The Recovery of Economic Loss in Tort

by

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I. INTRODUCTION

> To my mind the great blemish on the law of tort is its failure to provide adequately for injury other than physical done maliciously or carelessly. This seems to be due simply to under-development. The concept of negligence has been exploited up to a point, but has not apparently retained sufficient of its initial impetus to jump the barrier between the corporeal and the incorporeal. . . . This deficiency affects not only the jurisprudential quality of the law of tort but creates an unnecessarily wide gap between the law of tort and the moral law. It leaves far too large an area of culpable injury without redress. . . . [1]

Perhaps the most deep-rooted judicial attitude to be detected in the law of tort prior to 1963 has been the ingrained unwillingness of the judiciary to allow recovery of economic loss arising from negligence.[2] Some departure from this hitherto immutable principle was provided by the House of Lords in 1963 in *Hedley Byrne & Co.* v. *Heller & Partners*.[3] Here the Law Lords opened the door to recovery of economic or financial loss caused by negligent words or advice. *Hedley Byrne* was innovatory in two respects: first, it "allowed"[4] recovery of loss caused by negligent *words* or *advice,* and, secondly, it "allowed" recovery of financial loss.

[1] Lord Devlin, *The Enforcement of Morals* (Oxford University Press, 1968) 41-42.

[2] See for example the authoritative statement to this effect in *Salmond on Tort* (14th edit., 1965) 279.

[3] [1964] A.C. 465.

[4] Recovery would have been allowed but for the disclaimer, but subject to certain conditions precedent such as special skill. On the requirement of special skill see more recently *M.L.C. Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793.

The aim of this paper is an examination of an extension of the principle seen in *Hedley Byrne*, namely liability for economic loss caused by negligent *acts*. *Donoghue* v. *Stevenson*[5] is clear authority that recovery is allowed in respect of negligent *acts*, causing *physical* injury, and the pertinent question is whether the principles in *Donoghue* v. *Stevenson* and *Hedley Byrne & Co.* v. *Heller & Partners* can be married to permit recovery for negligent *acts* causing *financial* loss.[6]

Negligent acts causing financial loss fall into two categories:

(i) where A by his negligent act causes direct financial loss to B.
(ii) where A by his negligent act causes injury to a third party or object so that consequentially B suffers financial loss.

The question to be answered is whether a remedy is available to an injured plaintiff in either of these situations. A major stumbling block to recovery has been judicial emphasis on the requirement that where financial loss is suffered there must also be some property damage, for *damnum sine injuria* gives no right to recover.

II. The Pre-Hedley Byrne Cases

The most notable feature of tort law prior to *Hedley Byrne* has been the remarkable consistency with which the courts have refused to allow a plaintiff to recover for financial loss pure and simple. One of the major taproots of this clear rule is the leading case of *Cattle* v. *Stockton Waterworks Co. Ltd.*[7] The plaintiff was a builder who had entered into a lump sum contract to construct a tunnel under land belonging to another person. The defendants, the owners of the adjoining waterworks, negligently allowed water to escape from their main and this escape of water made completion of the plaintiff's contract much more difficult and costly than it would otherwise have been. The plaintiff sued to recover the pecuniary loss suffered but the court refused to countenance an action to recover damages for the negligent interference with the contract of another. Just two years later this rule was reinforced by the House of Lords in *Simpson* v. *Thomson*.[8] In both these cases it was obvious that the courts were concerned about the far-reaching implications which would result if

[5] [1932] A.C. 562.
[6] Note, however, the warning given by Lord Pearce in *Hedley Byrne* itself against the glib application of the formulations in *Donoghue* v. *Stevenson* to situations involving economic loss: [1964] A.C. 465, 536. See also Heuston "*Donoghue* v. *Stevenson* in Retrospect" (1957) 20 M.L.R. 1, 19.
[7] (1875) L.R. 10 Q.B. 453.
[8] (1877) 3 App. Cas. 279.

such an action were allowed. Lord Penzance expressed these sentiments clearly in the House of Lords:[9]

> The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself. . . . This, I say, is the principle involved in the respondent's contention. If it be a sound one, it would seem to follow that, if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident?

From the *Stockton Waterworks* case[10] and *Simpson* v. *Thomson*,[11] there flowed a line of shipping and charterparty cases which reinforced this stand, and the refusal to allow recovery for financial loss became well established. In these cases three parties were involved: the defendant/tortfeasor A injures B thus causing financial loss to the plaintiff C. In each case the plaintiff was seeking to recover financial loss from A.

The first of these cases was *Société Anonyme de Remorquage à Hélice* v. *Bennetts*.[12] The plaintiffs were the owners of a tug engaged in towing a ship to Wales. The defendant's ship, through the negligence of their servants, sank the ship under tow, but caused no physical damage to the plaintiff's tug. The plaintiffs claimed for loss of profit on the towage contract. Hamilton J., however, concluded that the plaintiffs had no cause of action—it was a *damnum sine injuria* situation.[13] Had there been damage to the tug also, a valid cause of action would have been made out; "but all that has happened is that in the course of performing a profitable contract an event happened which rendered the contract not further performable and therefore less profitable to the plaintiffs."[14]

A series of charterparty cases arose after this case in which the courts consistently refused to allow sub-charterers and charterparties to recover for financial loss, on the grounds that the plaintiffs, as

[9] Ibid., 289-290.
[10] (1875) L.R. 10 Q.B. 453.
[11] (1877) 3 App. Cas. 279.
[12] [1911] 1 K.B. 243.
[13] Ibid., 248.
[14] Idem.

charterparties, had no proprietary interest in the injured vessel, and that, accordingly, their rights arose only because of the contract and not independently of it. The first of these cases was *The Okehampton*[15] in which the plaintiffs, who were sub-charterers of a ship sunk by the negligence of the defendants, claimed for loss of profit on freight which they would have earned had the voyage been completed. It was clear at first instance and in the Court of Appeal that the necessity of a proprietary interest was uppermost in the minds of the judges.[16] If a possessory interest in the injured ship could be found then this would convert a claim for mere financial loss into a claim for physical injury coupled with financial loss, and this the courts were prepared to entertain. In this case the court found that there was a possessory interest and, accordingly, allowed recovery.

A similar case was *Chargeurs Réunis Cie Francais de Navigation à Vapeur* v. *English & American Shipping Co.*[17] Here the Court of Appeal said that no action would lie, for, under the charterparty, the plaintiff had merely a contractual right to use the vessel and, as this was their only source of rights in respect of the vessel, they could not claim damages against the tortfeasor. Bankes L.J. said that "in order to ascertain what their exact position was and what their rights were, it is necessary to look at the terms of the contract and not outside the contract."[18] Accordingly, the plaintiff could not recover for the economic loss suffered.

The only authority that can be raised against this long line of shipping cases is *The Greystoke Castle* case.[19] Here, a number of the Law Lords discussed a hypothetical case involving recovery for purely financial loss following physical damage to a chattel even where the plaintiff does not have any proprietary or possessory interest in the chattel. Lord Roch said:[20]

> If two lorries, A and B, are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B and if lorry A is negligently driven and damages lorry B so severely that, whilst no damage is done to the goods in it, the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way, and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then, in my judgment, he has a direct cause of action to recover such expense.

[15] [1913] P. 54, 173.
[16] Ibid., 178 (per Vaughan Williams L.J.).
[17] (1921) 9 Ll.R. 464.
[18] See also *Elliott Steam Tug Co. Ltd.* v. *The Shipping Controller* [1922] 1 K.B. 127, 139, 141 (Scrutton L.J.) and *Federated Coal & Shipping Co.* v. *The King* [1922] 2 K.B. 42.
[19] [1947] A.C. 265.
[20] Ibid., 280.

Both Lord Roche and Lord Porter, who comprised two of the majority in the House of Lords, were prepared to allow the plaintiff in such an action to recover for his financial loss. This was so even though he had no proprietary interest in the damaged chattel, the lorry.

However, this case is not the clear authority for the principle of recovery of pure economic loss that this simple outline would appear to suggest. It has caused commentators considerable difficulty and they have reached markedly different conclusions in attempting to analyse the grounds on which the Law Lords based their conclusion. Atiyah[21] regards Lord Roche and Lord Porter as having reached their conclusion on the basis of there being a joint venture. North finds the decision explicable on other grounds:[22]

> If Lord Roche's dictum is good law, which may be doubted, it can be explained either as being restricted to the rules of carriage of goods, or on the ground that the owner of lorry A had created an unreasonable risk of loss to the owner of the goods in lorry B and was therefore in breach of duty to him.

However, on whatever grounds the statements are explained, it seems clear that they carried little force in the face of the long line of cases starting with *Cattle* v. *Stockton Waterworks Co. Ltd.*[23] which militated against recovery for financial loss alone. The statements of Lord Porter and Lord Roche were only obiter dicta and for this reason alone could not combat the extensive authorities to the contrary. Certainly the commentators do not support this case in the face of such a weight of authority. North says of his own explanations of the dicta:[24]

> Neither explanation is wholly satisfactory and if the case is to be considered merely as a decision on the working of the rules of general average contribution this being the principal matter at issue in the case it is of little value to a plaintiff who has suffered financial loss otherwise.

Atiyah,[25] also, finds the case "puzzling" and obviously inadequate to support a general rule allowing recovery for financial loss.

In summary, the courts have insisted that for recovery of financial loss to be given in the courts, there must be some possessory right in the chattel injured. North[26] rejects any contention that these shipping cases form a specialised branch of admiralty law. He notes that most of these cases relied on *Cattle* v. *Stockton Waterworks Co. Ltd.* as the leading authority. This, he says, is a non-shipping case and,

[21] "Negligence and Economic Loss" (1967) 83 L.Q.R. 248, 255.
[22] "Liability for Financial Loss" (1966) New L.J. 348, 350.
[23] (1875) L.R. 10 Q.B. 453.
[24] Loc. cit., 350.
[25] Loc. cit., 255.
[26] Loc. cit., 349.

accordingly, he submits that these cases "are just illustrations of a more general principle applicable uniformly throughout the law of torts."[27]

Two related policy considerations can be detected behind this general rule that the courts have formulated. The first of these is a fear that if a remedy in respect of financial loss is given this would create an ever-widening circle of liability. Judicial conservatism and this fear of too wide an area of liability led the courts to baulk at granting relief for financial loss. This is evident in the judgment of Blackburn J. in *Cattle* v. *Stockton Waterworks Co. Ltd.*:[28]

> In the present case the objection is technical and against the merits and we should be glad to avoid giving it effect. But if we did so we should establish an authority for saying that in such a case as that of *Fletcher* v. *Rylands*, the defendants would be liable not only to an action by the owner of the drowned mine and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman or person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. Many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss and that if the law does not give them redress it is imperfect. Perhaps it may be so. But, as was pointed out by Coleridge J. in *Lumley* v. *Gye* courts of justice should "not allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness, as I conceive, of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts."

A similar attitude was made manifest by Lord Penzance in *Simpson* v. *Thomson*.[29]

The courts, following the *Stockton Waterworks* case, saw that they could prevent an ever-widening circle of liability arising by insisting on the possessory requirement in the injured chattel. This was merely another way of saying that there was no liability for financial loss *alone*, for once there is a possessory right in the damaged chattel the plaintiff has a cause of action based on physical damage coupled with financial loss. Here the courts are on familiar ground.

An allied policy reason for this rule is the consistent disinclination of the court to give a remedy where the plaintiff has lost an expectation of profit. This was at issue in the shipping cases. In most of these cases the plaintiff had been deprived of future profit, yet again the courts showed reluctance to entertain these actions because these were somehow too remote, and it might be a dangerous precedent to give a remedy.

It is submitted that the distinction the courts have constructed between physical (direct) and financial (consequential) damage is

[27] Loc. cit., 350.
[28] (1875) L.R. 10 Q.B. 453.
[29] (1877) 3 App. Cas. 279, 289-290.

purely arbitrary, for financial damage can be, in certain situations, to use Atkinian terms, equally as foreseeable as physical damage. In *Société Anonyme de Remorquage à Helice* v. *Bennetts*[30] it should surely have been within the rubric of foreseeability that if the tortfeasor sank the ship under tow, financial damage would be caused to the towage firm. Yet the law is very clear that such damage is purely consequential and therefore not within the foreseeability test (i.e. within the contemplation of the tortfeasor when he is directing his mind to the acts or omissions called in question). The distinction then, is essentially one of policy—where do the courts draw the line of remoteness? Here the courts have drawn the line after physical damage, and, however illogical it may be, have refused recovery for financial loss.

The consequences of this illogical development are forcefully illustrated by Lord Devlin.[31] The rule against recovery for financial loss, says Lord Devlin, "creates an unnecessarily wide gap between the law of tort and the moral law. It leaves far too large an area of culpable injury without redress and far too many cases in which the good citizen should feel under a moral obligation which the law does not enforce".[32] The force of this comment can be seen in relation to a statement of Hamilton J. in *Société Anonyme de Ramorquage à Hélice* v. *Bennetts*[33] outlining why no action will lie:

> *All that has occurred* is that in the course of performing a profitable contract an event occurred which rendered the contract no further performable and therefore less profitable to the plaintiffs. (emphasis added)

Here a very valid cause of action is being dismissed because of an arbitary rule precluding recovery of a loss of this kind.

III. Hedley Byrne Itself

A break with the traditional judicial attitude towards financial loss was attempted unsuccessfully by Denning L.J. (as he then was) in *Candler* v. *Crane Christmas & Co.*:[34]

> I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care but if once the duty exists I cannot think that liability depends on the nature of the damage.

This was the first judicial attempt (disregarding the rather questionable dicta of Lords Roche and Porter in the *Greystoke Castle* case)[35]

[30] [1911] 1 K.B. 243.
[31] *The Enforcement of Morals* (Oxford University Press, 1968).
[32] Op. cit., 42.
[33] [1911] 1 K.B. 243.
[34] [1951] 2 K.B. 164, 179.
[35] [1947] A.C. 265, 280.

to look beyond the rule against recovery for financial loss, and see that in some cases it might perhaps work injustice. Financial loss could fall within the foreseeability rubric and Lord Denning felt that justice might well be failing a worthy plaintiff if it denies him a remedy merely because of the nature of the damage suffered. However, Denning L.J.'s "innovatory" tendencies were strongly resisted by the other members of the Court of Appeal. Both Asquith[36] and Cohen L.JJ.[37] excluded financial loss from the scope of the "neighbour principle".

Twelve years after *Candler* v. *Crane Christmas & Co.* was decided the House of Lords bestowed judicial approval on Denning L.J.'s departure from the norm, in the case of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[38] The facts of this case are too well-known to bear relating. Here the Law Lords allowed recovery for financial loss caused by negligent mis-statement provided that there was some special skill and reliance on the advice,[39] and in doing so removed much of the judicial suspicion of recovery for economic loss.

Hedley Byrne, then, was innovatory in two respects: first, it "allowed"[40] recovery for loss caused by negligent words, and, secondly, it "allowed" recovery of financial loss. Prior to 1963 the negligence concept had always been oriented towards negligent acts. This naturally followed from the Atkin dictum in *Donoghue* v. *Stevenson*:[41]

> You must take reasonable care to avoid *acts* or *omissions* which you can reasonably foresee would be likely to injure your neighbour.

Lord Atkin was clearly talking about acts or omissions causing physical loss and this was how his dictum was interpreted in subsequent cases.

Before *Hedley Byrne* there had been a few rather unsatisfactory cases where recovery in respect of negligent words appeared to be allowed: *Sharpe* v. *Avery,*[42] *Watson* v. *Buckley*[43] and the Australian case of *Barnes* v. *Commonwealth of Australia,*[44] but there had been no clearcut statements to the effect that negligent mis-statement was a recoverable head of tort. The opening up of this area of negligence by the House of Lords seems to a certain extent to have overshadowed

[36] [1951] 2 K.B. 164, 189.
[37] Ibid., 196.
[38] [1964] A.C. 465.
[39] Ibid., 486 (Lord Reid), 502-3 (Lord Morris). For subsequent caselaw development see *M.L.C. Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793.
[40] See footnote 4 supra.
[41] [1932] A.C. 562, 576.
[42] [1938] 4 All E.R. 85.
[43] [1940] 1 All E.R. 178.
[44] (1937) S.R. (N.S.W.) 511—see also the dissenting judgments of Cartwright J. and Rinfret C.J. in *Guay* v. *Sun Publishing Co. Ltd.* (1953) 4 D.L.R. 577.

the second major feature arising from the case, namely the granting of a right of recovery in respect of financial loss. Indeed, the Law Lords themselves (with the exception of Lords Devlin and Hodson), failed to comment on this dramatic reversal in judicial thinking. It almost appeared to slip by unnoticed.

It is this second feature of the *Hedley Byrne* case which is the more important for the purposes of this discussion. In allowing that the plaintiff, but for the disclaimer of Heller & Co., could have recovered for their pecuniary loss, the House of Lords was destroying the fiction that financial loss was never a direct loss and therefore could found no action. Lord Devlin[45] was emphatic in his rejection of the old rule—perhaps not surprising in view of his extra-judicial statements:[46]

> This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor commonsense in this. . . . I am bound to say, my lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle.

It is necessary to enter a caveat at this point. *Hedley Byrne* is not authority for a general principle that whenever financial loss falls within the foreseeability rubric and a duty of care is owed, there is a right of action. The *Hedley Byrne* case allowed recovery for financial loss caused by negligent words where a "special relationship" between plaintiff and defendant could be proved. The test for recovery of financial loss here was not foreseeability, for the general conception of *Donoghue* v. *Stevenson* was inappropriate to the case of negligent words, without the imposition of additional conditions. These additional conditions of assumption of responsibility, reliance on the statement and special skill were necessary safeguards because the Law Lords were anxious to ensure that casually spoken words did not incur liability. Yet the imposition of these safeguards took the right of recovery for financial loss caused by negligent words *beyond* the *Donoghue* v. *Stevenson* formula. The test was whether there was a special relationship, not that of reasonable foreseeability. It is for this reason that *Hedley Byrne* cannot be cited as authority for the proposition that if financial loss is reasonably foreseeable it is recoverable.

We must now look at the cases since *Hedley Byrne* to determine what effect that case has had on the rule prohibiting recovery of financial loss caused by negligent acts.

[45] [1964] A.C. 465, 517; See also Lord Hodson at p. 509.
[46] *The Enforcement of Morals* (Oxford, 1968) Ch. II.

IV. Cases Since Hedley Byrne

A. *Part One*

1. Perhaps the most influential case in this area since *Hedley Byrne* has been *Weller* v. *Foot & Mouth Disease Research Institute.*[47] The defendants were a foot and mouth disease research institute. Due to their negligence some virus escaped from the institute and infected cattle in the surrounding area. To safeguard against an outbreak of the disease the Minister of Agriculture made an order closing the local cattle auction market and the plaintiffs, who were cattle auctioneers, were unable to carry on their business. Accordingly, they sued the Institute for financial loss suffered when the market was closed. The plaintiffs presented a two-tier argument: first, under the Atkinian neighbour principle, that, since the loss was foreseeable, the defendants owed them a duty of care and, secondly, by using *Hedley Byrne,* that if a duty of care was owed, financial and not just physical loss was recoverable.

Widgery J. first tackled the proposition that as the loss for a foreseeable result of the escape of the virus, a duty of care was owed by the defendants. The learned judge was not prepared to accept this straight application of the foreseeability test to financial loss. He said:[48]

> The difficulty facing counsel for the plaintiffs is that there is a great volume of authority, both before and after *Donoghue* v. *Stevenson,* to the effect that a plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure or at least threaten directly to injure the plaintiff's person or property, but merely caused consequential loss, as, for example, by upsetting the plaintiff's business relations with a third party who was a direct victim of the act or omission. The categories of negligence are never closed, but when the court is asked to recognise a new category, it must proceed with some caution.

Widgery J. was aware that he was being asked to give his blessing to a new head of negligence—financial loss caused by negligent acts. The dilemma he had to resolve was whether to extend the *Hedley Byrne* principle to include negligent acts or to follow the previous lines of authority.

After a methodical examination of the pre-*Hedley Byrne* cases, the effect of *Hedley Byrne* itself and Lord Devlin's rejection of any distinction between physical and economic loss, Widgery J. said:[49]

> In my judgment, the plaintiff's failure in these earlier cases was not because this truth to which Lord Devlin refers had escaped the eminent judges who decided those cases but because the plaintiff was regarded

[47] [1966] 1 Q.B. 569; [1965] 3 All E.R. 560—a decision of Widgery J. (as he then was).
[48] [1966] 1 Q.B. 569, 577.
[49] [1966] 1 Q.B. 569, 587.

> as being outside the scope of the defendant's duty of care. The duty of care arose only because a lack of care might cause direct injury to the person or property of someone and the duty was owed only to those persons whose person or property were foreseeably at risk.

It is submitted with respect that Widgery J. begs the question he seeks to answer. Moreover his argument can be characterised as circular. The learned Judge says that in the old decisions, the plaintiff was unsuccessful because he fell outside the defendant's duty of care. But the reason the plaintiff fell outside this duty of care was that the courts had a deep-rooted suspicion (well shown in the *Stockton Waterworks* case)[50] of recovery for economic loss. This being so the courts would automatically say that the plaintiff did not come within the requisite duty of care. Widgery J. appears unconsciously to recognise this:[51]

> The duty of care arose only because a lack of care might cause direct injury to the person or property of someone else and the duty was owed *only* to those whose person or property were foreseeably at risk. (emphasis added)

If the courts only accepted that there was a duty of care where the plaintiff's person or property was foreseeably at risk, it follows logically that a plaintiff would fall outside any duty of care constructed.

Widgery J. finally concluded that although the plaintiff's financial loss was foreseeable, this was not *of itself* sufficient to say that the defendant owed a duty of care, nor had *Hedley Byrne* decided this.[52] This was true because *Hedley Byrne* was dealing with negligent words and these required additional safeguards above and beyond mere foreseeability tests. But, with respect, Widgery J. appears to have overlooked, whether consciously or unconsciously, the vital distinction between negligent words and negligent acts. He concludes that, because *Hedley Byrne* did not apply straight foreseeability tests to the financial loss suffered there, in this case likewise the foreseeability test was inappropriate to establish a right of recovery. For this reason he concluded that *Hedley Byrne* had not swept away the necessity of direct injury to the person or property to support an action in negligence where financial loss had been suffered. Widgery J. stated that a duty to take care only arose at common law where the defendant could reasonably foresee not merely financial loss but also physical injury to the person or property of the plaintiff.

Therefore, for Widgery J., foreseeable financial injury alone (where caused by a negligent act) was not sufficient to create a duty of care. But the learned judge did allow that if physical damage was foreseeable then a duty of care arose and the plaintiff could recover

[50] (1875) L.R. 10 Q.B. 453.
[51] [1966] 1 Q.B. 569, 587.
[52] Idem.

both direct and consequential loss, proof of direct loss not being an essential part of the claim. Atiyah[53] points out that, assuming Widgery J. means physical when he says "direct" and pecuniary when he says "consequential", this is some advance on the previous law. The pre-*Hedley Byrne* cases demanded that the plaintiff suffer some actual physical damage to person or property before financial loss was recoverable. Widgery J., on the other hand, implies that if the plaintiff falls within the range of foreseeable physical damage then he may recover pecuniary loss. *Actual* physical damage does not now seem to be necessary if Widgery J. is right.

Subsequent cases which have applied *Weller* v. *Foot & Mouth Disease Research Institute*[54] have disregarded this distinction between the tests of merely foreseeable physical damage and actual physical damage.[55] Atiyah does not support Widgery J.'s refinement and says "the foreseeability of physical injury would seem irrelevant when it is not in fact physical injury that is being complained of."[56] The formulation seems open to criticism on other grounds also not the least of which being Lord Hodson's statement in *Hedley Byrne* itself, that "[i]t is difficult to see why liability as such should depend on the nature of the damage."[57] Nevertheless, in insisting on the property requirement as a condition precedent to the recovery of financial loss, Widgery J. was basically reiterating the formulation found in all the cases before *Hedley Byrne*. Yet in those cases financial loss was never recoverable, whereas *Hedley Byrne* seemed to change the law in this respect by allowing recovery of such loss. Widgery J., in returning to the old law, appears to have ignored this vital factor, and if Widgery J. is correct, then *Hedley Byrne* has had no effect whatever on the law relating to financial loss caused by negligent acts.

It seems clear that Widgery J. reached this conclusion because of his fear of the results of allowing such an action. He could see that if he allowed recovery of pecuniary loss here, the scope of the duty of care would be cast very much wider than before. There seemed to be no limits to remoteness if this were done and this factor affected his decision greatly:[58]

> [I]f this argument is sound, the defendant's liability is likely to extend far beyond the loss suffered by the auctioneers, for in an agricultural community the escape of foot and mouth disease virus is a tragedy which

[53] (1967) 83 L.Q.R. 248, 260.
[54] [1966] 1 Q.B. 569.
[55] See for example *Margerine Union G.M.B.H.* v. *Cambay Prince S.S. Co. Ltd.* [1964] 1 Q.B. 219.
[56] "Negligence and Economic Loss" (1967) 83 L.Q.R. 248, 260.
[57] [1964] A.C. 465, 509.
[58] [1966] 1 Q.B. 569, 577.

> can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by the transport of animals are out of work; dairymen may go short of milk and sellers of cattle feed suffer loss of business. The magnitude of these consequences must not be allowed to deprive the plaintiffs of their rights but it emphasizes the importance of this case.

Widgery J. was trying to cover his tracks in the last sentence above, but clearly the issue of remoteness formed a vital part of his decision not to extend the *Hedley Byrne* principle to negligent *acts* causing pecuniary loss.

It is submitted that the following summary can be made of the decision in *Weller* v. *Foot & Mouth Disease Research Institute*.[59]

(i) Even though financial loss may be foreseeable, it is only recoverable if physical injury is also foreseeable. Widgery J. declined to extend the *Hedley Byrne* principle to pure financial loss in the context of negligent acts. Instead he reaffirmed the line of authority starting with the *Stockton Waterworks* case,[60] which had always required that there be physical damage before financial loss was recoverable.[61]

(ii) Clearly the problem of remoteness was one that worried the learned judge, and was one of the chief reasons for his refusal to allow recovery even where the financial loss was foreseeable. If he allowed recovery of financial loss caused by negligent acts where would the line of remoteness be drawn? Widgery J. could foresee a flood of decisions giving rise to an ever-widening circle of liability.

2. After *Hedley Byrne* there followed two shipping cases involving the characteristic tri-partite situation which was to be seen in the pre-*Hedley Byrne* shipping cases—i.e., where the defendant/tortfeasor A injures B or a chattel belonging to B causing financial loss to the plaintiff C. In each of these cases the court was called upon to decide what effect *Hedley Byrne* had had on the old line of authority.[62]

The first case was *The World Harmony*.[63] Here vessel A collided with vessel B, A catching fire, and the fire spreading to B, whereupon B cannoned into ship C. The outcome of this series of mishaps was that all three ships were written off as total losses. Ship C had been used for pleasure cruises and a time charterer brought an action

[59] [1966] 1 Q.B. 569.
[60] (1875) L.R. 10 Q.B. 453.
[61] This had been achieved, as already seen, by insisting that the plaintiff have a proprietary or possessory interest in the injured chattel.
[62] The line of cases beginning with *Société Anonyme de Remorquage à Hélice* v. *Bennetts* [1911] 1 K.B. 243.
[63] [1965] 2 All E.R. 139.

against the negligent owners of Boat A to recover pecuniary losses suffered because of his inability to enter into any future cruising contracts. The plaintiffs argued that if economic damage arising out of a careless representation could be redressed (*Hedley Byrne*), then surely a physical act which caused such loss ought to be actionable.

The same dilemma that faced Widgery J. in *Weller* v. *Foot & Mouth Disease Research Institute*[64] also faced Hewson J. Did *Hedley Byrne* affect the line of cases which had held that the charterer could not sue for the negligent infliction of loss upon him unless he could show a property or possessory interest in the damaged vessel? Hewson J. considered that this principle was not affected by the House of Lords' decision in *Hedley Byrne*. He said:[65]

> . . . counsel referred me to a recent case *Hedley Byrne & Co.* v. *Heller & Partners Ltd.* Now that case was very much nearer contract than tort. The facts are so entirely different from the present case, and as the line of cases to which I have referred was not quoted in the House of Lords in the Hedley Byrne case, I would hesitate long before I would apply anything that was said by their Lordships in that case to this case.
>
> There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of damage by a third party to a chartered vessel.

With respect, Hewson J. may be guilty of the same error as Widgery J. in *Weller* v. *Foot & Mouth Disease Research Institute* for his argument is circular. Of course there is no charterparty case allowing recovery of such damage—the judges always held that such a loss fell outside the duty of care. But *Hedley Byrne* appeared to say that financial loss could fall within the duty of care;[66] yet the learned judge did not discuss this vital factor. He was content to dismiss *Hedley Byrne* on the rather superficial ground that the facts were different.

Similarly, Hewson J. was not prepared to extend the *Donoghue* v. *Stevenson*[67] principle to financial loss caused by negligent acts—a corollary to the *Hedley Byrne* principle which allowed redress for economic loss arising out of careless representations.

The second case was *Margerine Union G.M.B.H.* v. *Cambay Prince SS. Co. Ltd.*[68] Here the defendants had negligently failed to fumigate their ship and as a result a cargo of copra on board was damaged by cockroaches. A portion of this cargo was to be sold to the plaintiffs who had received certain delivery orders relating to the quantity but, as counsel agreed, the plaintiffs acquired no title to their copra until it was unloaded and separated from the bulk load. Accordingly,

[64] [1966] 1 Q.B. 569.
[65] [1965] 2 All E.R. 139, 155.
[66] Albeit a special duty of care—the 'special relationship test'.
[67] [1932] A.C. 562.
[68] [1969] 1 Q.B. 219.

at the time of the defendant's negligent act the plaintiffs had had no legal title to the goods or any immediate right to possession.

The plaintiff's suit in negligence once again fell foul of the long line of pre-*Hedley Byrne* shipping cases, Roskill J. reaffirming the traditional rule that an action in negligence in respect of loss or damage to goods could not succeed unless the plaintiff had a proprietary or possessory title to the goods.[69] Counsel for the plaintiff sought to bring his case within this principle by saying that there had in fact been property damage to his client's goods, but Roskill J. answered this by saying that the plaintiff was not the owner of the goods at the time of the negligent act.

Roskill J. regarded *Hedley Byrne* as not affecting the long line of authority coming from the shipping cases and he was fortified in the decision by a statement in *Weller* v. *Foot & Mouth Disease Research Institute*[70] to this effect.[71]

As with Widgery J., the question of remoteness was clearly a vital issue in the mind of the learned judge, and was one of the reasons why he would be loathe to allow the plaintiff to recover:[72]

> Thus both Lord Penzance 90 years ago [in *Simpson* v. *Thomson*[73]] and Widgery J. two years ago drew attention to the consequences to a modern community of allowing too great an extension of liability for the consequences of an ordinary act of negligence in everyday life.

A second policy reason which motivated the judge (as with Hewson J. in *The World Harmony*[74]) was a reason seen to underlie many of the pre-*Hedley Byrne* cases. The court accepted the argument of the defendants that the plaintiff's real claim was that their purchase had turned out to be less advantageous than they had anticipated, and that recovery was not possible unless the plaintiff owned the goods at the time of the negligent act. The courts have been traditionally wary of allowing recovery for loss of profit or where a contract turns out to be less profitable than expected and this case is yet another instance of this attitude.

After reviewing these latest shipping cases, one could be forgiven for thinking that *Hedley Byrne* has had no effect on the principle emerging from the long line of shipping cases. However, there is evidence that the judges in these two recent shipping cases felt bound by the long line of authority because they were only first instance judges, and it was not for them to apply *Hedley Byrne* in the face

[69] Ibid., 250.
[70] [1966] 1 Q.B. 569.
[71] [1969] 1 Q.B. 219, 250-1.
[72] Ibid., 237-8.
[73] (1877) 3 App. Cas. 279.
[74] [1965] 2 All E.R. 139.

of such a weight of caselaw. In *The World Harmony* Hewson J. said:[75]

> After giving this side of the case such consideration as I am able, I have come to the conclusion that it must be for a court other than mine to decide that a time charterer can recover in the circumstances of the present case.[76]

B. *Part Two*: *The "Actio Per Quod Servitium Amisit"*

Apart from the two shipping cases that followed in the wake of *Hedley Byrne,* there were a number of other non-shipping cases involving attempts to recover for pure economic loss. These cases were only again examples of the familiar tri-partite situation.

However, before these cases are examined, the writer proposes to investigate the analogous action compendiously called the *actio per quod servitium amisit* (the *actio per quod* for short). This action allows a master to recover financial loss where his servant has been injured by the negligence of a third party. Under the *actio per quod,* the master can recover against the tortfeasor. The principle of the action is well outlined by Williams J. in *Smaill* v. *Alexander*:[77]

> If an action by a master against a man for injuring his servant will lie at all, I see no reason why, if the master pays the doctor's bill, he should not be able to recover it from the wrongdoer as part of the damages. That he can recover it is laid down in every textbook that deals with the subject. It was because of the loss of service. . . .

Here, it is submitted, lies an established cause of action by which the courts have allowed recovery of financial or economic loss caused by the negligent act of a tortfeasor. Recovery is permitted on the basis of the attendant master-servant relationship, yet as has been seen is illogically denied in the charterparty cases,[78] where there is merely a contractual relationship between B and C. It seems illogical to say that, if there is a master-servant relationship, C can recover against the tortfeasor A, whereas if there is merely a contractual relationship between B and C, C cannot recover from A.

The reason for this may well lie in the pages of history. The *actio per quod* is a very old action (Windeyer J. in *Commissioner for Railway* v. *Scott*,[79] traces it back beyond the time of Bracton) and in those times servants were regarded as the property of the master. It could be suggested, then, that the law here was protecting the property rights of the master as regards his domestic servants. This property

[75] Ibid., 156.
[76] See also *Margerine Union G.M.B.H.* v. *Cambay Prince S.S. Co. Ltd.* [1969] 1 Q.B. 219.
[77] (1904) 23 N.Z.L.R. 745.
[78] Exemplified by *Société Anonyme de Remorquage à Hélice* v. *Bennetts* [1911] 1 K.B. 243.
[79] (1959) 102 C.L.R. 392.

requirement would be sufficient to satisfy the conditions imposed in the shipping cases and in *Weller* v. *Foot & Mouth Disease Research Institute.*[80] It is conceded that this explanation is satisfactory where menial servants are involved, but the illogicality arises once more when the law moves to protect a master's interest in servants who are not domestic or menial. Here it cannot be said that the master has a proprietary interest in his employee, so that the property requirement would seem to fall to the ground.

A case in point is *Commissioner for Railway* v. *Scott.*[81] Here an engine driver in the service of the Commissioner suffered a breakdown as a result of the negligence of the rider of a motor cycle, and was unable to perform his duties for some time. During his absence from duty the driver received payments equal to his salary and also the cost of his medical treatment. The Commissioner then sought to recover from the motor-cyclist the amount paid to the engine driver. The High Court of Australia was faced with the decision of the Privy Council in *Att-Gen (N.S.W.)* v. *Perpetual Trustees*[82] which laid down that the *actio per quod* lay only where a menial or domestic servant was involved. The High Court, however, disregarded this decision and the English Court of Appeal decision in *I.R.C.* v. *Hambrook*[83] and held that the *actio per quod* lay in *any* case where the relationship between the plaintiff and the person injured by the trespass was one of master-servant. It was not confined, they said, to the case where the injured person is a domestic or menial servant.[84] Windeyer J. said:[85]

> Moreover, there seems to be to be no logic in measuring the total liability of a tortfeasor by whether the person harmed by his wrongful act is or is not a menial servant.

It is submitted that this statement could be extended to include other situations where there is a contract (other than the master-servant contract) between B and C, and where A has caused foreseeable injury to C. The logical basis for an extension of the area of recovery for economic loss was already in existence in the form of this old action well before *Hedley Byrne.* It could even be argued that the logical development in this area of economic loss should have been based on the *actio per quod* and not *Hedley Byrne,* for here is pure financial loss being recovered centuries before 1963.

[80] [1966] 1 Q.B. 569.
[81] (1959) 102 C.L.R. 392.
[82] [1955] A.C. 457.
[83] [1956] 2 Q.B. 641.
[84] The availability of the *actio per quod* in New Zealand in respect of servants who are not domestic or menial was left open by Henry J. in *Attorney-General* v. *Wilson and Horton Ltd.* [1972] N.Z.L.R. 364.
[85] (1959) 102 C.L.R. 392, 440.

This possible conclusion appears to be supported by Windeyer J. in *Commissioner for Railway* v. *Scott*. The learned judge said:[86]

> I incline to the view that, in general, moneys which a master became legally obliged to pay to or for his servant by reason of an injury incapacitating the servant are recoverable by the master in an action against the wrongdoer—and that . . . the only form which such an action could take would be the Common Law action *per quod servitium amisit*, such damages being *consequential* upon the loss of servitium. *It is of course immaterial that they might not have been foreseen by the wrongdoer.* (emphasis added)

Here Windeyer J. is allowing recovery for "consequential" economic loss but it is not even necessary for the plaintiff to prove that the loss was foreseeable.[87]

C. *Part Three: The Non-shipping Cases*

1. The first case which calls for examination is *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.*[88] Here one of the plaintiff's telephones was put out of action for three days and the other for three weeks, when the defendants, who were engaged in demolition work next-door, dropped some concrete on to a telephone junction box on the corner of the site. The main phone cable was severed as a result. The plaintiff was a book publisher to whom a telephone was of vital importance especially over the Christmas rush, and he claimed that owing to the loss of the telephone, he lost £345.

The plaintiff claimed on two grounds: first, that the defendants were guilty of lack of care (which was admitted), and, secondly, that the defendants were in breach of their duty of care towards him as they should have foreseen that by severing the cable they would cause him financial damage. The plaintiff attempted to rely on *Hedley Byrne* to support his second contention, claiming that this case said that direct injury to a plaintiff's person or property, as apart from economic loss, need not be proved. Judge Herbert Q.C. applied Widgery J.'s statement in *Weller* v. *Foot & Mouth Disease Research Institute* that:[89]

> . . . there is nothing in *Hedley Byrne* . . . to affect the common-law principle that a duty of care . . . is owed only to those whose person or property may foreseeably be injured by a failure to take care.

He found that the damage was not to the plaintiff's person or property as the plaintiff did not own the junction box, and that accordingly,

[86] (1959) 102 C.L.R. 392, 462.
[87] The place of this old action in the modern law on recovery of economic loss is discussed later in this paper.
[88] [1966] 2 Ll.R. 482.
[89] [1966] 1 Q.B. 569, 587.

there was no duty owed and no breach. However, as this writer has attempted to show, Widgery J.'s statement is open to criticism, and moreover, it appears to conflict with Lord Hodson's dictum in *Hedley Byrne* itself.[90] Here then is an example of a questionable principle perpetuating itself by the use of precedent and it is submitted that for this reason the decision in this case could well be open to review.

2. A similar situation was at issue in *Electrochrome Ltd.* v. *Welsh Plastics Ltd.*[91] Here the plaintiff's and defendant's factories were some 500 feet apart on the same trading estate, and the defendants were engaged in enlarging the access road to their factory. One Sunday the defendant's servant was driving one of the defendant company's vans and, at a point just outside their factory, negligently (as was admitted) collided with a fire hydrant. The mains were turned off as soon as possible, repairs were begun at 7.30 a.m. on the Monday and water was restored by 10.30 a.m. that same day. However, the plaintiff's factory plated small items of hardware and water was required for the process. As water was not available during the morning to heat the boilers, a whole day's work was lost. The plaintiffs claimed £29 10s 0d as financial damage for this forced closure.

Geoffrey Lane J. held that the plaintiffs had no cause of action against the defendants for the economic loss suffered because they had no proprietary interest in the chattel damaged:[92]

> Damage was done by a wrongdoer to the hydrant in which the plaintiffs had no immediate or reversionary property and no possessory right by reason of any contract, and as a result of that damage the contract which the plaintiffs have with the industrial estate for the supply of water became less beneficial.

Here is another instance of a High Court judge accepting this continued requirement of property damage before a cause of action arises, thus enabling the courts to place limits on the availability of any action for financial loss.

It is fair to say that, like Widgery J. in *Weller* v. *Foot & Mouth Disease Research Institute*,[93] Geoffrey Lane J. based his decision in part on convenience and on underlying fears of a superfluity of cases arising if he allowed such an action—"this is one of the cases where public convenience and interest demand that the right of action must stop short."[94] Geoffrey Lane J. took as his starting point the dictum of Lord Penzance in *Simpson* v. *Thomson*[95] where similar questions of remoteness and convenience were considered. Once again the ques-

[90] [1964] A.C. 465, 509.
[91] [1968] 2 All E.R. 205.
[92] Ibid., 207.
[93] [1966] 1 Q.B. 569.
[94] [1968] 2 All E.R. 205, 208.
[95] (1877) 3 App. Cas. 279.

tion of remoteness has overshadowed the primary issue in the case—that of the necessity of a remedy to enable recovery of economic loss. The 'property requirement' is eagerly clutched at to draw the line of remoteness and again convenience is considered at the expense of a valid cause of action.

3. The third relevant case is *Seaway Hotels Ltd.* v. *Gragg (Canada) Ltd.*,[96] and is a Canadian decision coming before *Hedley Byrne*. Here an underground feeder line supplying electric power to a hotel was broken by contractors engaged in installing a gas-pipe for a public utility, the contractors being aware before construction began of the presence of the feeder line. As a result of the power being cut off, refrigerators storing food and cooking and washing equipment could not operate. Air-conditioning, lights and elevators were also affected. Food spoiled to the value of $1274 and dining room and cocktail bars had to close early causing loss of $1540.

The appeal against the successful recovery of the plaintiff in the lower court was on two grounds. First, the defendants argued that although the plaintiff had suffered damage (*damnum*), the *injuria* was to the owner of the electricity cable, and that as *damnum* and *injuria* were not combined in one person, there was no cause of action. Secondly, the defendants argued, the damage claimed was too remote and indirect for recovery to be allowed.

Laidlaw J.A. ignored the first ground, and appeared to determine the whole case on the second ground of appeal alone. The fact that the plaintiff had suffered only loss (*damnum*) and no *injuria* was not dealt with, and instead the judge applied the so-called "foreseeability test" to determine whether the loss was recoverable. He held that it was quite certain that this injury was likely to follow from interference with the electric duct and that the damage suffered was "an injury which ought reasonably to have been foreseen by the defendants".[97]

It is clear that the direct interference or injury was to the electric duct owned by the Toronto Hydro Electric System, and that, accordingly, the injury to the hotel (its food and profits) was consequential only. Laidlaw J.A. seemed to recognise this when he said it "was injury that was likely to *follow* from the interference with the electric duct."[98] Despite the fact that this is consequential loss (physical and economic) Laidlaw J.A. still applied the normal negligence test of foreseeability. It seems apparent that the court did this in order to give a remedy which on strict application of the pre-*Hedley Byrne*

[96] (1960) 21 D.L.R. (2d) 264.
[97] (1960) 21 D.L.R. (2d) 264, 266.
[98] Idem.

authority[99] would have been barred. It is noteworthy that none of these cases were cited in the judgment and the judge proceeded through the case on the basis that this was direct physical injury to the hotel, while recognising at the same time that it was not.

4. *Seaway Hotels Ltd.* v. *Gragg (Canada) Ltd.*[1] was mentioned by Lawton J. in another recent case *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.*[2] Here again both the plaintiff and defendant manufacturers were situated on an industrial estate. The plaintiff manufacturers were claiming damages from the defendants who manufactured electrical components. The plaintiffs claimed that metal foil strips blew from the defendant's premises, and came into contact with an electricity sub-station on the industrial estate causing a power failure. This brought the plaintiff's machines to a halt and certain materials in them solidified. These machines had to be cleaned before production could start again, and time and materials were wasted. Profit to the value of £9372 was lost. The plaintiffs claimed that the defendants ought to have been aware of the likely consequence of the escape of the foil, for a similar flashover had occurred three years before, and the defendants had received a warning letter from the Electricity Board.

The plaintiff framed the action in negligence, nuisance and under the *Rylands* v. *Fletcher* rule. The relevant head for present purposes is that of negligence. Two questions faced the court under this head:

> first, did the defendants owe a duty to the plaintiffs "to take reasonable care to prevent these strips of metal foil being blown about in such a way as to foul the bus-bars?"[3]
>
> secondly, was the damage claimed too remote?

The first issue involved the Atkin dictum in *Donoghue* v. *Stevenson.* Lawton J. found that a duty of care was owed by the defendants, the crucial point in the plaintiff's favour being that such a flashover had occurred three years before and a warning letter had been sent about this danger.

The second issue was that of remoteness. The defendant's contention was that the plaintiffs had suffered pure economic loss and that this was not recoverable. Lawton J. refused to accept this argument for he found that the clogging of the machines was in fact physical

[99] See for example *The Stockton Waterworks* case (1875) L.R. 10 Q.B. 453; *Société Anonyme de Remorquage à Hélice* v. *Bennetts* [1911] 1 K.B. 243.
[1] (1960) 21 D.L.R. (2d) 264.
[2] [1969] 1 W.L.R. 959.
[3] Ibid., 965.

or property injury, this being accompanied by consequential loss of profits:[4]

> Through the cutting off of electricity the plaintiff's production line is said to have become clogged. Some of the machines had to be cleared and as a direct consequence of the clogging, production and profits were lost.

Lawton J. accordingly found it unnecessary to decide whether *Hedley Byrne* had overruled or qualified the long line of cases starting with *Cattle* v. *Stockton Waterworks Co.*[5]

The learned judge's holding on the question of remoteness is, however, open to question, if one seeks an approach consistent with earlier cases.[6] The injury inflicted by the defendants was to the electricity sub-station belonging to the power board, and the injury to the plaintiff's machines was a consequence of this direct interference with the sub-station. The sub-station was an intermediary between the plaintiff and defendant and, one cannot see how Lawton J. try as he might can legitimately call this injury direct. It is consequential pure and simple. There, it seems, the judge was applying straight negligence principles to a consequential damage situation in order to give the plaintiff a remedy. With respect, had the learned judge correctly diagnosed the damage suffered as being consequential, he would have been forced to decide the apparent conflict between *Hedley Byrne* and the long line of pre-*Hedley Byrne* cases—a conflict which he neatly sidestepped.

Lawton J. then turned to an examination of two post *Hedley Byrne* cases raised by the defendants, namely *Weller* v. *Foot & Mouth Disease Research Institute*[7] and *Electrochrome Ltd.* v. *Welsh Plastics.*[8] He distinguished *Weller's* case from the present on two grounds.

First, he dealt with Widgery J.'s summation of previous cases in the formulation that:[9]

> A plaintiff suing in negligence for damages suffered as a result of an act or omission cannot recover if the act of omission did not directly injure or at least threaten directly to injure the plaintiff's person or property, but merely caused consequential loss, as for example, by upsetting the plaintiff's business relations with a third party who was the direct victim of the act or omission.

Lawton J. showed concern as to the meaning of the phrase "direct victim of the act or omission". Did "direct victim" mean "the immediate victim only" or did it embrace "the victim whose person or pro-

[4] [1969] 1 W.L.R. 959, 965.
[5] (1875) L.R. 10 Q.B. 453.
[6] *Weller* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569; *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.* [1966] 2 Ll.R. 482; *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205.
[7] [1966] 1 Q.B. 569.
[8] [1968] 2 All E.R. 205.
[9] [1969] 1 W.L.R. 959, 966.

perty was injured by the operation of the laws of nature without any human intervention?" Lawton J. held that "direct victim" should take the latter meaning and that the plaintiffs here were "the direct victims of the defendant's negligence in allowing the metal foil to foul the bus-bars,"[10] whereas in *Weller's* case they were purely consequential victims. However, it is submitted that there is no difference between Lawton J.'s interpretation of direct victim and a consequential victim.

The second ground of distinction was that here property loss had been suffered, whereas in the *Weller* case the plaintiff auctioneers had had no proprietary interest in anything which might be damaged by the escaping virus. However, as we have seen above, the property damage in this case was to the sub-station and the property damage to the plaintiff's machines was only consequential. Therefore, the cases would seem indistinguishable on this ground. Perhaps the answer lies in a difference of proximity—the damage suffered in *Weller's* case being clearly more remote than the damage suffered here. This possibility will be explored in the writer's conclusions.

The second case relied on by the defendants was *Electrochrome Ltd.* v. *Welsh Plastics.* The facts of the two cases seem indistinguishable, for in both cases the defendant A injured an intermediary chattel (sub-station or fire-hydrant) in which the plaintiffs had no possessory interest, and caused consequential damage to the plaintiff C. Lawton J. purported to distinguish the *Electrochrome* case on the following grounds:[11]

> As I read Geoffrey Lane J.'s judgment he adjudged first that Welsh Plastics Ltd. did not owe Electrochrome Ltd. any duty of care, the element of foresight of injury to their property being absent, and secondly that the damage claimed was too remote anyway.

But in the *Electrochrome* case the defendants *did* foresee financial loss to the plaintiff for Geoffrey Lane J. said:[12]

> *With knowledge* that the damage to this particular hydrant and damage to this particular watermain might cause inconvenience or loss to other people on the industrial estate (that knowledge I assume against them for the purposes of argument) the defendants through their servant, nevertheless damaged the hydrant. (emphasis added)

The plaintiffs in the *Electrochrome* case failed not because the element of foresight of injury was lacking but because actual damage to the plaintiff's property did not occur. The consequential injury suffered was purely loss of profit. In this case, as we have seen, the injury was similarly consequential, but the one point of difference was that

[10] Idem.
[11] [1969] 1 W.L.R. 959, 967.
[12] [1968] 2 All E.R. 205, 206.

the consequential injury included *property* damage as well as loss of profit.

Hayes[13] in a casenote on the *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.*[14] says:[15]

> This actual damage to the plaintiff's property would appear to be crucial, but there is little to commend the distinction between machinery brought to a halt because it has been damaged by a failure of (electric) power, and machinery halted because it cannot be operated without (water) power. So that, for example, had the plaintiffs in *Electrochrome* suffered damages to their premises or machinery from a burst pipe, on the above analysis, they too would have recovered damages for all their losses; this is both anomalous and crude.

Lawton J.'s distinction is open also to the criticism of Lord Hodson in *Hedley Byrne* that "it is difficult to see why liability as such should depend on the nature of the damage."[16]

5. A recent Canadian decision is *Weiner* v. *Zoratti*[17] heard by Matas J. in the Manitoba lower court. The plaintiff was a pharmacist who owned a two-storey building in the city of Winnipeg. He carried out his pharmacy business on the main floor, and used the basement to store pharmacy stock and some personal goods. There was a window in the north wall of the basement. The defendant was driving past the building when he negligently struck a fire hydrant, shearing it off at the base. Water flowed from the hydrant down a natural slope in the roadway and reached the north side of the plaintiff's building. The water forced open the basement window and some 15 to 20 minutes after the accident, flowed into the basement. There was also seepage through the basement walls. The plaintiff made attempts to shift some of the stock to a higher place in the basement but these efforts were fruitless for the water eventually rose to a height of three to five feet. The plaintiff sued for damage to the stock, household supplies, personal effects and for repair, laundry and cleaning accounts. Clearly the plaintiff had suffered property damage. The defendant admitted his negligence but contested the act on two grounds:

(i) that the defendants did not owe a duty of care to the plaintiffs; and

(ii) that the plaintiff's damage was too remote.

Under the first head Matas J. had cause to consider both the *Electrochrome* case[18] and the *British Celanese* case.[19] The judge noted

[13] "Physical Damage and Consequential Loss" (1970) 33 Mod. L.R. 96.
[14] [1969] 1 W.L.R. 959.
[15] Op. cit., 98.
[16] [1964] A.C. 465, 509.
[17] (1970) 72 W.W.R. 299.
[18] [1968] 2 All E.R. 205.
[19] [1969] 1 W.L.R. 959.

Geoffrey Lane J.'s statement[20] to the effect that, because the plaintiff's had no proprietary or possessory right in the fire hydrant they could not recover. He moved to consider the *British Celanese* case and the passage where Lawton J. distinguished the *Electrochrome* case on the grounds that the *injuria* in that case was not foreseeable and that the damage claimed was too remote.[21] Matas J. adopted Lawton J.'s test and held that there was "such a nexus between the parties that the defendant owes a duty of care to the plaintiff."[22] He cited as his authority the Atkin dictum in *Donoghue* v. *Stevenson*.[23] The learned judge was fortified in his holding by the fact that here there had been property damage and not just economic loss. He unconsciously accepts the property requirement reaffirmed in *Weller's* case[24] but does not cite that case as authority. But here again if one is to seek an approach consistent with the cases just discussed, it must be submitted that the property damage was not direct but consequential. The direct property damage was to the fire hydrant whereas the damage to the plaintiff's stock and personal effects was only a consequence of this. On the strict application of the pre-*Hedley Byrne* cases this should not have been recoverable. Moreover, the effect that *Hedley Byrne* had on these cases, an issue which the judge should have faced, was not discussed.

The second head of defence was that the damages claimed were too remote, the defendants claiming that this was *damnum sine injuria* and that no recovery should be granted. However, Matas J. dismissed this contention, citing the *Wagon Mound* (No. 1)[25] and subsequent English and Canadian cases as his authority:[26]

> [I]t is not necessary to engage in speculation about the specific foreseeability of each specific event from the moment of impact, to the damage to the plaintiff's property; nor is it necessary to embark on an exercise in metaphysical subtleties. The plaintiff's loss was a direct probable and foreseeable result of the negligent breaking of the hydrant. . . .

6. The final case which calls for discussion, and the only New Zealand decision, is *Halls Poultry Farm Ltd.* v. *New Zealand Roadmakers Ltd.*[27] The plaintiff was the owner of a poultry farm. Owing to the negligence of the driver of a ditch digger working near the farm, the boom of his machine came into contact with the overhead wires. This caused a short circuit and a transformer a short distance away

[20] [1968] 2 All E.R. 205, 207.
[21] [1969] 1 W.L.R. 959, 967.
[22] (1970) 72 W.W.R. 299, 302.
[23] [1932] A.C. 562, 576.
[24] [1966] 1 Q.B. 569.
[25] [1961] A.C. 388.
[26] (1970) 72 W.W.R. 299, 304.
[27] (1968) 12 M.C.D. 271.

blew out causing a power failure. Power was cut off to an adjacent poultry farm where eggs were being hatched in incubators. As a result of the power failure and the Electric Power Board's failure to restore the power as quickly as it might, the owner of the poultry farm lost some 3000 eggs and his breeding programme was set back. He claimed $2000 against the employers of the ditch digger and $2000 against the Power Board. The claim against the roadmaking company is the only head relevant here.

Izard S.M. held that the liability of the first defendant turned on whether or not the consequences of its act of negligence were of such a kind as the reasonable man could have foreseen.[28] This was a straight application of the *Wagon Mound* test,[29] and the learned Magistrate held that the damage suffered was not so foreseeable.[30] Accordingly the claim against the first defendant failed.

7. *Summary*

These six cases together with *Weller* v. *Foot & Mouth Disease Research Institute*[31] illustrate the confusion in this area of tort. While *Weller* v. *Foot & Mouth Disease Research Institute* is explicable on the ground that the damage sought to be redressed there was too remote and *Halls Poultry Farm Ltd.* v. *New Zealand Roadmakers Ltd.*[32] is explicable on the basis that the damage suffered was not foreseeable, the other five cases appear to be in conflict.

(i) *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.*:[33] Here the Court made no finding whether the injury was foreseeable or not, but no recovery was allowed. *Electrochrome Ltd.* v. *Welsh Plastics Ltd.*:[34] Here the loss was held to be foreseeable but no recovery was allowed.

(ii) *Seaway Hotels Ltd.* v. *Gragg (Canada) Ltd.*,[35] *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.*,[36] *Weiner* v. *Zoratti*:[37] In these three cases the physical *and* financial loss caused to the plaintiff was held to be foreseeable and recovery allowed.

[28] Ibid., 274.
[29] [1961] A.C. 388.
[30] (1968) 12 M.C.D. 271, 274.
[31] [1966] 1 Q.B. 569.
[32] (1968) 12 M.C.D. 271.
[33] [1966] 2 Ll.R. 482.
[34] [1968] 2 All E.R. 205.
[35] (1960) 21 D.L.R. (2d) 264.
[36] [1969] 1 W.L.R. 959.
[37] (1970) 72 W.W.R. 299.

In each of these five cases there was damage to an intermediary object not belonging to the plaintiff and this triggered off some consequential loss to the plaintiff. In all the cases (except *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.*[38] where the question was not considered), the loss caused to the plaintiff was held to be foreseeable. Yet from the above analysis it can be seen that the judges reached opposite conclusions.

(i) *The first group*

In both *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.* and *Electrochrome Ltd.* v. *Welsh Plastics Ltd.*, the judges accepted Widgery J.'s reaffirmation[39] of the pre-*Hedley Byrne* principle that the plaintiff must suffer physical or property damage[40] before financial loss is recoverable.

(ii) *The second group*

The three cases in this group appear to be on all fours with the two cases just discussed. In these three cases the judges held that there was in effect "direct" injury to each of the plaintiffs. As the three elements of negligence (duty, breach and damage[41]) coalesced, and as the damage suffered was foreseeable, recovery was allowed. Yet, on strict analysis, the injury suffered in each of these three cases was not direct but indirect or consequential; the direct injury was to the intermediary object.

In all three cases the plaintiffs had no proprietary or possessory interest in the chattels damaged. If one follows the pre-*Hedley Byrne* charterparty cases, the post-*Hedley Byrne* shipping cases and Widgery J.'s reaffirmation of principles,[42] as the plaintiffs had *no* interest in the chattel damaged directly, they should not in strict law have recovered. Yet, in these cases,[43] the judges either distinguished or ignored *Weller* v. *Foot & Mouth Disease Research Institute* and the earlier decisions.

One difference between the two groups of cases can be pointed to. In the first group financial loss alone was suffered, whereas in the second group recovery of both property *and* financial loss was sought. Yet in strict logic this should not make any difference for the loss in all five cases is consequential and not direct. Moreover, both Lords

[38] [1969] 2 Ll.R. 482.
[39] [1966] 1 Q.B. 569, 577.
[40] The actual *rationes* of the pre-*Hedley Byrne* cases were that, as the plaintiff had no possessory or proprietary interest in the chattel damaged directly, he could not recover.
[41] Both physical and financial.
[42] [1966] 1 Q.B. 569, 577.
[43] *Seaway Hotels Ltd.* v. *Gragg (Canada) Ltd.* (1960) 21 D.L.R. (2d) 264, excepted as it was pre-1965.

Hodson and Devlin in *Hedley Byrne*[44] indicated that the nature of the damage should not determine liability. It must be concluded that, whatever may be the merits of the law as it stands at present, it has been inconsistently applied.

V. Policy Reasons

It is clear from the cases discussed that this area of tort is in a state of confusion. While *Hedley Byrne* appeared to open the way toward allowing recovery of economic or financial loss alone, the general tendency in subsequent caselaw has been to resist such a remedy. Several reasons for this tendency appear from the cases:

1. Despite apparent judicial approval of such actions in *Hedley Byrne,* the judges at first instance have failed to overcome their deep-rooted suspicion of recovery of financial loss *simpliciter.* This is well-illustrated by the judgments of Widgery[45] and Geoffrey Lane J.J.[46] Added to this judicial suspicion is the factor that in *Hedley Byrne,* although the Law Lords would have allowed financial recovery but for the disclaimer, only two of the Law Lords mentioned financial loss specifically and even then their remarks were strictly obiter—hence the timorous attitude of the first instance judges. The only remedy, it seems, is a decision from an appellate court directly on point. Indeed the first instance judges seem to wish for such a decision.[47]

2. The major reason for denial of a remedy in this area is that the judges fear the extent to which such actions would go, if they allowed recovery. The action has uncertain limitations and once again the lack of an authoritative pronouncement by the appellate courts is felt. The House of Lords has laid the groundwork for actions for recovery of economic loss, but has not defined the limits within which the action is available. Certainly Widgery J. gives vent to these underlying fears.[48]

3. A third reason why the courts have in general refused to allow recovery for economic loss is their bias (however unconscious it may be at times) against allowing a successful action for recovery of intangible profits. This attitude is particularly prevalent in the shipping cases that have been discussed but it can be detected first in the

[44] [1964] A.C. 465, 509, 517.
[45] *Weller* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569.
[46] *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205.
[47] E.g. Roskill J. in the *Margerine Union G.M.B.H.* v. *Cambay Prince S.S. Co. Ltd.* [1969] 1 Q.B. 219, 252.
[48] *Weller* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569, 585.

forerunner of the shipping cases, namely *Cattle* v. *Stockton Waterworks Co.*[49] Where the loss suffered is an out of pocket loss, the courts are more ready to give a right of recovery, but once again they often baulk at allowing recovery of purely financial loss. Where there is physical loss allied with either loss of profit or out of pocket losses the courts are on more traditional ground and a remedy is more readily available.

VI. Appellate Intervention

The intervention of an appellate decision in this apparently irreconcilable quagmire of first instance decisions came late in 1970 with the English Court of Appeal decision in *S.C.M. (United Kingdom) Ltd.* v. *W. J. Whittall & Son Ltd.*[50] While making preparations to build a boundary wall adjoining a road, the defendants, who were building contractors, damaged a cable supplying electricity to the plaintiff's factory which was situated some distance away in the same road. As a result of the damage to the cable (in which the plaintiffs had no proprietary or possessory interest) electricity to the factory was cut for about 7 hours. One day's loss of production was suffered as well as damage to plant and raw materials when molten materials solidified in the machines.

The plaintiffs claimed that the defendants were negligent, that the consequences of their acts were reasonably foreseeable, and that they owed a duty of care to the plaintiffs to take reasonable care not to damage the cable.

The case at both first instance and on appeal was on a preliminary question of law, namely whether, on the facts alleged, the defendants were liable in law to the plaintiffs for the damages claimed.

Before the Court of Appeal the plaintiff was careful to characterise his claim to recover loss of production as being economic loss consequent upon the property damage to the machines and not as being economic loss *simpliciter*. This was important tactically, for the Court of Appeal reaffirmed the long-established principle that economic loss consequent upon property damage was recoverable.[51]

Two members of the Court, however, went on to consider[52] whether economic loss without attendant property damage would be recoverable. Counsel for the defendant sought to counter any such recovery by two forceful propositions.

[49] (1875) L.R. 10 Q.B. 453.
[50] [1971] 1 Q.B. 337.
[51] Ibid., 341, per Lord Denning M.R.
[52] This was clearly *obiter* and expressly recognised as such: Ibid., 342 (Lord Denning M.R.), 347 (Winn L.J.).

(i) That no duty of care was owed to the plaintiff. Counsel advanced the familiar argument[53] that a duty of care extends only to those whose person or property is liable to be *directly* injured. Here the direct injury was not to the plaintiff but to the electricity board which owned the cable. Accordingly, a duty was owed to the electricity board but not the plaintiffs who had suffered only indirectly.

The distinction between direct and indirect injury which had occupied the judges in a number of the first instance decisions was decisively rejected by the Court as "illusory".[54]

(ii) That, if there was a duty of care, then logically economic loss would be recoverable as well as material damage. Counsel relied on Lord Devlin's dictum in *Hedley Byrne*[55] that there was "neither logic nor common sense" in distinguishing between the two kinds of damage.

This argument also found little favour with Lord Denning M.R. who found a basis in common sense at least for distinguishing between the two kinds of damage. He held that where a plaintiff had sustained economic loss only, recovery was not permitted on the ground of public policy,[56] and on the further ground that it was *per se* too remote.[57]

However, both Lord Denning M.R.[58] and Winn L.J.[59] qualified this firm position by admitting exceptions where the economic loss is the "immediate consequence of the negligence".[60] One such exception was the *Hedley Byrne* principle itself and Lord Denning M.R. admitted as a second exception Lord Roche's illustration in *Morrison S.S. Co. Ltd.* v. *Greystoke Castle.*[61] No clear thread or principle appears to link these exceptions but Lord Denning attempts to anticipate such criticism by concluding that in the last analysis the good sense of the judge must be relied on to draw the line between economic loss that is or is not too remote.[62]

[53] Seen in *Weller* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569; *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.* [1966] 2 Ll.R. 482; *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205.
[54] [1971] 1 Q.B. 337, 343. (Lord Denning M.R.).
[55] [1964] A.C. 465, 517.
[56] [1971] 1 Q.B. 337, 344. Also Winn L.J. 352. For expressions of policy in other recent negligence cases see: *McCarthy* v. *Wellington City* [1966] N.Z.L.R. 481, 519 (McCarthy J.), *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004 and C. R. Symmons "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394, 528.
[57] Ibid.
[58] Ibid., 345.
[59] Ibid., 352.
[60] Ibid., 345.
[61] [1947] A.C. 93, 110.
[62] [1971] 1 Q.B. 337, 345.

VII. Conclusion

It must be conceded that the decision of the Court of Appeal in *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.*[63] will have considerable impact on the area of economic loss.

The first major advance brought by this case is to the *area* of recovery. The pre-*Hedley Byrne* charterparty cases required that the plaintiff have an interest (whether possessory or proprietary) in the chattel damaged before economic loss was recoverable. This was translated by some of the post-*Hedley Byrne* cases to mean that to recover economic loss the plaintiff must have suffered direct physical or property damage. Hence the ruling out of recovery in *Elliott* v. *Sir Robert MacAlpine & Sons Ltd.*[64] and *Electrochrome Ltd.* v. *Welsh Plastics Ltd.*[65] on the basis that the direct property damage was to the telephone junction box or the fire hydrant. Hence, too, the rather artificial attempts in *Seaway Hotels Ltd.* v. *Gragg (Canada) Ltd.*,[66] *British Celanese Ltd.* v. *A. H. Hunt (Capacitors)*[67] *Ltd.* and *Weiner* v. *Zoratti*[68] to characterise as "direct" and therefore recoverable what was clearly indirect property damage.

These artificialities have been obviated by the Court of Appeal's rejection of any distinction between direct and indirect injury. As long as there is property damage, whether direct or indirect, and such property damage is not too remote, then any attendant economic loss suffered is also recoverable.

S.C.M. (U.K.) Ltd. v. *Whittall & Sons Ltd.* also indicates the extent to which policy plays a part in this field of recovery. Not only is emphasis placed on the traditional fear of ever-widening circles of liability should economic loss *simpliciter* be recoverable, but the Court has brought to the fore the concept of spreading risk.[69] Now one must ask not only "on whom does the fault lie?" but also "who, as between the plaintiff and defendant ought reasonably to bear the risk?" Lord Denning opts for the spreading of risk on the whole community rather than upon the shoulders of one defendant.[70] Of necessity, this policy stand rules against recovery of economic loss in general and indicates that the desirability of spreading risk may pre-

[63] [1971] 1 Q.B. 337.
[64] [1966] 2 Ll.R. 482.
[65] [1968] 2 All E.R. 205.
[66] (1960) 21 D.L.R. (2d) 264.
[67] [1969] 1 W.L.R. 959.
[68] (1970) 72 W.W.R. 299.
[69] C. Harvey in "Negligent Statements—The Wilderness Revisited" (1970) 120 New L.J. 1155, 1156 calls this the "reasonable coverability of risk". See also Atiyah "Negligence and Economic Loss" (1967) 83 L.Q.R. 248.
[70] [1971] 1 Q.B. 337, 344.

dominate over recovery even though there may be a finding of fault or negligence.

Remoteness is the tool employed by the Court of Appeal to give operation to its judicial policy. As it is not desirable in terms of the scope of liability and the spreading of risk to allow recovery of economic loss, such loss is characterised as too remote to be recoverable. The majority of the Court of Appeal opt for remoteness[71] rather than the test of foreseeability[72] as the means of controlling recovery. Foreseeability, like remoteness, is an expression of judicial policymaking but one that has more flexibility, in that its operation depends on the facts of each case. Rather than leave recovery of economic loss to the vagaries of individual fact situations the Court of Appeal has ruled out such recovery by characterising economic loss as being too remote.

Unfortunately, as with all hard and fast rules, there are exceptions and it is in outlining these exceptions that Lord Denning M.R. becomes less convincing. His concept of recovery where the economic loss is "immediate" bears an unhappy resemblance to the 'direct' injury concept he expressly rejects, and, despite judicial attempts to forestall criticism, one is left unsatisfied, with the feeling that economic loss is recoverable only when the judge says it is. With respect, lawyers reared in the common law tradition are more at home with judicial policymaking behind the veil of foreseeability.

While the Court of Appeal's approach to recovery of economic loss attendant on property damage brings order to prior chaos, one is left unsatisfied with its rejection of economic loss *simpliciter*. For, if one accepts the Court of Appeal's decision, it is clear that the generous statements of principle in *Hedley Byrne*[73] have been whittled away. Lord Devlin, it seems, was wrong (sic) when he found neither logic nor commonsense in distinguishing between physical and economic loss.[74] *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.* represents the first judicial attempt[75] to consider squarely the effect of *Hedley Byrne*[76] on the long line of charterparty cases, and it

[71] Ibid. (Lord Denning M.R.), 352 (Winn L.J.). Buckley L.J. and Thesiger J., at first instance, [1970] 1 W.L.R. 1017, 1035-6 were prepared to adopt the foreseeability test.

[72] For an example of the foreseeability test in this area of recovery see *Halls Poultry Farm Ltd.* v. *N.Z. Roadmakers Ltd.* (1968) 12 M.C.D. 271.

[73] [1964] A.C. 465, 509 (Lord Hodson), 517 (Lord Devlin).

[74] Ibid., 517. A practical application of Lord Devlin's dictum is seen in the Canadian first instance decision *Rivton Marine Ltd.* v. *Washington Iron Works* (1970) 74 W.W.R. 110.

[75] As has been seen, Widgery J. in *Weller* v. *Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569 and subsequent first instance judges neatly sidestepped the issue.

[76] [1964] A.C. 465. See M. Weaver, "Honestly the Best Policy" (1971) 34 M.L.R. 323, 326.

appears that the decision of the court was in part influenced by new limitations placed on *Hedley Byrne*[77] by the Privy Council in *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt*.[78] Yet, it is worth recording, that the Privy Council in that case was by no means unanimous, for there was strong dissent by Lords Reid and Morris (both of whom had decided *Hedley Byrne*[79]).

One of the chief difficulties in the Court of Appeal's approach is its apparent rigidity. Economic loss *per se* is too remote. Yet at once Lord Denning M.R. and Winn L.J. are forced to admit of exceptions. This appears a negative approach to the problem. The court denies that there can be any recovery of financial loss, but then "back-pedals" to admit exceptions. It is the writer's thesis that a positive approach is more apt—to admit that economic loss is *prima facie* recoverable and then to deal with cases as they arise. Herein lies the advantage of foreseeability as a test. With the Court of Appeal's approach one is reminded of the warning of the minority in *Mutual Life and Citizens Assurance Co. Ltd.* v. *Evatt*:[80]

> In our judgment it is not possible to lay down hard and fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When, in the past, judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned.

As noted, the reason for Lord Denning's hard and fast rule is his desire to implement the policy of "risk-spreading."[81] It is a convenient means of implementing this policy to have a rule "across the board" that economic loss is too remote. Yet since 1932 negligence has developed in a case by case fashion (a process of synthesis) rather than by hard and fast rules. Moreover, the desirability of the policy Lord Denning seeks to implement is by no means demonstrable in all cases. Its attractiveness is apparent in a case such as *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.*,[82] where the factory owner is easily able to pass on one day's production loss to the consumers of his products. The applicability of Lord Denning's policy is less convincing when one takes the example of the chemist in *Weiner* v. *Zoratti*.[83] If the loss to the small businessman is great it is difficult for him to pass on the loss. Atiyah,[84] who prior to *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.*,[85] championed Lord Denning's approach, concedes

[77] Idem.
[78] [1971] A.C. 793.
[79] [1964] A.C. 465.
[80] [1971] A.C. 793, 810.
[81] [1971] 1 Q.B. 337, 344.
[82] [1971] 1 Q.B. 337.
[83] (1970) 72 W.W.R. 299.
[84] "Negligence and Economic Loss" (1967) 83 L.Q.R. 248, 273.
[85] [1971] 1 Q.B. 337.

that not all plaintiffs will be large companies who can spread the loss. His answer, however, is that the law cannot differentiate between a plaintiff who can or cannot distribute the loss. Is this necessarily so?

If, as appears clear, modern negligence cases are frequently determined on a policy basis,[86] is it not equally conceivable that the ability of the plaintiff to pass on the loss will be one of the intangibles to influence the court's decision. Here again the flexibility of the foreseeability test recommends itself. The small plaintiff is precisely the man who cannot afford the loss, and it scarcely satisfies the community demand for redress of a tort to deny him this redress on the ground that it is an inefficient way of spreading the loss.

The recent history of economic loss before the appellate courts has been one of extremes. On the one hand the House of Lords in *Hedley Byrne*[87] in *obiter* statements saw little logic in distinctions between property and economic loss. On the other hand Lord Denning M.R. and Winn L.J. in *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.*[88] again in *obiter* statements virtually rule out recovery of economic loss *simpliciter* where caused by negligent acts. The answer may lie somewhere in between. The courts have a precedent for allowing recovery of economic loss in the *actio per quod servitium amisit.*[89] Admittedly recovery under this old action, due to the special master-servant relationship, will never lead to the rash of actions that the courts obviously fear from the granting of a right to recover economic loss *simpliciter.* Yet, the *actio per quod* shows the courts not baulking at allowing recovery of economic loss.

It is submitted that, having recognised clearly that policy elements permeate negligence decisions, the answer to recovery of economic loss is not to deny recovery altogether (for many good causes of action will go begging), but to face squarely the policy issues in each case using the foreseeability test as a vehicle of policy. With respect, this approach appears more flexible than Lord Denning's blanket

[86] See McCarthy J. in *McCarthy* v. *Wellington City* [1966] N.Z.L.R. 481, 519. See too McDonald J. in *Nova Mink Ltd.* v. *T.C.A.* [1951] 2 D.L.R. 241, 256; *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1140; C. R. Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394, 528.

[87] [1964] A.C. 465, 509, 517.

[88] [1971] 1 Q.B. 337.

[89] In *S.C.M. (U.K.) Ltd.* v. *Whittall & Sons Ltd.* [1971] 1 Q.B. 337, 345, 352 both Lord Denning M.R. and Winn L.J. expressly referred to *I.R.C.* v. *Hambrook* [1956] 2 Q.B. 241 as not allowing an employer to recover from a wrongdoer economic loss caused by injury to his employee. Yet, as has been seen, *I.R.C.* v. *Hambrook* was expressly not followed by the High Court of Australia in *Commissioner for Railway* v. *Scott* (1959) 102 C.L.R. 392. A recent decision of Henry J. in *Att. Gen.* v. *Wilson & Horton Ltd.* [1972] N.Z.L.R. 364 also proceeds on the basis that such recovery is allowable.

denial of recovery and his "immediate consequence" exception. Case by case growth, as the courts have recognised, is always a better approach than "rigid rules" which have later to be abandoned.[90]

[90] *M.L.C.* v. *Evatt* [1971] A.C. 793, 810 (Lords Reid and Morris).