ECONOMIC LOSSES AND NEGLIGENCE

The Search for a Just Solution

CHRISTOPHER HARVEY*

Prince Rupert

How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection.[1]

Introduction

Few areas in modern tort law are darker and more uncertain than the area now being probed, with differing results, in cases concerning claims in negligence for financial loss alone unsupported by injury to the person or property of the plaintiff. The purpose of this article is to throw some light on the issues at stake and to suggest that a general principle which already underlies some of the leading cases on this frontier of negligence might profitably be exploited as a guide to liability in future cases.

We are not concerned here with cases that satisfy the technical requirements of contract or trust, nor are we concerned with such torts as nuisance, defamation, slander of goods, slander of title, passing off, deceit, conspiracy, intimidation or inducement of breach of contract. In these areas liability for economic loss is well recognized and is based upon different principles. We define negligence in the normal way as the breach of a duty of care owed to the plaintiff causing him foreseeable loss. We investigate, in search for a rational unifying principle, the factors which determine the existence of the notional duty of care in cases where the foreseeable damage is economic and the relationship between the parties is wider than that of contract or trust.

This situation may arise in a great variety of circumstances. The following are some examples:

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* Christopher Harvey, of the English Bar. This article evolved from a dissertation prepared for a degree at the University of London, entitled "The Duty Concept in Negligence: Liability for Infringement of an Economic Interest". The dissertation was referred to in the course of judgment in *Rivtow Marine Ltd.* v. *Washington Iron Works* (1970), 74 W.W.R. 110, at pp. 120-121 (B.C).

[1] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465, at p. 536, per Lord Pearce.

(1) P owns and operates a restaurant. D, a pipeline contractor, is engaged in laying a pipe outside P's premises. D has a plan which clearly shows all existing underground mains but he nevertheless cuts through the electricity line (the property of the electricity authority) which supplies P's premises. After eight hours of blackout, during which P is unable to operate his business, the supply line is repaired. One week later D cuts through the supply line a second time. P seeks to recover his profits lost on both occasions from D.[2]

(2) D, a surveyor who is in the business of estimating the value of residential property, inspects a certain house at the request of X and subsequently prepares a valuation for X which he knows X will show to P, a prospective mortgagee. D advises that the house is sound and worth $30,000.00. In fact it is unsound and worth only $5,000.00. P was induced by the valuation to lend $20,000.00 to X who subsequently defaults. P seeks to recover his loss from D.[3]

(3) D manufactures farm equipment including "D" tractors. P, a farmer, buys a "D" tractor from X, an independent dealer, after reading advertisements by D in the *Farmers' Gazette*. The tractor is so full of defects that P is unable to harvest his crops. The tractor is in fact valueless. X has ceased trading. P seeks to recover from D damages for the lost value of the tractor and the lost harvest.[4]

I

Before the case of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[5] it was generally accepted as a rule of law that liability in negligence did not extend to pure financial loss. On that basis P's

[2] This example and the two which follow are hypothetical. For similar fact-situations in the reported cases see *J. G. Moore (North Shields) Ltd.* v. *Sharp* (1964), 108 Sol. J. 453; *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittall and Son Ltd.*, [1970] 1 W.L.R. 1017, aff'd [1971] 1 Q.B. 337; *Badham* v. *Williams*, [1968] N.Z.L.R. 728; *Byrd* v. *English* (1903), 43 S.E. 419; *Newlin* v. *New England Telephone* (1944), 54 N.E. 2d 929; *Seaway Hotels Ltd.* v. *Gragg (Canada), Ltd.* (1959), 17 D.L.R. (2d) 292, aff'd 21 D.L.R. (2d) 264 (Ont. C.A.).

[3] See *Cann* v. *Wilson* (1888), 39 Ch. D. 39, overruled by *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491, but restored by *Hedley Byrne* v. *Heller, supra*, footnote 1.

[4] See Linden, Products Liability in Canada, Studies in Canadian Tort Law (1968), ch. 10; Tobin, Products Liability: Recovery of Economic Loss? [1970] N.Z.U.L. Rev. 36; *Seely* v. *White Motor Co.* (1965), 403 P. 2d 145; *The Diamantis Pateras*, [1966] 1 Lloyd's Rep. 179; *Traders Finance* v. *Haley* (1966), 57 D.L.R. (2d) 15 (Alta. A.D.), aff'd *sub nom. Ford Motor Corp* v. *Haley*, [1967] S.C.R. 437; *Algoma Truck* v. *Bert's Auto Supply* (1968), 68 D.L.R. (2d) 363 (Ont. D.C.); *Rivtow Marine* v. *Washington Iron Works*, [1972] 3 W.W.R. 735 rev'ing (1970), 74 W.W.R. 110 (B.C.S.C.). The case is now on appeal to the Supreme Court of Canada.

[5] *Supra*, footnote 1.

claim in the situations above would fail. A court would have to say that the loss is not actionable or, taking the most usual formulation, that in the absence of foreseeable damage to P's property no duty of care arises. And, as Lord Esher said long ago, "a man may be as negligent as he pleases towards the whole world unless he owes them a duty".[6]

This general rule was based on several lines of authority originating in the last century. In *Lumley* v. *Gye* (1853),[7] it was held that negligent, as opposed to intentional, interference with the contractual relations of another is not actionable. In *Cattle* v. *Stockton Waterworks Co.* (1875),[8] the court rejected the plaintiff's claim for financial loss suffered when the defendant carelessly caused flooding on the land of X thereby making the plaintiff's contract with X—to construct a tunnel on X's land—far more difficult and costly. The defendant was held not liable because no property of the plaintiff had been damaged. And in *Simpson* v. *Thomson* (1877),[9] the House of Lords denied the right of an insurer to sue directly (as opposed to suing by subrogation) in a case where the admitted negligence of the defendant had caused damage to a ship owned by X and insured by the plaintiff, thus causing financial loss to the plaintiff.

The immediate policy reasons behind the rule are not difficult to see. Given the rudimentary conceptual "control devices"[10] in the early law of negligence the courts feared that once a duty to avoid economic loss was admitted in a relationship wider than contract there would be no logical stopping place to this kind of liability. The old bogey of "the opening of the floodgates of litigation" raised its head in these as in many other early negligence cases.[11] The concern to limit actions also gained support from the current ideal of *laissez-faire*.

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[6] *Le Lievre* v. *Gould*, *supra*, footnote 3, at p. 497. Another common formulation is that the loss is "too remote". See footnote 78 *infra*.

[7] 2 E. & B. 216.

[8] L.R. 10 Q.B. 453.

[9] L.R. 3 A.C. 279.

[10] See Fleming, Remoteness and Duty: The Control Devices in Liability for Negligence (1953), 31 Can. Bar Rev. 471.

[11] In *Winterbottom* v. *Wright* (1842), 10 M. & W. 109, Lord Abinger C.B. envisaged "an infinity of actions" and "the most absurd and outrageous consequences"; Alderson B. could see "no point at which such actions would stop". See, too, *Lumley* v. *Gye*, *supra*, footnote 7, at p. 253 ("If we go the first step we can show no reason for not going fifty."); *Cattle* v. *Stockton*, *supra*, footnote 8, at p. 457; *Simpson* v. *Thomson*, *supra*, footnote 9, at p. 289; the dissenting judgments in *Donoghue* v. *Stevenson*, [1932] A.C. 562; and the defendants' unsuccessful argument in *Hedley Byrne* v. *Heller*, *supra*, footnote 1, and *Dorset Yacht* v. *Home Office*, [1970] A.C. 1004. Occasionally the argument is still accepted: *Stevenson* v. *East Ohio Gas Co.* (1946), 73 N.E. 2d 200; *Weller & Co.* v. *Foot and Mouth Disease Research Institute*, [1966] 1 Q.B. 569, at p. 577; *Margarine Union* v. *Cambay S.S.*, [1969] 1 Q.B. 219, at p. 236; *Electrochrome* v. *Welsh Plastics*, [1968] 2 All E.R. 205, at p. 208.

The rule barring all pure financial loss was nourished in a wide range of fact-situations. It became established law, for example, that in a case where two ships collide the charterer of the "innocent" vessel can recover his consequential financial loss if the charter is one of demise but not if it is a time or voyage charter.[12] And where a person suffered financial loss through the injury or death of another person in whom he had a financial interest he would have no right of action against the wrongdoer at common law, apart from the exceptional cases within the *actio per quod servitium* or *consortium amisit*.[13] Thus, an employer, wife or child has in general no common law right of action for economic loss caused by negligent injuries to his employee, husband or parent as the case may be. The rule was consistent, too, with the denial of liability for negligent statements leading to financial loss in *Le Lievre* v. *Gould*[14] and *Derry* v. *Peek*.[15]

II

The rule remained for a time in spite of the generalization of liability which occurred in this century especially after *Donoghue* v. *Stevenson*.[16] Lord Atkin, as every lawyer knows, set forth the duty concept in broad terms of foreseeability of harm. But in *Old Gate Estates, Ltd.* v. *Toplis*, a case where the foreseeable harm was economic, the learned judge confined Lord Atkin's dictum to "negligence which results in danger to life, danger to limb, or danger to health . . .".[17] Asquith L.J. in *Candler* v. *Crane, Christmas & Co.*[18] (the case which was later overruled in *Hedley Byrne* v. *Heller)* accepted the addition of danger to tangible property but, he said, Lord Atkin's neighbour test "has never been applied to injury other than physical".

In practice, the rigorous application of this rule can lead to capricious results. Financial loss generally depends on the particular terms of a contractual or other relationship with a third party. It is frequently a matter of pure chance whether on the one hand the financial loss is suffered by the person in that relationship who

[12] *The Winkfield,* [1901] P. 42; *The Okehampton,* [1913] P. 173; *Chargeurs Réunis* v. *Eng. and Am. Shipping* (1921), 9 Ll L. Rep. 464; *Elliott Steam Tug* v. *Shipping Controller,* [1922] 1 K.B. 127; *The Zelo,* [1922] P. 9; *The Jupiter* (No. 3), [1927] P. 122; *The World Harmony,* [1965] 2 All E.R. 139. See also *Anglo-Algerian Shipping* v. *Houder Line,* [1908] 1 K.B. 659 and *Courtenay* v. *Knutson* (1957), 26 D.L.R. (2d) 768 (B.C.).

[13] "In a civil court, the death of a human being could not be complained of as an injury", *Baker* v. *Bolton* (1808), 1 Camp. 493 per Lord Ellenborough. See *Admy. Cmrs.* v. *S.S. Amerika,* [1917] A.C. 38; *Rawson v. Kasman* (1955), 3 D.L.R. (2d) 376 (Ont. C.A.); footnotes 27 and 28 *infra.*

[14] *Supra,* footnote 3.

[15] (1888), 14 App. Cas. 337.

[16] *Supra,* footnote 11.

[17] [1939] 3 All E.R. 209, 161 L.T. 227.

[18] [1951] 2 K.B. 164, at p. 189.

also suffered the physical injury, or whether on the other hand the financial loss is suffered by another but equally innocent party rendering it totally irrecoverable. The employer whose workman is injured by D, for example, may or may not be bound, by contract or statute, to continue paying his wages; if he is bound to pay, then in normal circumstances neither he nor his workman can recover that amount from D.[19] Similarly a charterer in a non-demise charter may or may not be bound to continue paying rent while the ship damaged by D is out of action; only if he is not (and the loss therefore falls on the owner of the ship), is the guilty party, D, liable to pay compensation for loss of use.[20]

Capricious in practice, the rule is supported only by historical development—and even that is suspect.[21] In logic the rule is quite unjustifiable. Personal injury cases may well call for separate treatment. But there is no compelling reason to distinguish between injury to property and infringement of other financial interests.[22]

It is not surprising, therefore, to note a clear reluctance in modern law to apply the rule in its illogical strictness. Ways were

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[19] See Atiyah, Negligence and Economic Loss (1967), 83 L.Q.Rev. 248; *I.R.C.* v. *Hambrook*, [1956] 2 Q.B. 641; *Myers* v. *Hoffman* (1955), 1 D.L.R. (2d) 272 (Ont.); *Terry* v. *Lotocky* (1961), 28 D.L.R. (2d) 640 (B.C.).

Not surprising the law of unjust enrichment has been invoked, but without avail, in a case of this kind: *Recr. for Met. Police* v. *Croydon Corp.*, [1957] 2 Q.B. 154. This case is criticized in Goff and Jones, Law of Restitution (1966), p. 220.

In England the Law Reform Committee considered this anomaly and recommended in their eleventh report (Cmnd. 2017) that the employer be given an independent right of action against the tortfeasor to recover the wages paid. Note the opposing minority view which is based on sound loss-spreading considerations. The majority recommendation was never adopted.

The employer is by statute subrogated to the rights of the injured workman in cases covered by the Ontario Workmen's Compensation Act, R.S.O., 1970, c. 505, s. 8. Exceptionally the employer or insurer may recover without such a statutory right: *Adams* v. *Ascot Foundry* (1968), 89 W.N. (Pt. 2) 37.

[20] *Chargeurs Réunis* v. *Eng. & Am. Shipping, supra*, footnote 12; see also *The Mergus* (1947), 81 Ll. L. Rep. 91, and *Deep Sea Tankers* v. *S.S. Tricape*, [1958] S.C.R. 585.

[21] Neither trespass nor the old action of *assumpsit*, the twin sources of negligence, were in origin confined to physical loss. See *Shiells* v. *Blackburne* (1789), 1 Hy. Bl. 158 and *Wilkinson* v. *Coverdale* (1793), 1 Esp. 74. Earlier cases, going as far back as 1241, can be found in Milsom, Trespass from Henry III to Edward III (1958), 74 L.Q.Rev. 195.

[22] Property is, after all, just another form of financial interest. For the vanishing point between tangible and intangible interests see the nervous shock cases, including *Guay* v. *Sun Publishing*, [1953] S.C.R. 216 and *Dillon* v. *Legg* (1968), 441 P. 912 (Cal.); and also *Charrington* v. *Tarry* (1964), 108 Sol. J. 251; *Dutton* v. *Bognor Regis U.D.C.*, [1972] 2 W.L.R. 299 (C.A.); *Badham* v. *Williams, supra*, footnote 2 (where a power cut was treated as a diminution of the value of the land served).

Significantly, Professor Jolowicz in his argument for a new classification of law on rational fact-based criteria (in The Division and Classification of the Law, 1970), lumps together "injury to property and other financial loss" and categorizes separately cases of personal injury.

found to mitigate its effect, but the devices used could be no more logical or consistent than the rule they sought to avoid. The following are some examples:

(1) Consequential economic loss became recoverable if it flowed from or was "parasitic on" (which is the same thing) physical damage to the person or property of the same plaintiff, and rules of remoteness grew up to control it.[23] Then "property" was extended to include a possessory interest such as that of a bailee.[24] Further the requirement that economic loss should "flow from" physical loss was expanded—or avoided—in some cases. For example, in *Seaway Hotel Ltd.* v. *Gragg (Canada) Ltd.*, which is discussed below,[25] the economic damage recovered was in fact collateral to the physical. Moreover, there has been no suggestion of a minimum limit (not even the principle of *de minimis non curat lex)* to the amount of physical damage required to support a claim for economic loss. In one case it was said that damage to a scrap of paper—a football pool coupon— would be sufficient to support a claim for the lost prize of £20,000.[26]

(2) In the type of case where P suffers because another person, X, upon whom he is dependant is injured by D, P's common law right of action is limited to the recognized *per quod* categories which have been based on an ancient notion of proprietary interest in another person.[27] In Canada the categories of this action appear to be more extensive than in England: the Supreme Court of Canada has held that the Crown may recover from a person who injures someone in military service such items of financial loss as medical expenses, sickness allowances, and wages paid during the period of incapacity.[28] Furthermore, there is some authority which extends this right of action to employers in general. Thus, in Ontario, a public company recovered the actual financial loss suf-

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[23] *Dredger Liesbosch* v. *The Edison,* [1933] A.C. 449.

[24] The authorities, including *The Winkfield,* [1902] P. 42, are reviewed in *Courtenay* v. *Knutson, supra,* footnote 12.

Even a contingent possessory interest, such as that of a finance company in a car on hire-purchase, is protected: *Mears* v. *L. & S.W. Ry.* (1862), 11 C.B. (N.S.) 850; *Dee Trading* v. *Baldwin,* [1938] V.L.R. 173; *Drive-Yourself* v. *Burnside,* [1959] S.R. (N.S.W.) 390.

[25] *Supra,* footnote 2. See text at footnote 68, *infra.*

[26] *Bart* v. *Brit. West Indian Airways,* [1967] 1 Lloyd's Rep. 239, at p. 267 (Guyana C.A.), per Bollers C.J.

[27] Blackstone, Commentaries on the Laws of England, 21st ed., III, p. 141. Or a "quasi-proprietary interest": *Best* v. *Samuel Fox,* [1952] A.C. 716, at p. 736; *Comr. of Rys.* v. *Scott* (1959), 33 A.L.J.R. 126, at p. 134; *R.* v. *C.P.R.,* [1947] 2 D.L.R. 1 (Can.); *A.-G. of Canada* v. *Nykorak* (1967), 28 D.L.R. (2d) 485, at p. 496 (B.C.C.A.).

[28] *R.* v. *Richardson,* [1948] 2 D.L.R. 305 (Can.); *A.-G. of Canada* v. *Nykorak,* [1962] S.C.R. 331; *cf. A.-G. for N.S.W.* v. *Perpetual Trustee,* [1955] A.C. 547; *I.R.C.* v. *Hambrook, supra,* footnote 19 (employer's action limited to loss of domestic servants).

fered when its general manager was injured in a road accident.[29] In Australia, Chief Justice Berwick has gone so far as to suggest that the supposed proprietary basis of the action be discarded and the usual concepts of negligence be applied as limited by the principle in *Wagon Mound No. 1*.[30]

(3) In other cases an effort was made by extending the notion of parasitic damages to allow a person suffering economic loss to recover damages in an action brought by another. In *Schneider* v. *Eisovitch*,[31] the learned judge allowed recovery of expenses reasonably incurred by relatives "rendering necessary assistance" to the injured plaintiff on the undertaking that the plaintiff pay over to those relatives the amount so awarded. One would have expected this device (which could not possibly have led to a multiplicity of actions) to have had a bright and useful future. But it was not thought to be technically correct. In later cases it was limited to attendant expenses incurred by reason of some legal, not just moral, liability.[32] Thus, in British Columbia, a plaintiff in a personal injury case failed to recover the economic loss suffered by his daughter who had left her job to tend him during his convalescence.[33]

[29] *Bermann* v. *Occhipinti*, [1954] 1 D.L.R. 560 (Ont.); followed in *Kneeshaw* v. *Latendorff* (1965), 54 D.L.R. (2d) 84 (Alta.); *Bursey* v. *Avis Transport* (1970), 1 N. & P.E.I.R. 131 (Nfld.); *Flakstad* v. *Wright*, [1971] 5 W.W.R. 697 (B.C.) (special damages recoverable). But see *Swift* v. *Bolduc* (1961), 29 D.L.R. (2d) 651 (N.S.) where a claim by a corporation to recover the amount of sickness and accident benefits paid and the cost of training a replacement for its injured employee failed on a different view of the law; *Crone* v. *Orion Ins.* (1965), 51 D.L.R. (2d) 27 (Ont.); *Pagan* v. *Leifer* (1969), 6 D.L.R. (3d) 714 (Man.); *Schwartz* v. *Hotel Corp.* (1971), 75 W.W.R. 664 (Man.), aff'd (1971), 20 D.L.R. (3d) 759; and see *Lee* v. *Sheard*, [1956] 1 Q.B. 192; *cf. Ashcroft* v. *Curtin*, [1971] 1 W.L.R. 1731 (loss to a "one-man business" included in the claim of the injured director).

[30] *Curran* v. *Young* (1964-1965), 112 C.L.R. 99, 101. The Australian decisions, too, are less restrictive than the English ones: *Comr. for Rys.* v. *Scott*, *supra*, footnote 27 (engine driver); *Sydney City Council* v. *Bosnich* (1968), 89 W.N. (Pt. 1) (N.S.W.) 168 (driver). Fleming, The Law of Torts (4th ed., 1971), p. 600, suggests that the action could serve an important modern function if extended.

[31] [1960] 2 Q.B. 430. See, too, *Myers* v. *Hoffman*, *supra*, footnote 19. *Rawson* v. *Kasman*, *supra*, footnote 13.

[32] *Gage* v. *King*, [1961] 1 Q.B. 188.

Note that, although a wrongdoer may be liable in this way to an insurance company suing by subrogation for the hospital expenses of a plaintiff who carries private hospitalization insurance, this liability is not extended for the benefit of insurers under a health scheme supported by tax: *Sheasgreen* v. *Morgan*, [1952] 1 D.L.R. 48 (B.C.C.A.); *Flaherty* v. *Hughes*, [1952] 4 D.L.R. 43 (B.C.C.A.).

See Fleming *op. cit.*, footnote 30, p. 204; Cooper, A Collateral Benefits Principle (1971), 49 Can. Bar Rev. 501.

[33] *Hamilton* v. *Hayes* (1962), 36 D.L.R. (2d) 687 (B.C.). But see *Wattson* v. *Port of London Authority*, [1969] 1 Lloyd's Rep. 95, where a wife in similar circumstances recovered her lost wages. The method commonly used to achieve this result is to claim the economic loss as part of

(4) Another way which the law has found to get around the rule excluding economic loss is to use the concept of "common adventure" or "joint venture", a concept which has the merits and defects of being both unfamiliar and imprecisely defined. On this basis a crew of fishermen in Scotland who worked under a profit-sharing agreement on a trawler owned by X, which was sunk through the negligence of the defendant in another vessel, recovered their lost share of the anticipated profits of the fishing venture in spite of the fact that they suffered no physical injury.[34] In the English case of *Morrison Steamship Co. Ltd.* v. *Greystoke Castle (Cargo Owners),*[35] the plaintiff cargo owners who suffered no physical damage to their property recovered the financial loss incurred which was the amount of general average contribution they had to pay in consequence of damage done by the defendant to the cargo-carrying ship. By reason of the joint venture between cargo owners and ship owners the House of Lords was able to say that the plaintiffs had a good cause of action. With a surprising freedom from technicality, Lord Porter said, apparently referring to the issues of duty and remoteness together:[36]

> One method of ascertaining the damages in an action of tort is to ask what loss would a reasonable man anticipate as a result of a wrongful act.

In the same case Lord Roche and Lord Porter said that in the analogous example of goods being transported by land where the transporting vehicle is damaged and delayed through the negligence of the defendant, another road user, the owner of the goods which were not themselves damaged would nevertheless have a direct right of action to recover his resultant economic loss. Again this conclusion was possible through the device of common adventure.[37]

(5) In other cases the concepts of contract and trust have been used and stretched to the point of artificiality in order to give a remedy for economic loss. For example, in *Woods* v. *Martins Bank Ltd.,*[38] a fiduciary relationship was said to exist between a

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the injured party's "treatment" expenses, as in *Sheasgreen* v. *Morgan, ibid.* Munkman, Damages for Personal Injuries and Death (1970 ed.), p.v, criticizes the adherence to *Gage* v. *King* in Canada, Australia, New Zealand and Scotland as "misguided".

[34] *Main* v. *Leask,* [1910] S.C. 772 (Ct. of Session). See also *Mair* v. *Wood,* [1948] S.C. 83.

[35] [1947] A.C. 265. [36] *Ibid.,* at p. 295.

[37] Lord Roche's example has frequently been cited with approval. See *e.g. Hedley Byrne* v. *Heller, supra,* footnote 1, at p. 518, and *S.C.M.* v. *Whittal, supra,* footnote 2, at p. 346, per Lord Denning M.R.

It is difficult to say how far this principle can be applied. Financial loss flowing from personal injury to one of two partners in business, which one would expect to be the prime example of a joint venture, has been held to be irrecoverable by the other partner: *Behrens* v. *Bertram Mills Circus,* [1957] 2 Q.B. 1; *Burgess* v. *Flo. Nightingale Hosp.,* [1955] 1 Q.B. 349.

[38] [1959] 1 Q.B. 55.

bank manager and a person who, although not yet a customer of the bank, sought and was given advice on investment. In other cases,[39] the notion of "collateral contract" has supported an action where a statement of warranty has been made by the defendant *animo contrahendi* and the plaintiff, a buyer, has entered into an agreement with a third person in reliance on the statement. In a similar way a Canadian court has gone so far as to impose liability on a manufacturer on the terms of the implied warranty provisions of the Sale of Goods Act in an action brought by an ultimate user who purchased the manufacturer's product (three trucks) from an independent dealer.[40] Other cases in contract, such as *De La Bere* v. *Pearson Ltd.*,[41] show the element of consideration being strained in other ways. These devices have been rightly criticized, not for the results achieved—for justice was done in the circumstances—but for the use of inapposite concepts based on notions of consensus where in fact there was nothing resembling a true consensus.[42]

These various devices—the wider concept of property, the *per quod* action, the parasitic action, the joint venture and the expanded concepts of contract and trust—are all unconnected and disparate devices. There are no consistent features running through them, nothing therefore which might be generalized to apply to all economic loss cases. The most one can say is that they serve the same ends: in their limited areas they provide a remedy for injury to an economic interest, thereby circumventing the old general rule. This is some indication that by these diverse means the law is making the same effort to respond to social changes and that the social, economic and other considerations which justified the rule in the last century no longer apply with the same force. Society has of course changed considerably since the days of *Cattle* v. *Stockton Waterworks*.[43] *Laissez-faire* has long since passed away. Liability for personal injury and property damage has become generalized. In the field of economic affairs the disasters of old have increasingly been cushioned in one way or another. Governments are now prepared to intervene to stabilize the economy, to provide jobs or to insure against unemployment, to control

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[39] *Shanklin Pier* v. *Detel Products*, [1951] 2 K.B. 854; *Andrews* v. *Hopkinson*, [1957] 1 Q.B. 229; *Yeoman Credit* v. *Odgers*, [1962] 1 W.L.R. 215; *Wells* v. *Buckland Sand*, [1965] 2 Q.B. 170.

[40] *Traders Finance Corp.* v. *Haley*, *supra*, footnote 4.

[41] [1908] 1 K.B. 280. Also *Carlill* v. *Carbolic Smoke Ball*, [1893] 1 Q.B. 256.

[42] "I think that today the result can and should be achieved by the application of the law of negligence and that it is unnecessary and undesirable to construct an artificial consideration. I agree with Sir Frederick Pollock's note on the case of *De La Bere* v. *Pearson Ltd.* where he said . . . that, 'the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract'." *Hedley Byrne* v. *Heller*, *supra*, footnote 1, at p. 528, per Lord Devlin.

[43] *Supra*, footnote 8.

minimum wages, to protect investors of money and to protect consumers. A person nowadays will feel that he has a right to a degree of economic security. He will in many cases feel a sense of injustice if he has no legal recourse to those who, by their carelessness, deprive him of his expected economic benefits.

The way in which the law of negligence relating to financial loss was falling short of social expectations was highlighted first in cases where the loss was caused by negligent statements.[44] In his famous dissenting judgment in *Candler* v. *Crane, Christmas & Co.*,[45] Lord Denning M.R. said:

> The second submission . . . was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. . . . I must say, however, that I cannot accept this as a valid distinction. I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think liability depends on the nature of the damage.

The majority, however, were against him. They confined Lord Atkin's principle in *Donoghue* v. *Stevenson* to cases of physical injury, albeit with some obvious misgiving. Asquith L.J. said:[46]

> I am not concerned with defending the existing state of the law or contending that it is strictly logical — it clearly is not. I am merely recording what I think it is.

In 1961 the authorities which put financial loss beyond the ambit of *Donoghue* v. *Stevenson* forced Salmon J. in *Clayton* v. *Woodman and Son, Ltd.* to conclude that in cases of negligent statement, physical damage is recoverable but financial damage is not. He added:[47]

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[44] Smith, Liability for Negligent Language (1900), 14 Harv. L. Rev. 184; Paton, Liability in Tort for Negligent Statements (1947), 25 Can. Bar Rev. 123. With incredible prescience Paton said, at p. 138: "It would be in keeping with the spirit and history of the common law at least to impose liability on those who in the course of business give gratuitous advice. There is no duty to act gratuitously but if the defendant takes the task upon himself why should an action not lie".

[45] *Supra*, footnote 18, at p. 178.

[46] *Ibid.*, at p. 195. He continues: "If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command."

[47] [1962] 2 Q.B. 533, at p. 546. Five years later there was a happy sequel to this troubled statement. In *Rondel* v. *Worsley*, [1967] 1 Q.B. 443 (C.A.), at p. 522, Salmon L.J. said, "Before *Hedley Byrne* it was not recognized that in the absence of a contractual or fiduciary relationship, negligent but honest advice could, in any circumstances, give rise to an action for damages for financial loss . . . . *Hedley Byrne* sounded the death knell of a rule which, as I ventured to suggest in *Clayton* v. *Woodman & Son, Ltd.*, was contrary alike to principle, reason and justice. It had nothing to support it except certain authorities which may have been binding on this court but which fortunately were not binding on the House of Lords." See also [1969] 1 A.C. 191, [1967] 3 All E.R. 993 (H.L.).

I accept that this view adds illogicality to illogicality, but that it seems to me to be preferable to enlarging the class of those to whom a remedy is unjustly denied.

III

In 1963 the case of *Hedley Byrne and Co. Ltd.* v. *Heller and Partners*,[48] the facts of which are too familiar to need repeating here, was argued in the House of Lords. The appellant (plaintiff) relied, *inter alia*, on *Donoghue* v. *Stevenson* and on Lord Denning's judgment in *Candler's* case. Counsel for the respondent argued that there was no liability in negligence in the absence of something in the situation created "which is dangerous to life or limb or harmful to property". A duty of care to avoid pure financial loss could arise, he said, only if the relationship is contractual or fiduciary; in wider relationships there is no duty unless "the financial loss flows from physical damage to the person or property of the plaintiff".[49] "To extend the law to create a general duty", he argued, "would open the floodgates of ligitation". The respondent won the day by virtue of the express disclaimer of responsibility. But without the disclaimer he would clearly have been held liable. The argument as to the irrecoverable nature of the damage was rejected and Lord Denning's dissent in *Candler's* case was approved.

The five law Lords in *Hedley Byrne* considered that the scope of the law of negligence was not limited and controlled by the inflexible distinction between types of damage which, as we have seen, had considerably affected the law hitherto. The judgments elaborate a more soundly based controlling principle based on a general notion of responsibility (to which we will return later). Lord Pearce accepted that "economic protection has lagged behind protection in physical matters",[50] but found no reason in authority or principle for excluding it altogether. Lord Hodson said:[51] "It is difficult to see why liability as such should depend on the nature of the damage"; it was, he said, associating himself with the words of Lord Morris, the special features of the relationship between the parties which give rise to "a duty to avoid inflicting pecuniary loss". Lord Devlin, before dealing with the positive side of the question, quite decisively destroyed what might be left of the old rule. Dealing with the respondents' submission that financial loss was only recoverable in negligence if it arose through the channel of physical damage, he said:[52]

The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If, ir-

[48] *Supra*, footnote 1.
[49] *Ibid.*, at pp. 473-480.
[50] *Ibid.*, at p. 536.
[51] *Ibid.*, at p. 509.
[52] *Ibid.*, at p. 517.

> respective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle.

Lord Devlin commented with approval, as did Lord Hodson, on the *Greystoke Castle* case which, he said, "makes it impossible to argue that there is any general rule showing that such loss [that is, financial loss in the absence of physical damage] is of its nature irrecoverable".[53]

A fortiori the case of *Hedley Byrne* must be taken as finally and conclusively exorcising from the law of negligence the dogmatic rule excluding economic loss. We suggest that this is the inescapable implication of *Hedley Bryne.* The decisions supporting the outgoing rule should now be regarded as of dubious authority in so far as they were affected by that rule and otherwise merely as examples of what the law at the time considered to be sufficiently proximate relationship between the parties. This view is supported overwhelmingly by academic opinion. Professor Flemming, for example, wrote in 1965:[54]

> But since responsibility cannot be any less for what a man does than for what he says, the recent opening of the door to claims for financial loss due to negligent misrepresentation cannot help but strike a fatal blow also at those few decisions in the past which had accepted the false premise that the law of negligence made no allowance whatever to claims for purely pecuniary loss.

And Professor M. A. Millner said in *Negligence in Modern Law:*[55]

> With the *Hedley Byrne* case, therefore, the relevance of the distinction between material damage and monetary damage loses significance; and this is entirely appropriate in an economy in which a multitude of economic interests are incorporeal rights, such as choses in action and good will, or well-founded expectations, such as anticipated profits, the adequacy of real or personal security, the safety of an investment, the recoupment of credit, the prospect of support.

Appropriate though it is, the courts have been slow to accept the new situation. Development since *Hedley Byrne* has been characterized by utter schizophrenia. The principles laid down

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[53] *Ibid.*, at p. 518. Lord Denning M.R. expressed the same view in *S.C.M.* v. *Whittall, supra,* footnote 2, at p. 346.

[54] *Op. cit.*, footnote 30 (3rd ed.), p. 173. This passage is modified slightly in the 4th ed. (1971), p. 165.

[55] (1967), p. 42.

in that case have not yet been generally accepted—perhaps they have not been understood—and without a guiding principle the cases involving economic loss in negligence show inconsistent and sometimes unjust results. The cases may be said to fall into two groups: those where no attempt whatever has been made to base liability on the new principles of *Hedley Bryne* and those where at least some attempt has been made, with a variety of results. In the first group, to which we now turn, the old rule still bedevils the law.

IV

Before turning to the main body of authority in those cases where the old rule lives on, it is worth mentioning the first case in time: *J.W. Moore (North Shields) Ltd.* v. *Sharp*.[56] It is exceptional because the learned judge accepted the obvious implication of *Hedley Byrne*. The plaintiff in that case was a printer who suffered economic loss when his electric presses stopped for a time due to the activity of a demolition contractor, the defendant, working on adjacent premises through which ran the plaintiff's electricity supply cable. The defendant's submission that non-physical loss as such was irrecoverable in negligence was rejected by the learned judge. The authorities supporting the old rule had, he said, been overruled in *Hedley Byrne*. Accordingly, damages were awarded to the printer.

Subsequent cases, however, went the other way. In *The World Harmony*,[57] the plaintiff was a time-charterer who suffered loss when the ship he had chartered was negligently rammed by the defendant's ship. The court applied the old authorities beginning with *Cattle* v. *Stockton Waterworks Ltd.* and *S. A. de Remorquage à Hélice* v. *Bennetts* and rejected the claim. *Hedley Byrne* was mentioned but not pressed in argument. The learned judge said it was not relevant, being a case "very much nearer contract than tort".[58] So, too, in *Weller & Co.* v. *Foot and Mouth Disease Research Institute*.[59] There the plaintiffs were auctioneers in a livestock market and they sought to recover the financial loss they suffered when their market was forced to close because of an epidemic caused by the escape of a virus from the defendant's premises. The learned judge had to assume for the purposes of the issue of law involved that the loss was foreseeable. On the strength of the old authorities he dismissed the claim, saying that *Hedley Byrne* had not altered the proposition that where the duty is based on foreseeability the law refers to

[56] *Supra*, footnote 2.
[57] Or *Konstantinidis* v. *World Tankers Corp.*, [1967] P. 341, [1965] 2 All E.R. 139.
[58] *Ibid.*, at p. 362 (P.).
[59] *Supra*, footnote 11.

foreseeability of direct injury to person or property, not to a bare financial interest. *Hedley Byrne* did not decide, he said, that foreseeability of economic loss without more *automatically* gives rise to a duty of care. True, but the learned judge ought to have told us what more the law does require to establish a duty to avoid economic loss.[60]

Weller's case does, however, go this far: it establishes that once the facts of a case give rise to a duty of care on the principle of foreseeable damage to person or property, then that duty may be breached and an action for economic loss may be maintained notwithstanding that no actual physical damage was suffered. But this view merely perpetuates the dogmatic physical-economic loss distinction in a different way. It has little to commend itself. As an alternative to or restriction of the terms of *Hedley Byrne* in the field of economic negligence *Weller's* case has been expressly disapproved, rightly in our view, in one important Canadian case to which we return later: *Rivtow Marine Ltd.* v. *Washington Iron Works.*[61]

In a number of subsequent English decisions *Weller's* case has been relied on as authority for the proposition that foreseeable physical harm is the one and only prerequisite to liability in negligence; discussion of the *Hedley Byrne* principles, consequently, has been effectively short-circuited. Thus, in *Elliot* v. *Sir Robert McAlpine and Sons, Ltd.*,[62] a demolition contractor who dropped a piece of concrete through the sidewalk, damaging an underground telephone junction box, was held not to be liable for the profits lost by the plaintiff whose business in the adjacent office was entirely dependent on the use of the telephone but had not suffered physical damage of any kind. And in *Margarine Union G.m.b.H.* v. *Cambay Prince Steamship Co. Ltd.*,[63] where the defendant was a shipper who negligently failed to fumigate the hold of his ship (with the result that it became infested with cockroaches which damaged the cargo in the course of the voyage), the plaintiff, who bought the cargo during the voyage not knowing of the damage which was occuring, was held to have no legal remedy. Why? Because by the contract of sale, property in the cargo did not pass to the plaintiff until the end of the voyage;

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[60] He was content to say only that foreseeability of economic harm does not automatically give rise to liability. The unfortunate result of this has been that *Weller's* case is frequently taken as authority for the much wider proposition that pure economic loss is always irrecoverable in negligence. In one bright exception a Canadian judge cut through this confusion at a stroke: *Rivtow Marine* v. *Washington Iron Works, supra,* footnote 4 (B.C. S.C.).

[61] *Ibid.,* at p. 127. But see the B.C. Court of Appeal decision in this case, *infra,* footnote 183.

[62] *Supra,* footnote 12.

[63] [1969] 1 Q.B. 219, [1967] 3 All E.R. 775.

without property in or possession of the cargo at the time the damage occurred no duty of care could be owed to the plaintiff.[64] The judge agreed with "every word" in *Weller's* case.

In the same way in *Electrochrome Ltd.* v. *Welsh Plastics Ltd.*,[65] it was held that no cause of action arose where the defendant negligently drove his motor vehicle into a fire hydrant causing the plaintiff's adjacent factory to lose a day's production. Again the loss was *damnum sine injuria* because of the old physical-economic loss distinction as carried forward by *Weller's* case.

The next English case in this line, *British Celanese, Ltd.* v. *A. H. Hunt (Capacitors), Ltd.*,[66] marks a kind of turning point, a belated recognition that in some cases economic loss might be recoverable. There, a piece of metal foil was carried by the wind from the defendant's premises and it landed, as it had on a previous occasion, on an electricity sub-station causing a power failure in the plaintiff's factory a short distance away. Because there was an element of physical damage to the plaintiff's property (molten metal solidified in the machinery and in due course had to be chipped away), the learned judge was able to impose liability for the consequential lost profits on that basis without having to "attempt to elucidate the problem whether the decision of the House of Lords in *Hedley Byrne* has overruled, or qualified, a long line of authorities of which *Cattle* v. *Stockton Waterworks* is probably the earliest, commonly relied upon to support the proposition that mere economic loss is irrecoverable in an action for negligence".[67] He did say, however, that the Canadian case of *Seaway Hotels, Ltd.* v. *Gragg (Canada), Ltd.*,[68] which for the first time had come to the attention of the English courts, "is a most persuasive authority for the proposition that those who work on or near electric power cables owe a duty of care to those whom they should reasonably foresee are likely to be injuriously affected by what they do".[68a]

In the *Seaway Hotels* case, which was decided before *Hedley Byrne*, the defendant, whilst installing a gas main, cut through an underground electricity line feeding the plaintiff's hotel which was about one mile away. The plaintiff claimed damages for (a) the spoilage of refrigerated food and (b) lost profits in the dining room, cocktail bar and in the rental of rooms. At the trial, counsel for the defendant submitted that damages under heading (b) were irrecoverable. He cited the old authorities beginning with *Cattle* v. *Stockton Waterworks* in support. The learned judge rejected

[64] This case is criticized in James, The Fallacies of *Simpson* v. *Thomson*, [1971] Mod. L. Rev. 149.
[65] *Supra*, footnote 11.
[66] [1969] 1 W.L.R. 959.
[67] *Ibid.*, at p. 966.
[68] *Supra*, footnote 2.
[68a] *Supra*, footnote 66, at p. 966.

that argument, however, and imposed liability under both heads. His judgment was upheld on appeal. Surprisingly, the Court of Appeal of Ontario applied the general principles of negligence without dwelling at all on the distinction between types of damage. Laidlaw J.A. said:[69]

> In this case, applying the principle as was stated in *Bolton* v. *Stone*, it is quite certain that the injury for which claim is made in this case was injury that was likely to follow from the interference with the electric duct. It was injury which ought reasonably to have been foreseen by the defendants.

This case was followed shortly by a comment, with which we agree, that liability for economic loss cannot be adequately controlled by means of the *Bolton* v. *Stone* (foreseeability) principle alone.[70]

The end, for the time being, of the line of cases in England relating to negligent damage to public utility supplies is *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittal and Son Ltd.*[71] An engineering contractor (the defendant), whilst carrying out operations in the road in front of the plaintiff's factory, cut through an electricity cable causing the loss of a full day's production. The factory owner sued initially only for his lost profits, but astutely amended his claim to say that some physical damage to property had occurred as well. The trial judge found the case indistinguishable from the *Seaway Hotels* case[72] and in a similar way he preferred to rely on general principles rather than arbitrary distinctions between types of loss. The plaintiff's counsel submitted at the trial that after *Hedley Byrne* an action in such circumstances was maintainable "even if pecuniary loss by way of loss of profit from interruption of the supply of power was alone alleged as it was in the original statement of claim". He conceded the point established in *Weller's* case: "There must be some connection between plaintiff and defendant other than mere foreseeability of damage by way of pecuniary loss". What else then? He suggested that in this case plaintiff and defendant were "in *close proximity* in days when industry depended on electricity in an industrial area and there was a duty to take care to avoid *unjustifiable acts* which would lead *directly* to power being cut off without warning". Thesiger J. in effect accepted these submissions. Whether or not the plaintiff suffered "physical harm" was relevant, he said, but it was not an exclusive test. Absolutely right, we suggest, but look at the struggle that follows. Other relevant considerations in his opinion were, (1) the degree of foreseeability of the plaintiff's

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[69] 17 D.L.R. (2d), at p. 266.
[70] B. H. Haines (1961), 19 U. T. Fac. L. Rev. 191.
[71] *Supra*, footnote 2. But see now *Spartan Steel* v. *Martin & Co.*, [1972] 3 W.L.R. 502. This case was reported too late for consideration here.
[72] *Ibid.*, at p. 1028 (W.L.R.).

loss, that is, whether it was "almost certain" or merely "probable", or was "a natural and probable" or a "direct" result of the act, (2) the degree of causation, that is, whether the consequences were "immediate" or "direct" or "natural and probable" or "remote" and (3) the degree of proximity between the parties. He distinguished *Weller's* case and the others following it as cases where the economic loss was not "reasonably within one's contemplation" by which he meant it was not "readily foreseeable". In the end Thesiger J. imposed liability on the basis of these general tests and was thereby able to avoid the overriding effect of the physical-economic loss distinction. He was also able to indicate how liability could be controlled which, if based only on "mere foreseeability of economic loss", might be inadequately controlled. His supplementary tests may be inconclusive in themselves, and perhaps inappropriate and too complex ever to be adopted. But the recognition of the need for supplementary tests in this type of case is an important step forward. The search is, at least, under way.

In many ways the Court of Appeal judgments, although affirming the decision of the trial judge, are less satisfactory. Winn L.J. took the law a step backwards. Having examined the proposition that liability should be based on *mere* foreseeability of economic loss he said that, as a principle of liability, it was (1) far too wide and (2) not established by *Hedley Byrne*. True, but then instead of considering possible supplementary tests,[73] he fell back on the old dogmatic exclusion:

> [A]part from the special case of imposition of liability for negligently uttered false statements, there is no liability for unintentional negligent infliction of any form of economic loss which is not itself consequential upon foreseeable physical injury or damage to property.[74]

Lord Denning M.R., on the other hand, said that the action for loss of profit "should not depend on the chance whether material damage was done as well". And he recognized the distinction between foreseeability of economic loss as a *necessary* condition of liability, which it is, and a *sufficient* condition, which it is not. But he offered very little guidance as to what would be regarded as sufficient. That, he said, was a matter of policy. The *usual* rule was, he accepted, that pure economic loss cannot be recovered because in most cases this would put too great a burden on one person, for instance, the contractor who by mischance or negligence cuts an electric cable and stops *many* factories from working as a result. But in exceptional cases (such as *Hedley Byrne* and

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[73] He did not consider, for example, what principle of liability *was* established by *Hedley Byrne*. See, *infra*, ss. VI and VII.

[74] [1971] 1 Q.B. 337, at p. 352.

Greystoke Castle) he said, economic loss is the "immediate consequence of the negligence and is recoverable accordingly".

> Seeing these exceptional cases you may well ask: How are we to say when economic loss is too remote or not? Where is the line to be drawn? Lawyers are continually asking that question. But the judges are never defeated by it. We may not be able to draw the line with precision, but we can always say on which side of it any particular case falls. . . . Where, again, is the line to be drawn? Only where "in the particular case the good sense of the judge decides".[75]

And he refers us only to case law for guidance, which at present is not much help.

Buckly L.J., the third appellate judge, emphasized that the pure economic loss issue did not arise in this case as the plaintiff's counsel by this time had confined his claim for economic loss to such loss as flowed directly from physical injury, and so the judge preferred not to discuss the wider issue. He agreed with Lord Denning that the *Seaway Hotels* case (where "the damaged cable supplied only one establishment") was rightly decided "at least so far as damage to food was concerned", and he agreed also that counsel for the defendant was wrong in his contention that the law of negligence, like trespass, is concerned only to protect a person from invasion to his property or his physical person.[76]

V

The present position, therefore, is highly ambivalent. Nothing is certain. On the one hand there is support, especially in the judgment of Winn L.J. above, for the proposition that the old rule lives on in all but the negligent statement cases. On the other hand, it is arguable that the rule is gone and is replaced by a positive test of liability: that a duty to take care to avoid economic loss arises where the loss is "reasonably foreseeable" *(Seaway Hotels* case) or is "reasonably within one's contemplation" or "readily foreseeable" *(S.C.M.:* trial judge) or where the loss is the "immediate consequence of the negligence" *(S.C.M.:* Lord Denning). But in these cases there is no real agreement as to the terms of the general test. Nor is the area of its operation at all clear.

This confusion would be enough by itself to render the law unsatisfactory. But the problem is deeper than mere confusion. The suggested tests are themselves objectionable. It has long been recognized that a decision on the duty of care issue in cases such as these ultimately rests on a policy decision based on competing social and economic factors; it is the outcome of a value judgment that the plaintiff's interest which has been invaded is deemed

[75] *Ibid.*, at p. 346.
[76] *Ibid.*, at p. 357.

worthy of legal protection.[77] The real question is whether society is prepared to burden members of the community with the responsibility of accounting for the loss of others in given situations. It is therefore otiose and misleading to seek the answer in such concepts as "foreseeability" in the duty issue, or "remoteness" or "immediate consequence" in the causation issue. Whether one chooses causation or duty as the operative control device (and duty is preferable because it disguises the "creative legislative problem" less easily) the real determinants lie buried well below the surface.[78] These formulae focus one's attention on risk and on the causal connection, they do not focus directly on the question who ought to bear the risk. As a result many relevant factors are often left, to the law's detriment, unresearched, unargued, and buried willy-nilly in the courts' judgment under the cover of terms such as foreseeability, remoteness or public policy.

The alternative rule, that is, to reject all supplementary tests and therefore to exclude all pure economic loss with the exception of the narrow *Hedley Byrne* situation, is also objectionable. Admittedly the law must find some way of excluding liability in the case, for example, where a minor accident by an individual near an electric supply causes a loss of profits to hundreds of factory owners. The burden would be an unfair one, and the suffering of the factory owners would not amount to much anyway. They could pass the loss on to their customers. No one would expect liability in such circumstances. But to deny liability on the basis that the law knows of no duty to avoid foreseeable economic loss is unnecessarily crude. It involves shutting out all other cases where the element of physical injury is missing regardless of their merits. A court would have to deny liability, for example, even where the loss is suffered by the plaintiff and no one else, where the plaintiff is a single small business unable to absorb or spread the loss and with no choice but to rely on the competence of the defendant, where the conduct of the defendant is grossly negligent and unjustifiable, where the defendant has previously given an express undertaking that he will not damage the supply, or he

[77] See *Donoghue* v. *Stevenson*, *supra*, footnote 11, at p. 605 (Lord Macmillan); *Nova Mink* v. *T.C.A.*, [1951] 2 D.L.R. 241, at p. 256, per MacDonald J.; Green, The Duty Problem in Negligence Cases (1928), 28 Col. L. Rev. 1014; Williams, The Foundation of Tortious Liability (1939), 7 Camb. L. J. 111; Lawson, The Duty of Care in Negligence: A Comparative Study (1947), 22 Tulane L. Rev. 111; Wright, The Law of Torts 1923-1947 (1948), 26 Can. Bar Rev. 46; Morison, A Re-examination of the Duty of Care (1948), 11 Mod. L. Rev. 9; Fleming, *op. cit.*, footnote 10; Dias, The Duty Problem in Negligence, [1955] Camb. L.J. 198; Green, Foreseeability in Negligence Law (1961), 61 Col. L. Rev. 1401; Symmons, The Duty of Care in Negligence: Recently Expressed Policy Elements (1971), 34 Mod. L. Rev. 394; Linden, Down with Foreseeability: Of Thin Skulls and Rescuers (1969), 47 Can. Bar Rev. 545.

[78] Wright, *op. cit., ibid.*; Fleming, *op. cit., ibid.*

repeats the damage at intervals, or he has insured against the risk and has told the plaintiff so. In this sort of case, justice demands a remedy and the law should be equipped to respond.

VI

Before the old rule can be effectively interred a new principle to control liability in economic loss cases should be established. Then the law of negligence will be able to advance in this area with consistency and, if the principle is the right one, with justice.

The new principle should be flexible and broad enough to take into account all the various factors which are at present considered by anyone who is concerned primarily to allocate in a just way the risks in a given situation, this being the primary concern of tort law today.[79] The principle should, for example, encourage open consideration of the arguments for and against the claim that a given economic interest is worthy of legal protection. And it should encourage consideration of the fairness of ordering the defendant to compensate the plaintiff, that is, methods of "loss spreading" including the insurability of the loss should be considered together with the element of fault in the defendant's conduct. The traditional concept of foreseeability of risk as developed from *Donoghue* v. *Stevenson* is sufficient to draw together those factors necessary for determination of fault, but the new principle must be based on a broader concept because fault is no longer an exclusive criterion in the law of negligence. As the paramount consideration fault is in the process of being superseded by "reasonable coverability of risk"; blame is being superseded by responsibility.[80] If concepts are to be used at all (and the law can hardly dispense with them) we suggest that an objective concept of social *responsibility* be adopted, responsibility, that is, in the sense of answerability or accountability for loss.[81] If, in a case where D

[79] "[T]he law of tort may be said to be concerned with the allocation or redistribution of those losses which are bound to occur in our society.": Winfield and Jolowicz on Tort (1971), p. 1. "This change of emphasis from loss-shifting to the loss-spreading function of tort law is bound to modify much of the conventional thought concerning the so-called attribution of legal responsibility.": Fleming, More Thoughts on Loss Distribution (1966), 4 Osgoode Hall L.J. 161, at p. 163; and see Fleming, Introduction to the Law of Torts (1967).

[80] "Reasonable coverability of risk" was found by the English Law Commission to be a general principle of liability ("although it is admittedly ill-defined in scope") underlying some of the existing negligence cases concerning independent contractors: Civil Liability for Dangerous Things and Activities, Law Com. No. 32 (1970), at p. 5; *infra,* footnote 145. See also Ehrenzweig, Negligence without Fault: Trend Towards an Enterprise Liability for Insurable Loss (1951), reproduced at (1966), 54 Cal. L. Rev. 1422; Hadden, Contract, Tort and Crime: The Forms of Legal Thought (1971), 87 L.Q. Rev. 240.

[81] For a linguistic analysis of the term see Hart, Varieties of Responsibility (1967), 83 L.Q. Rev. 346.

causes financial loss to P, the law were to consider the relationship between the parties and ask whether in the given setting D must be taken, as a reasonable man, to have assumed responsibility for the loss, then surely the relevant factors would emerge. The cut-off point of liability as well as the required standards of care could then be laid down in accordance with general notions of responsibility in society. The factors relevant to reasonable foreseeability (and fault with it) could thereby be minimized while the factors which a thoughtful judge always has in the back of his mind anyway, such as the insurance position,[82] could be brought forward for legitimate discussion, argument and open criticism.

In the first group of economic loss cases discussed above we saw how judges have been searching, without much success, for a supplementary principle of liability, mere foreseeability being so obviously inadequate, and how the law in consequence has become inconsistent and confusing. In the other group of cases to which we now turn the position that economic loss *is* recoverable has generally been accepted and the courts have to some extent found guidance in an undeveloped concept of responsibility. We shall suggest that the cases which follow may be used as the basis of a much needed principle which we would put in these terms (retaining foreseeability for the time being): *a person should be bound by a legal duty of care to avoid causing economic loss to another in circumstances where a reasonable man in the position of the defendant would foresee that kind of loss* and *would assume responsibility for it.*

VII

Liability on the basis that a man, by his position or his conduct or both, assumes and accepts certain obligations, duties or responsibilities goes some way back in the law.[83] As "trespass on the case" developed actions for breach of an obligation of this sort were usually brought, not illogically, in an action "on the case" for *assumpsit.* The legal responsibility for negligence of innkeepers, artisans, office holders and professional men as well as those who made *ad hoc* undertakings, supported or not by consideration, was thereby worked out in the same mould. Responsibility

[82] See footnote 143 *infra.*

[83] Milsom, Historical Foundations of the Common Law (1969), pp. 271 *et seq.* and Trespass from Henry III to Edward III (1958), 74 L.Q. Rev. 195: in particular the case against the Humber Ferryman (1348), the London Surgeon (1364, 1377), the bailee (1371, 1374), the riparian owner who failed to repair the river wall, the sheriff, the innkeeper (1368), the horse doctor (1369). Our modern categories of contract and tort had a common origin in trespass, which was not, as was once thought to be so, concerned only with direct forcible injury. Nor was it always an action of strict liability; "no-negligence" seems to have been an accepted defence in the early law. See also Ames, History of Assumpsit (1888), 2 Harv. L. Rev. 1.

can, of course, be notionally accepted for economic loss just as it can be for physical damage. In the early law there was no marked distinction provided the primary *assumpsit* was made out.[84] However, when the distinction between contract and tort developed, trespass moved toward its modern meaning of direct physical injury and *assumpsit* came to be thought of generally in terms of contract as a separate and different action.[85] Negligence as an allegation in the writs appeared on both sides of the line, but predominantly on the trespass side. During the industrial revolution the fledgling independent tort of negligence was concerned overwhelmingly with physical injury. Cases where liability for negligence in tort was based on a notion of assumption of responsibility practically died out. Most economic loss cases, including actions on warranties (in England though not always in America) were categorized as contract.[86] Nevertheless this basis of liability in tort was not completely extinguished. The "common calling" cases, for example, resisted the limitations of the rules of contract and stood out as an anomalous line straddling the boundary of contract and tort.[87] Liability was attached by such well-worn formulae as, "every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill",[88] and "it is the duty of every artificer to

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[84] The special duty which was relied on was set out, with the facts to support it, in a preamble to the writ. The earliest such case recorded, which was one of pure economic loss, dates from 1241: Milsom, Trespass, *op. cit., ibid.,* p. 422, Historical Foundations, *ibid.,* p. 258.

[85] Milsom, Reason in the Development of the Common Law (1965), 81 L.Q. Rev. 496; Historical Foundations, *ibid.,* p. 271 *et seq.*

[86] "A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty. Originally sounding in tort, yet arising out of the warrantor's consent to be bound, it later ceased necessarily to be consensual, and at the same time came to lie mainly in contract." Note (1929), 42 Harv. L. Rev. 414. "The seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." Prosser on Torts (3rd ed., 1964), p. 651. See Stevens (1964), 27 Mod. L. Rev. 121, at pp. 161-166, and Williston, Liability for Honest Misrepresentations (1911), 24 Harv. L. Rev. 415.

[87] "A man who professed a 'common calling', like that of a smith, a farrier, an attorney, a surgeon, an innkeeper, a common carrier, was liable for negligence in its performance . . . and the rule is just as much law now as it was then. Such an obligation was a puzzling thing to classify. The duty of competence arose quite independently of contract between the parties." Winfield, Province of the Law of Tort (1931), p. 59. See also Poulton, Tort or Contract (1966), 82 L.Q. Rev. 346; *Bagot* v. *Stevens Scanlan,* [1966] 1 Q.B. 197 (architect: action based solely on contract); *Jarvis* v. *Moy,* [1936] 1 K.B. 399 (stockbroker: breach of duty arising independently of the obligation undertaken by contract considered); *Babcock* v. *Servacar,* [1970] 1 O.R. 125 (car tester: tort); *Central B.C. Planers* v. *Hocker* (1970), 10 D.L.R. (3d) 689 (stockbroker: tort); *Coats Patons* v. *Birmingham Corp.* (1971), 69 L.G.R. 356 (land charges registrar: contract and tort).

[88] *Lanphier* v. *Phipos* (1838), 8 C. & P. 475, at p. 479.

exercise his art right and truly as he ought".[89] Similarly liability on a gratuitous undertaking survived; there was strong authority behind it: "If a person undertakes to perform a voluntary act he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs* v. *Bernard.*"[90] On that basis in 1903 in the case of *Baxter & Co.* v. *Jones,*[91] an insurance agent who undertook without consideration to have the plaintiff's property insured was held by the Court of Appeal of Ontario to be liable in negligence for the economic loss suffered through his default. In the circumstances, it was said, the agent had "assumed a duty". We would say now that he must be held, as a reasonable man, to have *assumed responsibility* for the foreseeable economic loss.

The great modern authority for the notion that a man may owe a duty to avoid economic loss in situations where a reasonable man would assume responsibility is the case of *Hedley Byrne* v. *Heller.*[92] The House of Lords relied mainly on that line of negligence cases deriving from the old *assumpsit* action where contractual and tortious principles overlap. Liability on *Hedley Byrne* was said to depend on the nature of the *relationship* between the parties. For a duty of care to arise there had to be a "special relationship", and whether or not the relationship was "special" or sufficiently "proximate" (which is the same thing[93]) was determined not only by reference to foreseeability; the principles deriving from *Donoghue* v. *Stevenson* were said to be inadequate.[94] The duty was determined instead by reference to the notion of assumption of responsibility. Various elements of the relationship such as the defendant's special skill and his undertaking to advise, and the plaintiff's reliance were considerd cumulatively. These elements were the determining factors of the duty of care, but the single concept which

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[89] Fitzherbert, Natura Brevium (1652 ed.), p. 225.

[90] *Skelton* v. *L. & N.W. Ry.* (1867), L.R. 2 C.P. 631, at p. 636. In *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909, Powell J. said: "The gist of the action is the undertaking." This case has been used to support the following proposition: "The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." See Smith's Leading Cases (12th ed., 1915), p. 207; *Wilkinson* v. *Coverdale, supra,* footnote 21; *Whitehead* v. *Greetham* (1825), 2 Bing. 464.

[91] (1903), 6 O.L.R. 360. See also *Banbury* v. *Bank of Montreal* (1918), 44 D.L.R. 234, [1918] A.C. 626; *Mutual Mge. Corp.* v. *Bank of Montreal* (1966), 55 D.L.R. (2d) 164 (B.C.C.A.).

[92] *Supra,* footnote 1. See Fleming, *op. cit.,* footnote 30, p. 564: "The sheet anchor of a duty of care is the speaker's assumption of responsibility for what he says."

[93] "I regard this proposition as an application of the general conception of proximity." *Ibid,.* at p. 530, per Lord Devlin.

[94] "That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence." *Ibid.,* at p. 536, per Lord Pearce. See, too, at pp. 482, 524-525.

was used to bring them together in a conceptual test of liability was the assumption of responsibility. Lord Reid put it this way:

> The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has *undertaken some responsibility*. . . .[95]

Lord Devlin said:

> I have had the advantage of reading all the opinions prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a *responsibility* towards those who act upon information or advice and so creates a duty of care towards them. . . .[96]
>
> Where, as in the present case, what is relied on is a particular relationship created *ad hoc*, it will be necessary to examine the particular facts to see whether there is an express or implied *undertaking of responsibility*.[97]
>
> Since the essence of the matter in the present case and in others of the same type is the *acceptance of responsibility*, I should like to guard against the imposition of restrictive terms notwithstanding that the essential condition is fulfilled.[98]

The widespread acceptance in the Commonwealth of this decision is well known.[99] Suffice it to say here that it has been recognized now that in a proper case a person may recover economic loss caused by the negligence of persons such as bankers,[100] commission agents,[101] real estate agents,[102] accountants,[103] surveyors,[104] valuers,[105] analysts,[106] insurance brokers,[107] stockbrokers,[108]

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[95] *Ibid.*, at p. 483. My emphasis in every case.
[96] *Ibid.*, at p. 529.
[97] *Ibid.*, at p. 530.
[98] *Ibid.*, at p. 531.
[99] The accumulated literature on the case is voluminous, and not always laudatory (see, *e.g.*, Gordon (1964-66), 2 U.B.C. L. Rev. 113). The leading articles are Stevens, *op, cit.*, footnote 86, and Honoré (1964), 8 J.S.P.T.L. 284. The case is discussed in Studies in Canadian Tort Law (1968), in ch. 6 (H.J. Glasbeek).
[100] *Mutual Mge. Corp.* v. *Bank of Montreal, supra,* footnote 91; *Bank of Montreal* v. *Young* (1967), 60 D.L.R. (2d) 220 (B.C.); *Goad* v. *Can. Imp. Bk. of Commerce* (1968), 67 D.L.R. (2d) 189 (Ont.).
[101] *Anderson* v. *Rhodes (Liverpool) Ltd.*, [1967] 2 All E. R. 850.
[102] *Dodds* v. *Millman* (1964), 45 D.L.R. (2d) 472 (B.C.); *Hopkins* v. *Butts* (1968), 65 D.L.R. (2d) 711 (B.C.); *Reichl* v. *Rutherford-McRae* (1965), 51 D.L.R. (2d) 332 (B.C.); *Barrett* v. *West*, [1970] N.Z.L.R. 789; *Bango* v. *Holt* (1971), 21 D.L.R. (3d) 66 (B.C.).
[103] *Candler* v. *Crane, Christmas & Co., supra,* footnote 18 overruled by *Hedley Byrne* v. *Heller, supra,* footnote 1; *Dimond Mfing.* v. *Hamilton*, [1969] N.Z.L.R. 609 (C.A.); *cf. Dominion Freeholders* v. *Aird*, [1966] 2 N.S.W.R. 293.
[104] *Gordon* v. *Moen*, [1971] N.Z.L.R. 526; see also the discussion of *Le Lievre* v. *Gould, supra,* footnote 3 in *Hedley Byrne, supra,* footnote 1, at p. 532.
[105] North. Valuers: a Study in Professional Liability, [1965] The Conveyancer 186, 275; *Dodds* v. *Millman, supra,* footnote 102.
[106] Accountants, surveyors, valuers and analysts are mentioned in *Hedley*

For footnotes 107 and 108, see next page.

government employees,[109] doctors,[110] architects,[111] car salesmen who undertake to have cars insured,[112] car testers,[113] and drawers of cheques.[114] The principle of assumed responsibility which was at the root of *Hedley Byrne* has not, however, become familiar and widely applied. Thus, many cases of economic loss have proceeded unnecessarily on the basis that there is no guiding principle and this has led to confusion and inconsistency such as we have seen above.[115] With that in mind it is proposed to look more closely at the principle and how it works, and this is best done by examining some exceptional cases where the principle rather than the bare authority of *Hedley Byrne* has been used. These cases demonstrate the wide range of factors comprehended by the concept of responsibility; they also give some indication of what combinations of the various factors are sufficient to give rise to an assumption of responsibility and hence to a duty of care. It will be apparent that the principle is capable of wide application in cases of economic negligence. In the section which follows, the factors which combine to give rise to a notional assumption of responsibility will be enumerated as they appear. They are meant to be illustrative, not exhaustive.

VIII

The following factors were expressly considerd in *Hedley Byrne* itself: (1) any special skill possessed by the defendant,[116] (2)

Byrne, supra, footnote 1, at p. 538 where Lord Denning's judgment in *Candler* v. *Crane, Christmas & Co., supra,* footnote 103, is approved.

[107] *Marianne Winther* v. *Arbon Langrish,* [1966] E.A.R. 292 (Kenya H. Ct.); *Benson* v. *Ibbot-Seed* (1967), 60 D.L.R. (2d) 166 (B.C.C.A.); *Myers* v. *Thompson* (1967), 63 D.L.R. (2d) 476 (Ont.); *Osman* v. *Moss,* [1970] 1 Lloyd's Rep. 313 (C.A.); *London Bor. Bromley* v. *Ellis,* [1971] 1 Lloyd's Rep. 97 (C.A.).

[108] *George* v. *Dommick Corp.* (1970), 8 D.L.R. (3d) 631 (B.C.); *Central B.C. Planers* v. *Hocker, supra,* footnote 87.

[109] *Windsor Motors* v. *Powell River* (1969), 4 D.L.R. (3d) 155 (B.C.C.A.) (licence inspector); *Ministry of Housing and Local Government* v. *Sharp,* [1970] 2 Q.B. 223 (land charges registrar); *Dutton* v. *Bognor Regis U.D.C., supra,* footnote 22 (building inspector).

[110] *Smith* v. *Auckland Hospital Bd.,* [1965] N.Z.L.R. 191 (C.A.).

[111] *Clayton* v. *Woodman & Son, supra,* footnote 47; *Clay* v. *Crump,* [1964] 1 W.L.R. 53. Although these are cases of physical injury there is no good reason why an architect should not be responsible for the financial loss he causes as well: see footnote 47, *supra.* Note the effect of a contractual relationship: *Terrace School Bd.* v. *Berwick* (1963), 38 D.L.R. (2d) 498 (B.C.); *Bagot* v. *Stevens Scanlan, supra,* footnote 87.

[112] *Reid* v. *Traders General Ins.* (1964), 41 D.L.R. (2d) 148 (N.S.).

[113] *Babcock* v. *Servacar Ltd., supra,* footnote 87.

[114] *Lumsden* v. *London Trustee Savings Bk.,* [1971] 1 Lloyd's Rep. 114; *cf.* the case of the negligent maker of a bill of lading: *Heskell* v. *Continental Express,* [1950] 1 All E.R. 1033, mentioned in *Hedley Byrne, supra,* footnote 1, at p. 532.

[115] Sec. IV, *supra.*

[116] *Supra,* footnote 1, at pp. 495 and 510 (*Shiells* v. *Blackburne, supra,* footnote 21, cited).

any undertaking to apply that skill for the benefit of the plaintiff which may be implied from such facts as the giving of advice on a subject included in the defendant's area of skill or expertise,[117] (3) any *ad hoc* voluntary undertaking to do something carefully for the plaintiff's benefit,[118] (4) the seriousness of the occasion,[119] (5) knowledge on the defendant's part that *reliance* will be placed on his conduct,[120] (6) any express warranties given by the defendant,[121] (7) any express terms "agreed" between the parties as to acceptance or disclaimer of responsibility,[122] and (8) the reward if any which the defendant anticipates.[123] On the question of what combination of these factors would be sufficient the various formulations differed somewhat. Lord Morris said:

> [I]f 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.[124]

Lord Reid said that where "a reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on [gives an unqualified answer] he must, I think, be held to have accepted some responsibility for his answer being given carefully".[125] Lord Devlin said that the element of special skill (or qualification, profession or calling) was not essential and that in some cases the basic principle of responsibility would be satisfied without it.[126] But this has since been challenged.[127]

In the case of *Rondel* v. *Worsely*,[128] the question of the liability for professional negligence of a barrister in England was raised for the first time in a modern case. The judges quite commendably preferred not to draw conclusions from the absence in this case of either a contractual relationship or any physical damage. On the authority of *Hedley Byrne*, they said, these factors were no longer decisive.[129] The principle of assumed responsibility was applied

[117] *Ibid.*, at pp. 495, 526 (*Banbury* v. *Bank of Montreal, supra,* footnote 91, cited), 530 ("general relationship").

[118] *Ibid.*, at pp. 529, 530, 531.

[119] *Ibid.*, at pp. 482-483, 495, 539.

[120] *Ibid.*, at pp. 482, 486 ("imputed knowledge").

[121] *Ibid.*, at p. 529.

[122] *Ibid.*, at pp. 483, 486, 504, 530, 533, 540.

[123] *Ibid.*, at pp. 503 ("business advantage"), 529 ("reward in some indirect form").

[124] *Ibid.*, at p. 502.

[125] *Ibid.*, at p. 486.

[126] *Ibid.*, at p. 531: "If a defendant says to a plaintiff: 'Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me', I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any."

[127] In *Mutual Life* v. *Evatt,* [1971] A.C. 793.

[128] *Supra,* footnote 47.

[129] "And Lord Kenyon . . . held in *Wilkinson* v. *Coverdale* that a gratuitous act or omission could found a liability in damages for economic injury by negligence — a view of the law to which in the case of *Hedley Byrne* it returned . . . ." [1969] 1 A.C. 191, at p. 263, per Lord Pearce.

by most of the judges and by virtue of the factors already mentioned of special skill, implied undertaking and reliance, a *prima facie* case for liability was made out. Lord Upjohn said:

> The general principle is that if one undertakes to perform a service or to give advice gratuitously for another in circumstances in which it is clear that the other relies on those services or upon that advice, then, gratuitous though the labour or advice may be, the performer of the services or the giver of advice is liable to the other if he does so negligently.[130]

But again, the *prima facie* case was for the most part negatived.[131] Some further relevant factors emerged, namely (to continue the enumeration): (9) collateral and correlative obligations and responsibilities drawn not only from related areas of the law whether criminal or civil, statute or common law, but also from the whole social and professional environment. Such things as a barrister's duty to accept briefs regardless of their source and his overriding responsibility to the court for the efficient administration of justice were considered.[132] Also (10) the administration or justiciability aspects were considered: duties of care must be workable.[133] And (11) the regulatory (corrective and preventive) aspect was considered: the learned judges asked themselves whether there was an unmet demand for control of professional standards in this area. They decided, rightly or wrongly, that there was not.[134] As a result of these factors an advocate, whether solicitor or barrister, was held to be immune in England from liability for negligence in court. But outside the ill-defined role of the advocate a lawyer may in principle assume responsibility and on that basis owe a duty of care to avoid foreseeable economic loss to his client.[135]

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[130] *Ibid.*, at p. 279. He continues, at p. 280, "So *prima facie* counsel undertaking his client's case falls within the general rule that he will be liable for negligence."

[131] On grounds which were summed up in the term "public policy".

[132] *Ibid.*, at pp. 247, 268 *et seq.*, 281 *et seq.*

[133] The fear was expressed that the proposed action would be practically impossible to try because it would be difficult to distinguish an error of judgment from negligence, and that an unmanageable flood of actions would be brought by disgruntled clients from the criminal courts as a kind of appeal. See [1967] 1 Q.B. 443 (C.A.).

On the administrative factor see Green, The Duty Problem in Negligence Cases (1928), 28 Col. L. Rev. 1014, at p. 1034; and footnote 11, *supra* (the "floodgates of litigation" argument).

[134] "So far as concerns providing a spur to the advocate by the possibility of actions for negligence, this is unnecessary." [1969] 1 A.C. 191, at p. 272, per Lord Pearce.

This factor is considered in Hadden, *op. cit.*, footnote 80, at p. 256: "The primary objective in laying down standards of conduct is perhaps even more to induce people to comply with them than to deal with the situation when they do not. Standards of reasonable care are meant to be observed."

[135] "The duty is owed, quite irrespective of contract . . . ". *Ibid.*, at p. 244, per Lord Morris. See also at pp. 246-247, 286, 293-294. But see *Clark* v. *Kirby-Smith*, [1964] Ch. 506.

In *Rondel* v. *Worsely,* the court was dealing with a "general relationship", that of barrister and client. The assumption of responsibility, therefore, was derived more from the status of a barrister than from factors of a consensual nature which might vary from case to case and which were more important in the *ad hoc* relationship of *Hedley Byrne.*[136] The effect of consensual or "voluntary" factors in the concept of assumed responsibility was therefore reduced.[137] This happened again, quite properly, in the next three cases to be discussed.

In *Ministry of Housing and Local Government* v. *Sharp,*[138] an encumbrancer who suffered economic loss when his registered land charge was overlooked in a search by the local land registry, sued both the municipal council who employed the negligent clerk in the registry and the registrar who was by statute charged with the overall responsibility for keeping the register. The encumbrancer's action against the clerk (and the council vicariously) was allowed on the basis of foreseeability of loss, a basis which may rightly be criticized on a number of grounds.[139] The action against the registrar was not properly pleaded in negligence, but the court indicated that had it been so pleaded it would have been successful. The factors supporting a claim against the registrar appear most clearly in the judgment of Lord Denning M.R. who, for his part, would have held the registrar absolutely liable. He asked, "who, then, is to bear the loss?"[140] and he found the answer by referring to (12) the duties set out in the relevant statutes,[141]

[136] It is not always realized that *Hedley Byrne* was not a normal banker-customer (or potential customer) case. Lord Devlin described the relationship between the parties (at p. 530) as *ad hoc.* It is submitted that it is justifiable to allow a defendant to proscribe his own sphere of responsibility by a "voluntary" disclaimer only in such cases of *ad hoc* relationships. In the general relationship cases liability should derive more from status considerations and the defence of voluntary disclaimer of responsibility should be critically examined; the voluntary or consensual element of the assumed responsibility principle might well be left to wither away in most cases. See Stevens, *op. cit.,* footnote 86, and Honoré, *op. cit.,* footnote 99. See *e.g. Coats Patons* v. *Birmingham Corp., supra,* footnote 87, where the defendant was held liable for the negligence of its land charges registrar on the basis of an undertaking which was "implied" in spite of the existence of an express disclaimer of responsibility (which was held to negative contractual liability only).

[137] See, [1969] 1 A.C. 191, at p. 281; also, at p. 263, per Lord Pearce: "The special circumstances . . . in which the law will *infer* an assumption of liability are those in which such an inference is a fair reading of the relationship in which the parties stand." (My emphasis).

[138] *Supra,* footnote 109.

[139] See sec. V, *supra.*

[140] *Supra,* footnote 109, at p. 265. Although Lord Denning's question is the right one in a different form, the case did not proceed on the basis of the assumed responsibility principle. In so far as this principle requires a "voluntary" element it was criticized, for justifiable reasons as explained in footnote 136 *supra.*

[141] Both statutory duty and the "sense of social obligation" were relied on in a different context in *Horsley* v. *MacLaren* (1969), 4 D.L.R. (3d)

and to (13) the overall purpose of the register. From (12) he gleaned a statutory duty at least to use due diligence. And from (13) he concluded that it was "essential for the good working of the land registration system" that the registrar should bear the loss. Furthermore, it was an old "settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is personally responsible for seeing that the duty is carried out".[142] The modern justification—and always a fundamental factor to be considered—is that (14) such responsibility can easily be covered by insurance or otherwise:[143]

> It is not in the least unfair to the registrar. We were told that the Government always stands behind the Chief Land Registrar and indemnifies him. And that the local authorities always insure the local land registrar. That is the case here. The action is being defended by the insurers. They have no doubt calculated a premium commensurate with the risk of mistake: and should, therefore, be prepared to pay for the loss when it occurs.[144]

Considerations of this latter kind were not expressly set out but they seem to have weighed heavily in the next case, *Mutual Life and Citizens Assurance Co.* v. *Evatt*.[145] It was there held by a majority in the Privy Council that the defendant was not liable for negligent advice on investments which led to financial loss because his business (insurance) did not involve the giving of advice on investments. Lord Diplock, giving the advice of the Board, said:[146]

> Unless he carries on the business or profession of giving advice of that kind . . . he cannot be reasonably held to have accepted the responsibility of conforming to a standard of skill, competence and diligence of which

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557, rev'd. (1971), 11 D.L.R. (3d) 277; see now, [1971] 2 Lloyd's Rep. 410 (S.C.C.) esp. Laskin J., at p. 419: "The legislative declaration of policy . . . is a fortifying element in the recognition of that [common law duty of care], being in harmony with it in a comparable situation." See also *Dutton* v. *Bognor Regis U.D.C., supra,* footnote 22, at p. 299; *Hoskins* v. *Jackson Grain Co.* (1953), So. 2d 514. The effect of statutory duties on the common law duty of care is examined in Linden, Tort Liability for Criminal Nonfeasance (1966), 44 Can. Bar Rev. 25.

[142] *Supra,* footnote 109, at p. 266.

[143] In theory the insurance position is irrelevant. But in practice no sound development of liability in negligence is made without considering the "coverability" of the risk, which is usually achieved by liability insurance. See Friedmann, Law in a Changing Society (2nd. ed., 1972); Atiyah, Accidents, Compensation and the Law (1970); *Launchbury* v. *Morgans,* [1971] 2 W.L.R. 602, rev'd, [1972] 2 W.L.R. 1217 (H.L.); *Nettleship* v. *Weston,* [1971] 3 W.L.R. 370.

[144] *Supra,* footnote 109, at p. 269.

[145] *Supra,* footnote 127. In (1970), 120 N.L.J. 1155, Negligent Statements: The Wilderness Revisited, I suggest a connection between this case and the principle of "reasonable coverability of risk" which appears in a Law Commission (Eng.) report, Law Com. No. 32, on a different area of tort law.

[146] *Ibid.,* at p. 807.

> he is unaware, simply because he answers the inquiry with knowledge that the advisee intends to rely on his answer.

This additional factor—(15) the defendant's sphere of business or professional expertise—is undeniably a relevant one which ought always to be considered. It confines liability to an area which is easily covered by insurance. But as an overriding factor, as a condition precedent to liability, it is open to criticism. As has been suggested elsewhere, it is not justified by precedent: in the past *ad hoc* undertakings and warranties which induce reliance have been held to be sufficient.[147] Nor is it justifiable in principle: enough other relevant factors may be present in any one case to lead a court unavoidably to the conclusion that a reasonable man in that situation would assume responsibility for the resulting loss. Canadian courts, being free from this case as authority, may well feel that the minority judgment contains a more useful and flexible formulation of the assumed responsibility principle. Lords Reid and Morris said:[148]

> The law must keep in step with the habits of the reasonable man and consider whether ordinary people would think they had some obligation beyond merely giving an honest answer.

And later:[149]

> In *Hedley Byrne* their Lordships were not laying down rules. They were developing a principle which flows, as in all branches of the tort of negligence, from giving legal effect to what ordinary reasonable men habitually do in certain circumstances.

We would agree with the minority that a reasonable man in the position of the defendant in *Evatt's* case would accept the responsibility of exercising due care when advising the plaintiff.

In the latest important economic loss case in England a clear description is given of the judicial process involved in fixing duties of care. The case, *Dutton* v. *Bognor Regis Urban District Council,*[150] also illustrates again the barrenness of the foreseeability formula in this area. The case was about a homeowner who claimed damages for loss resulting from the fact that her house had been constructed (for a previous owner) on unstable ground which was formerly a garbage dump. The foundation subsided, cracks appeared, and repairs had to be carried out. She sued both the builder and the local authority, the latter on the basis that its building inspector had been negligent in approving the foundations. The case against the builder was settled. When the claim against the inspector came before the Court of Appeal, Lord Denning M.R. said:[151]

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[147] *E.g. Shiells* v. *Blackburne, supra,* footnote 21; see footnote 145, *supra.*
[148] *Supra,* footnote 127, at p. 811.
[149] *Ibid.,* at p. 813.
[150] *Supra,* footnote 22; now on appeal to the House of Lords.
[151] *Ibid.,* at p. 307.

> Never before has an action of this kind been brought before our courts. Nor, so far as we can discover, before the courts of any other countries which follow the common law.

The action, nevertheless, succeeded. The court unanimously found that a duty situation existed between inspector and subsequent owner. The inspector was found to be negligent and so the plaintiff recovered damages from the defendant for the cost of repairing her house and for the diminution of its value. The defence had argued that the loss was purely economic and therefore not recoverable in negligence but, again, this proposition was rejected. Stamp L.J. said:[152]

> [O]ne finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but may embrace economic damage which the plaintiff suffers through buying a worthless thing. . . .

The factors which seem to have influenced the court in coming to its decision are for the most part those which have been discussed already, the main factor being the essential purpose of the relevant legislation which provided a measure of protection to purchasers of houses.[153] One additional factor should, however, be mentioned and that is (16) *control*. The legislation gave a degree of control over building work to the local authority and, in the words of Lord Denning M.R.:[153a]

> The common law has always held that a right of control over the doing of work carries with it a degree of responsibility in respect of the work.

In the course of judgment in *Dutton's* case some interesting and far-reaching observations were made as to the nature of responsibility undertaken by a builder or vendor of realty and by manufacturers. Lord Denning M.R. went so far as to say that the manufacturer of an article with a latent defect in it would be liable to an ultimate user for the cost of repair even where the defect is discovered and repaired *before* it causes injury to anyone.[154] Whether or not an English court at the present time would accept and apply this dictum without qualification is still doubtful, but the main factor behind it should help to determine a manufacturer's responsibility for this type of loss in future cases. This factor, which we should

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[152] *Ibid.*, at p. 329.

[153] *Ibid.*, at p. 321, and at p. 313, per Lord Denning M.R.: "In the second place, the council's inspector was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them. Their shoulders are broad enough to bear the loss."

[153a] *Ibid.*, at p. 308; Sachs L.J., at p. 318.

[154] *Ibid.*, at p. 312. This is the very point raised by *Rivtow Marine* v. *Washington Iron Works, supra,* footnote 4.

number as (17), is the degree of *danger* created by the defect complained of. Where, for example, a manufacturer's negligence creates a danger to life it may well be right to extend his responsibility to cover the repair costs necessary to avert the danger. The fortuitous absence of blood-letting is an unattractive defence.

Two interesting Canadian cases must be mentioned next. The first is *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*[155] where the plaintiff, a property development company, sought to recover the loss it had suffered through reliance on a zoning by-law which was, after the company had incurred some expense in preparing building plans, challenged by someone else and eventually declared to be *ultra vires*.[156] The plaintiff claimed that the defendant municipal corporation was negligent (a) in failing to exercise due care to see that the procedures upon which valid enactment depended were followed, and (b) in making a representation to the plaintiff that the deficient by-law was effective. At the trial the learned judge dismissed the claim on a number of grounds. He evidently felt that the interest of a legislative body freely to abolish, replace or amend its by-laws weighed more heavily in the balance than the reliance interest of members of the public in normal circumstances. But he recognized that in other cases there might be countervailing considerations, which were not present here, which would lead to a different conclusion. By referring to the principle of assumed responsibility he was able to leave open the possibility of imposing liability in those cases. He said:[157]

> There is no duty on a municipal corporation to continue its zoning regulations without change unless or until it *assumes responsibility* for the continuance of that zoning by the issuance of a building permit or by some other like action which creates a special relationship.

In the Manitoba Court of Appeal the majority (Freedman J.A. dissenting) did not expressly consider the principle of assumed responsibility.[158] As one would therefore expect, liability was denied without a positive statement as to the scope of liability in this type of situation.

The Supreme Court of Canada in turn also rejected the plaintiff's claim in *Welbridge,* but it did so in an admirable judgment given by Laskin J. after full consideration of the responsibility undertaken by the defendant corporation in terms of the *Hedley*

[155] (1969), 4 D.L.R. (3d) 509 (Man.), aff'd (1970), 12 D.L.R. (3d) 124 (Man. C.A.), aff'd, [1971] S.C.R. 957.

[156] In *Wiswell* v. *Metro. Corp. of Gr. Winnipeg,* [1965] S.C.R. 512.

[157] (1969), 4 D.L.R. (3d) 509, at p. 520, emphasis mine. A contrary view as to the effect of issuing a building permit was expressed by Laskin J. in [1971] S.C.R. 957, at p. 967.

[158] But see the dissenting judgment of Freedman J.A. who relied, *inter alia* (1970), 12 D.L.R. (3d) 124, at pp. 138-139, on evidence of specific assurances given to the plaintiff by the defendant.

Byrne principle. First the effect of *foreseeability* was reduced to size:

> It is important to emphasize in this case that a duty of care of the defendant to the plaintiff cannot be based merely on the fact that economic loss would foreseeably result to the latter. . . .[159]

Turning then to *Hedley Byrne* the learned judge accepted that that case "had expanded the concept of duty of care, whether in amplification or extension of *Donoghue* v. *Stevenson*".[160] But he found that the defendant, in all the circumstances, had not assumed responsibility so as to come within the *Hedley Byrne* sphere of liability:

> Under the considerations on which *Hedley Byrne's* annunciation of principle rests, it cannot be said in the present case either that a special relationship arose between the plaintiff and the defendant or that the defendant assumed any responsibility to the plaintiff with respect to the procedural regularity.[161]

The learned judge determined the defendant's sphere of responsibility by considering broadly its role in society, including its various functions, its public character, and its political and social responsibility. "There may be", he concluded,[162] "an individualization of responsibility for negligence in the exercise of business powers". But he found that there could be no equivalent assumption of responsibility to the individual with respect to the defendant's legislative and quasi-judicial functions because that would be inconsistent with its first responsibility to act always in the public interest. The latter might, on occasion, call for by-laws or decisions which necessarily involve loss to some individuals.[163]

The second case is *Rivtow Marine Ltd.* v. *Washington Iron Works*[164] where the plaintiff, who was the charterer of a log barge, claimed the repair cost and the loss of profits incurred when a dangerous latent defect was discovered in the barge which forced

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[159] [1971] S.C.R. 957, at p. 966.

[160] *Ibid.*, at p. 967.

[161] *Ibid.* Laskin J. found, furthermore, that the defendant's allegedly negligent representation did not, in these circumstances, amount to an assumption of responsibility. Referring to Freedman J.A.'s dissenting judgment in the court below, he said, at p. 971: "I cannot accept what must be implicit in the learned judge's reasoning that the representations involved an assumption of responsibility to the plaintiff for the procedural regularity of the rezoning proceedings."

[162] *Ibid.*, at p. 968.

[163] *Quaere* whether it would not have been better to leave it open to the defendant corporation to plead that it was acting in the public interest as a defence in any particular case (alongside the defence of no-negligence) rather than denying the possibility of an action altogether on this basis. In a case, for example, involving the grossest ineptitude in circumstances which could not possibly be justified as being in the public interest, why should not a member of the public who has reasonably relied on the exercise of due care have his action?

[164] *Supra*, footnote 4.

the plaintiff immediately, during the most profitable part of the year, to withdraw it from service for repairs. The plaintiff sued both the manufacturer and the distributor. What brought the defect to light was a disastrous structural collapse causing the death of one workman on a sister barge, the collapse being caused by the same defect. That case had already been litigated, and the plaintiff there recovered from the same parties the total repair costs on a straightforward application of *Donoghue* v. *Stevenson*.[165] There was negligence in design. The only difficulty in the *Rivtow* case, therefore, was that no physical damage had occurred, apart, that is, from some cracks in the structure which were not treated as such. The learned trial judge found that the defendants knew of the danger and knew, furthermore, that the plaintiff trusted them on all matters of "advice, inspection and repair", the barges being still somewhat in the experimental stage. In those circumstances the learned trial judge held that the defendants had "assumed a duty" at least to warn the plaintiff of the existing danger and to advise immediate remedial repairs. The defendants were in breach of that duty and were therefore liable for the loss consequent thereon, which, quite logically, was found to be the difference between the actual profits lost in the high season and the profits which would have been lost in the low season had the defendants properly carried out their duty to warn.

The approach of the learned trial judge in *Rivtow* was impeccable. At an early stage he rejected the old exclusion of economic loss cases as brought forward by *Weller's* case. He relied, rather, on the *Hedley Byrne* principle.[166] He found that something more than mere foreseeability of economic loss was necessary to give rise to liability and he looked to the various elements of the relationship between the parties to find the necessary additional criteria. He expressly considered factors of undertaking and reliance (based on past dealing), knowledge of danger, unreasonable conduct, and normal commercial practice. In the end he was able to impose liability in the way he did because he found that in the special circumstances of the relationship between the parties the defendants had assumed an obligation which covered at least a portion of the economic loss.

Having adopted the preferred view of the law and having gone that far with it, the learned trial judge might well have gone a

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[165] See *Straits Barge Towing Ltd.* v. *Washington Iron Works* (1970), 74 W.W.R. 228 (B.C.).

[166] *Supra*, footnote 4, at p. 126: "Their Lordships [in *Hedley Byrne*] never suggested duty arose 'automatically' from foreseeability. What they did say was there must be proximity, and the duty arises from that relationship between the parties and not from the nature of the damage that may result."

step further.[167] He might have imposed a duty on the manufacturer to pay the repair costs as well on the basis (considering the original carelessness in design, the known danger factor and the special relationship between the parties) that the manufacturer had assumed responsibility to recall the barge or otherwise to have it repaired at his expense. In the commercial world as the judge found it, however, the manufacturer's responsibility fell short of this. And, if one accepts that decision as correct, it follows that Ruttan J.'s apportionment of loss was the right one.

Both parties appealed to the Court of Appeal of British Columbia, the plaintiff seeking the cost of repair as well as lost profits, the defendants seeking to deny liability altogether. Tysoe J.A., giving the judgment of the court, found that the case posed a question of pure law which he put in these terms:[167a]

> [A]ssuming [the defendants] come within the proximity of relationship and the rule of liability contemplated in *Donoghue* v. *Stevenson*, is Rivtow entitled to recover for the *character of harm* suffered by it?

The learned judge answered the question in the negative, and thereby disposed of the appeal. Reversing the trial judge, he held that pure economic loss in any form is irrecoverable in a case such as this one.

Both question and answer, it will be noted, are essentially the same as those in *Weller's* case, and many of the criticisms made earlier in relation to that case apply with equal force here.[168] *Hedley Byrne* v. *Heller* was discussed but was given an unusually narrow interpretation. Its underlying principle seems to have been overlooked. Admittedly, the following statement appears, but it appears alone as though it were a simple question of fact rather than a conclusion based on a number of competing considerations:[168a]

> In the case before this court neither [defendant] assumed any special duty to Rivtow to advise it of the need for repairs.

But what is equally serious and fundamental is that the learned judge ventured into the turbulent sea of American products liability jurisprudence and there was misled by the cases he saw, all from the mid-fifties and earlier, into thinking that American law treats economic losses as being categorically outside the limits of recovery in tort. Two apparent errors of a fundamental kind appear to have been made by the learned judge. They are errors which are easily made by anyone who is not directly involved

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[167] A "brief step" in the extension of liability from its present limits, according to Fleming, *op. cit.*, footnote 30, p. 445.

[167a] [1972] 3 W.W.R. 735, at p. 743 (B.C.C.A.).

[168] See text at footnotes 60-62, *supra*.

[168a] *Supra*, footnote 167a, at pp. 748-749.

with the day-to-day development of American case law.[169] The first is the natural assumption that common law concepts, such as negligence, are used there in a similar way and to do the same jobs. They clearly are not. In the United States, products liability law has evolved at least four distinct remedies in tort, each with its particular rules: negligence (which plays a declining role), the express warranty, the warranty implied by law, and the strict tort action. Any translation to Canadian and Commonwealth law, therefore, should take into account that our negligence action is still alone in the field and must, perforce, be versatile. The second error is to think that American cases of the mid-fifties accurately set out the law of today. The change has been much too fast for that.[170] Had Tysoe J.A. had the advantage of an up-to-date survey of American law he would have found a wealth of authority to support the plaintiff's claim in *Rivtow* and to discredit the loss distinction which he accepted. Close to home, for example, it was said in 1968:[171]

> Where the other elements of a negligence case are present we see no reason why the availability of a tort remedy should depend upon whether the harm was traumatic.

It is to be hoped that the *Rivtow* case will eventually reach the Supreme Court of Canada and there receive more deserving treatment.

IX

The above cases form the basis for our suggestion that the objective concept of responsibility has been applied in a variety of cases already, that through it a wide range of factors relevant to sound decisions on the scope of liability in economic loss cases arise for proper "legal" discussion, and that it should, therefore, have a useful future in this area of negligence law. In a novel case of economic loss those concerned might well find the an-

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[169] The following is a fair summary of the American law position: "The field of products liability has developed at a rapid pace but not without the usual attendant confusion surrounding the fall of ancient legal precepts . . . . The question . . . has been argued by legal scholars with all the zeal, fury and abstruseness of medieval theologians." *Buttrick* v. *Lessard* (1969), 260 A. 2d 111 (N.H.), per Griffiths J.

[170] See the cases listed in footnote 183, *infra; Braniff Airways* v. *Curtiss-Wright* (1969), 411 F. 2d 451 (2nd Cir.); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer) (1960), 69 Yale L.J. 1099; Prosser, Spectacular Change: Products Liability in General (1965), 36 Clev. B.A.J. 167; Prosser, The Fall of the Citadel (Strict Liability to the Consumer) (1966), 50 Minn. L. Rev. 791; Note, Economic Loss in Products Liability Jurisprudence (1966), 66 Col. L. Rev. 917; Franklin, When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases (1966), 18 Stan. L. Rev. 974; Keeton, Products Liability (1969), 23 S.W. L.J. 1; Tobin, Products Liability: A United States-Commonwealth Survey, [1969] and [1970] N.Z. U. L. Rev.

[171] *Oregon rel. Western Seed Prod. Corp* v. *Campbell* (1968), 442 P. 2d 215, at p. 218 (Ore. S.C. in banc).

swer to the question, "who ought to bear the loss?" by applying the principle that a person should be bound by a duty of care to avoid economic loss in situations where a reasonable man would foresee that kind of loss *and* would assume responsibility for it. The dogmatic rule denying liability for all pure economic loss might then be interred once and for all.

Apart from those few cases where the old rule dictates an anomalous result the immediate effect of this more broadly based approach would be far from revolutionary. In arriving at decisions in particular cases a good judge always considers the many factors encompassed by the concept of responsibility anyway although he may not always acknowledge them as such.[172] But it would be a considerable gain for honesty and thus for clarity of thought and for the healthy future development of tort law. Moreover the effect of the categorization of economic loss cases into contract and tort would gradually lose significance. Duties of care would become more responsive to the range of social factors which affect general notions of responsibility and which generally cross the legal boundaries without much hesitation.[173]

X

In the course of this article we have referred to a number of fact-situations involving economic loss. We now return to them to test the implications of our suggested approach.

In the first hypothetical case set out at the beginning of this article,[174] a case of interrupted electricity supply causing business losses, the existing case law as we have now seen[175] is in a confused state and still shows a heavy and unjustifiable reliance on the chance existence of physical loss. Approached in terms of responsibility the effect of this single factor would be reduced to its proper place. The law as stated in *Seaway Hotels, Ltd.* v. *Gragg (Canada), Ltd.*,[176] in so far as the absence of causative physical loss was not decisive, could then be accepted. And this need not give rise to fear that liability in similar cases will be unlimited and uncontrollable. Other factors will operate within the concept of responsibility to determine the cut-off point of liability where justice in the circumstances demands. In a case

[172] See the attempt by Benjamin Cardozo to analyze the multifarious determinants of the judicial choice in an area of uncertain law in The Nature of the Judicial Process (1925).

[173] Notions of responsibility and risk-allocation are superceding not only fault as the sole basis of negligence in tort law, but also free consensus as the basis of contract: Hadden, *op. cit.*, footnote 80. The principle of assumed responsibility, therefore, is in line with general development in both tort and contract law. See footnote 180, *infra*.

[174] See text at footnote 2, *supra*.

[175] *Supra*, sec. IV.

[176] *Supra*, footnote 2.

where, for example, the economic loss is suffered by a number of plaintiffs and is entirely disproportionate to the fault or economic strength of the defendant, or where persons in the plaintiff's position generally accept the risk of such interruptions themselves and insure against it, install emergency electrical plant or simply pass the loss on to their business customers,[177] it would be open to a court to say that a reasonable man in the position of the defendant would not assume responsibility for that loss. In other cases there may be different factors present which lead to the opposite conclusion, for example, where the defendant's conduct is unjustifiable or it is he who is in the best position to prevent or to cover the loss, or both.

The facts of the second hypothetical case—D, the careless surveyor—are sufficient to give rise to a duty of care by analogy with *Hedley Byrne*.[178] Moreover, such a duty would be soundly based on the principle of assumed responsibility. Various considerations drawn from the relationship between the parties in the relevant social environment would satisfy the principle: D is a professional man acting within the sphere of his expertise, hence (1) P would reasonably rely on the exercise of due competence by D, (2) D would be in the best position to assess the risks and avoid them or insure against them, and (3) it is in the public interest that standards of competence in such situations be enforced by law.

In the third case—the defective tractor—the law in Canada and the Commonwealth has come close but has so far not granted a remedy. There is no contractual relationship and in no similar reported case has a duty in tort been imposed.[179] Without more, the farmer as ultimate owner of the product would have to bear the loss. And so long as there is anything left of the notion of *caveat emptor* this is likely to remain so.[180] But in some such cases

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[177] These factors were considered in *S.C.M.* v. *W. J. Whittall and Son Ltd., supra,* footnote 2, at p. 1036 (W.L.R.).

[178] The following cases to the contrary were disapproved in *Hedley Byrne: Le Lievre* v. *Gould, supra,* footnote 3, and *Old Gate Estates* v. *Toplis, supra,* footnote 17. See now *Gordon* v. *Moen, supra,* footnote 104; *Dodds* v. *Millman, supra,* footnote 102.

[179] *Supra,* footnote 4. In *Algoma Truck* v. *Bert's Auto Supply, supra,* footnote 4, an ultimate user recovered repair costs and loss of business profits from a defendant who negligently reconditioned a cylinder head. The case is, however, of low authority and probably *per incuriam*. An alternative view as to the extension of *Donoghue* v. *Stevenson* to this situation appears in *Young* v. *McManus Childs,* [1969] 1 A.C. 454, at p. 469. But see Lord Denning's dicta in *Dutton* v. *Bognor Regis U.D.C., supra,* footnote 22, discussed at footnote 154, *supra.*

[180] In *Christopher Hill* v. *Ashington Piggeries,* [1971] 2 W.L.R. 1051, at p. 1093, the determination of responsibility under the fitness for purpose section of the Sale of Goods Act was said to pose "a stark question of legal policy" depending largely "upon one's personal view as to whether the swing of the pendulum since 1893 from *caveat emptor* to *caveat venditor* has now gone far enough and ought to be arrested or whether it should be

there may be special factors such as an express warranty or danger to life, or both, which make it fair to say that the manufacturer has assumed responsibility for the loss at least up to the purchase price of the defective product and should therefore be subject to liability. Such a case was *Traders Finance* v. *Haley*[181] although there it was the rules of contract, strained somewhat, which provided the remedy. Such a case, too, was *Rivtow Marine* v. *Washington Iron Works*, a case in tort as we have seen.[182] In special cases such as these the principle would be useful now. In the future it might be used to extend the liability of a manufacturer, even in the ordinary case, from a limited duty of care in relation to the safety of his products as it exists in law at present, to a duty in relation to their proper performance. If and when such a development becomes desirable from a socio-economic point of view it will be helpful to consider the American cases where this form of products liability is already being explored.[183] In *Seely* v. *White Motor Co.*,[184] for example, the owner of a one-man truck business recovered damages from the manufacturer of his defective truck for the lost value of the truck together with the business losses caused by its non-performance. There was no privity of contract between the parties. Liability was imposed on the basis

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given a further impetus, albeit a minor one, upon its current course". Lord Diplock approached the problem in terms of the principle of assumed responsibility (at pp. 1090 and 1097): "If the law of sale of goods is as sensible and simple as it ought to be, the question of law for the court should be: What, if any, responsibility as to the characteristics of the goods to be supplied under the contract would the seller reasonably understand that the buyer believed that he, the seller, was accepting?".

[181] *Supra*, footnote 4.

[182] *Ibid.*

[183] *Hoskins* v. *Jackson Grain Co.*, *supra*, footnote 141 (Fla.: damages for crop losses caused by negligently mislabelled seed); *Continental* v. *Cornelius* (1958), 104 So. 2d 40 (Fla. C.A.: ultimate user recovers cost of replacement of defective electricity cable); *Spence* v. *Three Rivers Builders* (1958), 90 N.W. 873 (Mich.: house-owner recovers against manufacturer of defective building blocks); *Lang* v. *General Motors Corp.* (1965), 136 N.W. 2d 805 (N.D.: damages from manufacturer for economic loss caused by defective truck-tractor); *Santor* v. *A. & M. Karagheusian, Inc.* (1965), 207 A. 2d 305 (N.J.: damages from manufacturer of defective carpeting for lost value of carpeting, *i.e.* the difference between the price paid and the actual market value); *Thomas* v. *Olin Mathieson Chem. Corp.* (1967), 63 Cal. Rptr. 454 (C.A.: big game hunter recovers from manufacturer of defective rifles the expenses of unsuccessful safari); *Cova* v. *Harley Davidson Motor Co.* (1970), 182 N.W. 2d 800 (Mich. C.A.: ultimate purchaser recovers loss of value and cost of repairs from manufacturer of defective golf cart); *Southwest Forest Ind.* v. *Westinghouse El. Corp.* (1970), 422 F. 2d 1013 (9th Cir.: ultimate purchaser of defective turbine generator recovers from its manufacturer the cost of repair but not consequential loss); *Lewis* v. *Mobil Oil Corp.* (1971), 438 F. 2d 500 (8th Cir.: sawmill operator recovers his direct expenses and loss of profits due to improper oil); *Oregon* v. *Campbell*, *supra*, footnote 171 (damages for crop losses caused by negligently reproduced seed).

[184] *Supra*, footnote 4.

of a warranty implied in all the circumstances[185] that the manufacturer's product was suitable for normal consumer demands.[186]

In many of the other situations discussed, where recovery of economic loss is already well established on the basis of such concepts as property, the *per quod* categories, parasitic damages, joint venture, contract and trust, the immediate effect of a recognition of the principle of assumed responsibility would probably be limited to clarifying thought as to the issues involved. In the long term, perhaps, a more general approach would prevail, the separate devices being replaced by general principles of negligence liability.

In a case such as *Margarine Union* v. *Cambay Prince Steamship*,[187] the principle of responsibility might well lead to a different result. The decision would not, at any rate, be forced upon a court against the merits of a case by the technical rules as to the time of passing of property. In *Weller's* case[188] the result would hardly have been different but a negation of liability based on the principle of responsibility would have at least two immediate advantages. First, it would not put all analogous cases beyond the scope of negligence. Change the facts of that case somewhat: let those whose economic interests are at obvious risk clamour for the removal of the virus-infested Institute, let the Institute respond by giving public assurances that due care will be used at all times,[189] let it be known that an insurance company or the government has agreed to stand behind the Institute.[190] Then who would not hold the Institute to a duty of care to avoid infringing those economic interests? The duty could be based on responsibility as it never could be on foreseeability of physical injury. The second advantage is that it would be clear for all to see that the relevant considerations in that case are not the same as those in cases where supplies of water or electricity are negligently cut off, or

[185] This seems to be the most realistic way of explaining the case, although Traynor C.J. found an express warranty. Peters J. says convincingly at p. 152 that the warranty was not an express one, nor was it relied on by the plaintiff.

[186] Traynor C.J. drew a distinction in this case between strict tort liability which was, he said, appropriate for physical injury cases but not economic loss cases, and liability (in tort) on an express warranty which was appropriate in economic loss cases as well. The manufacturer, he said, can fairly be held liable where he has expressly "agreed" (*i.e.* warranted) that his product will come up to a certain standard. Note that the necessary "agreement" can be elicited from such things as printed warranty forms and past dealings (*Seely's* case), representations in advertisements or labels (*Lang* v. *Gen. Motors Corp.* (1965), 136 N.W. 2d 805) or in sales brochures (*Ford Motor Co.* v. *Lemieux Lumber Co.* (1967), 418 S.W. 2d 909).

[187] See text at footnote 63, *supra.*

[188] See text at footnote 59, *supra.*

[189] *Cf.* the assurance relied on by Freedman J.A. in *Welbridge, supra,* footnote 155.

[190] *Cf.* these factors in *Ministry of Housing and Local Government* v. *Sharp,* see text at footnote 138, *supra.*

where a person, having responded to a moral obligation to tend a road accident victim, seeks to recover his expenses from the guilty driver or rather (through the action of insurance) from the motoring community.[191]

In the end no easy answers are given, nor can they be. Cases of economic loss caused by sub-standard conduct are as multifarious as all the physical loss cases in the books on negligence. Some of them cry out for a remedy. In others the loss ought to be left where it falls. There are no easy answers but by asking the right question the law will get closer to the right solution.

Conclusion

The rule which arose in the last century to the effect that a person owes no duty of care to another to avoid causing him pure financial loss is capricious, illogical and of doubtful historical validity; it leads to distinctions on technical grounds between equivalent cases. It purports to put a vast area of economic interests beyond protection in negligence. As such it has been much criticized. It is, nevertheless, retained in some cases owing primarily to fear, frequently expressed, that the conceptual control-devices in negligence are insufficient to distinguish between one economic loss case and another and that a flood of unmeritorious cases would be successfully brought to the courts if the barrier excluding them all were dropped.

In *Hedley Byrne* v. *Heller,*[192] the rule received what ought to have been a fatal blow. Since then it has been impossible to argue that economic loss is always beyond the scope of negligence. But the principle which formed the basis of *Hedley Byrne* is still unfamiliar and is infrequently applied. In most subsequent cases of pure economic loss the law has muddled along without any guiding principle whatever.

An objective concept of responsibility was at the heart of the *Hedley Byrne* decision. Building on this concept we suggest a general principle of liability in these terms: that a person should be bound by a legal duty of care to avoid causing economic loss to another in circumstances where a reasonable man in the position of the defendant would foresee that kind of loss *and* would assume responsibility for it.

This principle brings together wider considerations than the reasonable foreseeability formula which, standing alone, is inadequate to control liability in economic loss cases. The addition of reasonable responsibility directs the court's inquiry to the question

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[191] Whether by a "parasitic" or an independent action, see text at footnotes 31-33, *supra.*

[192] *Supra,* footnote 1.

of whether a reasonable man in the shoes of the defendant would have assumed responsibility for the loss. And that, as every common law lawyer will recognize, is the same as the fundamental question of whether the defendant ought to be made to bear the loss. Thus the principle suggested here may be used to map out the bounds of liability for economic losses with confidence that the truly relevant factors will emerge for open discussion, and without fear that liability will somehow flow uncontrollably into unexpected areas with disastrous consequences.

In this area of negligence which is, as yet, largely unexplored, the objective principle of assumed responsibility already has a respectable basis in the decided cases. It is therefore open for development by the courts. Should this opportunity be missed the old rule which purports to exclude all economic loss cases will inevitably continue to bedevil the law in one form or another. But if the opportunity is seized, this area of the common law will be able to develop with consistency and with justice, liability being worked out through the cases according to a principle which is able to respond to social demands for protection of economic interests from the carelessness of others.