

The following is the text of a paper delivered at a seminar conducted by the Westland District Law Society at Greymouth on 24 April 1983:

RECENT TRENDS IN 'NEGLIGENCE'

"When the ghosts of case and *assumpsit* walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland of Tort and Contract."

Selected Topics on the Law of Torts (1953) 380, 452.

1. *Historical Outline*

To obtain an understanding of the growth and current trends of the tort of "negligence" it is helpful to have a brief outline of its history. Such an outline will show the progress of the tort from an inchoate body of actions derived from the writs of covenant and trespass, to a regimented body of case law with its accent heavily upon defining a particularised relational duty of care, down to the present day, where principle is the dominant theme and the case law is of value merely as illustrative of the application of such principle. History will also throw into relief the origins of the present day negligence/contract dichotomy.

For many centuries it would have been impossible to state the common law otherwise than in the form of a list of various torts which had been remedied by various forms of action. It was only with reluctance that torts were admitted to the list of those actionable in the King's Courts. There was no theory which would draw all those details into a coherent system. The forms of action stood in the way. It was the action of "case" which first evolved a principle sufficiently wide to cover many of the constantly recurring forms of tort.

Violent trespasses were the first varieties of the writ of trespass to acquire an independent existence. Of the large and varied collection of actions which remained some became independent actions in their turn, and the rest survived and were classified as "actions on the case". Such actions were classified because they would not fit anywhere else, rather than that they had any logical connection with one another. Repulsion from trespass or absolute liability was the main test. Hence the principle is evolved that direct assault or violation to chattels constitutes trespass, while damage less direct, or damage caused by means less personal, will be classified as "case". This view helped considerably when the damages were caused by the defendant's omission. Here is the important principle that some sorts of inactivity are actionable. There are, in fact, grounds for believing the word "negligence" was first used in this sense. That is the defendant neglected to do something.¹

Closely identified with the concept of "case", was the view that trespass would not lie if someone working on a chattel, or operating surgically, caused damage. Again, in such a situation the development of "*assumpsit*"

¹ See "*A Concise History of the Common Law*". Plucknett, 5th ed. p. 469.

imposed liability only where the defendant "undertook" to produce a particular result. If the undertaking was breached there would be an action of "deceit".

In 1348 the following case was noted:

"J. de B. complained by bill that G. de F. on a certain day and year at B on Humber undertook to carry his mare safe and sound in his boat across the water of Humber; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished to his tort and damage.

Richmond (counsel). Judgment of the bill which does not suppose that we have done any tort, but *rather proves that he would have an action by writ of covenant or trespass.*

Baukwell J. It seems that you did him a trespass when you overloaded your boat so that the mare perished, and so answer."²

This case has features of a new development; *Richmond's* objections seemed to be that those facts *prima facie* might have sustained an action of covenant, or an action of trespass; but since the bill alleged no covenant under seal, nor any use of force and arms, it did neither. This dilemma between tort and contract henceforth appears with monotonous regularity and still persists, as will be shown, down to the present time. *Richmond* clear thought that "tort" meant only those wrongs actionable by trespass "vi et armis", and "covenant" meant only a covenant under seal.

The record does not contain the word "assumpsit" although it does say that the defendant "ferryman had received the mare to carry safely in his ship". The verdict further says that the boat was loaded "against the will of the plaintiff". The bill was treated by the Court as a form of trespass, although from the point of view of later lawyers, it seemed an example of "case on assumpsit".

In the "Farrier's case" we go a stage further. The writ was brought "on the case" and did not allege force and arms, nor that the defendant acted maliciously, but the plea was upheld in spite of these objections.

Other cases might also be considered, but their general effect seems to be that just after the middle of the fourteenth century it was not considered vital to distinguish the three forms of action, namely, "case", "trespass" and "assumpsit". That task was left for the reign of Richard II, and more particularly to the fifteenth century. As a result of that development "assumpsit" became in effect contractual: and so we are left with "trespass on the case".³

Assumpsit left its mark on the action upon "the case". Hence the combination of negligent action and passive inaction linked to a relational duty, which previously may have lain in assumpsit. It was no doubt such historical factors that led Sir Robin Cooke J. in a recent case, where he gave specific support to a proposition that economic loss alone may be recoverable as damages flowing from an act of foreseeable negligence to say:⁴

"In view of the origin of contractual liability in the old action on tort, any tendency to exclude tort because the field is already covered by contract would, perhaps, be ironical."

² 22 Ass. 94 (No. 41) see *Plucknett* p. 470.

³ *Plucknett* p. 471.

⁴ *Bowen v Paramount Buildings (Hamilton) Ltd* (1977) 1 NZLR 394, 423.

By 1800 “case for negligence” was a common expression, and it began to be said that the action was actually based upon negligence. Thence forward it became possible to argue that this was the beginning of our independent tort of negligence. It was at the beginning of the nineteenth century that plaintiffs were obliged by the formulary system to frame their actions in accordance with established writs. They could choose between “assumpsit” and “case”. In cases where a duty of care arose out of a contractual relationship the choice was left to the plaintiff.⁵ As Tindal C.J. said in *Boorman v Brown*:

“That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for breach, or non-performance, is indirectly either assumpsit or case upon tort, is not disputed. . . and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff.”⁶

It suffices to say that there was flexibility in the demarcation of the boundaries of contract and tort. Remedies were available in the alternative.

In 1932 the seminal case of *Donoghue v Stevenson*⁷ was decided. This case enunciated “the neighbour” or “Atkinian” test, which marked out the boundaries of the duty of care. It could now with confidence be said that there was a tort of negligence.

Before *Donoghue* there were duties of care. These duties of care were particular and relational. A duty was owed by the defendant to the plaintiff alone, and it arose out of the special relationship between the parties.⁸

In the 1920’s the law of tort was pulling in two different directions with respect to negligence. There were calls for rationalisation, led by Pollock, who argued that the range of particular relational duties not to be negligent had become sufficiently wide for them to be grouped together under a general duty of care. On the other hand, there were the traditionalists who insisted, with Salmond, that whatever the conceptualisation of duty ought to be:

“The duty of carefulness is not universal; it does not extend to all occasions, and all persons and all modes of activity . . .”⁹

Donoghue exploded that view, but its emphatic rejection did not really take place until the 1970’s and 1980’s. One of the recurring themes of this paper will be the insistence that in the field of negligence broad general principle and the extension thereof by analogy are all-important and that the use of previously decided case law is relevant only as showing examples pointing to the application of such principle. As Lord Morris said in *Dorset Yacht Co Ltd v Home Office*.¹⁰

⁵ See: “*Contract and Tort*” by Sutton & Mulgan (1980) NZLJ 366, 367 and 368.

⁶ (1842) 3 Q.B. 511, 525-6.

⁷ (1932) A.C. 562.

⁸ See “The Road from Morocco” — M. Davies (1982) 45 MLR. 534, 540, 541.

⁹ Salmond, *The Law of Torts* (7th Edition 1928) p. 25.

¹⁰ (1970) A.C. 1004, 1038.

"But precedents do not fix the limits of what may be called duty situations; they illustrate them. If there are no clear-cut precedents the court may have to reach a decision whether, once the facts and circumstances of a situation are ascertained, it can be said that it was a 'duty situation'".

or as Lord MacMillan said in *Donoghue* "The categories of negligence are never closed."¹¹

Despite the clear mandate given by *Donoghue* the application of the general duty of care to particular and novel factual situations was cautiously applied. In particular in the field of recovery for economic loss induced by negligent statements the Courts retreated to a formula devised out of a particularised relational duty. We are at present seeing history repeat itself in this field and witnessing the triumph of general principle over a particularised relational duty. This relational duty is being slowly eroded and withered away, as will be shown.

Indeed, the history of the *Hedley Byrne* rule over the past decade shows, in cameo form, the breaking down of a particularised relational duty situation to the bare application of a generalised duty of care. That has been the overall history of "negligence": the evolution from the particular to a generalised conceptual doctrine. From a fossilised body of precedent to a living flexible "duty" concept that is capable of meeting the myriad of factual situations arising in the technological age.

II. *The Present Trends:*

The scene is now set to evaluate and distil from recent cases of high authority the trends indicated therein. While a traditional approach will be taken in analysing the tort into components, heed should be taken of the warning, that such analysis "should not eliminate consideration of the tort of negligence as a whole; and that it may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the other elements needed to make up a complete cause of action".¹² In short, in classifying a factual situation a pragmatic approach should be taken, as all the components of the cause of action will interact and have a bearing on ultimate liability. Those components are (1) Duty (2) Breach of duty (including the standard of care) (3) Damages.

A. *Duty of Care:*

In establishing the duty of care *Donoghue* still provides a substantial part of the touchstone. In *McLoughlin v O'Brian*,¹³ speaking in the House of Lords in 1982 Lord Wilberforce said:

"Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J.: that there is a duty, but as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may

¹¹ (1932) A.C. 562.

¹² *Scott Group Ltd v McFarlane* (1978) 1 NZLR 553 at 584 per Cooke J.

¹³ (1982) 2 WLR 982, 988.

be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in *Donoghue v Stevenson*: 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected . . .'. This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear."

In that case the plaintiff's husband and four children were involved in a road collision caused by the negligent driving of the defendant's motor lorry. The plaintiff was at home at the time of the accident. She went to the hospital to see her family. There she learned that her youngest daughter had been killed and saw her husband and the other children and witnessed the nature and extent of their injuries. She alleged the impact of what she heard and saw resulted in psychiatric illness. It was originally held at first instance that the defendant owed no duty of care to her because the possibility of her suffering nervous shock was not reasonably foreseeable. The Court of Appeal, while holding that the shock was foreseeable, held that it was settled law that the duty of care was limited to persons or owners of property at or near the scene of an accident and directly affected by negligence and, further, that because of considerations of policy the duty of care should be limited.

The House of Lords allowed the appeal and held that there was a duty of care and that the same was not limited by policy. The issue of policy was held by Lord Scarman and by Lord Bridge not to be justiciable. That view was attacked by Lord Edmund-Davies. Lord Scarman (pp. 997 F-H) had said:

"Policy considerations will have to be weighed but the objective of the Judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. . . . If principle leads to results which are thought to be socially unacceptable Parliament can legislate to draw a line or map out a new path."

Lord Edmund-Davies, in a vigorous dissent,¹⁴ referred to *Rondel v Worsley*,¹⁵ (Immunity from suit for barristers for negligence); *Herrington v British Railways Board*¹⁶ (How far occupiers are required by law to protect and safeguard children as a matter of public policy), and other cases as showing that in addition to the foreseeability test, public policy had to be considered in a judicial decision. That he, Lord Wilberforce and Lord Russell are unquestionably right in imposing this qualification is seen by a recent case in 1982 in the English Court of Appeal, *McKay v Essex Area*

¹⁴ See p 993.

¹⁵ (1969) 1 A.C. 191.

¹⁶ (1972) A.C. 877.

Health Authority.¹⁷ In that case a pregnant mother contracted German Measles in the early months of her pregnancy. The child was born severely disabled. It was alleged on behalf of the child that the doctor had been negligent in not advising the mother of the desirability of an abortion. It was held that there was a duty to an unborn child not to injure it. However, a claim in respect of what in effect amounted to "wrongful life" would be contrary to public policy as a violation of the sanctity of human life. In addition the damages problem would be insoluble, as it would mean comparing the value of non-existence "with the value of an existence" in a disabled state.

However *McLoughlin v O'Brian* clearly showed that the House of Lords were not enamoured of the "floodgates" argument. This argument had been the view that had initially blocked the way to recovery for economic loss. The reasoning of Cardozo C.J. in *Ultramares Corporation v Touche* 255 N.Y. 170 (1931) was that if liability for negligent mis-statements were held to exist then accountants "could be exposed to a liability in an indeterminate amount for an indeterminate time to an indeterminate class". These last few words had been repeated in some judgments almost as though they were a self-evident truth. Sir Robin Cooke had earlier felt the "floodgates" argument was specious.¹⁸

Secondly, *McLoughlin v O'Brian* pointed out that public policy was not immutable and that "any invocation of it calls for the closest scrutiny". This erosion was pointed out graphically in *Saif Ali v Sydney Mitchell & Co* by Lord Diplock:¹⁹

"During the years that have passed since *Rondel v Worsley*²⁰ was decided, the extension of liability for negligence in doing things that were not previously regarded as giving rise to any legal duty of care has gone on apace. A few examples serve to show how broad this trend has been. Architects have been held liable for negligence in valuing work for the purposes of certificates of interim payments under building contracts: *Sutcliffe v Thackrah*,²¹; accountants for negligence when acting as valuers for the purpose of a contract between other parties: *Arenson v Casson*;²² building inspectors employed by local authorities for negligence in inspecting the foundations of a building in course of erection: *Anns v London Borough of Merton*²³; borstal officers for negligent failure to control their charges: *Home Office v Dorset Yacht Co Ltd*²⁴; and professional salvors have been held liable for negligence in carrying out salvage operations: *The Tojo Maru*.²⁵ The extension to the duty of care to trespassers to land that was made in *British Railways Board v Herrington*²⁶ illustrates the existence of a similar general trend extending beyond the limited field of professional work."

In *Saif Ali* the House of Lords whittled the immunity of counsel to suit for negligence down to such matters (including pre-trial work) as could be

¹⁷ (1982) 2 All ER 770.

¹⁸ *Bowen v Paramount Builders (Hamilton) Ltd* (supra) p. 422.

¹⁹ (1978) 3 All ER 1033, 1042.

²⁰ *Supra*.

²¹ (1974) 1 All ER 859.

²² (1975) 3 All ER 901.

²³ (1977) 2 All ER 492.

²⁴ (1970) 2 All ER 294.

²⁵ (1971) 1 All ER 1110.

²⁶ (1972) 1 All ER 749.

said to be intimately connected with the conduct of the case in court. The examples given by Lord Diplock show that the courts will carefully review "policy" from time to time and will strictly view any plea shutting out liability based on the same.

It is submitted that the well known test propounded by Lord Wilberforce in *Anns v London Borough of Merton* (supra) should still be applied, subject to the injunction that the second question relative to restricting the duty should be cautiously approached. Such test for convenience is set out hereunder:²⁷

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

Examples of this are *Hedley Byrne's* case where the class of potential plaintiffs was reduced to those shown to have relied on the correctness of statements made and *Weller & Co v Foot and Mouth Disease Research Institute*²⁸ and (I cite these merely as illustrations, without discussion) cases about "economic loss" where, a duty having been held to exist, the nature of the recoverable damages was limited. See *S.C.M. (United Kingdom) Ltd v W. J. Whittal & Son Ltd*²⁹ and *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*.³⁰

How fast the law has developed is shown by the statements that it can be, first, confidently argued that "the economic loss" restriction now no longer applies, and secondly, arguably a case can be made out that the *Hedley Byrne* principles are factors only to be considered in establishing "proximity" and "the seriousness of the occasion" in regard to negligent statements.

Firstly, in regard to the recovery of pure economic loss caused by negligence, that liability was recognised both in Australia³¹ and New Zealand, in 1976 and 1978 respectively.³² The House of Lords in 1982, in *Junior Books Ltd v Veitchi & Co Ltd*³³ held that where the proximity between a person who produces faulty work or a faulty article and the user was sufficiently

²⁷ (supra) p. 498-499.

²⁸ (1966) 1 Q.B. 569.

²⁹ (1971) 1 Q.B. 337.

³⁰ (1973) Q.B. 27.

³¹ See *Caltex Oil (Australia) Pty Ltd v The "Willemstad"* (1976) 136 C.L.R. 529.

³² See *Taupo Borough Council v Birnie* (1978) 2 NZLR 397 (CA).

³³ (1982) 3 All ER 201.

close there could be recovery of economic loss simpliciter. Liability did not depend on showing that the work was dangerous or that its condition was such as to cause danger to life limb or property. The issue in that case was the replacement of a defective factory floor laid by a sub-contractor. The proceedings were brought by the factory owner against the sub-contractor. It was held that there could be a duty of care in such circumstances. Lord Roskill was of the view that "the economic loss cases" could no longer be regarded as good law.³⁴

Secondly, turning to the *Hedley Byrne* prerequisites to establishing liability for careless statements, unnecessary complications may at least be reduced at the present stage of development if the fictional element associated with the imputation of responsibility for negligent misrepresentations in professional situations is dropped.³⁵ It would be as well if it was recognised that the basis of liability for negligent misrepresentations in these situations as resting on gratuitous promise cases has outlived its usefulness.

This argument is reinforced by the fact that these cases concerning liability for negligent words are no longer confined to those where the economic loss is caused by the plaintiff's reliance either on a representation by the defendant or on some undertaking by him to perform a service. The basis of liability on an assumption of responsibility to the plaintiff therefore becomes so artificial as to fail to offer appropriate guidance. Thus in *Ministry of Housing and Local Government v Sharp*³⁶ the defendant public authority's negligent certification of freedom of land from encumbrance destroyed the plaintiff's encumbrance when acted upon by the purchaser of land. It was the purchaser to whom the certificate was given, not the plaintiff. In *Ross v Caunters*³⁷ the defendant solicitor was held liable for carelessness to a beneficiary in failing to see that a will was properly attested. In neither of these cases could there be said to be a direct reliance by the plaintiff on the defendant.

In the latter case Megarry V.C. said of his reasons for rejecting the *Hedley Byrne* type test in favour of the *Donoghue* test³⁸ "I find some difficulty in seeing how the principles stated in that judgment apply to someone to whom no statement will be made or shown, but who will be injured by a negligent statement being acted upon by some third party".

The bar to applying a *Donoghue* type test to liability for negligent words was a dictum of Lord Reid in *Hedley Byrne*, disavowing that type of approach.³⁹ However, in *Junior Books* (supra) Lord Russell "found" certain dicta of Lord Devlin in *Hedley Byrne*:⁴⁰

"I do not understand any of your Lordships to hold that it is a responsibility imposed by law on certain types of persons or in certain sorts of situations. . ."⁴¹

³⁴ (1982) 3 All ER 201, 214.

³⁵ See *Current Judicial Analyses of Negligence* Terry (1981) 55 A.L.J. 728, 735.

³⁶ (1970) 2 Q.B. 223.

³⁷ (1979) 3 W.L.R. 605.

³⁸ (1979) 3 W.L.R. 605, 622.

³⁹ (1964) A.C. 465, 482.

⁴⁰ (1982) 3 All ER, 201, 210.

⁴¹ (1964) A.C. 465, 529.

And . . .

“I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. . . I regard this proposition as an application of the conception of proximity. Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular person any more than in *Donoghue v Stevenson* the ginger beer was supplied for consumption by any particular person; and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v Stevenson* a specific proposition to fit the case.”⁴²

Certainly the High Court of Australia, having been freed from the constraints of the Privy Council case *M.L.C. v Evatt*,⁴³ made short work of removing the particularised relational tests laid down therein. In *Shaddock L. & Associates Pty Ltd v Parramatta City Council* Murphy J enunciated the test as follows:⁴⁴

“In general, a person who makes a negligent mis-statement in circumstances where he knows or should know that the person or persons to whom the mis-statement is made may rely upon it, is liable in damages for loss sustained by the person or persons as a result of relying upon the mis-statement.”

Woodhouse J in *Scott Group v McFarlane*,⁴⁵ a decision of the New Zealand Court of Appeal, applied Lord Wilberforce’s two stage test laid down in *Anns* “as being a valuable and logical guide” in determining liability for negligent statements. In that case Sir Owen Woodhouse said of *M.L.C. v Evatt* (supra): “that case⁴⁶ was a majority decision which turned upon a particular application of principle to the very facts of the case”. It is argued that *M.L.C. v Evatt* was a backward step and should rightly be confined to its particular facts.

The reason for the particularised relational rules laid down by *Hedley Byrne* and *Evatt* arose from the considerations that⁴⁷

- i. “words are more volatile than deeds. They travel fast and far afield”; and
- ii. the aversion against giving a remedy for pure “economic loss”.

It is submitted that “the economic loss” argument is now no longer relevant. The objection to giving relief in regard to “words” can be met by applying the general standard of care strictly. In particular, in those cases where the factors of *Hedley Byrne* and *Evatt* are not available, there should be a high standard of care and a policing of the requirement that the words should have been uttered in circumstances that the plaintiff should reasonably believe that the defendant was accepting responsibility for the same. The particular relational factors laid down by *Hedley Byrne*

⁴² (1964) A.C. 465, 530.

⁴³ (1971) A.C. 793.

⁴⁴ (1981) 36 A.L.R. 385, 409.

⁴⁵ (1978) 1 NZLR 553, 573.

⁴⁶ (1978) 1 NZLR 553, 572.

⁴⁷ See *Hedley Byrne* per Lord Pearce (1964) A.C. 465, 534.

should be evidential only and not crucial in establishing the duty of care. The duty of care in all cases should be based on proximity. In a modern age this will give the law flexibility to deal with changing situations.

B. *Breach of Duty*

Whether there has been a breach of the duty of care is a question of fact to be determined by the court. The inquiry which must be undertaken to determine breach is a two stage inquiry:⁴⁸ The first issue is whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff; secondly the court must determine what a reasonable man would do by way of response to the risk. The risk to be foreseen must be a "real risk". Far-fetched or fantastic risks do not involve breach.⁴⁹

The issue of foreseeability must be determined in arriving at the duty of care and then in ascertaining whether there has been a breach thereof. The test is more generalised at the duty of care stage, and therefore more specific at the breach stage. At the breach stage the criterion of foreseeability is applied by the court directly to the situation before it. The inquiry is precise in its focus to the factual situation pertaining. The degree and magnitude of the risk are important matters.⁵⁰ The standard of care is that of the reasonable man confronted by such circumstances. The standard of care is objective, but directly related to the particular circumstances. In determining what a reasonable man would do by way of response, the court must balance the magnitude of the risk, the degree of probability of its occurrence, the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.⁵¹ The issue is one of fact and "must be a matter of impression and instinctive justice as to what is fair and just".⁵² There is little profit in considering a litany of case law. Each case will be different and stand on its own feet.

It is important to note that generally the characteristics of the defendant or his situation will not be taken into account. However, the defendant's infancy⁵³ is a characteristic that modifies the standard of care, though his physical or mental state is not.⁵⁴ Where the defendant is a professional or skilled person it is implicit in the objective test that his behaviour will be assessed in the light of what could be expected of a reasonable professional or skilled person in that field. This principle is subject to the fact that, if the plaintiff is aware of the defendant's lack of skill or capacity, he may be held to have agreed to a lower standard of care, or to have consented to the defendant's actions or may himself be guilty of contributory negligence.⁵⁵

⁴⁸ See *Current Judicial Analyses of Negligence* — Terry (1981) 55 ALJ 805, 810.

⁴⁹ See: *The Council of the Shire of Wyong v Shirt* (1980) 54 ALJR 283.

⁵⁰ See *Scott Group Ltd v McFarlane* (1978) 1 NZLR 553, Cooke J. 582.

⁵¹ See: (1981) 55 A.L.J. at 812.

⁵² See: *Scott Group Ltd v McFarlane* (supra) per Cooke J. 584.

⁵³ See *McHale v Watson* (1964) 111 C.L.R. 384.

⁵⁴ See *Adamson v Motor Vehicle Insurance Trust* (1957) 58 W.A.L.R. 56.

⁵⁵ See *Nettleship v Weston* (1971) 2 QB 691.

In view of the generalised duty of care, it is at the breach stage that courts will effectively and pragmatically control negligence liability. This leads to flexibility and the ability to do individual justice between the parties. However, objections of uncertainty must inevitably arise.

Precedent is useful as a guide only and the court will arrive at its decision by a process of reasoning by analogy. This trend has pervaded other fields; consider the discretionary statutes recently passed regulating contract.⁵⁶

The accent in any case will now more heavily than ever be concentrated on the factual situation before the court. This should give rise to a more specific and precise pleading of the allegations giving rise to responsibility.

C. Damage

The Privy Council in the *Wagon Mound (No 1)* attempted to lay down a clear policy decision concerning the law applicable to remoteness of damage in negligence cases. The directness test laid down by the English Court of Appeal in *Re Polemis*⁵⁷ though frequently criticised, had never been overruled. Viscount Simmonds in the *Wagon Mound (No. 1)* held that the test of remoteness of damage in negligence was foresight of consequences, not directness. In his celebrated dictum Viscount Simmonds said:

“It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of minimum standard of behaviour.”⁵⁸

The reference to “qualifications” and “probable” consequences does give the principle room to expand in order to meet new situations. However the emphatic overruling of *Re Polemis*⁵⁹ and the insistence upon the following principle has caused what was aimed at being a just, clear and defensible principle to be eroded:

“They have been concerned primarily to displace the proposition that, unforeseeability is irrelevant if damage is ‘direct’. In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.”⁶⁰

Commentators have pointed out that *Re Polemis* was probably correctly decided.⁵¹ In *Re Polemis* a ship that was loaded with cases of benzine was destroyed when the cases leaked, and during unloading a plank fell into the hold causing a spark. The spark in turn ignited the vapour in the hold. The unloading was being carried out by the servants of the charterers of

⁵⁶ See *Illegal Contracts Act 1970; Contractual Mistakes Act 1977; Contractual Remedies Act 1979; Credit Contracts Act 1981*.

⁵⁷ (1921) 3 K.B. 560.

⁵⁸ (1961) A.C. 388, 422.

⁵⁹ (supra).

⁶⁰ (1961) A.C. 388, 426.

⁶¹ See *The Road from Morocco* M. Davies (supra); *Remoteness of Damages and Judicial Discretion* (1978) C.L.J. 288 — Sir Robin Cooke; *Policy and Remoteness* J. G. Merrills *Ottawa L. Review* (1973) 6: at p. 18.

the vessel. It was found by the arbitrators that the unloading had been negligent and while some damage was foreseeable the spark was not. The Court of Appeal treated the question as one of remoteness of damage in negligence and held that foresight was not relevant, but that liability for all the direct consequences must be paid for, whether foreseeable or not.

Re Polemis was decided before *Donoghue*, so that the broad "neighbour" duty test did not then pertain. Liability arose out of the particularised relational duty, namely under the charter party, between the plaintiff and the defendant. Thus viewed the case did not do injustice between the parties. The charterers were responsible for the safety of the hold and had by omission created a dangerous situation. Their servants had acted negligently in close proximity of the hold and it does not seem just that having regard to the closeness of the parties the defendant should have escaped liability.

The facts of the *Wagon Mound (No. 1)* were different: The *Wagon Mound*, an oil burning vessel chartered by the defendants, while taking on bunkering oil in Sydney Harbour discharged some of the oil into the harbour. During that day and the next, the oil was carried by the wind and tide to the plaintiff's wharf against which the plaintiff's were repairing a ship with electric and oxy-acetylene welding equipment. Molten metal falling from the wharf set fire to rag or cotton waste floating on the surface of the oil. The oil ignited and the ensuing conflagration seriously damaged the wharf.

It was found that the discharge of the oil was a result of the defendant's carelessness, but that the defendants neither knew nor ought to have known that the oil had fouled the plaintiff's slipways and that this was a direct result of the escape of the oil. The Privy Council decided that the defendants escaped liability, holding that the test of remoteness of damage in negligence was foresight of the kind of harm incurred. Here, as the kind of damage suffered, damage by fire, was not foreseeable the defendants were not liable.

Shortly after *Wagon Mound (No. 1)*, *Hughes v Lord Advocate*⁶² was decided by the House of Lords. In that case the plaintiff, an eight year old boy, fell into unguarded street workings. The workings had been left unguarded during a fifteen minute tea break. The boy climbed into them and began to play with a paraffin lamp. This lamp dropped causing an explosion from the released paraffin which vapourised. *The explosion was found to be unforeseeable*, though it was foreseeable that the plaintiff might be burnt from playing with the lamp.

The House of Lords held that the defendants were liable. They had caused the plaintiff a foreseeable kind of damage, damage by burns. The way in which the burns had been caused was unforeseeable, but it was unnecessary for the defendants to have foreseen "*the precise concatenation of circumstances which had led up to the accident*".⁶³ Nor was it relevant that the damage caused was more extensive than might have been foreseen. It is clear that the decision of the House of Lords did manifest justice between parties, but it does not lie easily with a narrow view of *Wagon Mound (No. 1)*.

⁶² (1963) A.C. 837.

⁶³ (1963) A.C. 837.

The New Zealand Court of Appeal, in 1972, in *Stephenson v Waite Tileman Ltd*,⁶⁴ had occasion to create another exception to the test of “foreseeability of the damage of the kind a reasonable man should have foreseen”. In that case a steeplejack in re-setting the wire rope of a crane which was rusty and frayed sustained an injury to his hand. The rope had sprung free. Negligence was present. It was apparently a minor injury, but he developed an unknown virus, with possible brain damage. It was argued on the basis of *Wagon Mound (No. 1)* that the kind of injury received was not reasonably foreseeable. This argument was rejected. It was held that in cases of personal injury the inquiry of foreseeability should be limited to the initial injury and if the type of or kind was foreseeable then the ultimate consequences can be forged simply as one of cause and effect.

Similarly in 1979 the negligent escape of water flooded *unknown* fishponds of the plaintiff causing considerable loss of fish. Again it was argued that the kind of damage caused was not foreseeable. Bisson J held (*McIsaac v City of Tauranga*)⁶⁵ that as floods cause damage the defendant had to accept the state of the plaintiff’s property. The general loss of property being foreseeable, following *Hughes v Lord Advocate*, the details of how the flood caused the death amounted “to an unforeseeable concatenation of circumstances” and liability resulted.

It is submitted that the law concerning remoteness is therefore far from clear and is in an unsettled state. The foregoing examples show how the principle of the *Wagon Mound (No. 1)* clearly does not fit the circumstances of all cases.⁶⁶ That principle, though useful in some situations, has proved inadequate for resolving in a just, clear and defensible way the wide variety of problems which cases on remoteness raise.

The problems in this area of the law are highlighted in an article in the Cambridge Law Journal in 1978 by Sir Robin Cooke, “Remoteness of Damage and Judicial Discretion”.⁶⁷ In particular, the observations of Lord du Parc in the *British Monarch*⁶⁸ are underlined:

“Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest jurors should be persuaded to do an injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties.”

Sir Robin Cooke, after traversing the cases, states:⁶⁹

“Secondly, no one could today define contract and tort rules as to remoteness with any confidence. And such is the position despite a succession of attempts by strong courts to re-state the rules in a clear and authoritative way. The possibility suggests itself that in a sense all these attempts may have been directed at not quite

⁶⁴ (1973) 1 NZLR 152.

⁶⁵ (Rotorua Registry A 114/76 delivered 16.10.1979).

⁶⁶ See also *Taupo Borough Council v Birnie* (1978) 2 NZLR 397, Richmond J.

⁶⁷ (Supra).

⁶⁸ (1949) A.C. 196, 223-224.

⁶⁹ (Supra) 296, 297.

the right target. Enough weight may not have been given to the approach suggested by Lord du Parc's speech in *The British Monarch*, echoing Viscount Haldane's speech in *British Westinghouse*. As all would agree, the basic purpose or principle in both contract and tort is to place the plaintiff, as far as money can do it, in as good a situation as if his rights had not been violated by the defendant. That is to say, as if the contract had been performed or as if the plaintiff had not been harmed by the tort — between which two propositions there may be a difference in result, flowing from the difference that in one class of case the plaintiff claims that he has not received a promised benefit, whereas in the other he claims to have been injured by the defendant's activities. Prima facie the plaintiff is entitled to be compensated for all the loss caused to him by the defendant by acting in breach of his rights. Whether any particular head of loss has been so caused is a question of fact which perhaps cannot usefully be refined further than by asking whether the defendant's action was a *substantial cause*. . . Once causation has been established, it is necessary, as stated by Lord Wilberforce in *Anns v London Borough of Merton* to ask whether there are any considerations which ought to reduce or limit the damages. In a civilised society it may be just not to impose full liability on the defendant."

Sir Robin Cooke then propounds a discretionary approach and sets out some circumstances that may be relevant to the exercise of such discretion. As he points out it is natural for common lawyers to work from principle by analogy. Further the trend in other areas of the law is the enactment of statutes entrusting judges with a wide discretion to do justice between the parties.

It should be noted that in *McLoughlin v O'Brian* (supra) the House of Lords, on the nervous shock issue, dealt with it as a "duty" problem rather than one of remoteness of damage. That case approved of the "rescue" cases and likened the actions of the plaintiff going to the hospital as similar to "a rescuer" and hence within the general area of foreseeability.

On the causation issue reference should be made to a recent 1982 English Court of Appeal case, *Knightley v Johns*.⁷⁰ In that case the first defendant through his negligence had been involved in a serious road accident near the exit of a one-way road tunnel. The plaintiff, a policeman, had been ordered by his superior to travel after the accident against the traffic in the tunnel to close it and was seriously injured. The trial judge held the first defendant wholly liable and the Police Inspector, the second defendant, not liable. Nor had the second defendant broken the chain of causation.

The Court of Appeal held that there had been a break in the chain by a '*novus actus interveniens*'. The test to be applied was whether the damage was natural and probable and therefore reasonably foreseeable. This was a test based on the likelihood of what had happened rather than what happened being a mere possibility which would not occur in the mind of a reasonable man or, if it did, would be discounted by him as being too remote to require precautions against it.

The sequences of events was to be compared with a degree of common sense, rather than logic, with the facts and circumstances of other cases. On the issue of foreseeability, the particular emergency does not have to be foreseen, but rather the fact that some emergency might arise and what happened was natural and probable and therefore foreseeable.

⁷⁰ (1982) 1 All ER 851.

Before concluding on the issue of damages mention should be made, that despite strictures of the House of Lords in *The Heron II*⁷¹ that the remoteness tests in contract and tort are not necessarily the same, recent cases have tended to the view that they may be assimilated,⁷² in that, for physical injury to person or property or ensuing expense, the contract rule should be the same as in tort and that the defaulting party should be liable for any loss or expense that might reasonably have foreseen at the time of the breach as a possible consequence, even if it was only as a slight possibility.⁷³

It is submitted that the damages issue is bedevilled by semantics. As Stephenson L.J. said in *Knightley v Johns* (supra).⁷⁴

“In the long run the question is, as Lord Reid said in the *Dorset Yacht Co* case, one of remoteness of damage, to be answered, as has often been stated, not by the logic of philosophers but by the common sense of plain men.”

D. *The Tort/Contract Dichotomy*

As has been seen, historically the common law never adopted a general policy of excluding concurrent liability in both tort and contract. The great case of *Donoghue v Stevenson* itself arose out of a contract. One would have thought that a contractual relationship set the scene for a “proximity” of the very closest kind. In such a setting the contract could modify or even expressly exclude the duty of care (it should be noted that the claim in *Hedley Byrne* failed by reason of an exclusion clause). The contract would be a very relevant factor in measuring the liability between the parties. In most contracts there will be an implied term to take care in the performance of a contract. The question therefore must be asked: does it really matter whether the source of the obligation to take care is grounded in negligence or contract? What then are some of the practical issues involved in classifying the source of the liability?

1. *Contributory Negligence*: It is not clear whether contributory negligence can be pleaded as a defence in contract. However, in *Turner Hopkins & Partners v Rowe*⁷⁵ the New Zealand Court of Appeal in 1982 on this issue per Cooke and Roper J.J. said:

“On the Act (Contributory Negligence Act 1974) it would therefore not be right to do more in this particular case than refer to the view that it can apply wherever negligence is an essential ingredient of the plaintiff’s cause of action, whatever the source of the duty. In disposing of this appeal on the facts only we should not be taken necessarily to assent to the narrower view of the Act reached in the judgment under appeal.”

2. *Jurisdictional and Procedural Rules*: These are often framed so as to produce different results, depending on whether an action is categorised

⁷¹ (1969) 1 AC 350.

⁷² See *H. Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* (1978) 1 All ER 525, 532; *Knightley v Johns* (1982) All ER 851 Stephenson L.J. p. 863.

⁷³ Per Lord Denning M.R., *Parsons v Uttley Ingham & Co* (supra) at p. 532.

⁷⁴ (supra) p. 866.

⁷⁵ (C.A. 31/81 delivered 2.6.1982).

as being in tort or contract. A plaintiff in contract may have a wider choice of venue than a plaintiff in tort, for example.

3. *Damages*: Again, the recovery may be different depending on whether the issue is in contract or tort. However the real question is one of compensating for what is lost and in a concurrent situation damages may well lie for loss of bargain as well as the actual tort damage. There is, as has been seen continuing pressure to have the same tests for remoteness. Certainly it would be easier for a plaintiff in tort to claim exemplary damages or damages for distress.
4. *Limitation of Actions*: Under the Limitation Act 1950 a cause of action in contract accrues at the time of the breach even if damage does not occur until later. In fact, because damage is necessary to found an action in negligence the cause of action does not exist until the damage occurs. It had been thought that in tort, time did not run until the damage had occurred and was then discovered or ought to be discovered.

The House of Lords in *Pirelli General Cable Works v Oscar Faber & Partners*⁷⁶ has now decided that the critical date is when the damage occurs and not the date when it was discovered. The House thought that the conclusion was unfortunate, but the same would have to be cured by legislation.

It was in respect of the limitation period that the tort/contract tension was from a practical viewpoint thrown mostly into relief.

The New Zealand Court of Appeal in *McLaren Maycroft & Co v Fletcher Development Co Ltd*⁷⁷ has effectively barred the way in New Zealand to a principle of concurrent liability in tort and contract. In that case professional engineers had been held liable in negligence to developers in regard to a subdivision. A claim in contract was statute barred under the Limitation Act 1950. In the Court of Appeal Richmond J. held that "the only right of action which the developers had against the engineers was an action for breach of contract".⁷⁸

In the United Kingdom Oliver J. has held that there could be concurrent liability against a solicitor in tort as well as contract (*Midland Bank v Hett, Stubbs & Kemp*).⁷⁹ Similarly in *Junior Books Ltd v Veitchi Co Ltd* (supra) Lord Roskill said:⁸⁰

"Any remedy of that kind it was argued must lie in contract and not in delict or tort. My Lords, I seem to detect in that able argument reflections of the previous judicial approach to comparable problems before *Donoghue v Stevenson* was decided. That approach usually resulted in the conclusion that in principle the proper remedy lay in contract and not outside it. But that approach and its concomitant philosophy ended in 1932 and for my part I should be reluctant to countenance its re-emergence some fifty years later in the instant case. I think today the proper control lies not in asking whether the proper remedy should lie in

⁷⁶ (1983) 1 All ER 65.

⁷⁷ (1973) 2 NZLR 100.

⁷⁸ (1973) 2 NZLR 100, 115.

⁷⁹ (1979) Ch. 384.

⁸⁰ (1982) 2 All ER 201, 213.

contract or instead delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not (it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages) but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.”

Recently in 1982 the New Zealand Court of Appeal uttered the following in regard to a solicitor’s concurrent liability in *Turner Hopkins & Partners v Rowe*, per Cooke and Roper J.J.:⁸¹

“A few words should be added about *McLaren Maycroft*; Obviously what was said there, about the relationship of professional man and client being contractual only, requires at least reconsideration. . . . In the meantime it is equally plain, that in the field of professional negligence, trial judges should apply the law as stated in *McLaren Maycroft*, as again Prichard J did in this case. But, similarly, findings of fact that may be needed should be made: against the day — perhaps not far distant — when the issue arises squarely in this Court.”

McMullin J. said:

“In the result the door which the *McLaren Maycroft* approach might have suggested was firmly closed may now be thought to rest ajar. Whether it is to be opened, and to what extent, to admit of concurrent liability in contract and tort must await further argument in this Court.”

It is suggested that s.6 of the Contractual Remedies Act 1979 which provides a remedy for what was previously an innocent misrepresentation, but bars the way to a concurrent plea of negligent mis-statement may go far to narrow the factual situation, where “the concurrency argument” is likely to arise. However, if in doubt, pleadings, where applicable, should frame the cause of action alternatively in tort and contract. It should be remembered that in *J. & J. C. Abrams Ltd v Ancliffe*⁸² (a negligent estimate by a builder) Cooke J. was not concerned whether the negligence arose from a duty in contract or in tort.

Junior Books adverted to a problem which is not strictly one of concurrent liability, that is, to what extent does a contract modify the duty of care to a stranger, who may never even have known of the existence of such a contract? While the problem did not arise from the facts it was referred to in dictum.

The issue in that case was not that the floor was dangerous, but rather defective. The example was given that a building constructed in fulfilment of a contract for \$100,000 might justly be regarded as defective, while the same building constructed in fulfilment of a contract for \$50,000 might not. Lord Fraser was of the opinion that, provided the building “*was not dangerous to persons or other property*”⁸³ then the contractual arrangements between the original parties would have to be viewed in regulating the duty of care. This would be so even if the plaintiff was unaware of the contract.

⁸¹ (C.A. 31/81 — delivered 2.6.1982).

⁸² (1981) 1 NZLR 244.

⁸³ (1982) 2 All ER 201, 204.

However, if the *construction foreseeably would cause harm to a third party*, then the contract would be a matter to be taken into account only, and would not necessarily modify the duty of care.⁸⁴

It is submitted that the clear trend of principle is in favour of concurrent liability in tort and contract and *McLaren Maycroft* will shortly meet its demise.

III.

CONCLUSION

1. It has been seen that from a historical viewpoint the trend with regard to negligence has been the withering away of a particularised relational concept to a generalised duty of care. It is forecast that this trend will continue in regard to the "*Hedley Byrne*" type factual situation which will ultimately be determined by the application of Lord Wilberforce's two stage test in *Anns*. The relational factors listed in *Hedley Byrne* and *Evatt* will be evidential only as going to establish proximity and the seriousness of the occasion and the assumption of risk by the maker of the statement.
2. Negligence actions will be determined by principle and reasoning by analogy from previous situations. The limits of the duty of care are not to be determined by precedent. As under the *Anns* test policy and public opinion may restrict the duty of care and as policy or public opinion are not immutable, it follows that it can be dangerous to seek guidance from cases that may be behind the times.
3. The question of remoteness of damages still presents a semantic sea of semi-conflicting principle. In addressing the damages question the injunction of Lord Pearson to consider "the tort of negligence as a whole"⁸⁵ is thrown into relief. Damages should flow in a natural and common sense way from the factual situation making up all the components of the tort.
4. History again points the way to the fact that the tort/contract tension is artificial and should be done away with. The trends in New Zealand appear to be moving to a view of concurrent liability.
5. The determination of liability including damage will be essentially left as a particular assessment of fact for the individual judge. While it can be argued this will lead to uncertainty, nevertheless the flexibility and ability to administer the real justice between the parties is to be welcomed. It is the "breach" stage that will assume importance in marking off the liability between the parties.
6. It finally should be noted that the New Zealand Court of Appeal has been a forerunner in the evolution of expanding the modern doctrine of

⁸⁴ See *Bowen v Paramount Builders (Hamilton) Ltd* (1977) 1 NZLR 394, 407, 419.

⁸⁵ See *Home Office v Dorset Yacht C. Ltd* (1970) A.C. 1004, 1052.

“principle” in this field. The statements being uttered by the House of Lords in 1982 were being made a decade ago by our court in *Bognuda v Upton and Shearer Ltd.*⁸⁶

Editors' Note: Since the above paper was delivered, the New Zealand Court of Appeal has considered some of the issues raised by Mr Cadenhead in the case of *Gartside v Sheffield, Young and Ellis* (a firm) (C.A. 126/81, 1 June 1983). This was an appeal from a judgment of Thorp J on the preliminary issue of whether an intended beneficiary could recover damages in tort from the testator's solicitor for negligence in the preparation of the will. The negligence alleged was that the solicitor, having received instructions for a new will, to succeed an existing will, had failed to have the will duly executed before the testator died. The plaintiff would have been the residuary beneficiary of the estate under the new will. The result of the alleged negligence was that another became the residuary beneficiary, under the original will. Thorp J. had held that no cause of action was disclosed.

The Court of Appeal unanimously allowed the appeal.

Cook J. noted firstly that there was a fairly even division of judicial opinion on this and related issues.¹ This (said Cooke J.) allowed the Court freedom to arrive at what it saw as being a just solution. He noted that the Court had previously held that a solicitor may owe a duty of care in tort to party other than his client,² and that the mere fact that only “economic loss” has been suffered does not necessarily rule out a duty of care. At best it is a factor which may in some cases tell against a duty or limit the scope of liability.

The learned Judge at first instance had primarily denied the existence of such a duty because he felt that to recognize the existence of such would be to provide a right equivalent to a *jus quaesitum tertio* in contract, thus undermining fundamental privity rules.

Cooke J. firstly noted as to this that the learned Judge might have decided differently had he known that the Legislature was about to reform the law of privity.³ Secondly, he thought that the cases on privity were in any case not a true parallel with the case of a suggested duty of care on the part of B to C as an intended recipient of A's bounty, where the relationship between A and B is that of testator and solicitor.

Having dismissed the privity argument Cooke J. expressed the view that the imposition of such a duty is fair and just, and acknowledges “the solicitor's professional role in the community. . . the public relies on solicitors. . . to prepare effective wills. It would be a failure to the legal system not to insist on some practical responsibility.”⁴

⁸⁶ (1972) NZLR 741.

¹ The following cases were referred to: *Ross v Caunters* (1980) Ch. 297; *Watts v Public Trustee For Western Australia* (1980) WAR 97; *Seale v Perry* (1982) VLR 193; *Whittington v Crease* (1978) 88 DLR (3d) 353; *Sutherland v Public Trustee* (1980) 2 NZLR 536.

² See *Allied Finance and Investments Ltd v Haddow & Co.*, (C.A. 38/82, 19 April 1982).

³ Contracts (Privity) Act 1982.

⁴ Transcript, page 14.

The above analysis lends support to Mr Cadenhead's conclusions (see above). Furthermore, Cooke J. expressly stated that it was "in accordance with the way in which negligence law has been developing to confine the present situation to the kind of facts before the Court".⁵

Richardson J. tended towards the same approach adopted by Cooke J., but expressly referring to the now well-known "Anns two-stage enquiry", as being the appropriate method to adopt. He also emphasised that under such an enquiry "the ambit of the duty of care is determined on a case by case basis. What is decided in this case cannot be applied automatically to other situations in which a duty of professional care to third parties is alleged".⁶

As the first stage of the enquiry, Richardson J. held that there was sufficient proximity to give rise to the duty of care. The solicitor must reasonably foresee that his failure to execute the will in time would lead to damage being suffered by persons such as the plaintiff.

As the second stage of the enquiry, Richardson J. had to ask whether there were any policy considerations affecting the existence of this prima facie duty. Firstly, His Honour dismissed the privity analogy, as had Cooke J. This was not a case of two persons purporting to contract to confer a benefit on a third. There was nothing in the solicitor/client contract to that effect. For this and other policy reasons (paralleling those of Cooke J.), Richardson J. held that there was nothing to restrict the duty of care. McMullin J. was in agreement with Cooke and Richardson J.J.

This case, then, provides in very clear terms an example of the pragmatic approach which our Court of Appeal is now prepared to adopt in hearing negligence cases. Whether this approach will have an adverse effect remains to be seen. However, the judgments of their Honours clearly support the views of Mr Cadenhead.

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⁵ Transcript, page 16.

⁶ Transcript, page 5.