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THE LAW OF TORT

Introduction

The purpose of this chapter is to outline those areas of the Law of Tort which directly impact upon International Trade and the Maritime Industry. The Law of Tort is concerned with minimising losses resulting from civil conflicts in society and deciding who shall pay for such losses. The conflicts cover such things as injury to people, their property and their interests. The Law of Torts determines if and when the law will provide redress for damage suffered or threatened and attempts to strike a fair balance between plaintiffs and defendants in the provision of compensation, aimed at putting the innocent victim back, as far as possible, in the financial position that they would have been in if the wrong had not been committed. Some torts such as trespass and defamation are actionable 'per se' without proof of loss because the law considers that for social and public policy reasons, these rights require a very high degree of protection. Other torts, such as Negligence are only actionable on proof of loss resulting from the breach of a duty owed to the defendant by the plaintiff. The Law of Tort plays a significant role in the legal regulation of relationships between those involved in international trade and the carriage of goods by air, land and sea.

Tort Defined. A tort is a civil wrong independent of the Law of Contract. Winfield states that *'A tort may be defined as the breach of a legal duty owed independent of contract, by one person to another for which a common law action for unliquidated damages[1] may be brought.'*

The distinction between torts and other types of wrongs. It is important to distinguish between the various categories of wrong because the courts that deal with each are either, distinct and separate, or the cause of action founded in each area is distinct. Furthermore the remedies available in each area differ to reflect the social interests protected by that branch of the law.

Crimes. Crimes are not civil wrongs. The aim of criminal proceedings is to protect the community by punishing the offender, setting an example, which deters others from wrongful behaviour and rehabilitates the offender. By contrast, the aim of the Law of Tort is to compensate the victim for his loss.

Contractual wrongs. Liability in contract is based upon a pre-existing duty arising out of an agreement between the parties. In Tort the parties may never have met until the wrong is committed and there is no need for a prior relationship between the parties. Tortious liability is imposed by the law, independently of a prior agreement.

Damage to Equitable Interests. Trusts exist only in Equity and are based on a prior trustee / beneficiary relationship between the parties. The law of tort is based on the Common Law, which does not recognise the existence of trusts.

It is possible for a defendant to be liable both in tort and some other area such as contract, equity and under the criminal law. A person who hits someone deliberately and wrongfully commits a crime and may be punished for the conduct. The victim may also recover damages for the injury suffered.

[1] Unliquidated damages are damages, which are assessed by the court rather than being previously agreed by the parties. Damages are not the primary remedy for all torts. Sometimes what the plaintiff will most desire is an injunction to prevent an act continuing which is likely in an action founded on the Tort of Nuisance or regarding a continuing trespass on land.

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Interests protected by the Law of Tort. The Law of Tort protects a wide and diverse range of interests. The method of protecting such interests depends on what is appropriate regarding the interest in question. The heads of tort include amongst others, trespass to the person and property, nuisance, defamation, fraud, unlawful interference with business interests, breach of copyright; conversion, damage by fire and negligence

The manner of causing loss to another may provide a course of action under the Tort of Negligence. However, careless but non-deliberate acts causing purely financial loss unrelated to physical injury or damage to tangible assets are not normally covered by the Law of Torts although it may be protected in those cases where it is deliberately caused by someone.

Unless a plaintiff suffers an invasion of a recognised interest he cannot claim compensation for his losses under the Law of Tort. This is summed up by the phrase 'Damnum absque inuria' or 'loss without legal injury'. Thus, the Tort of Negligence only extends to the protection of a limited sphere of interests.

The mental element in torts. Different torts depend upon different mental elements on the part of the defendant. This makes it difficult to state any general basis for liability in the law of torts.

Intention. The torts of assault, false imprisonment and deceit require that the defendant acted intentionally. The defendant must have been aware of the consequences of his act and he must have desired those consequences. though recklessness is tantamount to intention in the law of torts. A defendant will be said to be reckless if he is aware of the risks inherent in what he is doing and while not actually wanting to injure the plaintiff is totally indifferent to the possibility that he could well injure him.

Negligence governs liability in the many cases but is distinct from the 'Tort of Negligence.' A defendant will be said to have been negligent in law if he failed to take reasonable care to guard against the likely consequences of his acts or omissions. The test adopted to determine whether reasonable care has been taken is an objective one based on what a hypothetical 'reasonable man' would have done.

Strict liability. Some torts are based upon what is termed strict liability, that is to say that a defendant will be held liable for the consequences of his actions even if he is neither negligent or reckless and does not intend the consequences of his actions. Strict liability applies to a range of torts including the breach of specified statutory duties and the vicarious liability of employers for the torts of their employees committed during the course of their employment.

Trade and maritime interests affected by the Law of Tort and in particular the tort of negligence.
Accidental and deliberate damage to cargo interests by third parties without any contractual nexus to the cargo owner, including bailment relations, will often be subject to regulation by the law of tort and respectively by the torts of trespass and negligence. [2]

Thus, the tort of negligence governs compensation claims in respect of collisions between vessels. To the extent that many maritime risks are covered by London insurance, subject to English Law and jurisdiction, the international impact of the English Law of Tort is extensive, since underwriters are likely, having paid out to an assured on a marine insurance claim, to seek to recover some, if not all, of their losses in subrogation of the assured's legal rights against the wrong doer.

Misrepresentations in international trade documentation, in particular bills of lading, that induce others to enter into contracts or continue to carry out contractual duties, are subject to the negligent misstatement provisions of the tort of negligence. [3]

[2] e.g. stevedores see in particular **Scruttons v Midland Silicones Ltd**. [1962] A.C. 446 and **The Aliakmon** [1986] 2 W.L.R. 902

[3] **Kwei Tec Chao v British Traders and Shippers Ltd**. [1954] 2 Q.B. 459.

THE TORT OF NEGLIGENCE

Introduction. The word negligence has two distinct meanings in tort law

i). As an ingredient of other torts and equates with carelessness.

ii). As the distinct Tort of Negligence which is a cause of legal action.

Definition. *"Negligence as a tort is the breach of a legal duty* [owed by the defendant to the plaintiff], *to take care, which results in damage, undesired by the defendant, to the plaintiff."* [4]

The definition contains three distinct elements :-

a) **Duty**. The defendant owes the plaintiff a legal duty of care

b) **Breach.** The defendant fails to carry out that duty, that is to say, he breaches the duty of care Breach of Duty): and thereby

c) **Causation / Remoteness of Loss :** causes damage to the plaintiff which must not be too remote a consequence of the defendant's negligence.

The Burden of Proof. In order to make a successful claim in negligence the plaintiff has to succeed on all three of these elements. He has to establish that a legal duty of care, recognised by the tort of negligence has been owed to him by the defendant. He has to prove that on a balance of probabilities that the defendant breached that duty. He has to prove to the court that as a result of that breach of duty he suffered a direct loss to a recognisable legal interest These three hurdles together make the tort of negligence a very difficult action for a plaintiff to mount. A failure to establish any one of the three, will result in the action failing.

Foreseeability. The Tort of Negligence is a conceptually difficult subject to study because whilst the definition appears to require three distinct hurdles to be passed in order to establish liability, once the ingredients of each of these hurdles is examined, one finds that they all centre around the concept of foreseeability.

A legal duty only exists if a reasonable person is able to foresee that harm may result from the conduct under question. The standard and quantum of care required in respect of a breach of duty is measured in terms of reasonableness and foreseeability. Finally, remoteness can be measured in terms of foreseeability as well. When a judge talks about foreseeability it may not be possible to distinguish at all times whether he is talking about a failure of foreseeability in relation to element a) b) or C). or indeed in respect of all three elements. In one respect the categorisation of the tort into three separate elements is artificial, but without doing so the tort is even harder to analyse. Another problem is that the tort contains

1 General tests to determine the existence of duties AND

2 Policy decisions of the courts which exclude liability.

Policy changes to reflect changes in society. Modern society has forced the courts to impose legal responsibility for the affects of behaviour that would not have been recognised in earlier times where the type of harm alleged was considered to be too ethereal to quantify. Policy decisions may be express or masked by a judge finding that something was not foreseeable though the reason why it was not foreseeable may not be apparent to anyone else apart from the judge.

Foreseeability is on the one hand a question of law, that is to say is it theoretically possible to foresee harm as likely regarding an activity. If so, there is the theoretical basis for a duty to be owed. Thus for example, there can be a duty owed by solicitors to clients.

However, foreseeability is also a question of fact. In the actual circumstances set before it, the court asks whether or not a reasonable person would have foreseen the harm that was caused as a harm that was likely to result from the activity. If so an actual duty has been established and has been, in those particular circumstances breached. Thus the court may find that 'In the particular circumstances of the instant case, a solicitor did, or did not owe, a duty of care to the claimant client, regarding the conduct of the affairs for which compensation is claimed, followed by a decision that that duty, if it existed, was or was not, actually breached.'

[4] per Winfield in Winfield & Jolowitz, THE LAW OF TORTS.

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Negligence and The Duty of Care : The Tort of Negligence arises when damage is caused to person or property by another's failure to take the care that the law requires in the circumstances of the case. Negligence as a cause of action was stated in **Blythe v Birmingham Waterworks,**[5] by Baron Alderslade to be " *... the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do."*

Before a negligence action can be founded the plaintiff must show that the defendant owed him a legal duty of care. The problem with Alderslade's definition is that it doesn't tell us when a duty of care arises but rather sets a test for breach of the duty of care.

Up to the 1930'ies development of the Tort of Negligence had been piece meal and fragmented. Initially the courts decided on a case by case basis whether or not a legal duty of care existed in a particular situation. Once a duty of care had been established, for a particular activity, similar actions were easy to initiate. However, if the facts surrounding a litigant's case differed in any way from established precedent he could not be sure of success. Much depended on whether or not the trial judge was prepared to widen the scope of the duty of care to embrace the new circumstances. The creation of new categories of duty by the judiciary would have made it look as if they were making law. Many judges felt that legislation was Parliament's job and were reluctant to do anything, which was too adventurous or made it obvious that they were effectively making new law. Judicial caution seriously impeded the growth of the tort of negligence. Parliament on the other hand could not anticipate a diverse number of situations where people should be under a legal duty to take care and did not seem to be particularly interested in legislating in general terms. Parliament often imposes duties in specific areas, for example, when making regulations on safety in buildings or on the factory floor. However, such duties do not apply to activities which whilst similar are not specifically covered by the Act of Parliament. Often Parliament imposes duties and enforces them by criminal sanction. The civil courts have sometimes found a civil duty of care coexists with criminal liability but not always. If Parliament imposes a statutory duty and provides a civil remedy there is no scope for a separate common law tort action and essentially the statutory tort is mutually exclusive. If Parliament imposes a duty but no sanction it is quite likely that there will be common law liability in tort but this is not guaranteed. [6]

Lord Atkin believed that what was needed was a set of principles which could admit new categories of duties without involving the judiciary in apparent law making. A set of principles which would allow flexibility in the law and enable it to adapt to changing circumstances where there is a need to hold people legally and financially responsible to others for the adverse outcomes of their actions. Such a principle is analogous to a mathematical theorem. A + B = a duty of care.

Three attempts at developing a principle were made

1). Brett M.R. (latter to become Lord Esher) postulated the proximity test in **Heaven v Pender**.[7]
2). Lord Wright put forward the 'Reasonable foreseeability of danger or harm test' in **Bourhill v Young**.[8]
3). Lord Atkin established the 'Neighbour Test' in **Donoghue v Stevenson**.[9]

Lord Atkin describes the pre-1932 situation and the need for a new principle in **Donoghue v Stevenson** [10] as follows :- "the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.'"

5 **Blythe v Birmingham Waterworks** (1856) 11 Ex 781 by Baron Alderslade
6 See **Anns v Merton L.B.C**. [1978] A.C. 752. House of Lords.
7 **Heaven v Pender** (1883) 11 Q.B.D. 503. and see also **Le Lievre v Gould** [1893] 1 Q.B. 49. Lord Esher
8 **Bourhill v Young** [1943] A.C. 92.
9 **Donoghue v Stevenson** [1932] A.C. 562.
10 ibid at p759

On the basis that there must be a common element, Lord Atkin devised the neighbour test as a way of recognising situations where such a duty exists. The success of the third attempt, *'The Neighbour Test'*, has been so complete that it is often forgotten that it includes within it the concepts embodied in the other two tests which are still valid. It should not be forgotten either that the initial precedent based method of deciding whether a duty of care exists is still valid and provides a useful guide to the likelihood of the existence or otherwise of a duty of care. The value of the neighbour test is in relation to new situations rather than regarding established areas of legal duty and liability. Presumably, where a precedent recognised a duty of care exists in a certain situation and relationship the neighbour test should also recognise that such a duty exists. Both should produce the same result.

Unfortunately, the reverse has not proved to be so reliable. Situations and relationships, which have in the past been held not to be subject to a duty of care, may satisfy the neighbour test. Whether or not to accept the neighbour test as a blanket formula for determining duty of care and overrule past cases has proved to be a major challenge for the courts. If the neighbour test is to be dissapplied, then the courts have had to find a reason for doing so. This is where policy enters into the process.

In **Donoghue v Stevenson,** a friend of Miss McAlister bought a bottle of ginger beer from a retailer for her consumption. As the bottle was opaque the contents couldn't be seen. She drank some of the ginger beer and on pouring out the remainder of the contents discovered the decomposed remains of a snail. Miss McAlister claimed that she became ill as a result of this incident and so she sued the manufacturer in negligence (she couldn't sue in contract as there was no contract between her and the manufacturer and the shop keeper was not considered rich enough to sue in any case. The shop-keeper had not been negligent and there was no effective consumer protection legislation in those days). Apparently the thought of drinking the snail made her continuously vomit. She was sick for about three years and eventually her stomach ruptured and she died. The action was continued on her behalf, by her personal representative. The action failed at first instance and was appealed through the Scottish Courts to the House of Lords.

The court held that a manufacturer can owe a duty of care to the ultimate consumer of its products to take reasonable care to ensure that a product does not contain some hidden substance which is likely to cause injury to health. The case then had to be sent back to the Scottish Court to decide whether there was in fact an actual breach of duty and assessment of damages. In the circumstances it would presumably have been relatively easy to establish that the theoretical duty had in fact been breached. It would appear however that it never got back to court and the parties eventually settled out of court for £100 damages.

What did Donoghue v Stevenson decide ?

i). Separate actions involving different parties can co-exist in contract and in tort at the same time. Initially it was though that if there was a contractual relationship a tort action could not be mounted by anyone. This appeared to have excluded actions by third parties to the contract. A tort action based on Donoghue v Stevenson allows third parties to recover. [11]

ii). Where a manufacturer packages goods in such a way that they cannot be inspected before consumption or use, the manufacturer owes a duty of case to the user to ensure that the product will do him or her no harm. This was essential in 1932 since until the Married Women and Joint Tort Feasors Act 1935 the plaintiff had to sue the shop keeper unless he was completely blameless and there was no way of getting at the manufacturers who could afford to pay the damages. Since 1935 the shopkeeper and manufacturer can be joined as defendants. It created a useful precedent for a new category of duty.

iii) The categories of negligence are never closed.[12] This means that there is scope for growth in the tort of negligence.

[11] The law continued to prevent a party to a contract mounting a tort action against the other party to the contract until the decision in **Henderson v Merrett**. [1994] 3 All.E.R. 506.

[12] **Donoghue v Stevenson** [1932] A.C. 562. Per Lord MacMillan

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When should one sue in tort and when in contract ? If a contract is breached the innocent party can sue on the terms of the contract. The duties imposed by the agreement speak for themselves. There is no need to prove the existence of a duty. The contract imposes it. It is very straightforward therefore to sue in contract and most of the time the innocent party will prefer to sue in contract. However, there are differences between the procedures governing contract and tort actions. The statutory limitation period is different. The methods of assessing damages [13] differ. Until recently cases such as **The Saudi Crown**[14] still prevented parties to a contract from choosing to sue each other in tort rather than contract. **Donoghue v Stevenson** only cleared the way for third parties to sue in tort.

Henderson v Merrett Syndicates Ltd [15] now states that where there is concurrent liability in tort and contract the plaintiff may sue in either in order to maximise his claim. He may choose whichever cause of action offers the most benefits regarding time of action and quantum of damages. The circumstances of the contract must however give rise to a duty of care in tort. Not all contracts will do this. The court held that the agency relationship between the names (the underwriters) at Lloyds and the syndicates that brokered insurance policies with clients (the assured) gave the syndicate absolute discretion as to what policies they negotiated on behalf of the names i.e. the scope of their authority under the agency agreement, but that when carrying out their contractual duties they owed a duty of care in the way they exercised their skill and judgement. They had been instructed to take out policies in relation to low risk activities but had insured high-risk activities and breached their duty of care. The names lost millions of pounds.

Where a contract contains limitation or exclusion clauses, these clauses according to Henderson may negative the existence of a duty of care in tort thus preventing a tort action. In this respect remember that all exclusion clauses must satisfy the U.C.T.A. 1977 and the Unfair Contract Terms Directive. If unfair they could fail to exclude tort liability because they would be struck out of the contract by the court.

The Neighbourhood Test : The New Principle. The Neighbour test was the creation of Lord Atkin alone. As such it cannot be regarded as the ratio decidendi of the case. It can be regarded as the ratio of Lord Atkin's speech. Consequently the test was merely obiter dicta. However it has subsequently been adopted and confirmed by latter cases and now represents the law. Application of the general principle has been limited however by policy and the principle now looks rather like

A + B = Duty of Care unless XYZ policy precludes it.

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

Thus a theoretical duty of care is owed to any person whom we can reasonably foresee will be injured by our acts or omissions. The test, therefore, is objective and is based upon the reasonable foresight of the reasonable man.

The difference between Objective and Subjective tests.

Objective Tests. An objective test is a test based on what an ordinary reasonable member of 'Joe Public' would have done or seen in the circumstances of the case. He has been referred to as the 'Man on the Clapham omnibus'. A refinement of this test sometimes considers what an ordinary reasonable member of 'Joe Public' with the same abilities as the person being tried would have done or seen.

This refined version of the test is preferable. It is fairer to the defendant. However, when discussing the Standard of Care note that a different test is applied. If a person has claimed to have a certain skill he may be judged by the standard of an ordinary person with that skill, even if he didn't actually possess that skill.

The Subjective Test. A subjective test is a test based on what the court concludes the actual person being tried was aware of at the time the event occurred. This test is very fair to the defendant but less fair to the plaintiff. It is mostly used in relation to mens rea [16] and criminal liability.

[13] the amount of money the court awards for compensation.

[14] **The Saudi Crown** [1986] 1 Lloyd's Rep 261

[15] **Henderson v Merrett Syndicates Ltd** [1994] 3 All.E.R. 506.

[16] Mens rea is roughly translated to mean "a guilty mind."

Public Policy and the Neighbour Test. The main objection to a general principle of negligence is that its scope may prove to be too wide and open up the 'flood gates'. In the past, using the precedent system judges were able to limit the growth of liability and often did so to protect the vested interests of industry, landowners and the State. A general principle of liability removes the scope for judicial protection. Public policy exceptions to the duty of care provide the judges with a new tool for judicial control.

The courts over the last thirty years have experimented with the notion of public policy as a way of determining whether or not a new category of negligence should or should not be opened up. The first step has been to establish whether a cause of action is disclosed by applying the neighbour principle. Then the court decides whether or not as a matter of public policy it is desirable to admit of the new category of negligence. The court may ask itself whether the injury suffered is an interest that the court should protect, or whether the activity complained of must be excluded from legal action in the interests of public policy. Thus, precedent is still an important aspect of Duty of Care. Now however it is used as a way of limiting the scope of the neighbour test rather than as a method of determining the existence of a duty or to expand the categories of duty that are recognised by the courts.

The courts have also tried to develop a test to determine when public policy should operate, since the imposition of public policy exceptions also involves a degree of judicial law making. This test has proved to be elusive. The result is that this is a very difficult area of law to study.

Public Policy and the Duty of Care. In **Anns v Merton,**[17] an attempt was made to create a new test to be grafted onto the Donoghue v Stevenson Neighbour test. In **Anns v Merton** a local authority was held to be liable for failing to spot a mistake of another when carrying out a building inspection. The council argued that it had discretionary powers and if it exercised these, as a matter of public policy, it should not subsequently be held liable in negligence for the way it carried out that duty. The court held that once the council decided to act it had to do so with proper care. It had not acted with due care, the plaintiff suffered loss and the council was liable for the plaintiff's loss under the tort of negligence, even though that loss was purely economic. Be careful. The case has since been overruled and limited to its own facts so you should not apply it in future.

The importance of the case was not simply the decision in relation to the duty owed by a local authority regarding the supervision of building work, but more importantly because of the two tier test approach to be applied to the existence of a duty of care and its scope in new situations developed. Lord Wilberforce stated that in deciding whether or not a duty of care was owed :-

"*...First one had 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*." which is a restatement of the **Donoghue v Stevenson** Neighbour test.

"*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*".

Whilst the **Anns v Merton** test was followed in many subsequent cases a chorus of criticisms developed and even when applied some restrictions or at least reservations started to creep into judgements. The principle criticism of Lord Wilberforce's approach was that in the first tier 'the proximity test' approach was too broad and consequently left too much to the second stage based upon policy.

The House of Lords appeared to completely overrule **Anns v Merton** in **Murphy v Brentwood**.[18] Elements of the case have survived and have been applied since **Murphy v Brentwood** in **Spring v Guardian Assurance**[19] in relation to a case where the court imposed a duty of care on an employer / referee writing a reference for an employee for a new job. Apart from any future use of **Anns v Merton**, the two principal ways of moving forward in relation to new situations now appear to be

17 **Anns v London Borough of Merto**n [1978] A.C. 752. House of Lords.

18 **Murphy v Brentwood District Council [**1991] 1 A.C. 398 House of Lords.

19 **Spring v Guardian Assurance** [1995] 3 All.ER 129 HL

1) **The incremental approach**, extending precedent to similar situations by analogy where the court feels such an extension is justified. Extension to new or novel situations is based on the discretion of the court and is not predictable or certain so litigation is the only way of discovering if a duty does or does not exist. In **Caparo Industries plc v Dickman** [20] where Lord Bridge stated :-

'In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships, there has for long been tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised.

Lord Bridge later adopts Brennan J's dicta in **Southerlandshire Council v Heyman**.[21] "It is preferable in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 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."

2) **The justice, fair and reasonable tests** etc. A variety of recent cases such as **White v Jones**[22] and **Spring v Guardian Assurance** have found situations where it is considered fair, just and reasonable that a duty of care should exist, or where the law would otherwise fail to provide a remedy and provides no other incentive for care to be exercised. They differ from the incremental approach in that they do not extend existing precedent but rather break new ground.

Implicit within the overruling of **Anns v Merton** is a need to reassess the value of the neighbour principle. Donoghue v Stevenson is not overruled and still applies but how to use the neighbour principle and for what purpose is not easy to answer. **Murphy v Brentwood** highlights the fact that in **Donoghue v Stevenson** Lord Atkin set out to identify the common ground in previous negligence cases but that Lord Atkin accepted that there were many other variants involved in the cases. In particular **Murphy v Brentwood** identifies cases of pure economic loss as being outside the neighbour principle. Nonetheless the neighbour principle formed the basis of the Hedley Byrne V Heller case in relation to recover of pure economic loss for negligent misstatement. Clearly **Donoghue v Stevenson** features in so many precedents that it cannot be jettisoned.

The principal objections to **Anns v Merton** was that it was too broad and failed to discriminate between deserving and undeserving claims and opened the flood gates in particular to recovery of pure economic loss. Assuming that recovery of pure economic loss is undesirable (this is not universally accepted as can be seen from the Australian case of **Bryan v Maloney,**[23] the **Anns v Merton** two tier test had to be removed. Now that the **Anns v Merton** straight jacket is removed the courts have a wider discretion to recognise of reject imposition of a duty of care. In **The Nicholas H**.[24] the C.A. applied a three stage test of 1). reasonable foreseeability, 2). relationship of proximity between the parties and 3). just fair and reasonable. It is suggested that a better approach would be as follows :-

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 the wrongdoer's part may be likely to cause damage to the latter, in which case the core common ground required to impose a duty of care is established.

Secondly, if the first question is answered affirmatively, regard should be paid to existing case authorities of the same or of a similar kind. Unless there is a compelling reason based on fairness, justice, reasonableness or a change in the requirements of society, the precedent for accepting or rejecting the existence of a duty of care in the current case should be followed.

20 **Caparo Industries plc v Dickman** [1990] 1 All.E.R 568 the House of Lords per Lord Bridge

21 **Southerlandshire Council v Heyman** (1985) 60 A.L.R. 1 High Court of Australia

22 **White v Jones** [1995] 2 A.C. 207. House of Lords.

23 **Bryan v Maloney** [1995] 128 A.L.R. 163

24 **The Nicholas H.** [1994] 3 All.E.R. 686

Thirdly, if there are compelling reasons as outlined above, the lower courts should consider whether on the basis of fairness, justice, reasonableness and the requirements of society there are sufficient grounds to distinguish the case from prior cases to justify a finding that the situation does or does not give rise to a duty of care. If there are no such grounds to distinguish the case from precedent but it is undesirable to follow the precedent then only the House of Lords can overrule the precedent (perhaps an accelerated leapfrog appeal would be desirable).

Fourthly, if the current case being considered exposes a novel situation it is necessary to evaluate the situation taking into account notions of fairness, justice, reasonableness and the requirements of society in order to decide whether or not the situation gives rise to a duty of care.

The advantage of this scheme is that it accommodates the central role of the **Donoghue v Stevenson** neighbour test along side precedent whilst acknowledging the role of the judiciary in developing the tort in line with the requirements of a changing society.

The assertion in **Murphy v Brentwood** that the **Anns v Merton** test resulted in a large amount of uncertainty and litigation and that removing the test would solve the problem, return certainty to the law and would reduce the incidence of litigation is questionable. If each new situation and any situation where the status quo is seriously challenged requires a judicial decision in order to establish whether a duty of care does or does not exist there is no more certainty or predictability than there was under **Anns v Merton**.

Marc Rich v Bishop Rock Marine,[25] indicates that the courts are far from settling the way that a court should approach duty of care. The three stage test used in the Nicholas H is stated to be the proper way to approach duty of care in all cases including those regarding pure economic loss. A vessel, The Nicholas H, laden with cargo belonging to third parties developed a crack in its hull. The vessel put into port. A surveyor from a classification society advised temporary repairs. After these were carried out the surveyor declared the vessel fit to proceed and advised that after discharge full repairs should be carried out. The vessel sailed but the repairs failed, the crack reappeared and the vessel sank and the cargo was lost. The cargo owners sued the surveyor in tort for negligently advising that the vessel was safe to continue with its voyage thus causing them loss. The C.A. held that there was insufficient proximity between the classification society and the cargo owners and it would not be fair just or reasonable to impose liability since the cargo owners could sue the shipowner under The Hague Visby Rules.

The case is likely to be appealed. It claims to treat physical and pure economic loss on the same basis; ignores the **Caparo** [26] incremental approach; attempts to do away with the concept of concurrent liability in tort and contract on the basis that it would be unjust, unfair and unreasonable and undermines the general trend towards imposing liability for professional negligence developing on the back of misrepresentation.

A thorough understanding of the variable factors that influence judges in respect of the existence or otherwise of a duty of care is the only real tool of predictability left to lawyers advising clients on the possible outcome of litigation or as to how they should conduct their business affairs.

Variable factors affecting the existence of a duty of care. The principal variable factors involved in assessing the existence or otherwise of a duty of care in negligence actions have included :-

Protection of the Judicial Process. There area range of devices, to protect the integrity of the judicial system. These include criminal offences for interference with the course of justice, privilege to guarantee free speech in court exempting persons from liability for libel and slander and an exclusive hierarchy of courts from first instance to final appeal. The court process should only be challenged by due process on permitted grounds of appeal. To what extent should lawyers be able to shelter behind this protective screen ?

Could a lawyer be sued for negligence in preparing a case ? It was held in **Rondel v Worsley,**[27] that where court work is involved no, since to establish the lawyer's negligence it would require the retrial of cases which is against public policy. In other circumstances not involving the court there is no reason why a duty

25 **Marc Rich v Bishop Rock Marine - The Nicholas H.** [1994] 3 All.ER 685.

26 **Caparo Industries plc v Dickman** [1990] 2 A.C. 605

27 **Rondel v Worsley** [1969] 1 A.C. 191 and see also **Saif Ali v Sydney Mitchell** [1980] A.C. 198 : **Rees v Sinclair** [1974] 1 N.Z.L.R. 180:

of care should not exist. Lawyers giving financial advice, conveying property, administering wills etc are subject to liability for negligent acts and omissions.[28]

Protection of the Administrative Process. Office holders should be excluded from liability to ensure they will carry out their legal duties. If an office-holder labours under the fear of personal legal consequences or of legal liability attaching to their department, which could in turn jeopardise job security this might inhibit the office holder from carrying out his job with commitment and enthusiasm by seeking to limit the extent to which potential claimants might be affected by his or her actions. Acts of Parliament often provide administrators with powers to do things which adversely affect the rights and interests of people. The only form of redress for any losses are limited to the provisions of the Act. Should their be a general mechanism for the protection of the state ? This is allied to the next issue :-

Protection of the Public Purse. The tax payer should not always be expected to carry the burden of loss for citizens misfortunes simply because public officials have played a part in that loss. This notion has been in existence for a long time. It was not until the Crown Proceedings Act 1947 that the Crown could be held liable in either tort or contract for the acts of Crown Servants, employees, civil servants, the armed forces etc. Should individuals have to bear the burden of things done on behalf of society as a whole or should society share that burden and compensate the individual ? In **Dutton v Bognor Regis R.D.C**.[29] and **Anns v Merton L.B.C.**[30] the courts considered whether or not public surveyors should be afforded immunity on the basis of public policy to protect the public purse ? It was held that the public purse alone is no reason for immunity. However, as will be seen later a distinction between statutory duties giving rise to a duty of care to the individual and statutory duties that only give rise to a duty to the State has since been made in **Murphy v Brentwood D.C.**[31] which has the effect of indirectly protecting the public purse.

Exclusion of liability for psychiatric injury or nervous shock. The courts have in the past been reluctant to award damages for various aspects of mental suffering on the basis that it is difficult for the courts to make an award for something, which is very hard to define and to determine the scope of and which the claimant can have difficulty proving actually exists. Nervous shock was the prime example of this where witnesses to disasters were initially refused compensation by the courts for the psychological suffering alleged to result from being involved in such incidents. The law had traditionally expected the British to be made of sterner stuff. Shell shock victims during the 1st world war were shot for refusing to obey orders, so the judicial attitude towards nervous shock was hardly surprising. The mere fact that something is hard to define or prove should not in itself be a bar to recovery. A person with any injury is likely to suffer pain. How much pain depends on the pain threshold of the victim but this does not prevent the judge from having to make an assessment and an award. Nervous shock is real but some people may attempt to fake it to gain compensation.

The courts have now accepted that they have to make a judgement and award compensation in appropriate circumstances for psychiatric injury. Nonetheless, the courts have been involved in some difficult decisions in relation to the scope of the duty of care and case law in this area is rather complicated in relation to proximity.

The Defining of Nervous Shock. The court held in **Brice v Brown,**[32] that Nervous shock means *mental injury or psychiatric illness* and not simply grief and sorrow: There are a number of reasons why the courts have adopted this stance:

1) Fear of fraudulent claims and excessive litigation;
2) Difficulty in putting a monetary value on such loss
3) Difficulty in proving a link between D's conduct & the shock to P with the consequent unfairness to D if damages become out of proportion to the negligent conduct complained of.

Should public policy allow P to recover for nervous shock ? Despite the difficulties in proving that such loss had occurred, the courts are allowed to permit damages to be recovered in apposite circumstances.

28 See **Ross v Caunters** [1980] Ch 297 and **White v Jones** [1995] 2 A.C. 187.
29 **Dutton v Bognor Regis R.D.C.** [1972] 1 Q.B. 373:
30 **Anns v Merton L.B.C.** [1976] A.C. 728.
31 **Murphy v Brentwood D.C.** [1991] 1 A.C. 398
32 **Brice v Brown** (1984) 1 All.E.R. 997.

The late nineteenth century approach was that no duty of care was owed in respect of nervous shock causing physical injury because it was not the type of injury which, ordinarily, would result from the negligence of another. By 1943 Lord Macmillan had said in the case of **Bourhill v Young,**[33] that "...it is now well recognised that an action will lie for injury by shock sustained by the medium of the eye or ear without direct contact". In **Chadwick v British Railways Board,**[34] a rescuer at the scene of a railway crash in which 90 people died suffered neurosis necessitating hospital treatment. He succeeded in his claim for damages as it was held that in the circumstances injury, by shock to volunteer rescue workers, was foreseeable. Accordingly a duty was owed to such persons and damages would be awarded even though the shock did not arise from fear of injury to himself or his family.

Similarly, in **McLoughlin v O'Brian,**[35] the defendant negligently caused a road accident in which two of the plaintiff's children and her husband were seriously injured and another daughter killed. The plaintiff was at home at the time and first heard of the accident from a friend who drove her to the hospital to which her family had been taken. She then learned of her daughter's death and, saw the injuries to her husband and children. Lord Wilberforce and Lord Bridge allowed her claim for nervous shock, on the basis that it was reasonably foreseeable. Although the House of Lords ruled that the sole test in nervous shock cases was whether or not shock to the plaintiff was reasonably foreseeable the approaches of Lords Wilberforce and Bridge differ in that the former adopted a much more restrictive approach.[36]

Wilberforce referred to 'three elements inherent in any claim' for nervous shock

1) The closer the tie between the plaintiff and the person injured the greater is the case for permitting recovery;
2) The plaintiff's physical proximity to the scene of the accident;
3) Whether the plaintiff saw or heard the accident personally or merely learned about it later from a third party.

Lord Bridge disagreed with this approach as it would lead to a 'largely arbitrary limit of liability'.

In **Wigg v British Railways Board,**[37] a train driver was awarded damages for nervous shock after discovering the dead body of a passenger who had been dragged under a train due to the negligence of the defendants as the train left the station. The passenger was a stranger to him. There were no emotional ties.

In the leading case of **Alcock v Chief Constable of South Yorkshire,**[38] spectators were crushed to death and more than 400 received physical injury at Hillsborough Stadium when the police negligently channelled large numbers of people through an entrance to the stadium. Ten plaintiffs sued the police for psychiatric trauma. Their claims failed, as did their appeals to the House of Lords. Some of the claimants were not present and only saw the incident on the television. They could suffer fear because of the general situation and the knowledge that their loved ones might be hurt, but since in the event the television did not show their loved ones actually being injured, they were not entitled to compensation.

McFarlane v Caledonia,[39] concerned the Piper Alpha oil rig disaster in the North sea. It was held that the horrific nature of a disaster was not enough to enable mere bystanders to recover for psychiatric injury. Something more is required. This additional factor is demonstrated by **Dooley v Cammell Laird**,[40] where a crane driver recovered for nervous shock when a rope on his crane broke dropping his load onto men in a ship. Whilst only an onlooker he was irrevocably involved and open to public condemnation even though his employer was really to blame for not maintaining the crane. Similarly, in **Hevican v Ruane**,[41] the plaintiff's son died in a road accident. The police told him his son had died and took him to the to a

33 **Bourhill v Young** [1942] 2 All.E.R. 396. House of Lords.
34 **Chadwick v B.R. Board** [1967] 1 W.L.R. 912
35 **McLoughlin v O'Brian** [1983] 1 A.C. 410 :
36 Compare their respective views on the duty of care in Ann's and subsequent cases regarding which Lord Bridge adopted a more restrictive approach.
37 **Wigg v British Railways Board** (1986). The Times February 4th.
38 **Alcock v Chief Constable of South Yorkshire** [1992] 1 AC 310. 95
39 **McFarlane v Caledonia** [1994] 2 All.E.R 1.
40 **Dooley v Cammell Laird** [1951] 2 Lloyd's Rep 271.
41 **Hevican v Ruane** [1991] NLJ 235.

mortuary to see the body. He became depressed and lost his job and successfully sued the estate of a minicab driver who caused the accident for nervous shock.

Exclusion of liability to undeserving claimants. Whenever the courts are called upon to consider a new category of duty they can have recourse to a very broad test and decide whether or not it would be 'fair and reasonable' in the circumstances to impose a duty of care. A duty of care might unfairly and unreasonably inhibit society's freedom to engage in such an activity or deprive society of the benefits of that activity. Precedent provides a guide to the types of activity where no duty of care is owed because it is not fair or reasonable to impose one. Perhaps even more germaine to the notion of 'fair and reasonable' can be the relationship between the plaintiff and the defendant. The test affords the courts considerable scope for policy decisions and has played an important role in relation to pure economic loss. Relationships have featured in nervous shock claims though not always a decisive element and not linked to the 'fair & reasonable' test.

The Doctrines of Privity of Contract and Consideration have been regarded as fundamental to contract law in the UK. Despite the fact that privity and consideration are not accorded such importance in civil law countries the use of equity and trusts and other devices to circumvent the doctrines has met with limited success. Parliament may provide exceptions to the doctrines but the courts should not do so. The use of the tort of negligence to provide a remedy to third party beneficiaries of contracts as a way of getting round the doctrines of privity and consideration have met with judicial opposition. Thus Lord Keith dissented in **White v Jones** because of the threat to the jus quaesitum in tertio (Privity) doctrine. In the light of **White v Jones** one may speculate as to how many other contracts may be found to impose duties on parties towards third party beneficiaries who provide no consideration which will enable the third party to sue in tort. However, in **Murphy v Brentwood** the tort of negligence was not permitted to overcome the bar to a contract action by those not privy to the contract.

Personal liability and third party wrongdoers. A person should only be responsible for his or her own acts and should not under normal circumstances be held liable for the wrong doings of others. The prison and borstal cases are an example of this. Where a person being detained evades detention and commits damage, usually criminal, to other people's property or person the authorities do not bear prima facie liability for that damage in negligence. There is no general duty to prevent others causing harm. Thus in **Smith v Littlewoods**,[42] it was held that an owner or occupier of land is not normally liable for damage caused by trespassers on his land when they cause fires which spread to adjoining land. There is no duty to keep trespassers out of vacant boarded up property.

An alternative way of approaching this is by invoking the third element of negligence and showing that the chain of causation is broken, and that there is a novus actus interveniens.[43] Thus in **Lamb v Cambden B.C**.[44] the foundations of a house were damaged when council workmen broke a water main The house was occupied by a tenant. The tenant had to leave. The house was boarded up pending remedial work to the foundations. Squatters moved in and damaged the house. The owner sued the council and received compensation for the damage to the foundations. However the damage caused by the squatters was not recoverable from the council. It was not their duty to keep the squatters out. The owner should have taken steps to do that herself.

There are special circumstances, where one person may be held responsible for other people's acts as will be seen from the concept of vicarious liability later where an employer is liable for the acts of his employees and a principal may in certain circumstances be held responsible for acts of his agents which he has authorised and supervised. Such responsibility was taken one step further with the development of occupier's liability. Thus in **Cunningham v Reading Football Club,**[45] where Bristol City supporters tore off lumps of concrete from a stadium and injured Reading Fans and the police, the court held that the Club owed a duty of care to their clients to render the stadium vandal proof. A policeman sued the club for negligent maintenance of the ground since they knew violent fans could use the material as projectiles. The policeman was awarded £258,618 damages.

42 **Smith v Littlewoods** [1987] 1 All.E.R. 710
43 **Dorset Yacht v Home Office** [1970] A.C. 1004
44 **Lamb v Cambden B.C**. [1981] 1 Q.B. 625.
45 **Cunningham v Reading Football Club** [1991].Times L.R. 153

Distinction between Acts and Omissions. The neighbour principle embraces acts and omissions but should they always be treated the same way ? A failure to do something should only be culpable if there is first a legal duty to act. There is no general legal duty to save a stranger in danger, though of course a life-guard or fireman may be under a legal duty to act. Clearly therefore the law has always recognised some distinction between acts and omissions. How much of a distinction should be drawn between acts and omissions ? Is it always possible to tell the difference between an act and an omission ? Depending on the way a concept is expressed it can appear to be a positive act or an omission. For example

a) Where a doctor examining a patient gets a diagnosis wrong one could say either that the Doctor gives a false diagnosis (an act) or that the doctor fails to recognise what is wrong with the patient (an omission). In this situation the defining factor is that the doctor has carried out an examination and has therefore done an act. The act can be subject to a duty of care.

b) Where an onlooker watches a person drown without intervening there is no duty to act, the onlooker has not carried out an act or duty. Since there is no duty to act there is no duty of care. The omission is not culpable.

If a building inspector inspects building work but fails to spot defects, he fulfils the duty to inspect, albeit that he carries out the duty in a negligent manner. If the inspector fails to carry out the duty to inspect he has omitted to carry out his duty. Should the act and the omission be treated in the same manner ? Even if there is a duty to act, is the duty owed to the person suffering loss ? [46] In **Ross v Caunters**,[47] a solicitor took instructions from a client and prepared a will for the client. Despite being advised that the client was very ill the solicitor did not take the will to the client for counter signature before the client died. The prospective beneficiaries of the will successfully sued the solicitor for lost bequests. The solicitor had carried out an act negligently. Similarly in **Smith v Claremont Haynes**,[48] a terminally ill client instructed his solicitor to alter his will to include two relatives. The client died before the solicitor had got around to changing the will. The solicitor was held liable for the relatives losses. Subsequently in **Kecskmeti v Rubens Rabin**,[49] a solicitor failed to point out to his client that the rules regarding the right to survivorship would defeat the intentions in the will. The testator therefore did not make the appropriate arrangements to ensure the prospective legatees would get their promised bequests. The solicitor was held liable for their losses.

In **White v Jones**,[50] a solicitor took instructions from a client but failed to visit and draw up a will or get it signed before the client died. Beneficiaries again successfully sued the solicitor. This time the solicitor had not even started. This was a negligent omission to act. The court found that there was a duty to act owed to the beneficiaries despite the fact that they had no relationship with to the solicitor and no element of reliance since they might not even have known about the instructions for the new will. A duty to act arose out of a professional assumption of responsibility to the plaintiff. The duty to act turned the omission into an actionable tort. Lord Keith dissented objecting to the imposition of liability for omissions. Lord Goff relied on the lacuna in the law which would otherwise allow the solicitor to escape liability whilst Nolan relied on **The Caparo** incremental approach.

The major problem with **White v Jones** is to know in what other circumstances professional people may be deemed to have assumed a responsibility for pure economic loss towards others and who these others might be. Gibbs.J in **The Dredge Willemstaed,**[51] suggested that where A does work for B which if done negligently could reasonably and foreseeably cause loss to particular designated individuals, a duty of care could be owed to such individuals. This formula avoids the imposition of 'liability in an indeterminate amount, for an indeterminate time to an indeterminate class' which was so famously warned against by the U.S. judge Cardozo CJ in **Ultramares Corp v Touche**.[52]

46 See the difference between the outcome of **White v Jones** and **Murphy v Brentwood D.C.**

47 **Ross v Caunters** [1980] Ch 297

48 **Smith v Claremont Haynes** [1991] Times 3.9.91

49 **Kecskmeti v Rubens Rabin** [1992] Times 31.12.92

50 **White v Jones** [1995] 2 W.L.R. 187

51 **The Dredge Willemstaed** [1976]

52 **Ultramares Corp v Touche** (1931) 174 NE 441.

In **Clarke v Bruce Lance** [53] a solicitor was found not to have assumed a responsibility towards a potential legatee and so did not owe him a duty of care. With the help of his solicitor a testator made a will devising a service station to the potential legatee. Later he employed the solicitor to give an option to purchase the station at a fixed price to the tenant of the station at any time before he or his wife died. The solicitor should have pointed out that this was a bad idea since property prices do not stand still and as time passed the value of his bequest to the potential legatee would fall substantially in the event of the tenant exercising the option. The testator died. The potential legatee sued the solicitor for the difference between the fixed price and the option price. The court held that since the option was not intended to benefit the legatee, the solicitor owed no duty of care to him.

The just fair and reasonable test is an additional element but does not help elucidate when responsibility is assumed. In **Hemmens v Wilson Brown,**[54] the defendant solicitor drew up a document on behalf of a client, in the presence of the plaintiff stating that the plaintiff had a right to call upon the client to pay her £110,000 to buy a house. The solicitor explained (incorrectly that the document was akin to a trust. In fact the document was worthless. It was not a contract, since there was no consideration, and not being under seal was unenforceable and no trust was established. The client later refused to honour the promise. The court held that because the client was still alive, justice could be achieved by the client suing the solicitor himself, for failing to create an effective document,. Justice did not require a duty to the plaintiff.

The 'no other way to recover damages or hold the defendant accountable for his conduct' argument applies to most cases where an action for damages in negligence has failed in any case and in many situations does not really seem to be very helpful. The artificiality of the application of this in **Hemmens v Wilson Brown** is evident in that the only person who could sue the solicitor was the client who caused the problem in the first place by refusing to hand over the money. The whole purpose of the document was to provide the plaintiff with a form of guarantee that the money would be made available. It is not clear why the solicitor was not held liable under **Hedley Byrne v Heller** for misrepresentation and bad advice.

In **Home Office v Dorset Yacht Co**.[55] the court had to consider whether or not public policy should provide the Home Office with immunity from liability for the acts of prison officers and borstal officers who negligently carried out their duties in containing prisoners. The court acknowledged that there are occasions when immunity is desirable in the public interest but decided that in the present case the Home Office could not hide behind public policy. The Home Office was sued in negligence for damage, caused to a yacht in a harbour by Borstal trainees who had only been able to escape because of the Borstal Officer's negligence. The boys were on an island. The only way to escape to the mainland was by boat. The boys had a history of prior escapes but the officers went to sleep leaving the boys unguarded and without locking them up. The yachts were a short distance away from where the boys were staying. The court applied the neighbour test and found that the officers owed a prima facie duty of care to persons in the vicinity. However, whether or not the chain of causation was broken, by a novus actus interveniens by the borstal boys, was left to the court of first instance to decide. Whilst there was no general duty owed to the public at large to keep the boys in, the circumstances meant that the yacht owners were 'closely and directly affected' by the failure to keep the boys away. It was virtually inevitable that in order to escape the island the boys had to use a boat.

Lord Reid said Lord Atkin's principle ought to apply unless there was some justification or valid explanation for its exclusion as a basis to the public policy. The suggestion that officers would be reluctant to do anything in future that may entail a risk, was rejected by the court. It did not apply in this case in any case. The exercise of a discretion to release someone on parole would not, if genuinely exercised, result in liability if someone took advantage of the situation and caused damage to another by committing a further criminal offence whilst out on parole.

The neighbour test was applied to an omission in **Dorset Yacht**. Should the test always be applied equally to acts and to omissions without any further qualification ? A theme touched on in the case, which has since been developed elsewhere, speaks of the imposition of a duty of care, in relation to the way statutory duties

53 **Clarke v Bruce Lance** [1988] 1 All.E.R. 364.
54 **Hemmens v Wilson Brown** (1993) 1 All.E.R. 826.
55 **Home Office v Dorset Yacht Co** [1970] A.C. 1004

are carried out by public authorities, is that it should be 'fair and reasonable'. The close proximity of the yachts and the inevitability of their misuse by escaping boys meant that in the circumstances it was 'fair and reasonable'. The 'fair and reasonable' test is a euphemism for public policy and so there was in fact a public policy element to the Dorset Yacht Case. It just so happened that that particular time public policy decreed that a duty should be owed. The problem here is in defining a test for 'fair and reasonable'. If there is none then it is a discretion open to the court and the existence or otherwise of a duty of care is unpredictable. In **Smith v Littlewoods**[56] Lord Mackay stated that a very high degree of foreseeability of harm resulting to the plaintiff is required before a duty can be imposed for nonfeasance and a relationship of proximity is vital.

Exclusion of liability for Pure Economic Loss. As a general policy, purely economic interests are not protected by the tort of negligence. Some torts such as Conversion, Interference with lawful business etc do protect economic and business interests but by enlarge the tort of negligence does not do so. The law of contract protects the anticipated profits from a commercial agreement from the consequences of breach of contract and compensates for the sale of damaged goods.

The Tort of Negligence was developed to provide compensation for physical damage to the person, chattles and realty. In assessing the damages for physical loss the court can also make an award for any economic loss consequent on the physical loss. Thus if a person is injured in an accident he can recover for pain and suffering, hospital bills, damaged clothes and lost earnings whilst incapacitated. If physical damage is caused to an interest protected by the tort of negligence, for instance a car is damaged in an accident by the negligent act of another, the car owner can recover the cost of repairing or replacing the car and any economic loss directly consequent to that physical loss such as hiring a car until the repair or replacement is effected. Causation and remoteness, the third element in the tort of negligence will prevent recovery for economic loss which is not a direct consequence.

If a person suffers economic loss without physical loss this is termed pure economic loss. The general rule is that the courts exclude liability for this loss to preserve funds for those who have suffered physical and other direct consequential loss. If allowed to recover the defendant's resources could be seriously depleted leaving little or nothing for the victims of physical loss, since large numbers of people may suffer some form of economic loss from a single incident. Thus, the employer of the injured person discussed above might suffer economic loss by being deprived of his employee's services, but the loss is not recoverable.

A simple formulation of this is to say that where a third party suffers economic loss because of negligent physical damage to someone else's property, the wrong doer owes a duty to the owner of the property but not to the third party.[57] What does and does not amount to physical damage to the plaintiff's property is in some respects rather artificial and involves some rather fine distinctions being drawn by the courts.

1) At the time of writing under English Law the plaintiff must have owned the property at the time when the negligent act took place. If he later acquires the property and the fault then comes to light he cannot sue for damages in respect of repairing the fault. The losses are deemed to be purely economic even though the result is that the property starts to disintegrate. In tort, the normal limitation time in which to commence a legal action starts to run from the time damage occurs. However, the limitation time may be put into cold storage in the event of latent damage so that it only starts to run from the time that the damage becomes evident. None the less if the plaintiff did not own the property at the time when the negligent act took place he still cannot sue. In **Bryan v Maloney**,[58] the Australian Court treats this as physical loss clearing the way for recovery by subsequent owners of property for damage to that property incurred by negligent construction.

2) In **The Aliakmon,**[59] a plaintiff who had agreed to buy goods, took constructive possession of them and had accepted the financial risk of damage to goods in his constructive possession but had not yet become the owner of the goods at the time that they were negligently damaged was not able to

56 **Smith v Littlewoods Organisation** [1987] A.C. 241

57 See **Cattle v Stockton Waterworks Co** (1875) L.R. 10 Q.B. 453. and **Weller v Foot & Mouth Research Institute** [1965] 3 All.E.R. 560.

58 **Bryan v Maloney** (1995) 128 A.L.R. 163 High Court of Australia

59 **The Aliakmon** [1986] A.C. 786

recover for his economic losses. He was under a duty to pay the seller the full price for damaged goods. The seller did not have to reimburse him since the goods were in good order when delivered into the plaintiff's constructive possession.

The artificiality of this is again evident in that under **Inglis v Stock,**[60] he is deemed to have a legally insurable interest and if insured could have claimed under the policy for his loss. However, the insurance company in subrogation of the policy holder's legal rights would not be able to recover from the wrong doer. The seller could recover but has not suffered any loss. Under the restated rule that one person can recover for the losses of another in **Dunlop v Lambert,**[61] **The Albazero** [62] and **Linden Gardens Trust v Lenesta Sludge Disposals** [63] a seller could have recovered the plaintiff's losses but had no incentive to expend time and effort in doing so. The refusal of a remedy in tort on the basis that someone somewhere could hold the wrongdoer accountable for his conduct is as equally superficial here as it is in **Hemmens v Wilson Brown**.[64]

3) The purchaser or consumer/user of defective goods or property suffers pure economic loss only, in relation to the seller and manufacturer of the goods regarding the damage to the defective goods or property. If anything else or anyone else besides the defective goods or property is damaged this may be deemed physical damage. In **Donophue v Stevenson,** M'Alister's illness was physical loss and recoverable but the cost of a replacement bottle of ginger beer was purely economic and not recoverable. If she had been sick over her dress and damaged it she could also have recovered for the physical damage to her dress.

Again this can be very artificial. If a person uses a fridge with a negligently installed defective switch and receives an electric shock, that person can recover for the shock but the cost of replacing the switch is purely economic and not recoverable in tort though it would be recoverable in contract if one exists between the fridge user and the seller/manufacturer. It is considered that the damage / defect to the goods was caused / created during manufacture while it still belonged to another. If the switch causes a fire and the fridge sustains further damage this is still pure economic loss. In common parlance one might consider that there is in fact physical damage to the person's property regarding the additional damage when the fire occurs. The courts at present operated on the premise that the fridge and the switch are not separable and are part of one distinct object. If the fire damages other property actual physical loss is suffered and this is recoverable.

4) Negligently defective equipment installed in a building during construction may or may not, depending on the method of procurement, result in a right of recovery by the owner for damage to the building.[65] Compare the following :-

The plaintiff engages a builder to build property complete with central heating. The central heating system is defective and after taking possession of the building causes a fire which destroys the building. The loss is purely economic and cannot be recovered in tort. Recovery in contract will depend upon the terms of the contract. For many years the classification of the loss as purely economic did not matter because concurrent liability in tort and contract was not recognised. Now that this bar to an action in tort has been removed by **Henderson v Merrett** the classification becomes even more important, though of course the scope of the duty of care would still be governed by legally permissible / reasonable exclusion clauses in the contract even if reclassified as actual physical loss.

The plaintiff engages a builder to build a property. After taking possession he engages a firm of heating specialists to install central heating. The system is defective and causes a fire which destroys the building. The plaintiff can recover for the cost of the damaged building in tort but not for the central heating system itself. Again there may be recovery in contract for the system depending on the legally permissible / reasonable terms of the contract.

60 **Inglis v Stock** (1885) L.R. 10 App.Cas. 263. House of Lords.

61 **Dunlop v Lambert** (1839) 7 ER 824

62 **The Albazero** [1976] 3 All.E.R. 129

63 **Linden Gardens Trust v Lenesta Sludge Disposals** [1993] 3 All.E.R. 417

64 **Hemmens v Wilson Brown** [1993] 1 ALL.E.R. 826.

65 **D & F Estates v Church Commissioners** [1989] A.C. 177, is very illuminating on the complex structure thesis and the differences between main contractors, sub-contractors and designated subcontractors regarding physical loss and pure economic loss.

Should public policy allow a plaintiff to recover for pure economic loss ? The wheel has gone full circle from the early cases such as **Cattle v Stockton** which declared that physical loss had to be sustained before an allied claim for economic loss could be mounted, to cases which suggested that pure economic loss alone could be recovered for such as **Anns v Merton**, **Junior Books v Merton** and **D & F Estates**, back to the status quo. It appeared to have been re-established in The Aliakmon that, with the exception of the Negligent Misstatement type situation, physical loss must be suffered first before the courts will give damages for economic loss in negligence actions. However, the scope of negligent misstatement seems now to have significantly broadened to a position where it is hard if not impossible to recognise the original formula laid down in **Hedley Byrne v Heller** in cases such as **White v Jones** and **Spring v Guardian Assurance**. Whilst the **Anns v Merton** two tier test has been savaged by the House of Lords it may eventually resurface like the phoenix. **Junior Books** has been limited to its specific facts but has not been overruled. The complex structure thesis in **D & F Estates** is still being used by some judges.

Ironically, whilst it was criticism of **Anns v Merton** by the Australian Court which prompted the English onslaught on the Anns' two tier test the Australians now appear in the vanguard of a movement to rehabilitate liability for pure economic loss where there is a limited category of potential claimant. Whilst the English courts have only so far applied pure economic loss to advice situations, an Australian court in **Bryan v Maloney** awarded damages for pure economic loss to a subsequent owner of property for the cost of repairing defects in the building resulting from the builder's negligence. The circle from **Stockton** to **Anns** and back to **Stockton** has been completed and the cycle is now starting all over again.

In **Cattle v Stockton Water Works,**[66] the plaintiff had a contract to build a tunnel for a landowner. The defendant negligently allowed water to escape onto the land. The cost of building the tunnel rose because of flooding. The plaintiff did not own the land and had no property damaged by the water. His loss was deemed purely economic and his claim against the defendant failed.

Weller v Foot & Mouth Research Institute,[67] involved a situation where The institute allowed a virus it was experimenting on to escape and it infected cattle in the adjoining area. The farmers were able to claim for loss of livestock. The government passed an order preventing all sales and movements of livestock from the area till the epidemic was stamped out. However, when the plaintiff cattle auctioneer sued the Institute for loss of livelihood but failed. His loss was purely economic.

Similarly, in **Spartan Steel v Martin**,[68] road contractors negligently severed a power cable and cut of the electricity to a foundry. It took 14 hours for the power to be restored. Metal in a furnace was damaged loosing the plaintiff £368 and £400 profit. Loss of the use of the furnace resulted in a further loss of £1,767 profit. The court held the contractors liable for the £368 of physical damage and £400 consequential economic loss. The £1,767 pure economic loss was irrecoverable.

However, in **Anns v Merton L.B.C.**[69] two original long lease holders and five others who had purchased long leases from original leaseholders of a two storey block of residential property sued the builder and the local authority because inadequate foundations caused structural damage to the property. The council had negligently failed to supervise the foundation work and had not made the builders remedy the defects before it was too late. The House of Lords, following **Dutton v Bognor Regis UDC.**[70] found the council owed owners and occupiers of property a duty of care to make sure builders comply with byelaws. Recoverable damages covered all those losses, which foreseeably arose from breach of the duty. The two major issues were 1) Whether a statutory power or duty could give rise to a duty of care in the tort of negligence and 2) whether pure economic loss relating to damage to the subject matter could be recovered.[71]

66 **Cattle v Stockton Water Works** (1875) L.R. 10 Q.B. 453

67 **Weller v Foot & Mouth Research Institute** [1966] 1 OB 569.

68 **Spartan Steel v Martin** [1973] Q.B. 27.

69 **Anns v Merton L.B.C.** [1977] 2 All.E.R 492

70 **Dutton v Bognor Regis UDC** [1972] 1 Q.B. 373

71 **Anns** has been substantially overturned and must now be read in the light of **Murphy v Brentwood**.

In **Junior Books v Veitchi,**[72] nominated specialist composition flooring contractors negligently laid a floor in a new factory being built by contractors for the plaintiff. Production had to be halted in order to replace the floor resulting in pure financial loss replacing the floor and from lost production. Following **Anns v Merton** the sub-contractors were held liable for the loss. The following were considered of crucial importance in finding a duty of care was owed to the plaintiff by Lord Roskill :-

1) The defendants were nominated subcontractors.
2) The defendants were specialists in flooring.
3) The defendants knew what products were required by the plaintiff and the main contractors and specialised in the production of those products.
4) The defendants alone were responsible for the composition and construction of the flooring.
5) The plaintiffs relied on the defendant's skill and experience.
6) The defendants as nominated sub-contractors must have known that the plaintiffs relied on their skill and experience.
7) The relationship between the parties was as close as it could be short of actual privity of contract.
8) The defendants must be taken to have known that if they did the work negligently the resulting defects would at some time require remedying by the plaintiffs expending money on the remedial measures as a consequence of which the plaintiffs would suffer financial or economic loss.

In **The Aliakmon**,[73] a shipowner carried steel coils, belonging to a vendor, in a damp ship. The coils rusted and were significantly devalued. A reservation of title clause meant that whilst risk in the coils transferred on shipment to the plaintiff, ownership in the coils remained in the vendor during the voyage when the damage was caused. The plaintiff's claim in tort failed because his loss was purely economic. The contract of carriage was negotiated and paid for by the vendor so the plaintiff could not sue in contract. The goods were in good order on shipment so the vendor was entitled to be paid in full by the plaintiff who therefore bore all the loss.

In **Curran v Northern Ireland Co-ownership Housing Association,**[74] the Housing Association gave the owners of a house an improvement grant to build an extension. The plaintiff bought the house and claimed compensation from the Association because the extension was so defective that it required rebuilding. The court held that the Association had no control over the manner of construction and so owed no duty of care to the plaintiff. In order to impose a duty three requirements were set out :-

1) The statutory power must be directed to protecting the public or the part to which the plaintiff belongs from the danger which is manifested.
2) The danger must have been potentially remediable by the proper exercise of the power; and
3) The fact that the power is not exercised or is exercised negligently must have created a hidden defect not discoverable or remediable before the onset of the damage.

In **D & F Estates Ltd v Church Commissioners for England,**[75] main contractors building a block of flats sub-contracted the plastering out. After occupation the plaster started to drop off. The contractor was held not liable in tort for the pure economic loss suffered, in having to do restatement work to the premises. The builder only owed a duty to employ competent sub-contractors. Thus, in order to get around **Anns v Merton,** the court had to draw some fine distinctions. Lord Bridge, without enthusiasm put forward the complex structure thesis, namely 'It may well be arguable that in the case of complex structures .. one element of the structure should be regarded ... as distinct from another so that damage to one part of the structure caused by a hidden defect in another may qualify to be treated as damage to other property.'

In **Murphy v Brentwood** he later dismissed the argument as artificial but Murphy leaves open a window of opportunity for liability in exceptional circumstances regarding specialist contractors and sub-contractors where a degree of reliance on their expertise exists.

This invokes

72 **Junior Books v Veitchi** [1983] 1 A.C. 520 Note that some elements of the case no longer apply in the light of **Murphy v Brentwood**.

73 **Leigh & Sillavan Ltd v Aliakmon SS. Co Ltd (The Aliakmon)** (1986) A.C. 786.

74 **Curran v Northern Ireland Co-ownership Housing Association** [1987] A.C. 718.

75 **D & F Estates Ltd v Church Commissioners for England** [1988] 2 All.E.R. 992.

a) the **Junior Books v Veitchi** type situation,
b) the **Hedley Byrne v Heller** reliance type cases and
c) the liability of consulting engineers for the defective design and construction of a chimney which later had to be demolished and rebuilt in **Pirelli General Cable v Oscar Faber**.[76]

It is difficult to establish and liability was denied in **Greater Nottingham Co-Op Society v Cementation Piling & Foundations Ltd.**[77] because the relationship with the sub-contractor was not close enough but presumably there must therefore be circumstances when it would be.

In **Murphy v Brentwood D.C**.[78] the plaintiff had bought a new semi-detached house with a raft foundation in 1970, that had been built on an in-fill site. The design was submitted to the council under building regulations for approval and independent consulting engineers recommended the council approve the plan which they did. The defective design of the raft foundation resulted in cracks in the foundation, differential settlement, cracks in walls and fractured gas and soil pipes. The plaintiff sold the house at a loss of £35,000 because of the defects and sued the council. The trial judge and the Court of Appeal found the council liable following **Anns v Merton** but the council successfully appealed to the House of Lords. The House of Lords held that the council did not owe a duty of care to the plaintiff in relation to the pure economic loss. Lord Oliver stated that 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not.'

The general principles, set out in the case, whilst dealing with the council's duties have a broader application and a builder is equally not be liable in tort for pure economic loss as demonstrated in **D.o.E v Thomas Bates,**[79] heard at the same time as **Murphy v Brentwood**. The builder used lightweight blocks instead of load bearing dense concrete blocks to build pillars supporting the next floor. The court held that the building was not unsafe but merely defective in that it could not hold the weight it was designed for lowering the value of the property. Restatement work was therefore purely economic. Major elements of **Anns v Murphy** and **Dutton v Bognor Regis** are therefore overruled. There is no reason however to conclude that the council does not still owe a duty of care in relation to actual physical loss, either to other property or physical injury which might occur if a building suddenly and unexpectedly subsides and for instance ruptures a gas pipe so causing an explosion. Once a defect is detected however users of the property should take steps to avoid injury to themselves or other property. **D & F Estates** was not overruled by **Murphy v Brentwood**.

Another theme canvassed widely is liability for remedial work to defects that impose an obligation on the owner of property to take preventative measures to eliminate danger to the public which results from the negligence of someone involved in the construction process. Lord Bridge envisaged continuing liability for the economic costs of carrying out this work. Whilst the danger notion is not universally recognised it is implicit in **D.o.E. v Thomas Bates** in that the court based its decision partly on the lack of danger. The Australian court rules that such a danger is foreseeable in **Bryan v Maloney,**[80] where, under a commercial agreement Bryan, a builder, built a house for his sister in law in 1979. Mrs Maloney, the 3rd owner bought the house in 1986 a survey indicating that it was sound. Six months later cracks appeared and substantially damaged the fabric of the house. The footings were inadequate to withstand seasonal changes in the clay soil. Mrs Maloney successfully sued the builder in the tort or negligence. 'It is obviously foreseeable by such a builder that the negligent construction of the house with inadequate footings is likely to cause economic loss to the owner of the house at the time when the inadequacy of the footings becomes manifest. When such economic loss is eventually sustained and there is no intervening negligence or other causative event the causal proximity between the loss and the builder's lack of reasonable care is unextinguished by either lapse of time or change of ownership.'

76 **Pirelli General Cable v Oscar Faber** [1983] 2 A.C. 1.
77 **Greater Nottingham Co-Op Society v Cementation Piling & Foundations Ltd** [1988] 2 All.E.R. 971
78 **Murphy v Brentwood D.C**. [1990] 2 All.E.R. 908.
79 **Department of the Environment v Thomas Bates** [1991] 1 A.C. 499. House of Lords.
80 **Bryan v Maloney** (1995) 128 A.L.R. 163 High Court of Australia.

The inter-relationship between contract and tort and economic loss. The law of contract provides compensation for economic loss where a loss is the foreseeable consequence of a breach of contract and was in the contemplation of the parties at the time that the contract was made. The aim of damages in contract is to put the parties in the position that they would have been in if the contract had been performed in accordance with the agreement. A vendor must compensate a purchaser for the cost of replacing defective products or of purchasing an alternative if the product is not delivered where there is a difference between the contract and the available market price. Lost profit from being deprived of the use of a product or the benefit of a service is often recoverable where the vendor should have had such loss in his contemplation at the time the contract was concluded.[81]

The tort of negligence was not intended to interfere with the contract relationship and to provide an alternative method of claiming damages for breach of contract. In **Verrity & Spindler v Lloyds Bank,**[82] Lloyds bank advanced money to the plaintiffs to buy and improve a town house as an investment. The bank encouraged the couple to take out the loan. The property boom crashed and the couple were left with negative equity. The couple could not keep up with mortgage payments and had to sell the house but were left with a £70,000 debt to the building society. The bank was held liable. A contract action would have failed since the loan was carried out and the contract itself fulfilled in every respect. This highlights the difference between the areas of liability in contract and tort regarding the same transaction.

Since **Henderson v Merrett Syndicates** in 1994, it is clear that even the parties to a contract can claim damages in tort for some of the consequences of negligence acts, of the other party to the contract. The pure economic loss principle however will still exclude liability in the tort of negligence for the economic loss incurred by the supply of defective goods. The contract action is still the only method of recovering for these losses. The pure economic loss principle would no longer be sufficient to exclude liability in the tort of negligence for economic loss incurred by a contract involving only the provision of information. Note again the artificial nature of the distinction. The provision of a port folio containing bad advice gave rise to liability because the information, not the paper it was printed on, was of the essence of the contract. Property built on the basis of bad advice does not give rise to liability against the builder because it is the property, which is of the essence of that contract, not the advice. Thus, a surveyor who receives a small amount of money for his services carries far greater legal responsibility than the building contractor and his team of professional advisors, who will earn substantial sums from the development.

The inter-relationship between contract, tort and exclusion clauses. The terms of a contract can, provided statute and common law does not require otherwise,[83] include a liquidated damages clause or even exclusion clauses to limit or exclude the scope of liability for damages for breach of contract. Permitted exclusion clauses in a contract can exclude both contractual and tortious liability. It would be unfair and unreasonable to enforce a duty of care in a situation where the parties had expressly stated that no such duty exists, so such clauses bind the parties to the contract in respect both of contract and tort actions.

The problem that has arisen is where third parties not privy to a contract suffer injury. Provided that third parties are aware of the exclusion clause it is possible for someone to limit or exclude the scope of their duty of care in tort. The exclusion clause will not work in the absence of notice of the exclusion clause. The courts have applied the Unfair Contract Terms Act 1977 to the non-contractual third party however and the clause or notice will be void if unreasonable under the Act.[84] Consumer Protection legislation also imposes compulsory duties on manufacturers and suppliers in respect of the safety of consumers even where they do not buy the product themselves.

81 See **Hadley v Baxendale** (1854) 9 Ex. 341 : **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd** [1949] 2 K.B. 528 : Sale of Goods Act.

82 **Verrity & Spindler v Lloyds Bank** [1995] Times Law Reports. September.

83 eg U.C.T.A. 1977 ; Defective Premises Act 1972 (as amended in 1988) ; The Sale and Supply of Goods Act 1994 ; The General Product Safety Regulations 1994 The Sale of Goods (Amendment) Act 1994 ; The Directive on Unfair Terms in Consumer Contracts 1999. Up to date the E.C. has only got around to making regulations and directives in respect of consumers but it is anticipated that at some time in the future regulations regarding business relations will also be forthcoming. See also **Photo Productions Ltd v Securicor Transport Ltd** [1980] A.C. 827. House of Lords.

84 See in particular **Smith v Eric Bush** & **Harris v Wyre Forest D.C**. [1989] 2 All.E.R. 514 and **Yianni v Edwin Evans** [1981] 3 All.E.R. 592.

The exception to the bar on recovery for pure economic loss. Should there be a blanket exclusion of liability for pure economic loss ? Where there are no physical loss sufferers to protect, the rationale for the policy disappears. The most common example of this is regarding advice and the provision of professional services. Bad advice can sometimes result in physical injury. Advising someone to do something when it is not in fact safe can result in death and personal injury and damage to property e.g. telling someone it is safe to cross the road when it is not or to manoeuvre a vehicle or to do something in a particular manner, for example by designing an unsafe building, which collapses on someone and injures them. Much advice however is given which only has financial repercussions. Lawyers, accountants, investment consultants, estate agents to name but a few can cause severe financial problems for clients and third parties if their advice is bad. These professional advice givers earn their living giving advice. If there is no duty of care in relation to the quality of advice given because losses suffered are purely economic then the law fails to hold these people accountable. Clearly such people could not be required to guarantee success in relation to advice given but surely they should exercise a reasonable degree of care when formulating their opinions and should be accountable for a failure to do so ? **Hedley Byrne v Heller** recognised the problem and made an exception to the pure economic loss exclusion of liability policy.

The duty of care principle expounded in **Hedley Byrne v Heller** was carefully constructed by the courts to afford a remedy only to persons having a close proximate special relationship with the advice giver and imposed a requirement of reasonable reliance on the advice giver's expertise and at first covered a very limited class of claimants. At the time **Hedley Byrne v Heller** was espoused there was no concurrent liability in tort and contract. In the light of **White v Jones** the scope of liability for not only negligent misstatement but also for professional negligence in general appears to be much wider. There appear to be a number of special situations when elements of the Hedley Byrne test can be dispensed with. Indeed there may not have to be a direct relationship at all or even reliance. The mere fact of being professional coupled with a restricted class of claimant may be sufficient to establish a duty and liability.

The duty of care and the tort of negligent misstatement. In **Hedley Byrne v Heller**,[85] a bank told an advertising agency - in response to an inquiry - that a mutual client was financially sound - whereas the client was close to bankruptcy. The agency invested £20,000 in advertising for the client who went bankrupt and couldn't pay the agency. The agency claimed against the bank for negligent misstatement. The court was prepared to award in favour of the bank but did not do so because the bank gave the information on the basis that no legal liability would be incurred for the accuracy of the information. Similarly, in **Mutual Life v Evatt,**[86] Evatt, an investor in Palmer Ltd asked Mutual Life about the safety of his investment because Mutual Life was a parent company of Palmer. He felt that Mutual Life would be in a good position to give him such advice. The advice was negligent but Evatt relied on it to maintain his investment and to increase it. He lost money. His claim for compensation from Mutual Life for the negligent advice failed because Mutual Life were not in the business of giving such advice. The court stated that before a duty exists there has to be

1) reliance on a statement
2) reliance has to have been reasonable
3) the advice giver should have a duty to give the advice or at least be aware of the fact that his advice will or is likely to be relied upon
4) the advice giver must have held himself out as expressly or impliedly to be a purveyor of such advice with either special skill or having access to information which is not generally available.

Negligent misstatement and pure economic loss. The courts have accepted that where, a person engages in an advice based industry a policy of only permitting physical loss based claims would permit advice givers to operate with impunity and without exercising due care so an exception to the rule that pure economic advice cannot be claimed exists for advice givers. Thus the courts would have been prepared to allow the claim in Hedley Byrne v Heller even though the loss to the advertising agency was purely economic.

85 **Hedley Byrne v Heller** [1964] A.C. 465

86 **Mutual Life v Evatt** [1971] A.C. 793.

Negligent misstatement and third parties. The problem can occur whereby a person gives advice to a party for a specific purpose and third parties rely on that advice to their detriment. The initial receiver of the advice may well have a contractual relationship and the ability to recover for breach of contract but the privity rule would prevent third parties claiming in contract. Nonetheless it might be quite normal for third parties to rely on the advice as well. If such persons are to recover for resultant loss from reliance on the misstatement their cause of action can only be founded in negligence.

In **Yianni v Edwin Evans**,[87] the court had to consider whether building surveyors who had negligently valued property for a building society should be held accountable to the building society's clients. A surveyor valued a house at £12,000. The society allowed the purchaser to see the valuation. The society relied on the valuation in order to assess the degree of risk that they were taking in making the loan. The client relied on the valuation to reassure himself that the house was worth buying. The house later needed £18,000 to be spent in repairs. Park J held that there was a sufficient relationship of proximity between the client and the surveyor, for a duty of care to exist and there was reliance because surveyors are well aware that house buyers rely completely on the valuation survey and do not have a full structural survey carried out.

Smith v Eric Bush,[88] involved a building society and a survey prior to a mortgage. In **Harris v Wyre Forest D.C**.[89] a survey was made before the council made an advance. The lender was held vicariously liable for the misstatement of a valuer who was his servant. In both cases the facts were very similar to **Yianni** above. The valuation surveys were commissioned by the lenders but were paid for by the purchasers. Harris's house suffered subsistence. Structural alterations to Smith's property undermined part of the structural fabric. There was no other damage and so loss was purely economic. In **Harris v Wyre** there was a disclaimer clause printed on the valuation that stipulated that "valuation has been prepared solely for information for Wyre District Council". The disclaimer was held to contravene the U.C.T.A. 1977 and was therefore deleted by the court.

The degree of reliance and its reasonableness is important. The court seems to have been prepared to protect an individual who had relied on a valuation to buy a home and suffered loss, but this is unlikely to be extended to business developers who rely on reports produced for other purposes to go ahead with business projects when they should safeguard themselves by having proper reports produced exclusively for their own purposes and where the expense of such reports is not customarily avoided as it often is with the house purchaser. In particular, the standard of reasonableness under the U.C.T.A. is far higher for consumers than for non-consumers so a disclaimer clause could well work between businesses. It would appear that as English law stands at present, neither in **Harris v Wyre** nor in **Smith v Bush** could the owners have sued builders, architects or engineers who might have been responsible for the defects in the properties but a surveyor who would only receive between £30 - £100 for his survey is liable.

In both **Ross v Caunters** and **White v Jones** solicitors were held for slightly different reasons to owe disappointed beneficiaries a duty of care to execute wills properly and promptly according to instructions given by respective the testators. However, there was no duty owed apparently in **Hemmens v Wilson Browne**,[90] regarding a solicitor's explanation to a third party of the effect of a piece of paper prepared buy the solicitor stating that his client would give the third party a large sum of money. The major difference seems to be that society relies on solicitors to execute wills to provide for the succession of property and so it is important to make sure solicitors are accountable for the way they do this work. If this is the distinction it is very clearly a policy decision by the courts.

Those persons acting outside a contractual duty, need to do so subject to express exclusions of liability. Whilst professionals will within the conduct of their profession have adequate procedures, it is in off guarded moments that they might expose themselves to undue liability. Thus in **Chaudhry v Prabhakar**,[91] a car expert and friend recommended a car to the plaintiff. Asked if the car had been in an accident, he said it

87 **Yianni v Edwin Evans** [1982] Q.B. 438 :
88 **Smith v Eric Bush** [1989] 2 W.L.R. 790
89 **Harris v Wyre Forest D.C**. [1989] 2 W.L.R. 790
90 **Hemmens v Wilson Browne** [1995] Ch.223.
91 **Chaudhry v Prabhakar** [1988] 1 W.L.R. 29

had not, though it had. An expert should have known this. He was held liable for the friend's loss

Knowledge of an intention to rely on advice is essential. In **Candler v Crane. Christmas & Co**.[92] a business advertised in the press for someone to make a capital injection. The plaintiff asked to see accounts and balance sheets before making a commitment. Crane, Christmas & Co the company accountants and auditors were preparing accounts for the company and their representative met Candler and showed him a draft version of the accounts, knowing full well why he wanted to see them. The finalised accounts were in the same form as the draft. The accounts had significant inaccuracies in them. Candler invested £2,000. The chairman withdrew the money and following a winding up petition Candler lost all his money. He sued the accountants stating that if the accounts had revealed the true position he would not have invested a penny. The claim failed with only Denning L.J. supporting the action. However, in **Caparo v Dickman**,[93] Lord Bridge acknowledges that the case was wrongly decided and that Candler should have recovered.

In **Caparo v Dickman** Fidelity plc shareholders relied on a 1984 audit of the company, conducted by the defendants, to increase their shareholding and made a successful take over bid for Fidelity. They claimed that the accounts overstated the trading profit of Fidelity by nearly £2m. Liability was denied because of the indeterminate class and number of that might make a claim. Even though Lord Bridge accepted that Candler should have recovered the distinction is that the accountants knew specifically about him and of his intention to rely on the accounts to make an investment. Compare the liability of directors and accountants in the tort of deceit under **Derry v Peek**[94] where deliberate false statements made to induce people to buy shares give rise to liability. The wide class of person potentially affected does not appear to adversely affect the duty of honesty in the same way as it does the duty of care. In **Morgan Crucible v Hill Samuel**,[95] accountants owed a duty of care to an identified bidder when preparing and showing accounts intended to influence his conduct as a take-over bidder and could be held liable for his losses due to inaccurate accounts.

A very similar set of circumstances to **Morgan Crucible v Hill Samuel** occurred in **James McNaughton Paper Group v Hicks Anderson & Co.**[96] but the court stated that there was no duty of care owed. The plaintiffs were interested in taking over another company. Draft accounts in August / September and certified accounts in January contained errors. Relying on the drafts and certified accounts the plaintiffs acquired the company. Presumably on the facts the degree of knowledge of the accountants must have been in some way distinguishable from the facts in **Morgan**. The court identified guidelines for the imposition of liability :

1 The purpose for which the statement was made.
2 The purpose for which it was communicated.
3 The relationship between adviser, advisee and any third party.
4 The size of any class to which the advisee belonged.
5 The state of knowledge of the adviser.
6 Reliance by the advisee.

Despite the plethora of guidelines available from the courts it is likely to be a finding of fact in each case which determines whether or not a duty of care exists in any new category of claim.

Reliance on advice given by public officials : Persons may indirectly give advice, in the course of fulfilling a statutory duty or discretion, imposed on them by statute. Thus local authority surveyors, those dealing with planning permission and in regulating the construction industry such as building inspectors who approve foundations and public record keepers all provide assurances to the public at large that certain standards or conditions have been complied with and that property is in a safe condition or that a certain state of affairs exists. To what extent if at all do these public officials owe a duty of care to the public at large, to ensure that they carry out their duties in a careful manner or that the records are accurate ?

92 **Candler v Crane. Christmas & Co** [1951] 2 K.B. 164.
93 **Caparo v Dickman** [1990] 2 A.C. 605
94 **Derry v Peek** (1889) 14 App.Cas. 337
95 **Morgan Crucible v Hill Samuel** [1991] Ch 295.
96 **James McNaughton Paper Group v Hicks Anderson & Co** [1991] 2 Q.B. 113.

In **Ministry of Housing v Sharp**,[97] the Ministry paid a Mr Neal £1,800 compensation when his application for planning permission was refused. If at any time permission were to be granted the £1,800 was to be repaid and a charge was placed on the property on the local land charges register. Parsons bought the property and applied for planning permission, which was granted. Sharp, a council employee negligently told Parsons that the registry was clear. The Ministry could not reclaim the money from Parsons and made a successful claim against Sharp and the Council. The register exists to protect registered interests and charges so a duty of care is owed for breach of the statutory duty.

In **Anns v London Borough of Merton,**[98] a local authority was held liable for failing to spot the negligent work a builder when carrying out a building inspection. The council argued unsuccessfully at the time that it had discretionary powers and if it exercised these it should not be held negligent subsequently. The court held that once the council decided to act, it had to do so with proper care. As we now know the council would no longer be liable under **Murphy v Merton B.C**. Why is it that this particular statutory duty to inspect foundations does not give rise to a duty of care ?

It will be remembered that Lord Wilberforce set out a two tier approach to establishing the existence or otherwise of a duty of care which appeared to be universally applicable. [99] Lord Wilberforce discussed the provisions of a local bye-law subsequent to the Public Health act 1936 setting standards for foundation work. Regarding undetected faults in the foundations Wilberforce states that as the building is intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in immediately after construction. What then is the extent of the Local Authority's duty towards these persons ?

Wilberforce said *"I do not think that a description of the council's duty can be based on the neighbourhood principle alone, or on merely any such factual relationship as control ... So to base it, would be to neglect an essential factor which is that the Local Authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law. The problem which this type of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court. It is in this context that the distinction sought to be drawn between duties and mere powers has to be examined*."

Lord Wilberforce concludes that where an authority has a discretion whether or not to act the manner of exercise of the discretion may in appropriate circumstances be challenged in public law.. The immunity from challenge regarding exercise of discretion is not absolute. That being so, the necessary premise for the proposition, 'if no duty to inspect, then no duty to take care in inspection' vanishes. He concludes that whether an authority acts under a power or a duty the result is the same. Providing there is no policy reason for excluding a duty of care then the authority can be liable for negligently carrying out the power or duty.

Subsequent cases have tended to be more restrictive. The criticisms of Lord Wilberforce's approach [100] being that in the first tier 'the proximity test' the approach was too broad and, consequently, left too much to the second stage which was based upon policy. The decision in **Junior Books v Veitchi** used **Anns v Merton** as a method of permitting pure economic loss. This led to a reappraisal and abandonment of **The Anns Test** which no longer represents the correct general approach to deciding the existence of a duty of care. The actual problem with **The Anns Test** was that subsequent judges relied on a literal approach to the first test and limited the scope of their inquiry to a question of foreseeability, relegating the proximity element of the test to a secondary role. Since **The Aliakmon** the proximity test has been elevated to a more prominent position making it harder to prove the existence of a duty in a novel situation especially in relation to pure economic loss and misstatement.

97 **Ministry of Housing v Sharp** [1970] 2 Q.B. 223

98 **Anns v London Borough of Merton** [1978] A.C. 752. House of Lords

99 "...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".

100 See Lord Bridge's judgement in **Curran v Northern Ireland Co. Ownership Housing Association Ltd**. [1987] A.C. 718

Murphy v Brentwood has now overruled the **Anns** two tier test and specifically overrules **Dutton v Bognor Regis** and all cases based on it, regarding local authority liability, though the basis of the decision at least in Lord Keith's speech centres on pure economic loss and does not really explain why an authority should not be liable apart from concluding that rate payers should not have to fund local authority insurance policies. Lord Keith even admits that without such liability there is no way of holding the authority accountable for the way it carries out its duties but does not feel this is of overriding importance. We are left with an anomalous distinction regarding both private individuals and local authorities. The classification of damage as being 'pure economic loss' can be fatal to an action. However, there is in ordinary parlance physical loss where a building is damaged. If the Australian line in **Bryan v Maloney** is accepted, then the pure economic loss distinction may eventually be dismantled. Nonetheless the statement in **Murphy v Brentwood** that Local Authorities do not bear liability under a duty of care in respect of public duties and powers remains, minus its major justification, which was general in application and not restricted to public authorities.

Where does this leave public bodies in relation to negligent misstatement ? Do they owe a duty of care or are all authorities always excused liability under **Murphy v Brentwood** ? Or does the line of liability based on Hedley Byrne v Heller remain intact ? In situations where there is no physical damage an authority may still be liable. Presumably **Ministry of Housing v Sharp** which preceded Anns v Merton and Dutton is not affected by Murphy v Brentwood yet the loss was also purely economic. In **Lawton v BOC Transhield**[101] it was held that an existing or former employee owes a duty of care when writing a reference for a colleague, to avoid careless misstatements which might result in him being unable to find subsequent employment. In the event the unfavourable reference was not inaccurate. The House of Lords confirmed the **Lawton** duty of care **Spring v Guardian Assurance**[102] in respect of job references. Is there a duty to write a reference or can an employer or ex-employer refuse to do so ? This might depend on whether or not there is an implied term in the contract of employment that the employer will provide a reference. It might be contrary to the U.C.T.A. to put an express term in a contract denying such a duty. Would the answers to these questions differ if the referee or potential referee worked for a public authority ?

Professional Liability and the Tort of Negligence : The term 'Professional Negligence' presents definitional difficulties, not least because it is, despite its jingoistic appeal, somewhat of a misnomer. Oliver J refers in Midland Bank v Hett Stubs & Kemp to the 'mesmeric effect' that the claim for damages for negligence and breach of professional duty tends to have. A more accurate, though less attractive label perhaps, is 'Professional Liability'. Even this may be too restrictive in the light of the factors taken into account in **White v Jones**. The term 'Professional' encompasses an ever widening variety of occupations. Jackson & Powell[103] discuss at some length the criteria for awarding the title 'Profession' to an occupation, though it is conceded that law and medicine are two of the oldest recognised professions.

The professional practitioner is exposed to liability for the manner in which he conducts his business, not only under the law of tort and specifically under the 'Tort of Negligence,' but also, under the 'Law of Contract', the breach of contract resulting from some negligent act which deprives the client of the benefit of the contract. The term 'Liability' encompasses both forms of action and echoes the modern approach to a 'Law of Obligations' which is gaining acceptability in educational circles today. Nonetheless, the basis of both forms of action is often a negligent act or omission.

There has been a massive growth in actions against professional practitioners in recent years. Whether this is because the general public has become more litigious or because the courts are more willing to hold the practitioner liable for his transgressions is unclear. Possible reasons for this phenomena and its merits or otherwise are discussed at length in an inaugural lecture on Professional Liability delivered by Lord Oliver[104] to the Centre for Professional Law & Practice. Lord Oliver reflects on the fact that the professions no longer appear to be held in esteem or awe by the general public who no longer treat the legal advice they are given

101 **Lawton v BOC Transhield** [1987] I.C.R. 7.

102 **Spring v Guardian Assurance** [1994] 3 All.E.R. 129

103 'Professional Negligence' . by Jackson & Powell

104 the trial judge in **Midland Bank Turst Co. Ltd v Hett, Stubbs and Kemp**. [1979] Ch. 384. Reported in Professional Negligence November/December 1988 p173-180.

as sacrosanct and are prepared to question it in the courts. This may have marginally improved the quality a legal services but the most significant result has been a benefit to the insurance industry. As premiums on insurance policies have risen, so has the cost of legal services. If the U.K. follows the U.S. model it may get to the stage where a practice which has made too many large calls on its insurance policy may become uninsurable and thus be forced out of business. Solicitors may eventually refuse to undertake certain types of legal work if that work is considered to be a bad insurance risk. At the end of the day it is the general public and justice who might prove to be the losers.

Recent literature and case law on professional negligence in general and with specific reference to the legal profession is extensive. Special rules have developed regarding the liability of specific professions such as lawyers, medical practitioners, auditors, bankers, builders, surveyors, architects and quantity surveyors. The range of services offered by lawyers today include advice on financial and other non-legal matters such as insurance broking, as reforms to legal services force lawyers to diversify onto new areas to compensate for income lost from activities which had till recently been the exclusive preserve of the solicitor, such as conveyancing. This spread of activities means that the rules relating to the professional liability of many of the other advisory professions also affect lawyers. Conversely many other professions are competing with each other on areas of their expertise. Civil engineers are now engaging in legal advice and represent clients in arbitrations and for alternative dispute resolution and in special circumstances in court.

The relevance of liability in negligence to the trade and shipping industry. There is potential liability for three separate categories in trade and shipping, namely negligent advice particularly in inaccurate documentation, third party losses due to physical loss to cargo arising out of the negligent provision of services and direct loss arising out of negligent navigation. Since there are a wide number of contractual services involved in trade and shipping there is an enormous potential for concurrent liability in both tort and contract if the contract terms are not drafted clearly enough to exclude liability in tort by removing the duty of care. Tortious liability is a recurring theme, which is discussed throughout this book.

Liability for misstatements. For those engaged in import/export, the primary legal duties of the buyer and seller are dealt with by contract law. It is third parties that advise on investments and provide financial services and those that give information to secure finance for themselves or others who are most likely to be affected by liability in negligence. Indeed, any area of activity involving documents and certificates, which are relied upon by others provides a situation, has the potential to involve a duty of care in the tort of negligence. Tortious liability has been canvassed in respect of surveyors of cargo and vessels, particularly regarding insurance, valuers regarding the value of cargo for insurable interest purposes. What is the liability of negligent claims adjusters in respect of unsuccessful insurance claims or surveyors and safety inspectors where a vessel, given a clean bill of health, subsequently founders ? What of the liability of ship's masters and others issuing clean bills of lading in respect of faulty goods and shipped bills of lading in respect of goods which have not been shipped ?

Liability for cargo losses and bailment. Bailment duties are not strictly speaking tortious but are governed by tort procedures and have given rise to much litigation discussed in Chapter 5 below.

Liability for collisions with other vessels. These fall directly into the classic formulation of the tort of negligence.]

CONCLUSIONS.

- Any professional is likely to owe a contractual duty to persons to whom they give advice. If the job is done badly they may be liable for breach of contract irrespective of tortious liability. Under the Misrepresentation Act 1967 there may be liability for misrepresentations that procure a contract. This could occur where a civil engineering department forms part of a construction company, which bases its estimates on engineers' evaluations of the type & quality of materials required. Liability for **Hedley Byrne v Heller** type actions in tort apply even when there is a potential contractual remedy now that concurrent liability in tort and contract has been confirmed in **White v Jones**.
- **Hedley Byrne v Heller** applies even if there is no contractual relationship, if a special relationship and reasonable reliance, which is known to the representer can be shown. An awareness of potential legal liability enables practitioners to take precautions to institute safe working practices to minimise the

danger of loss. Thus the disclaimer in Hedley Byrne saved the bank from liability. Good practices will help to ensure the duty of care is not breached. If risks are recognised in advance insurance policies can be taken out to provide financial protection.

- When things go wrong, an awareness of potential liability makes it possible to assess when there is a need to seek prompt professional legal advice.
- The law can be a sword as well as a shield, so an awareness of legal rights is valuable to know when to seek legal redress from others and when these other parties should take responsibility for things that have gone wrong.
- Despite **Murphy v Brentwood** liability is not necessarily restricted to physical loss and pure economic loss can be recovered especially in relation to negligent advice but understanding the distinction between the two and being able to differentiate between situations where pure economic loss can and cannot be recovered is essential.

SELF ASSESSMENT QUESTIONS

1 What are the central ingredients for a successful claim in the tort of negligence

2 What, if any, is the relevance of the Law of Tort to the conduct of international trade business and to the maritime industry in general ?

3 What is The Duty of Care and how can it be established that the duty exists within given situations and relations ?

4 What impact, if any, does public policy have on the establishment of a duty of care in given situations ?

5 What liability, if any exists in the law of tort for negligent misstatements and in what ways, if at all, might such liability impact on trade and maritime affairs ?

6 What is pure economic loss and what impact does it have on the tort of negligence ?