House of Lords before Lord Keith of Kinkel Lord Brandon of Oakbrook Lord Brightman Lord Griffiths Lord Ackner 24th April 1985

LORD KEITH OF KINKEL, My Lords,

1. My noble and learned friend, Lord Brandon of Oakbrook, is to deliver a speech setting out the reasons for which in his view this appeal should be dismissed. I agree entirely with his reasoning and conclusions, and would dismiss the appeal accordingly.

LORD BRANDON OF OAKBROOK, My Lords,

2. This appeal arises in an action in the Commercial Court in which the appellants, who were the c. and f. buyers of goods carried in the respondents' ship, the Aliakmon claim damages against the latter for damage done to such goods at a time when the risk, but not yet the legal property in them, had passed to the appellants. The main question to be determined is whether, in the circumstances just stated, the respondents owed a duty of care in tort to the appellants in respect of the carriage of such goods; and, if so, whether and to what extent such duty was qualified by the terms of the bill of lading under which the goods were carried.

3. The appellants' claim was put forward originally in both contract and tort. Staughton J. at first instance gave judgment for the plaintiffs on their claim in contract, so making it unnecessary for him to reach a decision on their further claim in tort. However, on appeal by the respondents to the Court of Appeal (Sir John Donaldson M.R. and Oliver and Goff L.JJ.), that court set aside the judgment of Staughton J. and dismissed the appellants' claims in both contract and tort. Sir John Donaldson M.R. and Oliver L.3. (as he then was) rejected the claim in tort on the ground that the respondents did not at the material time owe any duty of care to the appellants. Goff L.J. (as he then was) rejected the claim in tort on the ground that, although the respondents owed a duty of care to the appellants, they had not, on the facts, committed any breach of that duty. The judgment of Staughton J. is reported in [1983] 1 Lloyd's Rep. 203 and that of the Court of Appeal in [1985] 2 W.L.R. 289.

4. My Lords, the facts relating to what I have called the main question to be determined are unusual and need to be set out with some particularity. By a contract of sale made in July 1976 the appellants ("the buyers") agreed to buy from Kinsho-Mataichi Corporation ("the sellers") a quantity of steel coils ("the goods") to be shipped from Korea to Immingham on c. and f. terms, free out Immingham. The price of the goods was to be paid by a 180 day bill of exchange to be endorsed by the buyers' bank in return for a bill of lading relating to the goods. The buyers, who were traders in steel rather than users of it, intended to finance the transaction by making a contract for the re-sale of the goods to sub-buyers before the bill of lading was tendered by the sellers.

5. The goods were loaded on board the "Aliakmon" ("the ship") at Inchon in South Korea and a bill of lading dated 14 September 1976 was issued, in respect of them. The bill of lading showed the carrying ship as the "Aliakmon"; the shippers as Illsen Steel Co. Ltd; the port of shipment as Inchon; the port of discharge as Immingham; and the consignees as the buyers. It is to be inferred that Illsen Steel Co. Ltd., in shipping the goods, were acting as agents for the sellers. The bill of lading further expressly incorporated the Hague Rules.

6. The buyers later found themselves unable to make the contract for the re-sale of the goods which they had intended to make with the result that their bank declined to back the bill of exchange by which payment for the goods was to be made. In this situation representatives of the buyers and the sellers met on 7 October 1976 in an effort to find a solution to the problem. Following that meeting the sellers sent the bill of lading to the buyers under cover of a letter dated 11 October 1976, and receipt of these was acknowledged by the buyers by a letter dated 18 October 1976. The Court of Appeal has held, and the buyers now accept, that the effect of the letters so exchanged was to vary the original contract of sale in the following respects. First, the sellers, despite delivery of the bill of lading to the buyers, were to reserve the right of disposal of the goods represented by it. Secondly, while the buyers were to present the bill of lading to the ship at Immingham and take delivery of the goods there, they were to do so, not as principals on their own account, but solely as agents for the sellers. Thirdly, after the goods had been discharged, they were to be stored in a covered warehouse to the sole order of the sellers.

7. On arrival of the ship at Immingham the buyers duly carried out the terms of the contract of sale as varied in the manner described above. On discharge of the goods they proved to be in a damaged condition. Staughton J. found, and his finding has not been challenged, that a substantial part of this damage, but not all, has been caused by improper stowage of the goods in two respects: first, the stowage of steel and timber in the same compartment, resulting in condensation from the timber causing rusting of the steel; and, secondly, overstowage of the goods in such a way as to cause crushing of them. He further assessed the amount of damage at £83,006.07, a figure which is likewise not in dispute.

8. The buyers subsequently paid the price of the goods to the sellers, after certain claims for alleged defects in them had been settled. The result of this was that the legal ownership of the goods, which had until then remained in the sellers by reason of their reservation of the right of disposal of them, finally passed to the buyers.

9. My Lords, under the usual kind of c.i.f. or c. and f. contract of sale, the risk in the goods passes from the seller to the buyer on shipment, as is exemplified by the obligation of the buyer to take up and pay for the shipping documents even though the goods may already have suffered damage or loss during their carriage by sea. The property in the goods, however, does not pass until the buyer takes up and pays for the shipping documents. Those include a bill of lading relating to the goods which has been endorsed by the seller in favour of the buyer. By acquiring the bill of lading so endorsed the buyer becomes a person to whom the property in the goods has

passed upon or by reason of such endorsement, and so, by virtue of section 1 of the Bills of Lading Act 1855, has vested in him all the rights of suit, and is subject to the same liabilities in respect of the goods, as if the contract contained in the bill of lading had been made with him.

10. In terms of the present case this means that, if the buyers had completed the c. and f. contract in the manner intended, they would have been entitled to sue the shipowners for the damage to the goods in contract under the bill of lading, and no question of any separate duty of care in tort would have arisen. In the events which occurred, however, what had originally been a usual kind of c. and f. contract of sale had been varied so as to become, in effect, a contract of sale ex-warehouse at Immingham. The contract as so varied was, however, unusual in an important respect. Under an ordinary contract of sale ex-warehouse both the risk and the property in the goods would pass from the seller to the buyer at the same time, that time being determined by the intention of the parties. Under this varied contract, however, the risk had already passed to the buyers on shipment because of the original c. and f. terms, and there was nothing in the new terms which caused it to revert to the sellers. The buyers, however, did not acquire any rights of suit under the bill of lading by virtue of section 1 of the Bills of Lading Act 1855. This was because, owing to the sellers' reservation of the right of disposal of the goods, the property in the goods did not pass to the buyers upon or by reason of the endorsement of the bill of lading, but only upon payment of the purchase price by the buyers to the sellers after the goods had been discharged and warehoused at Immingham. Hence the attempt of the buyers to establish a separate claim against the shipowners founded in the tort of negligence.

11. My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. The line of authority to which I have referred includes the following cases: ***Cattle v. Stockton Waterworks Co.*** (1875) L.R. 10 Q.B. 453 (contractor doing work on another's land unable to recover from a waterworks company loss suffered by him by reason of that company's want of care in causing or permitting water to leak from a water pipe laid and owned by it on the land concerned); ***Simpson & Co. v. Thomson*** (1877) 3 App. Case 279 (insurers of two ships A and B, both owned by C, unable to recover from C loss caused to them by want of care in the navigation of ship A in consequence of which she collided with and damaged ship B); ***Societe Anonyme de Remorquage a Helice v. Bennetts*** [1911] 1 K.B. 243 (tug owners engaged to tow ship A unable to recover from owners of ship B loss of towage remuneration caused to them by want of care in the navigation of ship B in consequence of which she collided with and sank ship A); ***Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English A American Steamship Co.*** (1921) 9 Ll.L. R. 464 (time charterer of ship A unable to recover from owners of ship B loss caused to them by want of care in the navigation of ship B in consequence of which she collided with and damaged ship A); ***The World Harmony*** [1967] 341 (same as preceding case). The principle of law referred to is further supported by the observations of Scrutton L.J. in ***Elliott Steam Tug Co. Ltd, v. The Shipping Controller*** [1922] 1 K.B. 127, 139-140.

12. None of these cases concerns a claim by c.i.f. or c. and f. buyers of goods to recover from the owners of the ship in which the goods are carried loss suffered by reason of want of care in the carriage of the goods resulting in their being lost or damaged at a time when the risk in the goods, but not yet the legal property in them, has passed to such buyers. The question whether such a claim would lie, however, came up for decision in ***Margarine Union G.m.b.H_ v. Cambay Prince Steamship Co. Ltd. (The Wear Breeze)*** [1969] 1 Q.B. 219. In that case c.i.f. buyers had accepted four delivery orders in respect of as yet undivided portions of a cargo of copra in bulk shipped under two bills of lading. It was common ground that, by doing so, they did not acquire either the legal property in, nor a possessory title to, the portions of copra concerned: they only acquired the legal property later when four portions each of 500 tons were separated from the bulk on or shortly after discharge in Hamburg. The copra having been damaged by want of care by the shipowners' servants or agents in not properly fumigating the holds of the carrying ship before loading, the question arose whether the buyers were entitled to recover from the shipowners in tort for negligence the loss which they had suffered by reason of the copra having been so damaged. Roskill J. held that they were not, founding his decision largely on the principle of law established by the line of authority to which I have referred. He derived further support for his decision by reference to ***Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*** [1924] 1 K.B. 575. In that case it was held by the Court of Appeal that, although the plaintiffs could not bring themselves within section 1 of the Bills of Lading Act 1355 because they were neither consignees named in nor endorsees of bills of ladings relating to goods carried in the defendant shipowners' ship, nevertheless a contract between the plaintiffs and the defendants on the terms of the bills of lading could be implied from the fact that the plaintiffs had themselves presented the bills of lading to, and obtained delivery of the goods to which they related from, the ship at the port of discharge; and, secondly, that the plaintiffs were entitled to sue the defendants under such implied contract for loss suffered by them by reason of the want of care of the defendants in the carriage of the goods. Roskill 3. asked himself the rhetorical question why, if the plaintiffs had a right to sue the defendants in tort for negligence, should there have been any reason or need for implying a contract between them.

13. My Lords, counsel for the buyers, Mr. Anthony Clarke, Q.C., did not question any of the cases in the long line of authority to which I have referred except ***The Wear Breeze.*** He felt obliged to accept the continuing correctness of the rest of the cases ("the other non-recovery cases") because of the recent decision of the Privy Council in ***Candlewood Navigation Corporation v. Mitsui O.S.K. Lines Ltd. (The Mineral Transporter)*** [1986] A.C.1, in which those

cases were again approved and applied, and to which it will be necessary for me to refer more fully later. He contended, however, that ***The Wear Breeze*** [1969] 1 Q.B. 269 was either wrongly decided at the time, or at any rate should be regarded as wrongly decided today, and should accordingly be overruled.

14. In support of this contention Mr. Clarke relied on five main grounds. The first ground was that the characteristics of a c.i.f. or c. and f. contract for sale differed materially from the characteristics of the contracts concerned in tine other non- recovery cases. The second ground was that under a c.i.f. or c. and f. contract the buyer acquired immediately on shipment of the goods the equitable ownership of them. The third ground was that the law of negligence had developed significantly since 1969 when ***The Wear Breeze*** was decided, in particular as a result of the decisions of your Lordships' House in ***Anns v. Merton London Borough Council*** [1975] A.C. 728 and ***Junior Books Ltd, v. Veitchi Co. Ltd.*** [1983] 1 A.C. 520. In this connection reliance was placed on two decisions at first instance in which ***The Wear, Breeze*** [1969] 1 G.B. 269 had either not been followed or treated as no longer being good law. The fourth ground was that any rational system of law would provide a remedy for persons who suffered the kind of loss which the buyers suffered in the present case. The fifth ground was the judgment of Goff L.J. in the present case, so far as it related to the buyers' right to sue the shipowners in tort for negligence. I shall examine each of these grounds in turn.

Ground (1): difference in characteristics of a c.i.f. or c. and f. contract

15. My Lords, under this head Mr. Clarke said that in the other non-recovery cases the plaintiffs who failed were not persons who had contracted to buy the property to which the defendants' want of care had caused loss or damage; they were rather persons whose contractual rights entitled them either to have the use or services of the property concerned and thereby made profits (e.g. the time charter cases), or to render services to the property concerned and thereby earn remuneration (e.g. the towage cases). By contrast buyers under a c.i.f. or c. and f. contract of sale were persons to whom it was intended that the legal ownership of the goods should later pass, and who were therefore prospectively, though not presently, the legal owners of them.

16. I recognise that this difference in the characteristics of a c.i.f. or c. and f. contract of sale exists, but I cannot see why it should of itself make any difference to the principle of law to be applied. In all these cases what the plaintiffs are complaining of is that, by reason of their contracts with others, loss of or damage to property, to which, when it occurred, they had neither a proprietary nor a possessory title, has caused them to suffer loss: and the circumstance that, in the case of c.i.f. or c. and f. buyers, they are, If the contract of sale is duly completed, destined later to acquire legal ownership of the goods after the loss or damage has occurred, does not seem to me to constitute a material distinction in law.

Ground (2); equitable ownership

17. My Lords, under this head Mr. Clarke put forward two propositions of law. The first proposition was that a person who has the equitable ownership of goods is entitled to sue in tort for negligence anyone who by want of care causes them to be lost or damaged without joining the legal owner as a party to the action. The second proposition was that a buyer who agrees to buy goods in circumstances where, although ascertained goods have been appropriated to the contract, their legal ownership remains in the seller, acquires upon such appropriation the equitable ownership of the goods. Applying those two propositions to the facts of the present case, Mr. Clarke submitted that the goods the subject- matter of the c. and f. contract had been appropriated to the contract on or before shipment at Inchon, and that from then on, while the legal ownership of the goods remained in the sellers, the buyers became the equitable owners of them, and could therefore sue the shipowners in tort for negligence for the damage done to them without joining the sellers.

18. In my view, the first proposition cannot be supported. There may be cases where a person who is the equitable owner of certain goods has also a possessory title to them. In such a case he is entitled, by virtue of his possessory title rather than his equitable ownership, to sue in tort for negligence anyone whose want of care has caused loss of or damage to the goods without joining the legal owner as a party to the action: see for instance ***Healey v. Healey*** [1915] 1 K.B. 938. If, however, the person is the equitable owner of the goods and no more, then he must join the legal owner as a party to the action, either as co-plaintiff if he is willing or as co-defendant if he is not. This has always been the law in the field of equitable ownership of land and I see no reason why it should not also be so in the field of equitable ownership of goods.

19. With regard to the second proposition, I do not doubt that it is possible, in accordance with established equitable principles, for equitable interests in goods to be created and to exist. It seems to me, however, extremely doubtful whether equitable interests in goods can be created or exist within the confines of an ordinary contract of sale. The Sale of Goods Act 1893, which must be taken to apply to the c. and f. contract of sale in the present case, is a complete code of law In respect of contracts for the sale of goods. The passing of the property in goods the subject- matter of such a contract is fully dealt with in sections 16 to 19 of the Act. Those sections draw no distinction between the legal and the equitable property in goods, but appear to nave been framed on the basis that the expression "property", as used in them, is intended to comprise both the legal and the equitable title. In this connection I consider that there is much force in the observations of Atkin L.J. in ***In re Wait*** [1927] 1 Ch. 606, 635- 636, from which I quote only this short passage:

"It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code."

20. These observations of Atkin L.J. were not necessary to the decision of the case before him and represented a minority view not shared by the other two members of the Court of Appeal. Moreover, Atkin L.J. expressly stated that he was not deciding the point. If my view on the first proposition of law is correct, it is again unnecessary to decide the point in this appeal. I shall, therefore, say no more than that my provisional view accords with that expressed by Atkin L.J. in ***In re Wait*** [1927] 1 Ch. 616, 635- 636.

Ground (3); development of the law of negligence since 1969

21. My Lords, under this head Mr. Clarke relied principally on the well known passage in the speech of Lord Wilberforce in ***Anns v. Merton London Borough Council*** [1978] A.C. 728, 751-752. That passage reads:

*"Through the trilogy of cases in this House - **Donoghue v. Stevenson** [1932] A.C. 562, **Hedley Byrne & Co. Ltd, v. Heller & Partners Ltd.** [1964] A.C. 465, and **Dorset Yacht Co. Ltd, v. Home Office** [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in any particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."*

22. Mr. Clarke submitted that the proper way for your Lordships to approach the present case was to ask and answer the two questions set out by Lord Wilberforce in that passage. He said that the answer to the first question must be that there was, as between the shipowners and the buyers, a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, want of care on their part might be likely to cause damage in the form of pecuniary loss to the latter, so that a prima facie duty of care arises. With regard to the second question, relating to considerations which ought to limit the scope of the duty, he conceded that it would be unjust to the shipowners to be liable to the buyers in tort for negligence without reference to the terms of the bills of lading under which the shipowner carried the goods; and he sought to find a. legal rationale for the qualification of the duty of care by reference to those terms on the basis that those were the terms of the bailment of the goods by the sellers to the shipowners to which the buyers had, by entering into a c. and f. contract with the sellers, impliedly consented.

23. Before examining these submissions it will be convenient to refer to two decisions at first instance relating to the question of law raised by this appeal, both made alter the decision of your Lordships' House in ***Anns'*** case [1978] A.C. 728 and on the basis of the passage of Lord Wilberforce's speech in that case which I have set out above. The reasoning in those two cases, as will become apparent, tended to go further than Mr. Clarke has sought to persuade your Lordships to go in the present case.

24. The first decision is that of Lloyd J. in ***Schiffahrt-und Kohlen G.m.b.H. v. Chelsea Maritime Ltd. (The Irene's Success)*** [1982] Q.B. 481. In that case the plaintiffs were c.i.f. buyers of a complete cargo of coaking coal carried in the defendants' ship, **The Irene's Success,** from Norfolk, Virginia, to Hamburg. During the voyage the cargo was damaged by sea water and the plaintiffs alleged that the damage had been caused by want of care by the shipowners. The plaintiffs could not sue the shipowners in contract because they never became holders of the bill of lading, and they therefore sued them in tort for negligence on the basis that, although they were not the legal owners of the cargo when the damage was done, it was nevertheless at their risk at that time. A preliminary question of law was tried as to whether the plaintiffs were entitled to sue the shipowners in tort for negligence. Both counsel appear to have agreed that the question so raised fell to be determined by reference to Lord Wilberforce's two questions in ***Anns'*** case [1978] A.C. 728, and Lloyd J. had no hesitation in acting on that agreement. He answered Lord Wilberforce's first question in the affirmative, on the basis that the incidence of risk under a c.i.f. contract was or ought to be well known to shipowners. With regard to the second question he said, at p. 486:

"Another possible ground of policy for excluding the duty of care in the case of a c.i.f. buyer might be if it enabled him to sidestep the carrier's contractual exceptions, including, for instance, the rights and immunities conferred on him by the Hague Rules. It is difficult to know how far that argument would carry the defendants, since the point was not canvassed at the hearing. But if I may express my own tentative view, it would be that it would require a much stronger argument of policy for the duty of care in the present case, arising out of so close a relationship as that which exists between a carrier and a c.i.f. buyer, to be excluded."

25. As I have already indicated, Mr. Clarke, while resisting any suggestion that the question of policy- referred to by Lloyd 3. should exclude a duty of care altogether, accepted that it would be just for such duty to be qualified by the terms of the relevant bill of lading.

26. The second decision is that of Sheen J. in ***The "Nea Tyhi"*** [1982] 1 Lloyd's Rep. 606. In that case the plaintiffs were the endorsees of bills of lading relating to a part cargo of plywood carried in the defendants' ship, the ***Nea Tyhi,*** from Port Kelang to Newport. The plywood having been stowed on deck and damaged during the voyage, the plaintiffs sued the defendants for the damage both in contract on the bills of lading and in tort for negligence. Sheen J. found for the plaintiffs' claim in contract and did not therefore need to reach a decision on their alternative claim in tort. He indicated, however, that, if it had been necessary for him to do so, he would, in relation to the question of title to sue, have followed ***The Irene's Success*** [1982] Q.B. 481 rather than ***The Wear***

Breeze [1969] 1 Q.B. 219 for the reasons given by Lloyd 3. in the former case. He went on to say that Lloyd J.'s decision had the advantage, in a case where the legal ownership of the goods passed while they were still afloat, and damage was done to them progressively during the voyage, of obviating the need for a difficult inquiry into how much of the damage occurred before, and how much after, the time when the ownership passed.

27. Having referred to these two cases I now return to consider Mr. Clarke's submissions based on what Lord Wilberforce said in ***Anns'*** case [1978] A.C. 728. There are two preliminary observations which I think that it is necessary to make with regard to the passage in Lord Wilberforce's speech on which counsel relies. The first observation which I would make is that that passage does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence. In this connection I would draw attention to a passage in the speech of my noble and learned friend, Lord Keith of Kinkel, in ***Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*** [1985] A.C. 210. After citing a passage from Lord Reid's speech in ***The Dorset Yacht Co***. case [1970] A.C. 1004, 1027 and then the passage from Lord Wilberforce's speech in ***Anns'*** case [1978] A.C. 728, 751-752 now under discussion, he said, at p.240:

"There has been a tendency in some recent cases to treat these passages as being of themselves of a definitive character. This is a temptation which should be resisted."

28. The second observation which I would make is that Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analagous to any factual situation in which the existence of such a duty had already been held to exist. He was not, as I understand the passage, suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had repeatedly been held not to exist.

29. It is at this point that I think it is helpful to examine ***The Mineral Transporter*** [1986] A.C.l, which I mentioned earlier. The facts of that case were familiar enough. A collision took place between ships A and B solely by reason of want of care in the navigation of ship B. As a result of the collision ship A was damaged and had to be repaired, and during the period of repair the first plaintiff, who was the time charterer of ship A, suffered loss in the form of wasted payments of hire and loss of profits. The Supreme Court of New South Wales held that the first plaintiff was entitled to recover his loss from the owners of ship B. On appeal to the Privy Council that decision was reversed and it was held that the first plaintiff had no right of suit in respect of his loss. It was urged on the Board that the rule against admitting claims for loss arising solely from a contractual relationship between a plaintiff and the victim of a negligent third party could no longer be supported, and that it was enough that the loss was a direct result of a wrongful act and that it was foreseeable. The judgment of the Board was given by Lord Fraser of Tullybelton who rejected this contention. He made a full examination of the long line of English authority to which I referred earlier, and also of certain Scottish, Australian, Canadian and American decisions. He expressed the conclusion of the Board at p. 25 as follows:

"Their Lordships consider that some limit or control mechanism has to be imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence , . . The common law limitation which has been generally accepted is that stated by Scrutton L.3. in ***Elliott Steam Tug Co. Ltd, v. Shipping Controller*** *[1922] 1 K.B. 127, 139-140 ... Not only has the rule been generally accepted in many countries including the United Kingdom, Canada, the United States of America and until now Australia, but it has the merit of drawing a definite and ascertainable line. It should enable legal practitioners to advise their clients as to their rights with reasonable certainty, and their Lordships are not aware of any widespread dissatisfaction with the rule. These considerations operate to limit the scope of the duty owed by a wrongdoer, and they do so at the second stage mentioned by Lord Wilberforce in the passage cited above from his speech in* ***Anns v. Merton Borough Council*** *[1978] A.C. 728, 751-752."*

30. Although, as I indicated earlier, I do not think that Lord Wilberforce, in formulating the two questions which he did formulate in his speech in ***Anns'*** case, was intending them to be used as a means of re-opening issues relating to the existence of a duty of care long settled by past decisions, it will be observed that in ***The Mineral Transporter*** [1986] A.C. 1 the Privy Council was content to test the first plaintiffs' liability by reference to those two questions, and to exclude a duty of care on the basis of the answer given to the second question.

31. Mr. Clarke said, rightly in my view, that the policy reason for excluding a duty of care in cases like ***The Mineral Transporter*** and what I earlier called the other non-recovery cases was to avoid the opening of the floodgates so as to expose a person guilty of want of care to unlimited liability to an indefinite number of other persons whose contractual rights have been adversely affected by such want of care. Mr. Clarke went on to argue that recognition by the law of a duty of care owed by shipowners to a c.i.f. or c. and f. buyer, to whom the risk but not yet the property in the goods carried in such shipowners' ship has passed, would not of itself open any floodgates of the kind described. It would, he said, only create a strictly limited exception to the general rule, based on the circumstance that the considerations of policy on which that general rule was founded did not apply to that particular case. I do not accept that argument. If an exception to the general rule were to be made in the field of carriage by sea, it would no doubt have to be extended to the field of carriage by land, and I do not think that it is possible to say that no undue increase in the scope of a person's liability for want of care would follow. In any event, where a general rule, which is simple to understand and easy to apply, has been established by a long line of authority over many years, I do not think that the law should allow special pleading in a

particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to attempts to have it permitted in a variety of other particular cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined. Yet certainty of the law is of the utmost importance, especially but by no means only, in commercial matters. I therefore think that the general rule, re-affirmed as it has been so recently by the Privy Council in ***The Mineral Transporter*** [1986] A.C. 1, ought to apply to a case like the present one, and that there is nothing in what Lord Wilberforce said in ***Anns' case*** [1973] A.C. 728 which would compel a different conclusion.

32. Mr. Clarke sought to rely also on ***Junior Books Ltd, v. Veitchi Co. Ltd.*** [1983] 1 A.C. 520. That was a case in which it was held by a majority of your Lordships' House that, when a nominated sub-contractor was employed by a head contractor under the standard form of R.I.B.A. building contract, the sub-contractor was not only under a contractual obligation to the head contractor, under the sub-contract between them, not to lay a defective factory floor, but also owed a duty of care in tort to the building owner not to do so and thereby cause him economic loss. The decision is of no direct help to the buyers in the present case, for the plaintiffs who were held to have a good cause of action in negligence in respect of a defective floor were the legal owners of it. But Mr. Clarke relied on certain observations in the speech of Lord Roskill as supporting the proposition that a duty of care in tort might, as he submitted it should be in the present case, be qualified by reference to the terms of a contract to which the defendant was not a party. In this connection Lord Roskill said, at p. 546:

*"During the argument it was asked what the position would be in a case when there was a relevant exclusion clause in the main contract. My Lords, that question does not arise for decision in the instant appeal, but in principle I would venture the view that such a claim according to the manner in which it was worded might in some circumstances limit the duty of care just as in the **Hedley Byrne** case the plaintiffs were ultimately defeated by the defendants' disclaimer of responsibility."*

33. As is apparent this observation was no more than an obiter dictum Moreover, with great respect to Lord Roskill there is no analogy between the disclaimer in the ***Hedley Byrne*** case [1964] A.C. 465 which operated directly between the plaintiffs and the defendants, and an exclusion of liability clause in a contract to which the plaintiff is a party but the defendant is not. I do not therefore find in the observation of Lord Roskill relied on any convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A is, but B is not, a party.

34. As I said earlier, Mr. Clarke submitted that your Lordships should hold that a duty of care did exist in the present case, but that it was subject to the terms of the bill of lading. With regard to this suggestion Sir John Donaldson M.R. said in the present case [1935] 2 W.L.R. 289 at p. 301:

"I have, of course, considered whether any duty of care in tort to the buyer could in some way be equated to the contractual duty of care owed to the shipper, but . do not see how this could be done. The commonest form of carriage by sea is one on the terms of the Hague Rules. But this is an intricate blend of responsibilities and liabilities (Article III), right and immunities (Article IV), limitations in the amount of damages recoverable (Article IV, r.5), time bars (Article III, r.6), evidential provisions (Article III, rr.4 and 6), indemnities (Article III, r.5 and Article IV, r.6) and liberties (Article IV, rr,4 and 6). I am quite unable to see how these can be synthesised into a standard of care."

I find myself suffering from the same inability to understand how the necessary synthesis could be made as the learned Master of the Rolls.

35. As I also said earlier, Mr. Clarke sought to rely on the concept of a bailment on terms as a legal basis for qualifying the duty of care for which he contended by reference to the terms of the bill of lading. He argued that the buyers, by entering into a c. and f. contract with the sellers, had impliedly consented to the sellers bailing the goods to the shipowners on the terms of a usual bill of lading which would include a paramount clause incorporating the Hague Rules. I do not consider that this theory is sound. The only bailment of the goods was one by the sellers to the shipowners. That bailment was certainly on the terms of a usual bill of lading incorporating the Hague Rules. But, so long as the sellers remained the bailors, those terms only had effect as between the sellers and the shipowners. If the shipowners as bailors had ever attorned to the buyers, so that they became the bailors in place of the sellers, the terms of the bailment would then have taken effect as between the shipowners and the buyers. Because of what happened, however, the bill of lading never was negotiated by the sellers to the buyers and no attornment by the shipowners ever took place. I would add that, if the argument for the buyers on terms of bailment were correct, there would never have been any need for the Bills of Lading Act 1855 or for the decision of the Court of Appeal in ***Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd.*** [1924] 1 K.B. 575 to which I referred earlier.

Ground (4); the requirements of a rational system of law

36. My Lords, under this head Mr. Clarke submitted that any rational system of law ought to provide a remedy for persons who suffered the kind of loss which the buyers suffered in the present case, with the clear implication that, if your Lordships' House were to hold that the remedy for which he contended was not available, it would be lending its authority to an irrational feature of English law. I do not agree with this submission for, as I shall endeavour to show, English law does, in all normal cases, provide a fair and adequate remedy for loss of or damage to goods the subject-matter of a c.i.f. or c. and f. contract, and the buyers in this case could easily, if properly advised at the time when they agreed to the variation of the original c. and f. contract, have secured to themselves the benefit of such a remedy.

37. As I indicated earlier, under the usual c.i.f. or c. and f. contract the bill of lading issued in respect of the goods is endorsed and delivered by the seller to the buyer against payment by the buyer of the price. When that happens, the property in the goods passes from the sellers to the buyers upon or by reason of such endorsement, and the buyer is entitled, by virtue of section 1 of the Bills of Lading Act 1855, to sue the shipowners for loss of or damage to the goods on the contract contained in the bill of lading. The remedy so available to the buyer is adequate and fair to both parties, and there is no need for any parallel or . alternative remedy in tort for negligence. In the present case, as I also indicated earlier, the variation of the original c. and f. contract agreed between the sellers and the buyers produced a hybrid contract of an extremely unusual character. It was extremely unusual in that what had originally been an ordinary c. and f. contract became, in effect, a sale ex-warehouse at Immingham, but the risk in the goods during their carriage by sea remained with the buyers as if the sale had still been or. a c. and f. basis. In this situation the persons who had a right to sue the shipowners for loss of or damage to the goods on the contract contained in the bill of lading were the sellers, and the buyers, if properly advised, should have made it a further term of the variation that the sellers should either exercise this right for their account (see ***The Albazero*** [1977] A.C. 774) or assign such right to them to exercise for themselves. If either of these two precautions had been taken, the law would have provided the buyers with a fair and adequate remedy for their loss.

38. These considerations show, in my opinion, not that there is some lacuna in English law relating to these matters, but only that the buyers, when they agreed to the variation of the original contract of sale, did not take the steps to protect themselves which, if properly advised, they should have done. To put the matter quite simply the buyers, by the variation to which they agreed, were depriving themselves of the right of suit under section 1 of the Bills of Lading Act 1855 which they would otherwise have had, and commercial good sense required that they should obtain the benefit of an equivalent right in one or other of the two different ways which I have suggested.

Ground (5): the judgment of Goff L.J.

39. My Lords, after a full examination of numerous authorities relating to the law of negligence Goff L.J. (now Lord Goff of Chieveley) said [1985] 2 W.L.R. 289, 330:

"In my judgment, there is no good reason in principle or in policy, why the c. and f. buyer should not have ... a direct cause of action. The factors which I have already listed point strongly towards liability. I am particularly influenced by the fact that the loss in question is of a character which will ordinarily fall on the goods owner who will have a good claim against the shipowner, but in a case such as the present the loss may, in practical terms, fall on the buyer. If seems to me that the policy reasons pointing towards a direct right of action by the buyer against the shipowner in a case of this kind outweigh the policy reasons which generally preclude recovery for purely economic loss. There is here no question of any wide or indeterminate liability being imposed on wrongdoers; on the contrary, the shipowner is simply held liable to the buyer in damages for loss for which he would ordinarily be liable to the goods owner. There is a recognised principle underlying the imposition of liability, which can be called the principle of transferred loss. Furthermore, that principle can be formulated. For the purposes of the present case, I would formulate it in the following deliberately narrow terms, while recognising that it may require modification in the light of experience. Where A owes a duty of care in tort not to cause physical damage to B's property, and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C. To that proposition there must be exceptions. In particular, there must, for the reasons I have given, be an exception in the case of contracts of insurance. I have also attempted so to draw the principle as to exclude the case of the time charterer who remains liable for hire for the chartered ship while under repair following collision damage, though this could if necessary be treated as another exception having regard to the present state of the authorities."

40. With the greatest possible respect to Lord Goff the principle of transferred loss which he there enunciated, however useful in dealing with special factual situations it may be in theory, is not only not supported by authority, but is on the contrary inconsistent with it. Even if it were necessary to introduce such a principle in order to fill a genuine lacuna in the law, I should myself, perhaps because am more faint-hearted than Lord Goff, be reluctant to do so. As I have tried to show earlier, however, there is in truth no such lacuna in the law which requires to be filled. Neither Sir John Donaldson M.R. nor Oliver L.J. (now Lord Oliver of Aylmerton) was prepared to accept the introduction of such a principle and I find myself entirely in agreement with their unwillingness to do so.

41. My Lords, I have now examined and rejected all the five grounds on which Mr. Clarke relied in support of his contention that ***The Wear Breeze*** [1969] 1 Q.B. 219 was either wrongly decided at the time, or at any rate should be regarded as wrongly decided today, and should accordingly be overruled. The conclusion which I have reached is that ***The Wear Breeze*** was good law at the time when it was decided and remains good law today. It follows that I consider that the decision of Lloyd J. in ***The Irene's Success*** [1982] Q.B. 481, which even Mr. Clarke did not seek to support in its entirety, was wrong and should be overruled, and the observations of Sheen J. with regard to it in the ***The Nea Tyhi*** [1982] 1 Lloyd's Rep. 606 should be disapproved.

42. My Lords, if I had reached a different conclusion on the main question of the existence of a duty of care, and held that such a duty of care, qualified by the terms of the bill of lading, did exist, it would have been necessary

to consider the further question whether, on the rather special facts of this case, the shipowners committed any breach of such duty. As it is, however, an answer to that further question is not required.

43. For the reasons which I have given, I would affirm the decision of the Court of Appeal and dismiss the appeal with costs.

LORD BRIGHTMAN, My Lords,

44. For the reasons contained in the speech of my noble and learned friend, Lord Brandon of Oakbrook, I also would dismiss this appeal.

LORD GRIFFITHS My Lords,

45. For the reasons contained in the speech of my noble and learned friend, Lord Brandon of Oakbrook, I also would dismiss this appeal.

LORD ACKNER, My Lords,

46. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Brandon of Oakbrook, and for the reasons which he gives I too would dismiss this appeal.