring actual knowledge of the particular plaintiff who will rely on the statement was too narrow and that it was sufficient that a defendant should have actual knowledge of the limited class that will use and rely on the statement. Haig was a member of that limited class to whom the information was intended to be shown for a specified purpose. The court left open the question whether the test of foreseeability alone was a proper test to apply in determining the duty owed by accountants to third parties.⁶⁸

A similar result was reached in the New Zealand Court of Appeal in *Scott Group Ltd v McFarlane*.⁶⁹ Here company accounts prepared by the respondents for the company were relied on by the appellants in formulating a take-over bid. Richmond P. articulated the test to apply as whether the maker of the statement was or ought to have been aware that his advice or information would in fact be made available to and relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction.⁷⁰ On the facts His Honour thought that the general possibility of a takeover bid being made by someone at some time or other was a reasonably foreseeable possibility. Mere foreseeability of this kind was not, however, sufficient to give rise to a "special relationship". Cooke J. did not formulate any general proposition seeking to define the ambit of the class of persons to whom a duty may be owed. His Honour's judgment nonetheless contemplates a close and direct relationship based

⁶³ North P. and Turner J. both relied on this factor as giving rise to the duty.

⁶⁴ Both actions failed for lack of proof of any loss flowing from the defendants' breaches of duty.

⁶⁵ Lord Denning M.R. in *Candler's* case left open the question whether there might be liability in such a case.

⁶⁶ (1977) 72 D.L.R. (3d) 68.

⁶⁷ *Ibid* at 78-79.

⁶⁸ *Ibid* at 75.

⁶⁹ [1978] 1 N.Z.L.R. 553. See Johnston (1978) 8 N.Z.U.L.R. 175.

⁷⁰ *Ibid* at 566.

upon the respondent's knowledge or foresight of the use to which the accounts would be put, a view quite consistent with that of Richmond P. However His Honour took a different view of the facts in concluding that the evidence disclosed "a plain risk of a takeover and the virtual certainty that in such an event the accounts would be relied on by an offeror."⁷¹ The third member of the court, Woodhouse J., thought that the accountants owed a duty "to those persons whom they can reasonably foresee will need to use and rely upon [the accounts] when dealing with the company or its members in significant matters affecting the company assets and business".⁷² The apparent width of this duty may be tempered by its relationship to the particular facts in issue, although it should be noted that His Honour expressed himself unimpressed by the fear of indeterminate liability as an excuse from liability for negligent conduct.⁷³

In the result two members of the court contemplated liability to a limited class of persons based upon knowledge or foresight of the use to which the accounts were to be put while the third put the test in terms of mere foreseeable reliance. The former approach provides a means for limiting the range of liability to a determinate body of persons although it is of necessity imprecise. As for the latter, and notwithstanding Woodhouse J.'s confidence in keeping the floodgates shut, it is not thought that the courts are ready or willing to talk in terms of foreseeability alone. It is true that Lord Salmon in *Anns'* case thought that accountants would be liable in damages to any persons who invested in a company in reliance upon negligently prepared certified accounts⁷⁴ but the matter was not in issue in that case. Other cases which appear to apply the foreseeability test without any limiting features⁷⁵ may in fact be explained on other grounds.⁷⁶ There is no case where indeterminate economic loss has been recovered by the application of such a test.

The above "class" cases all concern liability for negligent statements but there is no reason why a similar principle should not equally apply where the complaint is of negligent conduct. In all such cases the court would have to determine how widely or otherwise the class of persons foreseeably likely to suffer loss should be defined. The larger or more amorphous it becomes the wider the range of potential plaintiffs and the more the test will approximate that laid down in *Donoghue v Stevenson*. It is thought likely that the courts will continue to require a close relationship between the parties in the sense of a relatively specific degree of foresight by the defendant of harm being caused to the plaintiff. One "conduct" case which might have been thought to have qualified under such a test is *Gypsum Carrier Inc v The Queen*.⁷⁷ The defendant ship negligently collided with and damaged a railway bridge owned by the federal Crown. The plaintiffs, three railway companies, were the only users

⁷¹ Ibid at 582.

⁷² Ibid at 575.

⁷³ Ibid at 571-572.

⁷⁴ [1978] A.C. at 769.

⁷⁵ e.g. *Ministry of Housing and Local Government v Sharp* [1970] 2 Q.B. 223; *Gordon v Moen* [1971] N.Z.L.R. 526.

⁷⁶ Post pp.43-48.

⁷⁷ (1977) 78 D.L.R. (3d) 175.

of the bridge pursuant to contractual agreements with the federal Crown. The plaintiffs sued for expenses incurred in rerouting their trains while repairs were being made to the bridge. Collier J. dismissed the actions, holding that economic loss, even if foreseeable, should not be recoverable unless it resulted directly from a negligent act. The railway companies were not persons so closely and directly affected that those persons having charge of the vessel ought reasonably to have had them in contemplation when the vessel was proceeding towards the bridge and, therefore, no duty was owed to them. The test here is obviously based on *Donoghue v Stevenson*. Yet the conclusion reached is surely assertion rather than explanation. One would have thought that the users of the bridge were eminently foreseeable on the part of the defendants. Should not the rationale of the case lie in the fact that the defendants could not have foreseen who those users might be? Indeed, the case is fundamentally similar to *Caltex Oil* and differs only in that the defendants had no actual knowledge of the plaintiffs' identities. One might think that a wider test could be applied here and that the users of a railway bridge — railway companies — could have been regarded as an inherently limited class of plaintiffs who would foreseeably suffer loss. Extensions of the *Caltex Oil* principle in this direction and in line with cases such as *Haig v Bamford* and *Scott Group Ltd v McFarlane* might now reasonably be expected.

FORESIGHT OF HOW ECONOMIC LOSS MAY BE INCURRED

A requirement that a defendant should be able to foresee who he may injure financially in order to render him liable for the loss certainly provides an adequate safeguard against liability to an indeterminate class but it may not always in itself suffice to banish the fear of liability in an indeterminate amount. There is some authority to the effect that an individually foreseeable plaintiff may recover his financial loss only where a relatively specific degree of knowledge or foresight on the part of the defendant of *how* the plaintiff would suffer the loss may be established. Knowledge of the transaction to be affected by the information or advice, and thus of how the loss may arise, has been said to be relevant in a number of misstatement cases, originally by Lord Denning M.R. in *Candler v Crane, Christmas and Co*⁷⁸ and most recently by Shaw, L.J. in *Howard Marine and Dredging Co Ltd v A. Ogden & Sons (Excavations) Ltd*.⁷⁹ Although there do not appear to be any existing cases in which a foreseeable plaintiff has failed in his action because the transaction in question was not foreseeable, this is nonetheless conceivable if information is used for quite unforeseeable purposes. Similarly it has already been seen that in each of the three major cases considered above the defendant knew the form which the loss would take. Ritchie J. in *Rivtow Marine* laid emphasis on the defendants' knowledge of the exact use to which the cranes were going to be put.⁸⁰ Stephen

⁷⁸ [1951] 2 K.B. 164 at 183.

⁷⁹ [1978] 1 Q.B. 574 at 601.

⁸⁰ In *Trappa Holdings Ltd v District of Surrey* (1979) 95 D.L.R. (3d) 107 (British Columbia Supreme Court) the defendants by their roadworks negligently obstructed access to the plaintiff's business. Ruttan J. held the defendants liable. They were aware of the plaintiff's situation and its dependence on a ready access to its premises. The plaintiff's economic loss resulted directly from the actions of the defendants and it was or should have been anticipated that just such a loss would occur in that situation.

J. in *Caltex Oil* stressed that the defendants knew that damage to the pipeline was likely to result in economic loss and also that the plaintiffs would suffer the particular kind of economic loss the subject of their claim, i.e. expenses incurred in arranging alternative means of transporting the oil.⁸¹ Finally, while Megarry V.C. in *Ross v Caunters* did not specifically advert to the point, on the facts the defendants knew precisely how the plaintiff's loss would arise.

This requirement would tend to exclude claims for "relational" losses where a particular plaintiff is unable to fulfil business commitments with third parties because of the defendant's negligence. For example, *Rivtow Marine* might be unable to deliver logs to its customers while its crane was being repaired or *Caltex* prevented from delivering supplies of oil to customers while setting up alternative means of transporting the oil to its refinery. Indeed in the latter case Stephen J. expressly distinguished such a claim from that which was before the court. Presumably, however, it could succeed if the probability of interruption in third party contracts were specifically known or contemplated by the defendant, although this, no doubt, would be a rare case.⁸² There is no reason in principle why such "secondary" losses should not be recoverable in appropriate circumstances.

FORESIGHT OF THE SCALE OF THE PLAINTIFF'S ECONOMIC LOSS

The contention that a rule for cases where there is a prospect of indeterminate liability should necessarily govern cases where there is none is not convincing. The point may provide an explanation for a number of cases where a defendant has been held liable in circumstances where he could not foresee who the plaintiff might be but could foresee the scale of the loss.

The starting point for a consideration of this category of case is *Ministry of Housing and Local Government v Sharp*,⁸³ a case which has been described as unique⁸⁴ but the principle of which has nonetheless been followed in a number of subsequent decisions. One of the issues requiring determination by the Court of Appeal was the claim by the plaintiff Ministry against the local authority whose clerk had negligently failed to mention in the certificate given in response to a local land charge search made by an intending purchaser that the Ministry had a charge on the land in question. The purchaser had thus taken the land free from the charge and the Ministry sued the local authority for the value of the charge that had been lost.

The above facts, as with those in *Ross v Caunters*, clearly did not fit in the *Hedley Byrne* mould. In neither case did the plaintiff rely on anything said or done by the defendant. It was noted above that Megarry V.C. relied heavily on *Sharp's* case in reaching his decision in *Ross v Caunters*. Yet what principle underlies *Sharp's* case itself? Lord Denning M.R. thought that the case fell squarely within his dissenting judgment in *Candler v*

⁸¹ The significance of the point was at least implicit in the judgments of Gibbs and Mason JJ.

⁸² See Brazier "Economic Loss—An Australian Solution" [1978] N.L.J. 327 where a link is drawn between the approach adopted by the High Court in *Caltex Oil* and the principles of remoteness of damage in contract.

⁸³ [1970] 2 Q.B. 223. See Mesher (1971) 34 M.L.R. 317.

⁸⁴ Winfield and Jolowicz, *Tort* (11th ed 1979) p. 272.

Crane, Christmas and Co.,⁸⁵ subsequently approved by the House of Lords in *Hedley Byrne*. However in *Candler's* case Lord Denning thought the scope of the duty of care owed by accountants engaged to audit a company was limited to their employer or client and to any third person to whom they themselves show the accounts or to whom they know their employer is going to show them so as to induce him to invest money or take some other action on them.⁸⁶ In *Sharp's* case there was no element of inducement or reliance, which would appear to render *Hedley Byrne* inapplicable, and the plaintiff himself, unlike in *Chandler's* case and *Ross's* case, was not individually foreseeable. In truth the test for liability laid down by His Lordship appears to rest on foreseeability alone:⁸⁷

I have no doubt that the clerk was liable. He was under a duty at common law to use due care. That was a duty which he owed to any person—incumbrancer or purchaser—whom he knew, or ought to have known, might be injured if he made a mistake.

Salmon L.J. approached the matter differently. He thought that the proximity between the parties was at least as close as that which existed between appellant and respondent in *Donoghue v Stevenson*. The fact that the loss was financial no longer mattered on the authority of *Hedley Byrne v Heller*.⁸⁸ Cross L.J. apparently took a similar view, though with some reservations.⁸⁹

It has been observed that in determining the availability of recovery for economic loss caused by conduct one cannot use the ordinary reasonable foresight test and then pick from the misstatement cases the idea that economic loss is recoverable; the issue of breadth of duty and type of loss are inextricably linked.⁹⁰ How else, then, may the decision be justified? One possible answer is to regard the case simply as a variant on the principle giving a cause of action to an individually foreseeable plaintiff. While the defendants here did not know the plaintiff's identity they could hardly be seen to rely upon the point because this was, of course, due to their own negligence in omitting the plaintiff's charge from the certificate. In any event no member of the court made use of any such reasoning. Lord Denning M.R. and Salmon L.J. did, however, make specific reference to the fact that the only person who could suffer any loss was the chargee or incumbrancer whose registered charge was carelessly omitted from the certificate. There was no risk of an indeterminate liability here. The significance of this fact has since become more readily apparent in the light of a number of later decisions.

The next case in time where a similar issue was raised is the well known decision of the Court of Appeal in *Dutton v Bognor Regis Urban District*

⁸⁵ [1951] 2 K.B. 164.

⁸⁶ *Ibid* at 180-181.

⁸⁷ [1970] 2 Q.B. at 268.

⁸⁸ *Ibid* at 278. Megarry V. C. in *Ross v Caunters* "with great respect and considerable hesitation" said that he preferred this approach (*supra* at 596).

⁸⁹ *Ibid* at 290-291.

⁹⁰ Craig "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 L.Q.R. 213 at 223. The point was made with reference to *Dutton v Bognor Regis Urban District Council* [1972] 1 Q.B. 373, discussed *post*.

Council.⁹¹ Lord Denning M.R. and Stamp L.J. both thought that Mrs Dutton could recover damages from the defendant council for her loss in having purchased a house built on defective foundations which had been negligently inspected and passed as fit by the defendants, even though her loss was purely financial.⁹² The reasoning adopted was similar to that of Salmon L.J. in *Sharp's* case, i.e. the duty of care was derived from *Donoghue v Stevenson* and *Hedley Byrne* permitted recovery for economic loss.⁹³ Again, no overt attempt was made to delimit the ambit of the duty. In no sense was the plaintiff here individually known or foreseen. Rather, the defendants could have foreseen loss to that person who happened to be the owner when the defects manifested themselves in cracks in the fabric of the building. As in *Sharp's* case, the scale of the loss was inherently limited. The value of *Dutton* for a discussion of the principles governing recovery of economic loss is, however, undermined by the decision of the House of Lords in *Anns v Merton London Borough Council*⁹⁴ where it was held that this type of loss was to be regarded as physical rather than economic.⁹⁵ The matter will be considered further below.

A third English case often ignored for its relevance in the present context is *Moorgate Mercantile Co Ltd v Twitchings*.⁹⁶ Lord Denning M.R. in the Court of Appeal took the view, obiter, that a finance company was under a duty of care to motor dealers to furnish details of hire purchase transactions to a third party, H.P. Informations Ltd, on which the dealers relied to let them know if a car the subject of a contemplated purchase belonged to a finance company. A breach of that duty might result in economic loss to a dealer who purchased a car which was already let on hire purchase in having to pay damages for conversion to the owner but this was one of those cases where economic loss was recoverable.⁹⁷ His Lordship did not state why but simply referred to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Spartan Steel and Alloys Ltd v Martin & Co Ltd*. On appeal to the House of Lords the majority⁹⁸ decided, inter alia, that in the circumstances there was no legal duty on the finance company to register or take reasonable care in registering with H.P.I. the particular hire purchase agreement.⁹⁹ It was not necessary to decide whether an action for

⁹¹ [1972] 1 Q.B. 373.

⁹² *Ibid* at 396, 414-415. Lord Denning M.R. took the view that the loss was recoverable whether categorised as physical or economic.

⁹³ The other member of the court, Sachs L. J., formulated a principle of liability applicable only to public bodies exercising statutory functions.

⁹⁴ [1978] A.C. 728.

⁹⁵ Lord Wilberforce held (*ibid* at 760) that *Dutton* was in the result correctly decided but that the correct legal basis for the decision was as determined by their Lordships in *Anns'* case itself.

⁹⁶ [1976] Q.B. 225 (CA); [1977] AC 890 (HL).

⁹⁷ [1976] QB at 239.

⁹⁸ Lord Edmund Davies, Lord Fraser and Lord Russell.

⁹⁹ The reason was that companies who were members of HPI were under no obligation to make use of the facilities provided by HPI and a dealer who bought a car after receiving a negative report from HPI was to be regarded as taking a reasonable business risk. Thus the dealer could not plead that the finance company was estopped by negligence from suing him in conversion.

damages by the dealer for his economic loss would succeed. Of the minority, Lord Salmon clearly thought that it would and that the duty of care was well within the principle laid down by Lord Atkin in *Donoghue v Stevenson* as enlarged by *Hedley Byrne and Co Ltd v Heller and Partners Ltd*.¹ Lord Wilberforce simply said this was something for another occasion.²

The point which deserves emphasis is that while in the above circumstances a plaintiff dealer may fail to establish a duty of care, this is not because his loss is economic. Thus the views of Lord Denning M.R. in the Court of Appeal and Lord Salmon in the House of Lords remain relevant and of interest.

The New Zealand courts have also had to deal with a number of claims of a fundamentally similar character and sometimes they have found it possible to rely expressly on *Hedley Byrne* even though the plaintiff was not individually foreseeable. One clear example is *Gordon v Moen*.³ The defendant in this case issued an "open" report certifying the sea-worthiness of a motor launch, the "Waiana". This was in response to a request from the owner who told the defendant he wished to raise finance on the security of the launch. In the event the owner sold the boat to the plaintiffs and before doing so showed them the defendant's report. The launch was in fact riddled with dry rot and on discovering this the plaintiffs sued the defendant for the cost of repairs. Roper J. thought that the special relationship class within the meaning of the *Hedley Byrne* principle "extended to all who might reasonably be contemplated as having an interest in the Waiana's value, whether as lenders or purchasers and to whom knowledge of the contents of the report might reasonably come".⁴ Notwithstanding criticism of the class to whom the duty was held to be owed as "erroneously defined with Athinian breadth"⁵ it is submitted that the case was rightly decided. Although any person in the class *might* suffer the loss, only one person could *actually* do so. The scale of reliance was thus clearly foreseeable.⁶ Exactly the same may be said of another New Zealand decision, *Barrett v Dalgety New Zealand Ltd*⁷ where Bain J. held, applying *Hedley Byrne*, that land valuers owed a duty of care to any person who would advance mortgage moneys in reliance upon the recommendation in the valuers' report.

A further New Zealand decision of considerable interest, even though the reasoning of Cooke J. undoubtedly needs clarification, is *Rutherford v Attorney-General*.⁸ In this case the appellant agreed to purchase a heavy

¹ [1977] AC at 908. It has been noted that his Lordship adopted the same approach in *Sharp's* case, supra.

² Ibid at 906.

³ [1971] N.Z.L.R. 526.

⁴ Ibid at 531.

⁵ Glass J. "Duty to Avoid Economic Loss" (1977) 51 A.L.J. 372 at 380 n 1.

⁶ Elsewhere the decisions are not, however, uniform. In *Beebe v Robb* (1978) 81 D.L.R. (3d) 349, where the facts were virtually identical with those in *Gordon v Moen*, Ruttan J. refused to hold the marine surveyor liable. His duty under the *Hedley Byrne* principle was owed only to those persons he knew or should reasonably know would rely on his opinion.

⁷ [1979] N.Z. Recent Law 199.

⁸ [1976] 1 N.Z.L.R. 403.

motor lorry from the owner if the lorry could get a certificate of fitness issued by the Ministry of Transport.⁹ After a preliminary rejection on the ground of minor defects a certificate was obtained and the purchase was subsequently completed. A week later the appellant discovered that the vehicle was in an unsafe condition and required considerable work before a fresh certificate would be issued. The appellant sued the respondent ministry for the cost of that work. As the defects in question were dangerous the case could have been decided on the basis that the loss claimed represented the cost of *preventing* physical harm to the plaintiff or his property and for that reason should be regarded as physical.¹⁰ Cooke J. did not take this approach. He proceeded on the basis that the loss was economic but held it nonetheless was recoverable. The certificate was, of course, issued to the prior owner, not the appellant, and, indeed, there was no evidence that the vehicle inspector knew of the proposed sale. The learned judge found it difficult to suppose that the ministry's liability should depend on whether the inspector had such knowledge.¹¹ He thought the fact the loss claimed was economic was relevant and in some circumstances told against the plaintiff but was far from decisive per se.¹² The duty here arose because it should have been readily foreseeable by the vehicle inspector not only that the truck might be about to be sold but also that in the event of an immediate sale the purchaser might rely on the certificate.¹³

The plaintiff in *Rutherford's* case was thus able to recover simply because he had suffered foreseeable loss. Cooke J. gave no specific guidance as to the circumstances in which pecuniary loss may be recoverable beyond saying that where it is suffered, it "weighs somewhat against the claim". Yet at the same time the learned judge stressed the determinate nature of the damages sought:¹⁴

The plaintiff is claiming no more than the cost of the work insisted on by the ministry, after a reasonably careful inspection, in order to qualify for a certificate. *No loss of profits or any other compensation is claimed.* [Emphasis added.]

At this stage of circumstances giving rise to the duty of care may be defined and at the same time the features common to all these cases identified. By foresight of the scale of the loss, under which heading the cases have been grouped, is meant foresight of a loss which is both inherently limited to a fixed sum, and thus does not encompass consequential loss, and is also in the nature of things liable to be suffered by only one person. It may typically arise from foresight of the making by the plaintiff of disadvantageous agreements or transactions or of the deprivation of the plaintiff's existing rights or expectations. It provides an alternative although narrower basis for recovery than in those cases where the plaintiff is individually foreseeable where the amount of the

⁹ Required by Transport Act 1962, s.143 (N.Z.).

¹⁰ Post p.48.

¹¹ [1976] 1 N.Z.L.R. at 412.

¹² *Ibid* at 411.

¹³ *Ibid* at 413.

¹⁴ *Idem*.

recoverable loss is not so circumscribed. As the identified limiting features are common to the cases, and appear to provide the reason for allowing recovery of the loss, it would be sensible to identify them as the circumstances giving rise to the duty and thus in terms define the scope of the duty as extending only to foreseeable determinate loss in the above sense. A convenient formula is at hand, as already observed. A limitation on the scale of recovery may, in the words of Lord Wilberforce, serve "to reduce or limit the scope of the duty . . . or the damages to which a breach of it may give rise". It provides an accurate rationale for the recovery of such loss which is singularly lacking in the explanations given in most of the cases themselves.

What are the implications of this conclusion in the particular field of liability for defective products? The traditional view is that loss caused by a *dangerous* product is recoverable in tort on ordinary principles whereas loss caused by acquiring a product which does not work is not.¹⁵ The latter loss is purely financial.¹⁶ Nevertheless, inroads have recently been made into this principle by classifying the relevant harm in some circumstances as physical. This is where expenses are incurred in taking preventive action before a latent defect causes further harm. In *Bowen v Paramount Builders (Hamilton) Ltd*¹⁷ the New Zealand Court of Appeal held that where a builder erects a house with a latent defect which causes actual damage to the structure of the house itself that loss was physical rather than economic.¹⁸ Further, the owner could remedy the defect and sue for the cost rather than wait until the damage actually occurred.¹⁹ This decision was approved by the House of Lords in *Anns'* case where Lord Wilberforce opined that the damage to the house caused by defective foundations was material, physical damage and what was recoverable was the amount of expenditure necessary to restore the dwelling to a condition in which it was no longer a danger to the health or safety of persons occupying and possibly expenses arising from necessary displacement.²⁰ That the principle in *Anns* also covers preventive action is made clear in the later decision of the Court of Appeal in *Batty v Metropolitan Property Realisations Ltd*²¹ where a house owner sued a builder and a property developer for negligently building his house on an unstable block of land which within the next ten years would subside into a nearby valley. The plaintiff apparently recovered the replacement value of the house, this presumably

¹⁵ See Smillie "Liability of Builders, Manufacturers and Vendors for Negligence" (1978) 8 N.Z.U.L.R. 109 at 114-124 and Cane "Physical Loss, Economic Loss and Products Liability" (1979) 95 L.Q.R. 117.

¹⁶ The point has occasionally been overlooked. See *The Diamantis Pateras* [1966] 1 Lloyd's Rep 179; *Algoma Truck & Tractor Sales Ltd v Bert's Auto Supply Ltd* (1968) 68 D.L.R. (2d) 363.

¹⁷ [1977] 1 N.Z.L.R. 394.

¹⁸ See also *Mount Albert Borough Council v Johnson* [1979] 2 N.Z.L.R. 234; *Young v Tomlinson* [1979] 2 N.Z.L.R. 441. Where a defect in a motor vehicle causes an accident that damages the vehicle that damage is likewise physical: see *Fuller v Ford Motor Co of Canada Ltd* (1979) 94 D.L.R. (3d) 127.

¹⁹ [1977] 1 N.Z.L.R. at 410, 417, 423; *Young v Tomlinson* supra.

²⁰ [1978] A.C. at 759.

²¹ [1978] Q.B. 554.

on the basis that he could then move out and buy another house and thus avert the danger. However the emphasis put in *Anns* on the risk to the occupiers is, perhaps, misleading. It is not thought that Lord Wilberforce was intending to cast doubt on the proposition accepted in *Bowen* that preventive repairs entailed by a risk posed to the property itself also fall into the category of physical loss. Nor, it might be added, did Lord Wilberforce contemplate any distinction in this context between defective houses and defective chattels.²²

Given the classification of the relevant loss as physical, the court in *Bowen's* case was able to hold that the claim for damages for loss in value of the building after all possible remedial work had been done and for loss of rent arising from the structural defects were sustainable.²³ This was thus simply economic loss consequential on physical damage. Two members of the court nonetheless gave consideration to the problem of non-dangerous defects. Richmond P. doubted whether liability would extend so far:²⁴

As at present advised I do not think that the courts would be justified in imposing a duty of care on builders tantamount to the full warranties normally implied in a building contract. Any such extension of the present law seems to me to be more properly a matter for legislation.

On the other hand Cooke J. gave specific support to the proposition that economic loss alone may also be recoverable:²⁵

In view of the origin of contractual liability in the old action on the case in tort any tendency to exclude tort because the field is already covered by contract would, perhaps, be ironical. In principle, and in the light of the opinions of the Master of the Rolls and Sachs L. J. in *Dutton v Bognor Regis Urban District Council*, I do not see why the law of tort should necessarily stop short of recognizing a duty not to put out carelessly a defective thing, nor any reason compelling the courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it.

The third member of the court, Woodhouse J., did not deal with this point.

There is much to be said in support of Cooke J.'s opinion. The distinction between physical and economic loss may be purely incidental. Take a builder who negligently erects a house where in breach of a local bye-law the building line is too near an adjoining street. The local authority serves an enforcement notice requiring the matter to be rectified. This entails demolishing the house and starting afresh. There is no risk of harm to persons or property in such a case. But should a different conclusion be reached for that reason alone?

If the nature of the loss is not a reason for denying recovery in tort for non-dangerous defects in houses and chattels, are there any other reasons which are more compelling? The majority view in *Rivtow Marine* was that liability for the cost of repairing damage to a defective article and for

²² See the dissent of Laskin J. in *Rivtow Marine Ltd v Washington Iron Works* supra at 548, said to be 'of strong persuasive force' by Lord Wilberforce in *Anns*, supra at 760.

²³ [1977] 1 N.Z.L.R. at 411.

²⁴ Ibid at 413-414.

²⁵ Ibid at 423.

economic loss flowing directly from the negligence is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract.²⁶ With respect, is this not fundamentally the same argument that prevailed in *Winterbottom v Wright*²⁷ in the context of physical harm and which was decisively overturned in *Donoghue v Stevenson*? The fact that work may be done by A pursuant to contractual obligations owed to B does not mean that the same work cannot give rise to tortious obligations owed to C. Recent decisions imposing concurrent duties in contract and tort confirm the argument.²⁸ In *Ross v Caunters* Megarry V.C. had no difficulty in holding that a solicitor owed a duty in tort to a third party in addition to his concurrent duty in contract owed to his client. Thus it is not thought that there is any special difficulty with respect to the imposition of the duty. Problems may, however, be envisaged in determining the standard of care required of the manufacturer. Products may be manufactured to varying standards of quality or fitness under a contract between A and B. How, then, can any duty owed by A to C, the ultimate consumer who has no knowledge of that contract, be measured? The answer lies in determining objectively whether the particular product was reasonably fit for the ordinary purposes for which it might be sold or used.²⁹ A manufacturer who originally took all due care by giving notice of a defect or labelling a product as of inferior quality or as a "second" could not then be said to be in breach of any duty nor to have caused any loss if it were later resold to a purchaser without any warning or label.³⁰

An associated problem is where the manufacturer in the original contract of sale excludes his liability for defects in the product. In *Young & Marten Ltd v McManus Childs Ltd*³¹ Lord Pearce said there seemed to be no reason why a third party should have better rights than the original purchaser.³² On the other hand, if the manufacturer should foresee damage to that third party, who usually would have no knowledge of the provisions of the contract, then what is the relevance of that contract? A manufacturer might exclude liability for dangerous defects³³ yet this clearly would not affect the position of an injured third party. Once it is recognised

²⁶ (1973) 40 D.L.R. (3d) at 541.

²⁷ (1842) 10 M & W 109. Lord Abinger foresaw that 'the most absurd and outrageous consequences, to which I can see no limit, would ensue' if it should ever be held that a party to a contract was under a duty to anyone but the promisee.

²⁸ *Batty v Metropolitan Property Realisations Ltd* supra; *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* supra. The New Zealand courts have, however, taken a different approach: *MacLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 N.Z.L.R. 100; *J. W. Harris & Son Ltd v Demolition & Roading Contractors (N.Z.) Ltd* [1979] 2 N.Z.L.R. 166.

²⁹ See Smillie op cit at 118.

³⁰ Could an action lie against a vendor for breach of a duty to warn of a non-dangerous effect? See Smillie op cit at 131-135.

³¹ [1969] 1 A.C. 454.

³² Ibid at 469.

³³ Such an exclusion is ineffective in the U.K. See Unfair Contract Terms Act 1977, ss.2; 16.

that the fact work is done under a contract does not prevent a duty in tort from arising out of that work then the situation contemplated by Lord Pearce is bound to occur. It might be thought unfortunate but it is certainly no reason for denying the existence of that duty.

However compelling the arguments on the inter-relation of tort and contract, it is thought that it is no longer sufficient to deny liability for loss in acquiring a safe but defective product simply because that loss is economic. The liability of the manufacturer would be for a foreseeable determinate sum—in principle the difference between what the purchaser has paid and the value of what he has got.³⁴ No doubt a manufacturer might be faced with multiple claims in the case of mass produced products but the number would nonetheless be determinate, the maximum being represented by the number of articles produced. Multiple liability can and does occur in the case of dangerous products and that has never been seen as a reason for denying liability. Nor should it in the case of shoddy products.

The assumption made in the preceding discussion is that economic loss consequential on loss of use of a safe but defective product would remain irrecoverable in tort. If this is right it would certainly lead to anomalies. It has been seen that the cost of preventive repairs to a dangerous product is regarded as physical harm, thus permitting recovery of economic loss caused by loss of use of the product,³⁵ yet exactly the same loss could be suffered while a safe defect is being repaired. However the authorities, although somewhat meagre, are against liability. It has already been observed that in *Rutherford's* case Cooke J. drew a clear distinction between damages for the cost of repairs to the lorry and damages for loss of use. Chilwell J. drew a similar distinction in *Hope v Manukau City*,³⁶ another New Zealand decision. Should the point arise directly in a case where the identity of the plaintiff could not be foreseen, it seems likely that the distinction will be maintained. It is only because the scale of the loss can specifically be foreseen that recovery may be permitted at all.

“IMMEDIATE” ECONOMIC LOSS

In a celebrated example in *Morrison Steamship Company Ltd v The Greystoke Castle (Cargo Owners)*³⁷ Lord Roche took the case of a defendant who negligently damaged a lorry carrying the plaintiff's goods, causing them to be unloaded and carried forward in another vehicle. His Lordship thought that the cost of unloading and carriage could be recovered because the owner of the goods and the owner of the lorry could be treated as being engaged on a “joint venture”.³⁸ It has been pointed out that while the concept of a joint venture was here being used for a very special and limited purpose, we are left completely in the dark as to what may be held

³⁴ In practice the damages would usually be the cost of repair or the original sum expended if the defect were irreparable.

³⁵ *Bowen v Paramount Builders (Hamilton) Ltd* supra.

³⁶ [1976] 2 N.Z. Recent Law (NS) 324.

³⁷ [1947] A.C. 265.

³⁸ *Ibid* at 280.

to constitute a joint venture for this purpose, except for the given example.³⁹ Lord Denning has since explained the grounds for recovery as lying in the "immediacy" of the damage⁴⁰ but again it is quite uncertain when damage may be regarded as "immediate" or, a term sometimes used interchangeably, "direct". Although references to immediate or direct damage may be found sprinkled throughout the cases⁴¹ nowhere are these terms defined. Nor do there appear to be any decisions founded solely on the fact that the damage suffered was of this kind save, perhaps, for *Taupo Borough Council v Birnie*⁴² a recent decision of the New Zealand Court of Appeal. It was held here that the respondent hotel could recover loss of accommodation profits caused by a fall in business after extensive publicity had been given to flooding of the hotel when the streams on which it was situated overflowed, this having been caused by the negligence of the defendants in carrying out work upstream from the hotel. This decision may be justified on well established principles. The respondents certainly suffered physical damage to the hotel buildings and the subsequent fall in occupancy was caused by and consequential on that damage and the fear that it might happen again. Cooke J. makes the point explicit in his approval of the trial judge's finding that the flooding would not only make some of the bedrooms unavailable for a time but would also deter travellers and travel agents from making bookings, because of doubt about whether satisfactory accommodation would be available or misgivings about further flooding.⁴³ That finding in itself should allow recovery. The difficulty comes with Cooke J.'s preceding words that in his view the economic losses caused by the floods "were not the less immediate or direct because they were prolonged".⁴⁴ This was a similar conclusion to that reached by Richmond P. who held that the loss "was such an immediate consequence of that negligence to be legally recoverable".⁴⁵ Unfortunately there is no further guidance on what particular factors made this loss so "immediate" or "direct". What is more 'immediate' about it than, for example, the loss suffered by the plaintiffs in *Spartan Steel and Alloys Ltd v Martin & Co Ltd* in being unable to use its furnaces to make the four melts the anticipated profits on which were disallowed by the Court of Appeal? The *Spartan Steel* case itself makes it clear that English law recognises no principle of parasitic damages under which a head of damage not otherwise recoverable could be annexed to some other claim for damages which was.⁴⁶

³⁹ Atiyah "Negligence and Economic Loss" (1967) 83 L.Q.R. 248 at 255-256 where it is pointed out that there is authority in the form of two decisions of Devlin J. (*Behrens v Bertram Mills Circus Ltd* [1957] 2 Q.B. 1; *Burgess v Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349) that a person is not entitled to recover for pecuniary loss caused by physical injury to his partner although partnership is the best and most obvious illustration of a joint venture in law.

⁴⁰ *S.C.M. (United Kingdom) Ltd v W. J. Whittall and Son Ltd* [1971] 1 Q.B. 337 at 345-346.

⁴¹ See, for example, *Rivtow Marine Ltd v Washington Iron Works* supra.

⁴² [1978] 2 N.Z.L.R. 397.

⁴³ *Ibid* at 404.

⁴⁴ *Idem*.

⁴⁵ *Ibid* at 402.

⁴⁶ [1973] Q.B. 27 per Lord Denning M.R. at 35; cf *Seaway Hotels Ltd v Cragg (Canada) Ltd* (1959) 21 D.L.R. (2d) 264.

Thus the fact that the respondents in *Taupo Borough Council v Birnie* suffered physical harm could not make their further loss any more 'immediate'.

In general terms the idea of immediacy seems to be founded on an unexpressed notion of causal proximity rather than on any particular application of the foresight test. In theory it provides another means of limiting the range of liability for financial loss but is too vague to be helpful. *Taupo Borough Council v Birnie* is best explained as a case taking a wide view of what amounts to consequential economic loss.

A further test for recovery which might be regarded as contemplating the recovery of "immediate" loss but which stands on its own is found in the reasoning of Jacobs J. in the *Caltex Oil* case. His Honour formulated a test based on physical propinquity between persons or property and the place where the conduct of the defendant had its physical effect such that a physical effect on the person or property of the plaintiff is foreseeable as the result of the defendant's act or omission.⁴⁷ In one respect this approach is broader than that formulated by Jacob J.'s brethren. Nowhere does His Honour appear to require foresight of the actual fact of physical propinquity. This would seem to be quite fortuitous. Rather the test is whether, given this fact, a physical effect on the plaintiff's person or property is foreseeable. In other respects it is far narrower. The facts of no other case discussed so far in which financial loss has been held to be recoverable would fall within its ambit. No doubt Jacobs J. would disclaim any intention to lay down a test applicable to the different circumstances of different categories of cases. But why formulate a principle with such obvious lack of utility? It seems to lead only up a blind alley. Further, the reasoning itself may be criticised for failing to give any adequate guidance on what is meant by "physical propinquity" and "physical effect" or to explain what relationship these new concepts bear to the well established concepts of physical and economic damage.⁴⁸ For these reasons it is thought with respect that Jacobs J. has marked out a path likely to be trodden only rarely.

CONCLUSION

There is no doubt as to the existence of a judicial fear of indeterminate liability for economic loss. The purpose of this article has been to recognize this fact rather than to consider whether it is justified and to identify those tests evolved by the courts which require specific types and degrees of foresight to be established and which thus reduce the scope of potential liability. They may here be expressed in terms of the two-stage enquiry formulated by Lord Wilberforce in *Anns'* case. Thus where a claim is for economic loss not consequential on physical harm the court must ask firstly whether the loss is foreseeable. If it is the court must then ask certain further questions. Should the defendant have foreseen damage to this particular plaintiff or to a limited class of persons including the plaintiff? If so, should he have foreseen the particular way in which it arose? Alternatively, should the defendant have foreseen the scale of the loss, as defined? If either the first two or the third question is answered in

⁴⁷(1977) 11 A.L.R. at 228.

⁴⁸Cane (1977) 13 U.W.A.L. Rev. at 254-257.

the affirmative the nature of the loss does not preclude recovery⁴⁹ although other factors still may.⁵⁰ How stringently these tests will be applied and whether the law will evolve further towards a simple *Donoghue v Stevenson* test of foresight of damage to one's neighbour remains to be seen. Experience may gradually come to show that the judicial fears are exaggerated.

The cases decided within the last ten years in themselves constitute a dramatic advance in what was a rigidly controlled field of liability. One largely unremarked consequence of this expansion⁵¹ is that negligence liability may increasingly take over the field covered by existing torts dealing with the recovery of economic loss, usually, although not necessarily, as a result of *intentional* conduct. Defamation is an obvious example. The tort may, of course, be committed unintentionally and without negligence but most defamation cases concern intentionally disparaging remarks directed at particular persons. Where financial damage results there may be scope for a duty of care in such cases. Similarly the requirement of "malice" in injurious falsehood⁵² may now have been overtaken by negligence. More controversially, at least some aspects of passing off may fall within the ambit of negligence, in particular inverse passing off⁵³ and unauthorised use of another's name and sponsorship value.⁵⁴ Finally, are there implications here for conspiracy, intimidation and interference with contract? An intention to cause damage is regarded as essential in these torts. It seems most unlikely that the courts would wish to render actionable combinations or threats which harm the plaintiff or conduct which induces breach of the plaintiff's contract with another simply on proof of negligence⁵⁵ but whether there is any stronger reason for denying a duty of care beyond a simple assertion that the duty has never been recognised in such cases is doubtful. The relationship between negligence and these other torts is a difficult issue and is clearly one which sooner or later the courts will have to tackle.

⁴⁹ If they are all answered affirmatively, as in *Ross v Caunters*, there is every reason to allow recovery.

⁵⁰ See n 6 - 9, ante p.30.

⁵¹ Though see *Mesher* (1971) 34 M.L.R. 317 at 321-323.

⁵² *Balden v Shorter* [1933] Ch. 427.

⁵³ *Bullivant v Wright* (1897) 13 T.L.R. 201.

⁵⁴ *Henderson v Radio Corporation Pty Ltd* (1960) S.R. (N.S.W.) 567.

⁵⁵ An attempt to plead a negligent inducement of breach of contract failed in *McLaren v British Columbia Institute of Technology* (1979) 94 D.L.R. (3d) 411.