NEGLIGENT ECONOMIC LOSS IN AMERICAN LAW

Professor John Fleming
University of California at Berkeley

Introduction

I would like to begin with some general observations. Negligent economic loss has been of absorbing concern for British tort lawyers ever since the categorical ban on its recovery was lifted from negligent misrepresentation in *Hedley Byrne v Heller*.[1] Hardly a year passed, especially after *Dutton v Bognor Regis U.D.C.*,[2] that appellate courts were not confronted with the problem of staking out the limits of this duty of care. Perhaps it is not as puzzling as it appears at first sight that a groundbreaking decision should be followed by a cluster of litigation until the storm eventually subsides. But by comparison the American experience has been much more relaxed. As so often, in products liability as here, American decisions commenced their run forty years earlier, when Judge Cardozo in the 1920s sketched the outlines of liability for negligent misrepresentation.[3] Since then decisions dealing with economic loss have been intermittent but never attained either the prominence or the frequency nationally or in any particular jurisdiction that has marked the British preoccupation with the subject. Indeed, the leading textbooks continue to give it little more than cursory treatment and not in its admitted context of "duty of care";[4] most casebooks, the principal vehicles of instruction, practically ignore it. In short, it is overshadowed, if not buried, by apparently more intriguing and divisive topics like mental disturbance, duties of affirmative action and products liability. Similarly, the volume of academic literature, usually a reliable barometer of topical and controversial subjects, bears no comparison with that in England and the Commonwealth.[5]

A second comparative aspect is the fascination with "principle" in British judgments, in contrast to the more pragmatic tenor of American legal opinions. It used to be fashionable to think of the Common law as much more fact-oriented and less theoretical than the Civil law, but this characteristic is nowadays more commonly found in America than in Britain and Australia. At any rate discourse on "duty" tends to become dissolved in a theoretical fog, in hopeless quest for inclusive generalization. This may be the legacy of Lord Atkin's famous "neighbour" formula, itself derived from a biblical aphorism, which inspired later generations of judges to follow his example into elegant abstraction. This tendency has been exacerbated by wrangles over the respective ambits of "principle" and "policy", in which these concepts often carry different meanings and "policy" is a taboo word suggestive of judicial legislation instead of denoting judicial creative thinking. This tendency has contributed, in the context of economic loss, to a reluctance for ad-hoc decisions in preference for the safer course of sticking to a well-worn formula.

By contrast, American legal thought is far less inhibited by generalization or formalism. Judges do not pretend that "adherence to rule can be pursued relatively neutrally, without regard to policies and reasons underlying or otherwise relevant to the rule. The purported

neutral application to rules is, they argue, a sham".[6] And, as Summers and Atiyah concluded, "the more substantive method of legal reasoning characteristic of American law tends to break up the unity of legal concepts and this necessitates a greater willingness to look to the underlying purposes behind the rules".[6a] Guidelines on "duty", if they exist at all, are open-ended and pragmatic and, being guides, are not given sufficient importance to become controversial.

If there is consensus on any aspect, it is that recovery for economic loss is narrower than for physical injury. Indeed, for bodily injury duty is, for all practical purposes, judged by foreseeability and plays no substantive role in the judgment process. "Duty" becomes relevant only on the periphery of legal obligation, such as omissions, mental disturbance, and economic loss. As regards the last, two aspects in particular have played a dominant role.

One is the relation between tort and contract. The Common law has only reluctantly and as yet imperfectly shed the chrysalis of the normal division of obligations into tort and contract. It took almost a century before *Donoghue v Stevenson* – and then by a slim majority of 3 to 2 – discarded the legacy of *Winterbottom v Wright* and recognised that a contractual obligation could engender a tort duty to third parties not in privity. And, as already mentioned, it was only 25 years ago that economic loss – hitherto considered the hallmark of contract law – was admitted within the scope of negligent misrepresentation. Even if American legal thought is less influenced by formalism, and succeeded many years earlier than the British in reaching these milestones, the contract/tort dichotomy is still apt to agitate the nerves of even the most emancipated Common law mind. As we shall see, even presumably so sophisticated a court as the U.S. Supreme Court invoked the formalistic argument that to allow the particular claim in tort would violate the distinction between contract and tort.[7]

Indeterminate Liability

Closer to the point is the celebrated warning by Judge Cardozo against "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[8] It directs attention to the allegedly disproportionate burden on defendants and society in the absence of substantial limitations on liability. The case, *Ultramares Corp v Touche*, presented the familiar problem of an accountant's liability to third party investors for negligent misstatements in a company audit. How can we distinguish, it has been asked, the liability – strict liability at that – of a products manufacturer with this immunity even from negligence? Most significant, no doubt, is that, whereas the manufacturer is able to distribute the cost of accidents among his countless consumers, the auditor is limited to one client at a time.[9] Insurance, if available at all, would become prohibitively expensive and lead to a shrinkage of the service, which is of substantial public benefit in providing access to information for the market. Moreover, the cost has to be borne by the client, while third party investors are "free riders" of a benefit without paying for it. Again, unlike the consumer, the investor is usually well placed to protect himself by making his own inquiries. To give him the benefit of a duty of care would expose him to the moral hazards of being lax in self-protection and advancing claim to losses of doubtful causality.

Without precisely articulating this economic thesis, the House of Lords recently followed Judge Cardozo's three indeterminates in denying an auditor's liability to the investing public.[10] Yet despite the cogency of the preceding argument and the New York court's reiteration of its earlier holding a few years ago,[11] some American courts have broken rank. They discern no categorical distinction, as regards the likely extent of damage, between physical and economic loss pointing to the potentially disastrous consequences of a holocaust, to the high fees earned by accountants, and are content to leave the issue to foreseeability. In the forefront of this departure have been the ultra-liberal courts of New Jersey and California, which have generally pursued a hard line against corporate defendants in the interest of deterrence and compensation for the "little man".[12] Having regard to the fact that an overstatement of assets would likely serve the interest of that client, there is otherwise lacking any incentive for the auditor to adhere to professional standards of care and competence in a situation fraught with conflicting interests.

"Indeterminacy" has had the strongest appeal in situation where the plaintiffs are members of a larger group not directly, but only *consequentially* affected by the defendant's negligence, as by damage to an object in which they have no proprietary or possessory interest. Examples are claimants whose business was interrupted by a closure of a bridge[13] and employees who lost wages as a result of damage to their workplace.[14]

The most adamant expression of this principle was by the 5th Circuit Court of Appeals in banc in *State of Louisiana v M/V Testbank*,[15] ruling against any claims by shipping interests and others against a bulk carrier and a container ship whose collision caused a chemical spill and subsequent closure of a river channel. In the majority's view, a hard-and-fast rule was preferable in maritime decisions even in the light of the argument from deterrence. " [I]t is suggested that placing all the consequences of its error on the maritime industry will enhance its incentive for safety. While correct, as far as such [economic] analysis goes, such *in terrorem* benefits have an optimal level. Presumably when the cost of an unsafe condition exceeds its utility there is an incentive to change. As the costs of an accident become increasingly multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens. When the accident costs are added in large but unknowable amounts the value of the exercise is diminished".[16]

The court also rejected the argument based on nuisance on the ground that it was well-nigh impossible to separate here who among an entire community that had been commercially affected by an accident had sustained a pecuniary loss so great as to justify distinguishing it from similar losses by others. Besides, rephrasing the claim as a public nuisance did not change its essential character so as to permit recovery for an interest that the law has consistently refused to protect.

Still, there are a few decisions that have broken rank. A year earlier the 9th Circuit had allowed recovery to commercial fishermen who had been prevented from pursuing their living by an oil spill on public waters.[17] Is the difference explainable as resting in the one case on the dominance of the oil industry in the Gulf region and in the other on the strong ecological sentiments against offshore oil exploration off California's sensitive coastline? And then there is the New Jersey court which held a defendant, whose tank car

exploded causing a temporary closing of an airport, liable to an airline for interruption of their business.[18]

The case for denying recovery in these situations is strengthened where the plaintiff is a better loss bearer. This might be because he is in a better position to estimate his exposure to the risk and able to absorb resulting losses. Typical are the cable cases, like *Spartan Steel v Martin,*[19] where in the course of a road construction the contractor breaks an electricity line, interrupting the power supply to factories in the neighbourhood. Work stoppages from whatever source are a foreseeable risk of industrial operations, calculated into the price of their products. They can, moreover, be anticipated and guarded against more cheaply by the plaintiff, for example by maintaining an emergency generator. Economic efficiency thus points to the potential victim as the better "loss-avoider", as Calabresi would say.[20]

Direct Loss

Situations where the plaintiff is directly, not consequentially, exposed to foreseeable loss most strongly resemble the stock tort paradigm. Foremost, of course, is the case of negligent misrepresentation to one to whom information or advice is passed directly or through an intermediary and who, as the defendant knows or should know, will place reliance on it in a particular transaction: the *Hedley v Byrne* situation.[21] Of special importance in the development of American law is Judge Cardozo's decision of *Glanzer v Shephard*[22] holding a public weigher liable in tort to the purchaser of a quantity of beans for certifying to the seller an overweight. Here the transmission of the certificate was not just a possibility, it was "the end and aim of the transaction, as certain and immediate and deliberately willed as if a husband were to order a gown to be delivered to his wife, or a telegraph company, contracting with the sender of the message, were to telegraph it wrongly to the damage of the person expected to receive it....The bond was so close as to approach that of privity, if not completely one with it".

Another illustration of the same principle is that of the intended legatee whose bequest is frustrated by the negligence of the testator's attorney. California courts were the first to allow recovery, emphasising the defendant's awareness of the plaintiff's identity and likely size of her loss; also that otherwise the defendant's negligence would lack all sanction. Both factors are equally weighty. First, the relation between the attorney and the intended legatee is so close as to be non-contractual only by giving undue importance to the technical lack of privity. Indeed American courts, mindful that the bequest to the legatee was "the end and aim of the transaction", have not hesitated to treat the legatee as a donee beneficiary entitled to sue in contract, as well in tort.[23] Secondly, it is only by happenstance that the attorney escapes liability to the testator himself: actually, the foreseeable loss is only transferred from the testator to the object of his bounty.

"Transferred loss" is even more clearly involved in two other situations, though its reality has escaped American no less than British courts. One is the case of a time charterer who sustains loss as the result of a collision with, or defective equipment supplied by, a negligent defendant. The highest courts in both jurisdictions have denied the charterer

compensation for resulting losses on the technical ground that only the owner or a person with a possessory interest in the ship has standing to sue.[24] The other case concerns damage to or loss of goods in transit where the purchaser has the risk of loss, but not the property. Again, recovery is denied on the ground that the plaintiff lacks the necessary standing.[25] Thus the one who has suffered the loss has no remedy, while the other who has the remedy has suffered no loss. Yet, in both cases the defendant's liability would have been the same if the owner instead of the purchaser had suffered the loss; by allowing the purchaser to recover, the defendant's liability would merely have been transferred from one to the other, thereby avoiding the spectre of indeterminate liability. German law which is even more constrained than the Common law by a categorical exclusion of economic loss in tort, has been remarkably inventive in contractual circumlocutions: its theory of "transferred loss" (*Drittschadensliquidation*), in effect urged by Goff LJ,[26] would have been a model for the Common law.

Insurance

A potent factor bearing on the relative capacity of the parties to bear the loss is the insurability of the risk. Except for professional liability, liability insurance is generally limited to personal injury and property damage. There can be no question that the availability of liability insurance has been a potent catalyst for the vast expansion of tort liability in American as in British law.[27] This is underlined by the very fact that the absence of such insurance has been a notable contributor to the survival of the immunity for economic loss.

Conversely, in many situations self-insurance by the potential victim is a more efficient way of absorbing the loss. As already discussed in connection with the interruption of electricity supply, the affected enterprise is better able to calculate and discount its potential exposure than would be the defendant and his insurer. So also in most cases of products liability, substantial economic losses, particularly loss of profits during repair or replacement, are incurred by businesses. These can generally look after themselves and in any event are not able to command the same compassion as victims of physical injury.

Economic theory has played only a modest role. Its general emphasis on deterrence as a primary means of reducing accident costs is in this context somewhat muted, as the before-mentioned passage from the *Testbank* case explained, by the frequently disproportionate cost of liability. Plaintiffs can thus be targeted in many situations as the better cost-avoiders.[28]

Triangular Relations

The tension between contract and tort becomes particularly acute in triangular relations, i.e. where there is a contract between A and B and between B and C and the question is whether A owes a duty of care to C. The first batch of English economic loss cases looked rather favourably on extending liability to relationships "equivalent to contract". Besides *Hedley Byrne*[29] itself, there was *Junior Books*[30] and as late as 1990 *Smith v Bush*[31] where a valuer instructed by the lender was held liable to the purchaser/borrower for overvaluation of the property, their relation being described as "akin to contract". That

decision may have been influenced, though, by the fact that the plaintiff borrower had borne the cost of the valuer's services.

The question comes to the fore especially in the context of construction projects. One difficulty in particular besets *Junior Books* and cases like it, which allowed a building owner to sue a designated supplier who was under contract (but only) with the main contractor. If we allow such a claim, how can we limit that liability to the extent assumed by the defendant in the contract? A lower standard of performance than that which would have been demanded by the legal standard of due care may have been stipulated or other exemption clauses agreed upon as a condition of his undertaking the job. But such defences are not ordinarily available against third parties in tort. Thus what told against a tort duty by the engineer to the contractor for under-valuation in *Pacific Associates v Baxter*,[32] for example, was a provision in the head-contract for arbitration of such a dispute between owner and contractor and a specific disclaimer in that contract of personal liability of the engineer. Proponents of "vertical liability" have insisted on holding the subcontractor liable only to the contractual standard, but have been hard put to explain how. Clearly, a contractual theory such as has occasionally been put forward by American and German courts, would cleanly solve that problem.[33]

It is also argued that the structure of the parties' contractual relations was understood, perhaps even designed, to exclude complementary obligations in tort, such as that between the building owner, his engineer and the contractor.[34] But in the absence of an expression to that effect, this is ultimately question begging.

American cases have looked both ways. On the one hand are jurisdictions, like California, which allow tort claims for economic loss in general by clearly foreseeable plaintiffs. These have included claims by contractors against supervising architects on the basis of the latter's control over the former[35] or, as the New Jersey court had it, because the contractors "share an economic relationship and community of interest with the architect on a construction project. The duty is based on circumstances establishing a direct and reasonable reliance by the contractor on the contracted performance of the architect when the architect knows or should know of the reliance".[36] The emphasis on reliance replicates the Australian High Court's insistence on that element as necessary for the recovery of economic loss in tort.[37] Also belonging to this group is the leading California case of *J'Aire v Gregory Inc*[38] where a tenant recovered from a contractor for negligent delay in carrying out the performance under his contract with the owner. The agreement, it was said, was "intended to affect the tenant". Besides these tort cases there are some others which occasionally succeeded in spelling out of the terms of the subcontract an intention to benefit the building owner and allowing him to recover as a third-party creditor beneficiary.[39]

There is however a line of authority to the contrary.[40] The leading Illinois case, for example, barred a subcontractor's claim against a construction supervisor for the cost of redoing a portion of its work, although it left the plaintiff wholly without a remedy.[41] In applying the same principle to an architect, the Virginia court commented that "the parties involved in a construction project resort to contracts and contract law to protect their

economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another's failure properly to perform is but one provision the contractor may require in striking his bargain. Any duty on the architect in this regard is purely a creature of contract".[42]

A comparison with other legal systems which have less difficulty in allowing recourse to such plaintiffs on a contractual basis[43] raise the question whether the problem in Anglo-American law is not primarily structural rather than substantive. Do not the cases allowing recovery resort to tort in order to overcome a blind spot of our law of contract: to jump the privity gap?[44] Arguably, this is a poor substitute for a contractual remedy which would be limited by the contract provision in regard to the standard of performance or other modifying terms. Tort law has found such problems somewhat vexing.[45] Contract law also would obviate the duality in the defendant's obligation, usually linked to strict performance in contract but to negligence in tort. Functionally, this disparity does not make any sense.

Is the privity rule based on more principled grounds? The argument is sometimes made that it would thwart the intention of the parties to a multilateral project to be placed under obligations they had no intention to assume. But this assumes too much. If they really desired not to be bound, they could easily so provide. Otherwise, it begs the question. In sum, the objection to claims of this kind seems to be less substantive than structural. The best solution would be to reform the contractual privity requirement;[46] the second best to tolerate tort filling the gap subject to the safeguards discussed.

Defective Buildings

Linked to the foregoing are claims against a building contractor by subsequent purchasers of a defective dwelling or other structure. This is a situation which has received most of the attention of British courts. Here too an earlier inclination to resort to tort in order to fill the privity gap was later replaced by a strict distinction between damage to the affected structure (economic loss) and damage to *other* property (physical loss). This development, of peculiar interest to New Zealanders, has resulted currently in a divergence between English and New Zealand decisions.

American cases are quite divided. Illinois and Virginia generally follow the English view of *D. & F. Estates*[47] and *Murphy*.[48] The leading Illinois decision,[49] for example, rejected the claim against a builder by a second owner of a home for the cost of repairing structural defects. Although presumably the defects could eventually have resulted in physical injury, "the hazard did not result in a member of the plaintiff's family being struck by a falling brick from the chimney. The adjoining wall has not collapsed on and destroyed the plaintiff's living room furniture. The plaintiff is seeking damages for the cost of replacement and repair of the defective chimney, adjoining wall and patio....The complained-of economic losses are not recoverable under a negligence theory".

Significantly, however, the court extended the Illinois implied warranty of habitability to cover subsequent purchasers of residential buildings like the plaintiff in that case. In

outcome, therefore, it reached the same conclusion as obtains in England under the Defective Premises Act 1972. This, in turn, raises an interesting reflection: was the decision in *D.& F. Estates* tacitly influenced by the protection afforded by this statute to residential dwellings, in practice confining the decision to commercial owners who, arguably, can better look after themselves? If so, that decision should have less precedential weight in jurisdictions like New Zealand which, at the moment, lack this statutory solution.[50] One defect of the British judgmental style, which often conceals a court's real motivation behind a mask of abstract doctrine, is that it may be interpreted elsewhere without reference to its local context.

Other cases from a wide range of jurisdictions,[51] however, support claims by subsequent purchasers for latent defects, citing the inexperience of ordinary home buyers and the fact that such purchasers would not have assumed the risk of latent defects. Moreover, even Illinois, otherwise a steadfast adherent of the "economic loss" rule, relented to allow recovery to school districts against asbestos suppliers for removal and repair costs on the ground that the toxic material had contaminated the whole buildings and had thus done damage to *other* property.[52] But reminiscent of the House of Lords in *Murphy* repudiating the idea of diluting the notion of *other* property by resort to the notion of "complex structures", the Illinois court guarded against "the use of some fictional property damage", besides stressing the unique nature of the "defect" and the "damage" caused by asbestos. Indeed, claims by school districts for asbestos removal have generally succeeded in American jurisdictions, distinguishing between "contamination" and property damage and excluding asbestos from risks allocated by private bargaining.[53]

Defective Products

In comparison with the British, American experience with the problems of economic loss caused by manufacturers of defective products is rich indeed. English case law on traditional liability for negligence can be assumed now to follow the guidelines established for defective structures in *D. & F. Estates* and *Murphy*. The only appellate case, *Muirhead v I.T.S.*[54] dealing with a defective water pump which did not pose any risk of personal injury, rejected the claim for loss of profits, while allowing damages for the lost lobsters which had perished from asphyxiation. The strict liability of producers under the Consumer Protection Act 1987, giving effect to the EEC Directive of 1985, likewise expressly limits damages to personal injury (or death) and damage to *other* property, not damage to or loss of the defective product itself.[55]

The diversity of American case law is its most prominent feature. The only (near) consensus appears to be on the identity of solutions alike for negligence and strict liability. On one extreme are jurisdictions adopting the same view as the British cases, with the distinction drawn according to whether the damage or loss emanates from damage to the defective product itself or to *other* property. The former is deemed economic, falling to the province of contract as one based on disappointed expectations in performance but with no distinction made between damages for loss of expectation and negative losses such as repair costs. This approach received a boost from the U.S. Supreme Court decision in *East River S.S. Co v Transamerica Delaval Inc*[56] rejecting the claim of a charterer for

loss of profit caused by a defective turbine, for fear that otherwise "contract law would drown in a sea of tort".[57] But as in most of the other cases following the same approach[58] the defect here did not have any potential for physical damage,[59] though this possible distinction was expressly negated in the majority judgment. In giving this decision of the U.S. Supreme Court its due, it should be borne in mind that it is controlling only for federal maritime jurisdiction, not however for state law (with which most of the claims are concerned) on which State supreme courts have the last word.[60]

A slight concession to the opposite view is suggested in the early landmark decision of the California Supreme Court in *Seely v White Motor Co*[61] where Traynor J allowed that, had the "galloping" of the defective truck caused the physical damage to the truck, that would have qualified as property damage and been recoverable from the manufacturer. As it was, the wrecking of the truck was attributed by the jury to a different cause, with the result that the claim for loss of profits and for money paid on the purchase price was rejected. Other opinions have also flirted with the idea that "an accident involving some violence or collision with external objects which results in physical damage will most likely be treated as a tort action",[62] but such an intermediate position, depending on the qualitative nature of the damage, even when occurring "through an abrupt, accident-like event", failed to persuade the U.S. Supreme Court, because "the resulting damage due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain – traditionally the concern of contract law".[63]

Another intermediate position turns on the nature of the risk, differentiating between defective products which endanger and those which merely disappoint users. Tort recovery is allowed at least when dangerous products cause the loss as a proximate result of their danger potential and under dangerous circumstances, as when a pickup truck went out of control as a result of a fractured defective weld in the axle housing.[64] This was the view shared also by Lord Denning in *Dutton*[65] and pressed by Laskin J in his dissent in the Canadian Supreme Court in *Rivtow Marine Ltd v Washington Iron Works*.[66] It strikes me as the best solution, since danger is the crucial element of tort and it is entirely haphazard whether the danger will eventuate in damage to the some other property or to the defective product itself. It would seem more consonant with principle to make the distinction on the basis of the defect and its foreseeable potential rather than its chance consequence.

Finally, at the other polar extreme, is the New Jersey decision in *Santor v A.&M. Karagheusian Inc*[67] which rejected all distinction between dangerous and merely shoddy goods and held a manufacturer liable for the lesser value of a carpet due to a disfiguring welt. (The seller had left town.) Reminiscent of the nominated subcontractor in *Junior Books*, a California case reached the same result against the manufacturer of unusable cans for packing abalone whom the intended consumer had specifically alerted to his special needs.[68] The U.S. Supreme Court's comment was that cases like *Santor* "raise legitimate questions about the theories behind restricting products liability, but we believe that the countervailing arguments are more powerful. The minority view fails to account for the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages".[69] These seem paltry reasons. There is no

inherent value in keeping tort and contract in hermetic compartments, except for minds addicted to convention and pedantry. More significant it would be if the tort doctrine involved exposure to exceptional damages. Such, however, is not the case, because a manufacturer as seller is always exposed to liability for breach of warranty whatever the defect. Tort recovery merely substitutes the consumer for the buyer as plaintiff, and decisions to the contrary in effect confer undeserved windfalls on defendants. Judge Cardozo's concern about indeterminate liability is not triggered by these cases.

Conclusion

Professor Gray, the editor of the second edition of *Harper & James*, several years ago commented on "the remarkable parallel between the American decisions on this point and those in Britain and the Commonwealth. These developments were largely independent of each other; the courts in our country rarely have cited British authority, and British courts rarely cite our decisions. Nevertheless the developments have been similar even to details in drawing the line on recovery".[70] Alas, this statement is correct only in its most general sense. For one thing, there is, as we have seen, considerable diversity of outcome in American case law, as indeed there currently is between English and Australian decisions on the one hand and Canadian and New Zealand decisions on the other. For another, American law is much more fluid even within a particular jurisdiction: yesterday's minority view is as likely to become tomorrow's majority. A change in a state Supreme Court's personnel, reflecting the advent of a different ideology, may bring drastic change, as occurred in California in 1987 when the liberal majority was unseated by popular vote and replaced by solidly conventional judges.[71] The looser system of precedent is compounded by the great number of voices from sister jurisdictions. In British jurisdictions, by contrast, while a dramatic turn-about is not unknown – indeed occurred in this very context when *Anns* was overruled by *Murphy* – once the law has been authoritatively expounded it will in general represent the received wisdom into the dim future.

1. [1964] AC 465.
2. [1972] 1 QB 373 (CA).
3. *Glanzer v Shephard*, 233 N.Y. 236, 135 N.E. 275 (1922); *Ultramares Corp v Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).
4. In *Prosser on Torts* (5th ed. 1984) negligent economic loss is still buried among Interference with Contractual Relations (§ 129); *Harper, James & Gray* in the 1984 edition deal with it in a new chapter on Damages (§25.18), and found no more than footnote space for it in relation to products liability (§28.9 n 21).
5. Apart from commentary on the liability of accountants (see, eg, Siliciano, "Negligent Accounting" (1988) 86 Mich LR 1929) mention must be made of Rabin, "Characterization, Context and the Problem of Economic Loss in American Tort Law" and Schwartz, "Economic Loss in American Tort Law: the Examples of *J'Aire* and Products Liability" both of which appeared in Furmston (ed), *The Law of Tort* (1986) chs 2 and 5.
6. Summers & Atiyah, *Form and Substance in Anglo-American Law* (1987) 91.

6a. Idem.

7. Supra, n 68 and accompanying text.
8. *Ultramares Corp v Touche*, 255 N.Y. 170, 174 N.E. 441, 444 (1931).
9. See Bishop, "Negligent Misrepresentation through Economists' Eyes" (1980) 96 LQR 360.
10. *Caparo Industries Plc v Dickman* [1990] 2 WLR 358.
12. *Rosenblum v Adler*, 93 N.J. 2d 324, 461 A. 2d 138 (1983); *Bily v Arthur Young & Co*, 222 Cal App 3d 289, hearing granted, which may presage reversal by the new conservative majority of the California Supreme Court.
13. *Rickards v Sun Oil Co*, 23 N.J. Misc. 89, 41 A.2d 267 (1945); *Federal Commerce & Navigation Co v M/V Marathonian*, 528 F. 2d 907 (2d Cir. 1975). *In re Kinsman Transit Co*, 388 F. 2d 821 (2d Cir. 1968) avoided the issue by deciding against the claim on ground of remoteness.
14. *Stevenson v East Ohio Gas Co*, 73 N.E. 200 (Ohio App. 1946); *Adams v Southern Pacific Transportation Co*, 50 Cal. App. 3d 37 (1975) Contra, *Miller Ind. v Caterpillar Tractor Co*, 733 F. 2d 813 (1984).
15. 752 F. 2d 1019 (1985), a 10: 5 decision
16. Ibid., at p.1029.
17. *Union Oil v Oppen*, 501 F. 2d 558 (1974).
18. *People Express Airlines Inc v Consolidated Rail Corp*, 100 N.J. 246, 495 A. 2d 107 (1985). Contra, *Koch v Consolidated Edison Co of New York*, 62 N.Y. 2d 548, 468 N.E. 2d 1 (1984) (blackout).
19. [1973] QB 27 (CA). American counterparts are *Byrd v English*, 117 Ga.191, 43 S.E. 419 (1903) and *Newlin v New England Tel & Tel Co*, 316 Mass. 234, 54 N.E. 2d 929 (1944) (allowing recovery for spoiled mushroom crop).
20. Calabresi, *The Costs of Accidents* (1970).
21. See, eg, *Smith v Bush* [1990] AC 871. Cf. American Law Institute Restatement, Torts, §552.
22. 233 N.Y. 235, 135 N.E. 275 (1922).
23. *Lucas v Hamm*, 56 Cal. 2d 583, 589-90 (1961); also *Ogle v Fuiten*, 102 Ill. 2d 346, 466 N.E. 2d 224 (1984). The legatee is a typical donee-beneficiary in the sense of American Law Institute Restatement, Contracts, §302.
24. *Candlewood Navigation Co v Mitsui O.S.K. (The Mineral Transporter)* [1986] AC 1 (PC); *Robins Dry Dock & Repair Co v Flint*, 275 U.S. 303 (1927).
25. *Leigh & Sillivan v Aliakmon* [1986] AC 785; *State of Louisiana, ex rel Guste v M/V Testbank*, 752 F. 2d 1019, 1022 ("the prevailing rule [in *Robbins*] denied a plaintiff recovery for economic loss if that loss resulted from physical damage to property in which he had no proprietary interest").
26. [1985] QB 350. Also *Federal Commerce & Navigation Co v M/V Marathonian*, 528 F. 2d 907 voicing strong doubts about the *Robbins* solution, but leaving overruling to the Supreme Court. Criticised from a comparative viewpoint by Markesinis, "An Expanding Tort Law – The Price of a Rigid Contract Law" (1987) 103 LQR 354.
27. This has not been doubted since the article by Fleming James, "Accident Liability Reconsid-

ered: The Impact of Liability Insurance" (1947) 57 Yale LJ 645. For England see Lord Denning, *The Discipline of the Law* (1979) 280.

28. The ill reasoned pseudo-economics by Sneed J in *Union Oil v Oppen* (supra, n 17) was castigated by Posner in "Some Uses and Abuses of Economics in Law" (1979) 46 U Chi LR 281, 297-301 and served as a warning against judicial amateurism in this field
29. *Hedley Byrne v Heller* [1964] AC 465.
30. *Junior Books v Veitchi Co* [1983] 1 AC 520.
31. [1990] AC 871.
32. [1990] QB 993 (CA). For other English decisions denying such claims see supra, n 34.
33. See particularly Markesinis, "Eternal and Troublesome Triangles" (1990) 106 LQR 556. For German law see Markesinis, *The German Law of Torts* (2d ed. 1990) 233-9; and Lorenz, "Some Thoughts about Contract and Tort" in *Essays in Memory of Professor FH Lawson* (1986) 86.
34. *Simaan v Pilkington* [1988] QB 758 (CA) (contractor v subcontractor); *Greater Nottingham Co-Op v Cementation* [1989] QB 71 (employer v subcontractor).
35. *US v Rogers & Rogers*, 161 F.Supp.132 (1958), a frequently cited opinion in California as elsewhere.
36. *Conforti & Eisele v J Morris Associates*, 418 A. 2d 1290 (N.J. 1980). *Forte Bros v National Amusements*, 525 A. 2d 1303 (Rhode Isl. 1987).
37. *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 461 per Mason J.
38. 24 Cal. 3d 799, 598 P. 2d 60 (1979). Schwartz in a detailed criticism would have preferred a contractual solution: see supra n 5.
39. *Oliver B Cannon & Son Inc v Dorr-Oliver Inc*, 336 A. 2d 211 (Del. Supr. 1975); *Sears, Robuck & Co v Jardel*, 421 F. 2d 1048 (3d Cir. 1970). Farnsworth, *Contracts* (1982) 723-4 contrasts these decisions with the "general rule" (citing authorities) against construing plaintiffs in these "vertical" construction contracts as "intended" beneficiaries under Restatement, Second, Contracts, § 302, since the obligations in the two contracts are not identical.
40. See Wright & Nicholas, "The Collision of Tort and Contract in the Construction Industry" (1987) 21 U Richmond LR 457.
41. *Anderson Electric Inc v Ledbetter Erection Corp*, 133 Ill. App. 3d 844, 479 N.E. 2d 476 (1985); reaffirmed *Davis v Chicago Housing Authority*, 555 N.E. 343 (1990). Also *State of Alaska v Tyonek Timber Co*, 680 P. 2d 1148 (Alaska 1984).
42. *Blake Construction Co v Alley*, 353 S.E. 2d 724, 727 (1987).
43. For example under German law, assignment seems to be the accepted practice (and solution), but even direct recourse by resort to the device of "contract with protective effect on third parties" is not impossible: see Markesinis, *The German Law of Torts* (2d ed. 1990) 44-5.
44. See Markesinis, supra n 26; Fleming, *Comparative Law of Torts* (1984) 4 OJLS 235. Also Adams & Brownsword, "Privity and the Concept of a Network Contract" (1990) 10 LS 12.
45. Supra, n 33.
46. New Zealand did so in the Contracts (Privity) Act 1982, but it is not believed that the Act would stretch to remedy the instant problem.
47. *D. & F. Estates v Church Commissioners* [1989] AC 177.
48. *Murphy v Brentwood DC* [1990] 3 WLR 944.
49. *Redarowicz v Ohlendorf*, 92 Ill. 2d 171, 441 N.E. 2d 324 (1982).
50. See Smillie, "Compensation for Latent Building Defects" [1990] NZLJ 310.
51. *Cosmopolitan Homes v Weller*, 663 P. 2d 1044 (Colo. 1983) cites precedents from 6 states. *J'Aire* case (supra, n 38) presumably belongs to the same group, holding a tardy contractor employed by a building owner liable for loss of profits by a tenant.
52. *Board of Education v A.C. & S. Inc*, 565 N.E. 2d 580 (1989).
53. Eg, *City of Greenville v WR Grace & Co*, 827 F. 2d 975 (4th Cir. 1987). Similarly, other cases of toxic damage: eg, *Shooshanian v Wagner*, 672 P. 2d 455 (Alaska 1983) (formaldehyde); *State Department of Environmental Protection v Ventron Corp*, 94 N.J. 473, 468 A. 2d 150 (1983) (toxic waste). See Connaughton, "Recovery of Risk comes of Age: Asbestos in Schools" (1989) 83 Nw ULR 512.
54. [1986] QB 507 (CA).

55. Section 5.
56. 476 U.S. 858, 106 S.Ct. 2295 (1986).
57. Ibid., at p. 866.
58. Eg, *Moorman Manufacturing Co v National Tank Co,* 91 Ill.2d 69, 435 N.E. 2d 443 (1982).
59. The decision has been distinguished on this ground in several cases: eg, *City of Greenville v WR Grace & Co*, 827 F. 2d 975, 977 (1987).
60. The House of Lords in *D. & F. Estates* and *Murphy* gave the impression that this decision represented *the* American viewpoint. All the same, the decision has had persuasive effect; eg, the 3d Cir. changed its prediction of Pennsylvania law in *Pennsylvania Glass Sand Corp v Caterpillar Tractor Co*, 652 F. 2d 1165 (1981) by reversing itself in *Aloe Coal Co v Clark Equipment*, 816 F. 2d 110 (1987).
61. 63 Cal. 2d 9, 403 P. 2d 145 (1965).
62. Eg, *Cloud v Kit Mfg Co*, 563 P. 2d 248 (Alaska 1977).
63. *East River S.S. Corp v Transamerica Delaval Inc,* 476 U.S. 848 at 870.
64. *Russell v Ford Motor Co*, 281 Ore. 587, 575 P. 2d 1383 (1978); *Pennsylvania Glass Sand Corp v Caterpillar Tractor Co*, supra, n 60.
65. *Dutton v Bognor Regis U.D.C.* [1972] 1 QB 373, 396.
66. [1974] SCR 1189.
67. 44 N.J. 52, 207 A. 2d 305 (1965).
68. *Ales-Pertis Food International Inc v American Can Co,* 164 Cal. App. 3d 277 (1985).
69. *East River S.S. Corp v. Transamerica Delaval*, 476 U.S. 858 at 870-1.
70. §25. 18A, vol 4, pp.624-5.
71. See Fleming, *The American Tort Process* (1988) ch 2.