NEGLIGENCE AND POLICY

Stephen Todd
Professor of Law, University of Canterbury

When I was approached about contributing a paper to this conference my choice of topic was left wide open. Developments in the law of torts during the 20 years in which Lord Cooke was a member and then the President of the Court of Appeal were to be the parameters for the discussion. Of course torts is a vast and sprawling subject. A variety of complex and controversial issues have required resolution during the period in question. Clearly enough it is not possible within the confines of a fairly brief paper to make an adequate legal analysis of all the major decisions delivered by the court, nor indeed properly to evaluate them. A broad overview is needed. Yet should this be an overview of the whole of the law? Or would it be better to narrow the field of inquiry and choose one particular topic from the many that are available?

Naturally before answering these questions it is necessary to look at the kinds of issues involving significant matters of common law principle which have in fact arisen for decision. No doubt it will not be found surprising that the bulk of the cases, perhaps about two thirds of the whole, concern the law of negligence and that in most of these the duty issue is prominent. It will not come as a surprise either that Lord Cooke was a member of the bench in nearly all of these cases. Yet various other torts have not escaped attention. A number of aspects of the law of defamation have required determination. These include the problem of identification where the defendant refers to a group and the plaintiff is one of the group; the ambit of the defence of justification where the defendant makes several allegations, the plaintiff relies on only one of them and the defendant seeks to justify the others; the calculation of damages for defamation and the guidance that the court may give to juries; and the politically controversial question as to whether reference by the defendant as part of the defence to a defamation action to things said or done in the House of Representatives by the plaintiff constitutes a breach of parliamentary privilege. The ambit of the tort of passing off has been considered on several occasions.

1 One early exception was the decision in *Takara Properties Ltd v Rowling* [1978] 2 NZLR 314. However Cooke P had an opportunity to express his views on the issues in this case in subsequent proceedings before the Court of Appeal in *Takara Properties Ltd v Rowling* [1986] 1 NZLR 22 (on appeal [1987] 2 NZLR 700 (PC)).

2 One which has is nuisance. Oddly enough there is little discussion in the Court of Appeal about the ambit of this tort and nothing about the vexed and much debated issue as to the standard of liability. The House of Lords has recently confirmed that liability in nuisance is strict and has expressed support for the view that the rule in *Rylands v Fletcher* ought to be understood as a species of nuisance rather than a separate tort: *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264. The High Court of Australia, by contrast, has held that *Rylands v Fletcher* should be subsumed within the ordinary rules of negligence: *Burnie Port Authority v General Jones Pty Ltd* (1994) 174 CLR 520. How the Court of Appeal sees this issue, and what it makes of these decisions, remains to be determined.


4 *Templeton v Jones* [1984] 1 NZLR 448; cp *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234, where the issue was as to the possible meanings arising out of a single allegation.

5 *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24; and see *Television New Zealand Ltd v Keith* [1994] 3 NZLR 84.

6 In *Television New Zealand Ltd v Prebble* [1993] 3 NZLR the Court of Appeal held by a majority that the statements of the plaintiff were absolutely protected from defamation proceedings and that the pleadings and particulars referring to them should be struck out, but as the defendant could not deploy all relevant evidence in support of the plea of justification the action should be stayed unless and until the House waived the privilege. In the Privy Council ([1994] 3 NZLR 1) it was held that the relevant pleadings were rightly struck out but that
Questions as to the extent to which protection may extend to the use of a descriptive trade name, how far the "get up" of goods can qualify as part of the goodwill, the acquisition of a class goodwill by the producers of goods distinctive of a particular geographical region, and what can constitute the damage necessary to support an action all have been explored. The recognition by the Court of Appeal of a tort of intentional interference with the economic interests of another, separate from the torts of interference with contract, intimidation and conspiracy, clearly is worthy of careful note. Other interesting issues considered include the right of action for conversion by a co-owner of intermixed goods, whether there can be liability for the unforeseeable consequences of a trespass to land, and the ambit of the immunity of judges from actions in tort in respect of conduct in the exercise of his or her judicial function.

No doubt the analyses and conclusions reached in at least some of these decisions may be made the subject of criticism. This, of course, is an occupational hazard for any court or judge. However I doubt whether they deserve to be attacked at the level of fundamental principle. By contrast the approach taken towards the question of liability for negligence has indeed been condemned on the broad grounds that it is lacking in structure, is devoid of principle and ultimately collapses into a series of ad hoc decisions founded upon individual inclination rather than the application of legal rules. Clearly, then, negligence is a very suitable topic for discussion today. The burden of our inquiry will be to examine how the Court of Appeal has gone about determining negligence cases and to see whether criticism of this nature is justified.

Negligence as a moral principle

Before looking at the leading decisions we must, I think, ask why we have a law of negligence at all. Tort liability in its earliest manifestations was concerned with direct and forcible injury to the person or invasions of land. Not much attention was directed to the defendant’s state of mind, it being enough that he or she voluntarily did the act in question. It was only during the 19th century, when the scope of the law of torts was expanding rapidly, that the notion of fault as an underlying rationale for the imposition of liability started to take firm hold. This development corresponded with the laissez faire attitudes of the day. The courts saw themselves as laying down a moral principle. They considered that it would be unfair to hold a person responsible for harm that could not be prevented by taking reasonable care. Without doubt, in my view, the courts continue to see liability for negligence in moral terms. Of course once we look at the question a little more closely we can recognise various objections. For example, a

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8 Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1988] 1 NZLR 16.
11 Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354. However the court declined to endorse Beaudesert Shire Council v Smith (1966) 120 CLR 145, where the High Court of Australia held that an unlawful, intentional and positive act inevitably causing loss to another gave rise to liability. In Northern Territory v Mengel (1995) 69 ALJR 527 the High Court overruled Beaudesert, because the principle extended to conduct where there was neither negligence nor an intention to cause harm.
12 Coleman v Harvey [1989] 1 NZLR 723.
13 Mayfair Ltd v Pears [1987] 1 NZLR 459.
15 Some parts of the discussion are based upon Todd The Law of Torts in New Zealand (2nd ed 1997).
finding of liability in negligence does not necessarily suggest any moral failing on the part of the defendant, for the expected standard of care is determined objectively, irrespective of the defendant's actual capacity to guard against the risk. So also the degree of a person's culpability is not proportioned to the extent of his or her liability. The same legal consequences may follow from a moment's inattention as from criminal intention or recklessness. Furthermore, defendants who are held to be culpable, of whatever degree of seriousness, may not actually have to pay the damages out of their own pockets, either because they are insured or because they committed the tort in the course of their employment and the plaintiff chooses to seek redress on the basis of their employer's vicarious liability. For these various reasons the idea that tort renders an individual personally accountable for morally blameworthy behaviour loses a good deal of its force. Yet this is not to say that it is lacking in all credibility. Objection to negligence liability as a moral principle in some cases ought not to be taken as objection in all. The underlying principle arguably retains validity. The essentially symbolic function of the law cannot be discounted either. This is readily apparent when we turn to consider some alternative rationales or solutions.

Another use of the rules of negligence can be to encourage safe behaviour, deter wrongdoing and promote the efficient use of resources. Clearly enough they may sometimes have this effect, particularly where activities are carried out deliberately and with knowledge of the consequences. Yet actions for negligence rarely are of this kind. People generally cannot be deterred from making a mistake, nor is their conduct likely to be governed by speculative economic consequences. Indeed the idea of laying down rules of liability in terms of their economic efficiency is open to broad objection, included in which are its questionable assumption that the activity in question is responsive to market principles and its inability to bring into account the human and social dimension attached to the economic consequences of accidents and the allocation of their costs. Certainly concepts of economic efficiency provide a very imperfect justification for having tort rules determining when losses ought to be shifted.

The preceding paragraphs do no more than touch upon profound issues as to the philosophy of the law of torts and the economic implications of rules allocating liability. They are intended merely to draw attention to some of the main strands of the debate, and to clarify the premise upon which the courts normally operate: that morality and justice require that a wrongdoer should be held responsible for the consequences of his or her conduct. If indeed this proposition is not accepted there is no satisfactory alternative. Perhaps if negligence liability were abolished altogether this would encourage the creative development and use of insurance and other loss spreading mechanisms. The result might well be economically efficient, and certainly it would avoid the time, trouble and expense involved in seeking to shift losses from where they fall. Equally certainly it is not a realistic proposition. Whatever the objections, negligence as a moral principle surely represents a deeply rooted social postulate.

Incrementalism

If we accept that we ought to have a law of negligence we at once encounter the familiar problem of drawing lines. On its face "negligence" looks only to the quality of the defendant's conduct and not to the interest of the plaintiff that has been invaded, the circumstances in which the loss came to be inflicted, the extent of the loss, the likely or possible number of persons affected by the conduct and all other factors not bearing directly upon the mere question of the carelessness or culpability of the defendant. The duty inquiry accordingly seeks to provide a structure whereby these factors may be taken into account in determining how far liability ought to extend. This brings us to the heart of the criticisms that have been directed at Lord Cooke in particular and generally at the Court of Appeal during the 1980s and 1990s. These are that the decisions which are reached are founded on little more than individual judicial predilection, that the ambit of liability has spread far beyond previously well accepted limits and that acute uncertainty attends the resolution of any disputed duty issue.
The debate in the courts concerning this issue has centred on the merits or otherwise of "incrementalism". The question, broadly, is whether the existence of a duty ought to be determined by reference to considerations of policy or to decided cases. In Anns v Merton London Borough Council Lord Wilberforce formulated his well known two stage test for duty, asking first whether there is a sufficient relationship of proximity as to give rise to a prima facie duty and then whether there are considerations which negative or limit any duty. Lord Wilberforce's approach was accepted early on in New Zealand and has continued to be seen as a helpful method of analysis. By contrast this general approach thereafter came under attack in England, on the ground that the law should develop novel categories of negligence incrementally and by analogy with established categories rather than by a massive extension of a prima facie duty of care restrained only by indefinable stage two considerations. However the decisions provide no clear explanation of what is meant by an "incremental" analysis. In a recent examination of the question Professor Stanton concludes that it bears the familiar hallmarks of being a scarcely defined approach capable of bearing a range of interpretations and, as with foreseeability and proximity, is open to considerable manipulation by the courts. Certainly decisions in the House of Lords show that it does not necessarily exclude considerations of fairness and policy in the duty inquiry, and some of these arguably revert to an Anns-type two stage inquiry. In Stovin v Wise Lord Hoffmann thought that provided the considerations of analogy, policy, fairness and justice are properly analysed it should not matter whether one adopts an Anns or an incremental analysis. Lord Nicholls maintained that the difference between Anns and Caparo is perhaps found more in presentation and emphasis than substance. As will be seen, these remarks were foreshadowed in the decision of the Court of Appeal in South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd.

On any view an incremental approach to the duty issue contemplates a degree of development and change. The point of dispute really is how closely this must be tied in with existing authority. An Anns or similar analysis is directed at providing a broad structure for determining the issue, an incremental analysis concentrates more on finding sufficient points of similarity with decided cases. Professor Smillie, in a powerful attack on the Court of Appeal's whole manner of determining questions of civil


17 (1978) AC 728.


20 Caparo Industries Plc v Dickman (1990) 2 AC 605 at 618 per Lord Bridge, quoting with approval from the judgment of Brennan J in Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 481.


22 Spring v Guardian Assurance Plc, ibid, is perhaps the clearest instance.

23 (1996) AC 923 at 949.

24 Ibid at 931.

25 (1992) 2 NZLR 282 at 294; below fn 39 and accompanying text.
liability, characterises the debate in terms of formalism versus fairness. He points to Lord Cooke’s leading and active role in promoting the development of a distinctive body of New Zealand law, in abandoning “the pretence of legal formalism” and in promoting instead a much more open emphasis on conscious value judgments. Professor Smillie recognises that the term “formalism” today almost always carries a strongly pejorative connotation, yet argues strongly that it offers real advantages. Consistent application of settled rules promotes certainty in the law, enhances the predictability of legal outcomes, and encourages future planning and co-operative activity. And since rules limit the number of facts and arguments to which decision-makers can have regard, rule-based adjudication offers a manageable and efficient means of resolving disputes which conserves the resources of judges, lawyers and litigants alike. Then again if formalism is abandoned, and the inherited common law no longer seen as reflecting the needs, values and aspirations of the New Zealand community, there is no accepted philosophical touchstone or frame of reference which informs the decision-making process. Thus Professor Smillie points to Lord Cooke’s espousal of “fairness” founded upon community values and expectations, but concludes that ultimately this ideal is both personal and intuitive, reflecting the judge’s own moral convictions. Those that in fact appear to underlie what is “fair” display a strongly paternalistic, communitarian sense, requiring everyone to display a reasonable level of concern for the well-being of others. The duty of care imposed by the law of negligence is put forward as the paradigm example. Professor Smillie notes that the New Zealand courts have enthusiastically extended the application of this duty far beyond its traditional concern with security of the person and physical property to protect a wide range of purely financial interests. He also thinks it inevitable that they will follow the decision of the House of Lords in Henderson v Merrett Syndicates Ltd and impose concurrent tortious duties of reasonable care alongside contractual obligations. Further, in the field of remedies he notes Lord Cooke’s view that there is no rule as to the legal measure of damages and that in all cases their assessment is a question of fact. Professor Smillie concludes that given their inability to agree on any single philosophy of substantive justice capable of providing a convincing normative basis for systemic change in the common law, perhaps New Zealand judges should settle for a strong but not dogmatic formalism, securing by their decisions, the formal values of certainty, consistency and predictability.

Policy

I am by no means unsympathetic to the general tenor of Professor Smillie’s argument. Formalist values undoubtedly ought to be given a high priority in any enduring legal system. However, at least as applied to developments in negligence liability, I am not certain that the approach taken by the Court of Appeal does in fact amount to an unwarranted assault on these values, nor that we have abandoned an era of certainty and stability in favour of an unbridled judicial discretion. Or to the extent that we have, I doubt whether the primary responsibility ought to be laid at the door of the Court of Appeal. In order for negligence to function successfully as a system whereby cases are decided by reference to a series of rules marking out the boundaries of liability, we must at the outset be able to identify these rules. Yet at least as the law of negligence has developed during the 20th century, such rules are conspicuous by their

absence. Until Donoghue v Stevenson,31 of course, liability in negligence depended upon the plaintiff showing that his or her claim fell within a recognised and discrete category of duty. Lord Atkin’s neighbour principle was the first successful attempt to provide a generalised basis for liability in circumstances where a person by his or her negligent conduct caused actual physical injury to another. To this extent the “category” approach was abandoned and replaced by one arguably clear rule identifying the primary basis for liability. Yet development of the law could not be, or at least was not, arrested at this stage: many important questions remained to be determined in circumstances where Donoghue v Stevenson could be of no direct assistance. The principles governing, for example, the ambit of liability for causing a person to suffer mental injury without being physically endangered, or for failing to act to safeguard another from harm, or for inflicting financial injury by words or by conduct, all required to be worked out. The last of these involved perhaps the area of greatest controversy, the breakthrough coming in the decision in Hedley Byrne & Co Ltd v Heller & Partners Ltd.32 It seems to me that from Professor Smillie’s point of view this is where the rot really set in. Judicial debate since then has been concerned primarily with coming to terms with the decision.

It is possible for Hedley Byrne to be understood as concerned only with liability for negligent misstatements, and in this sense it represents no more than a limited exception to a general rule of no liability for negligently causing financial loss. Yet it is not easy to point to any convincing justification for carving out a special category and otherwise leaving the general rule to operate. The point may be illustrated by comparing the decision of the Privy Council in Brown v Heathcote County Council33 with that of the House of lords in Murphy v Brentwood District Council.34 In the former case a drainage board inspected a site for a new house and tendered a report to the local council which, it was held, negligently ignored the risk of flooding from a nearby river. The council, relying on the report, approved the plaintiffs’ building plans. It turned out that the land was susceptible to flooding. It was held that the board was liable to the plaintiffs, on the grounds that it had made a practice of giving advice about the risk of flooding and thus had assumed a duty to warn. Although the plaintiffs had not themselves relied on the board, the council on behalf of the plaintiffs relied upon the previous practice of the board to give an appropriate warning. Liability was based upon Hedley Byrne, presumably because of the known, albeit indirect, reliance by a particular plaintiff for a particular purpose. Suppose now that an action is brought by a subsequent purchaser against a builder who has negligently erected a house on terrain which is susceptible to flooding. The builder has given no advice to the purchaser, and according to Murphy a negligent builder is not liable for causing financial loss to the subsequent purchaser of a defective building.35 Yet the loss suffered by the house owner is exactly the same as that suffered by the plaintiffs in Brown.

Arguably, then, Hedley Byrne should be seen as being of general significance in removing a major constraint on the possible ambit of liability in negligence. Yet limits on that liability clearly are necessary. How should they be expressed? We have to face the difficulty that uncertainty is inherent in the very concept of negligence. Clear boundaries which are apt to achieve certainty in application and predictability in outcome tend either to be over-simple viz that there can be no liability for non-physical loss or for a mere omission, or arbitrary in scope viz that financial loss is recoverable only if caused by words. Yet while a high degree of certainty may not be attainable, or attainable at too high a price, a system of rules which is at least coherent and internally consistent is not beyond reach. Indeed from

Donoghue v Stevenson onwards the courts have been seeking to articulate a principled basis to the law. Undoubtedly a major contribution to this debate is made by Cooke P in his judgment in the consolidated decisions of the Court of Appeal in South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd and Mortensen v Laing. Prior decisions in the House of Lords considering whether policy could support an incremental development had expressed the test in very general terms. Thus in Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd, the decision starting the retreat from Anns, Lord Keith thought it appropriate to ask simply whether it was “just and reasonable” to impose a duty. Then again in Caparo Industries Plc v Dickman Lord Bridge said that whether the courts will recognise a duty of care in any particular case depends on the foreseeability of the harm, the proximity of the relationship between the parties and, generally, considerations of fairness and reasonableness. Yet appeals to what is “fair” or “reasonable” do not take us very far. In South Pacific Cooke P sought to put flesh on these bare bones. We will examine the guidelines which have been provided and then consider how helpful they are in resolving the actual questions in issue in the South Pacific and Mortensen cases.

Cooke P sets out his views on duty of care principles in a discussion extending over 15 points of reference. At the risk of failing to do justice to the whole they are summarised below.

(i) A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. Ultimately the exercise can only be a balancing one and, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment.

(ii) Lord Wilberforce’s two stage test in Anns required a sufficient relationship of proximity and was not intended to create a prima facie presumption of a duty based on reasonable foresight. Naturally the degree of likelihood of harm and the seriousness of the foreseeable consequences can be important factors in the balancing exercise.

(iii) and (iv) Certain references by the English courts to what is reasonably foreseeable, for example in some “nervous shock” cases, are deliberately artificial. There can be no objection to this usage provided that it is acknowledged to be a special usage and is not employed to conceal the fact that the decision is one of policy rather than as to what was reasonably foreseeable in fact. In claims for psychiatric injury limits on the duty are dictated by considerations of fairness to defendants or, in other words, the floodgates argument.

(v) and (vi) In deciding whether or not there is a duty of care in a new situation the courts always should proceed gradually, step by step and by analogy with decided cases. However the label "incremental" used by some Australian and English judges solved few problems. A duty categorised by one court as "novel" may be as easily categorised by another as "incremental".

(vii), (viii) and (ix) The fact that economic loss rather than personal physical injury has been suffered may weigh against a duty of care, but is certainly not decisive per se. The first concern of the law naturally is personal safety: injury to the person is a kind of damage in a class of its own. On the other hand a plaintiff awarded damages for harm to property is being compensated essentially for economic loss. It would be a crude system of law that drew a vital distinction for this purpose between tangible and intangible property interests. In New Zealand since the introduction of the accident compensation

38 [1990] 2 AC 605 at 617-618.
scheme duties of care for personal safety are no longer the concern of the common law. The removal of the spectre of the floodgates in this area may help a more rational and less distracted approach to the evolution of what is now the economic tort of negligence.

(x) In certain pure economic loss cases in the United Kingdom the dictates of justice may be being met, where possible, by expanding the extent of implied contractual duties on the one hand while reducing the scope of tortious duties on the other. The contrast demonstrates that the tort-contract dichotomy can be used as a legal technique in varying ways. When the question is whether a defendant should be held to have assumed a certain responsibility, the dividing line is necessarily somewhat arbitrary.

(xi) The extent to which the plaintiff may fairly be said to have relied foreseeably on the carefulness of the defendant, including indirectly relying on a general practice, is one, and sometimes an important one, of the factors to be weighed in the balancing exercise.

(xii), (xiii) and (xiv) A statute can have a bearing on whether a duty of care should be recognised. The position is relatively straightforward if the true interpretation of the statute is either that it covers the field to the exclusion of the common law or that it gives rise to a cause of action for breach of statutory duty. If the statute expressly leaves the common law to operate it clearly is not intended to inhibit the courts in developing the common law, and its analogy can be a real help in deciding whether there is a common law duty.

(xv) A point telling against recognising a new common law duty of care arises when such a duty would cut across established patterns of law in special fields where experience has shown that certain defences, not dependent on absence of negligence, are needed. The same may apply where an adequate remedy is already available to a party who takes the necessary steps.

The question for determination in Mortensen was whether an insurance investigator who reported to an insurer that the insured had lit a fire on the insured property owed a duty of care to the insured. South Pacific was concerned with whether any such duty could extend to a creditor of the insured. Two factors, mentioned by all the members of the court, told in favour of a duty. One was the close proximity between the parties. The defendant knew that an adverse report would cause harm to the plaintiffs, who had no obvious means of protecting themselves against the risk. The other was that the defendant was a licensed investigator pursuant to the provisions of the Private Investigators and Security Guards Act 1974, which gave a right to third parties affected by the activities of an investigator to file a disciplinary complaint based on negligence. It was consistent with the policy of the statute to recognise a common law duty. Opposing considerations, however, were decisive. Chief among these was the impact of the proposed duty on the existing law of defamation and malicious prosecution. A negligence duty would cover the same ground yet its elements would be less stringent and liability accordingly would be easier to establish. Other factors seen as militating against a duty included the possible undermining of a litigant’s privilege from production and inspection of documents pertaining to expected court proceedings; possible conflict between the contractual duty of the investigator to the insurer and any tort duty to the insured; difficulty in pointing to any good reason why the duty category should not extend to anyone who carelessly investigates and reports on the conduct of a third person, whether pursuant to contract or otherwise; and the existence of the insured’s ordinary remedy in contract against the insurer.

Clearly enough it is hardly possible to identify every point of policy or principle that might bear upon a disputed duty question in whatever circumstances it might arise. However South Pacific does bring together in one decision some core concerns of negligence law. Accordingly we need to move beyond
the preceding summary and give each of them closer attention, seeking at the same time to place them in the context of other recent developments and decisions in this field.40

Preventing indeterminate liability

As the ambit of negligence has spread beyond simple claims for personal injury, the danger that recognition of a duty would open the floodgates has been accorded increasing attention. The concept of proximity is used to ensure that this danger is kept under reasonably firm control. So in South Pacific Richardson J remarked that proximity reflects a balancing of the plaintiff’s moral claim to compensation for avoidable harm and the defendant’s moral claim to be protected from an undue burden of legal responsibility.41

Claims for psychiatric injury are potentially indeterminate, for they extend the duty beyond the immediate, physical, victims of accidents. So actions by secondary victims are subject to certain control mechanisms, which require that there be a close relationship between the plaintiff and the injured person, that the plaintiff should have been proximate to the accident in both time and space and that the injury be induced by sudden shock rather than by mere knowledge of the consequences of an accident.42 In claims for financial loss the indeterminacy factor frequently is prominent. Fleming v Securities Commission43 is a recent instance where the majority in the Court of Appeal held that there could be no duty of care in negligently making information available to the world at large.44 Claims for relational economic loss - for loss that only occurs because of the relationship between the victim of a wrong suffering physical harm and the plaintiff - also bring the issue into sharp relief. The orthodox rule denies any recovery,45 but in a number of cases a duty has been found where financial harm was suffered by a particular known or identifiable plaintiff and it came about in a foreseeable kind of way.46 The question was discussed at length in Canadian National Railway Co v Norsk Pacific Steamship Co Ltd47 where, in a 4 to 3 decision, the Supreme Court of Canada upheld a claim for the financial loss suffered by the user (as opposed to the owner) of a bridge after the defendant had negligently damaged it and caused it to be closed for repairs. McLachlin J founded recovery broadly on the close physical, circumstantial and causal proximity between the parties. La Forest J, dissenting, thought that there were good policy
reasons for holding that contractual relational economic loss should be irrecoverable: the right of action of the property owner puts pressure on the defendant to act with care, the plaintiff could have a right of action in contract against the owner and the ripple effects of property damage causing economic loss are such that perfect compensation almost always is impossible. La Forest J recognised that the position might be different where a loss which might have been suffered by a property owner is transferred to another, so imposing a duty places no extra burden of liability on the defendant, but this was not such a case. Perhaps, however, the decision of the Court of Appeal in Williams v A-C\(^{48}\) can be understood in this light. Here the plaintiff was the unpaid vendor of a yacht which had been forfeited to the Crown after the purchaser used it for smuggling drugs. The plaintiff eventually obtained a ministerial waiver of the forfeiture order, but in the meantime the yacht had been left exposed to the elements and allowed to fall into a dilapidated state. Cooke P, speaking for the majority, thought that the claim succeeded, primarily because of the close proximity between the department and the former owner of seized goods. The possibility of loss to this strictly limited class of directly interested persons was highly foreseeable. It is apparent that the decision involved a special form of transferred loss, because the plaintiff was claiming in respect of damage to property the ownership of which had been transferred to the defendant, not for transferred contractual relational loss.

In weighing up whether a duty ought to be recognised there is no doubt that the level of the burden placed on the defendant and the element of proportionality between wrongdoing and liability are perceived as highly relevant. The difficulty comes in drawing a line which can be seen as principled rather than purely pragmatic. As regards psychiatric injury it is difficult to counter the objection that the limits to recovery, for example where the court has to determine whether the plaintiff has seen the injury to the immediate victim as part of or outside the “aftermath” of an accident,\(^{49}\) may operate arbitrarily and illogically. Again the court must attempt to separate the compensatable damage flowing from the presence of the plaintiff at the scene of the accident or its aftermath from the non-compensatable consequences flowing from the fact that an accident has occurred. It has indeed been strongly argued that the fear of wide ranging liability is overstated and that the courts should follow a more principled approach whereby liability is founded simply on foreseeability of psychiatric injury.\(^{50}\) In the relational financial loss cases more reliance on the consideration that loss could only be suffered by a small group of persons does not in itself seem a very satisfactory basis for determining liability, for this may be a pure matter of chance. In La Forest J’s words, the test serves neither to distinguish particularly meritorious victims nor single out particularly careless tortfeasors.\(^{51}\) One solution, as we have noted, is to maintain a general bar but allow claims for transferred loss as being analogous to claims for property damage. On the other hand a test requiring foreseeability of harm to an individual plaintiff or an ascertained class of plaintiffs is easier to justify in non-accident cases where the defendant makes a decision whether to speak or to act and has the opportunity to reflect on who might suffer damage as a consequence should he or she be negligent. In Mortensen the defendant did have that opportunity and, as we have seen, the foreseeability of harm specifically to the insured party was regarded as a very relevant consideration. By contrast in South Pacific the claim was made not by the insured but by an unsecured creditor and principal shareholder of the insured. Cooke P remarked that even if investigators owed a duty of care to the insured, such duty would not extend to persons financially interested in the insured. So wide a vista of liabilities would be opened up by such an extension of the law that he could not think that the legal system was ready for such a step.\(^{52}\)

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\(^{48}\) [1990] 1 NZLR 646.


\(^{50}\) Mullany and Handford Tort Liability for Psychiatric Injury The Law Book Co Ltd, 1993.


Requiring reasonable steps by way of self-protection

A factor which was treated as significant in *South Pacific* was the availability to the plaintiff of an action on the insurance policy against the insurer. All members of the court mention this point, although only Richardson J expands upon it in very much detail. Its implications need analysis.

Neither *South Pacific* or *Mortensen* directly raised the question as to whether there may be concurrent liability in contract and for the tort of negligence. In both cases there were contracts between the insured and the insurance company, and between the insurer and the investigator, but not between the insured and the investigator. Yet a duty was denied partly because the insured could bring a claim on an insurance contract, which might be thought to suggest that a party in contractual privity with another ought likewise to be confined to his or her remedy in contract against that other. Perhaps, then, *South Pacific* gives support to the “no concurrent liability” rule. This would be a surprising conclusion in view of the criticism of it in other decisions and, probably, of its impending demise. Accordingly we need to consider how and why the question at issue in *South Pacific* is different.

A rule that remedies for negligence in contract and tort should be treated as mutually exclusive always was misconceived. The history of the development of the common law shows that there can be no objection in principle to overlapping causes of action, nor, in particular, to concurrent actions in contract and tort.53 Yet in *Bagot v Stevens Scanlan & Co*54 Diplock LJ held that an action by a client against an architect for failure to exercise care and skill necessarily was an action founded on contract and on tort alone. In *McLaren Maycroft & Co v Fletcher Development Co Ltd*55 the Court of Appeal accepted that the very existence of a contractual remedy can exclude tort and expressed itself as being in complete agreement with everything said in *Bagot’s* case. Since then the doctrine has attracted doubt and criticism,56 and in *Mouat v Clark Boyce*57 Cooke P felt that the time had come when it would be unrealistic and unhelpful to refrain from saying that the view expressed in *McLaren Maycroft* should not stand. The other members of the court did not find it necessary to make a decision on the point and so for the time being the rule still represents the law in New Zealand. However as the House of Lords has now rejected it, certainly the likelihood is that the Court of Appeal will do the same when the occasion arises.58 In *Henderson v Merrett Syndicates Ltd*59 Lord Goff observed that the common law is not antipathetic to concurrent liability and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. He recognised that the result may be un tidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, did not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.

Any holding out of *Bagot* and *McLaren Maycroft* as examples of orthodox common law principle and their rejection as expansionist and unprincipled is, therefore, a reversal of the true position. Early

53 See generally *Lister v Romford Ice and Cold Storage Ltd* [1957] AC 555.

54 [1966] 1 QB 197 at 204.

55 [1973] 2 NZLR 100.


57 [1992] 2 NZLR 559 at 565. An appeal from an earlier decision of the Court of Appeal in this case ((1991) 1 NZ Conv C 190,197) was allowed on a different point: [1994] 1 AC 428.

58 In *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 at 74 Thomas J at first instance felt able to reach this conclusion.

decisions seen as laying down the rule against any concurrent liability of solicitors or other professional persons were decided at a time when tort liability for negligently inflicted financial loss had not been accepted. The question of concurrent liability thus could not arise. Of course that position changed with the decision in Hedley Byrne. Thereafter the courts were exercised with finding suitable limits to claims for financial loss, and Bagot was one of the solutions. The decision went too far in laying down a blanket rule of exclusion, yet this is not to say that the existence of a contractual remedy is necessarily irrelevant. Before the concurrent liability issue can arise the court must first decide whether the relationship between the parties is such as can found a duty of care. Determining this question can bring into account the reasonable availability of alternative means of protection as a policy deserving of promotion. The focus here is on the steps the plaintiff took or reasonably could have taken to look after his or her own interests. This is hardly a novel concept. The idea already underlies various defences to liability, notably that the plaintiff failed to take reasonable steps in mitigation of a loss, that he or she assumed the risk or that he or she was guilty of contributory negligence. There is no compelling reason why it should not also have a role to play in the duty inquiry. Thus the courts may be concerned not to allow a plaintiff greater recovery in tort than he or she was prepared to pay for in contract (the "free rider" argument), to promote self-help and alternative opportunities for deterring wrongdoing and to discourage unnecessary duplication of actions. They may give expression to these policies by deciding that a duty of care owed to the plaintiff would be inappropriate.

It would be possible for the courts to hold that parties who are bound by contract ought to be encouraged in all circumstances to rely on their contract and that a remedy in negligence can never be appropriate. This would be a rigorous manifestation of the policy, but in fact the courts seek to apply it with greater discrimination. Whether a contract between the parties in fact provided for a remedy is not determinative. The focus is not on the existence or actual terms of any contract but on what the plaintiff could reasonably have achieved in bargaining with the defendant. The principle thus can bring into account the parties' relative bargaining power and the market structure and lead to a distinction between "commercial" cases, where self-protective measures could reasonably have been expected, and "consumer" cases, where the market reality was that contractual protection could not in fact have been obtained. So the denial of any duty of care in tort owed by building contractors in respect of economic loss suffered by their employers arguably can be supported on this basis. In South Pacific Richardson J maintained that no duty of care could be owed by a commercial insurer to a commercial insured, because the insured could reasonably be expected to claim under the policy. Seemingly this is not intended to amount to an affirmation of the McLaren Maycroft rule. A similar analysis can be made in third party cases. In Smith v Eric S Bush the House of Lords recognised that a surveyor of a house reporting to a building society owed a duty of care to the prospective purchaser of the house, in circumstances where the building society made arrangements for the survey and the plaintiff was required to pay for it without having any direct right of recourse against the surveyor. Furthermore, the value of the house being modest, it was not incumbent upon the plaintiff to arrange for his own survey. The plaintiff was likely to rely on the one survey and the surveyor knew this. On the other hand in Leigh and Stillavan Ltd v Aliakmon Shipping Co Ltd goods in the course of transit were damaged at a time when the risk but not the ownership had passed to the buyers. A duty was denied because, inter alia, the

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60 See especially Groom v Crocker [1939] 1 KB 194.
64 [1990] 1 AC 831.
buyers could have protected their interests in a contract with the sellers, by inserting a term that the sellers should sue on the buyers' account or should assign to the buyers the right to sue.

A policy favouring the use of reasonable alternative steps by way of self-protection can help set a defensible limit to the much controverted question as to the liability of a builder or local authority for putting up or inspecting a defective structure. In Invercargill CC v Hamlin,66 where the owner's right of action was upheld, Cooke P observed that existing New Zealand cases all concerned only private dwelling houses, and it would be open to the court to hold that in the case of industrial construction the network of contractual relationships normally would provide sufficient avenues of redress without supervening tort duties.67 The very different position on the sale of a dwelling house needs to be emphasised. Here the principle of caveat emptor normally prevails and is likely to be non-negotiable, thus barring a remedy against the vendor. Denying a duty thus would hardly promote self-help, and in most cases the owner would be left with no remedy at all.

The Supreme Court of Canada has given a remedy to a commercial owner in the case of a defect which was also dangerous.68 Yet allowing a tort action in a commercial context tends to undermine the contractual negotiation of risks and liabilities, certainly where there is a closely negotiated network of contracts. Perhaps, then, commercial purchasers should look after themselves and negotiate in contract for the right to a remedy. On the other hand the denial of the tort action may lead to the undesirable consequence adverted to by the Supreme Court of Canada, that it gives plaintiffs no incentive to mitigate potential losses but, on the contrary, encourages them to do nothing and wait for physical damage to happen. Yet there may be no disincentive to repair if denial of a cause of action in tort encourages self-protective measures by the owner, nor is the element of deterrence weakened if liability ultimately is sheeted home on the builder. This may happen via a chain of contracts going back to the builder, or if the purchaser requires an assignment of the vendor's rights against the builder.69 The Court of Appeal in England has held that an assignee of the benefit of a building contract who would foreseeably suffer loss caused by breach of the contract could recover substantial damages from the negligent builder.70 A prohibition on assignment will not necessarily prevent recovery either. The House of Lords has accepted that such a prohibition is effective to prevent a right to sue vesting in the assignee, but has held also that the assignor can recover substantial damages for the benefit of the assignee. The contracting parties can be treated as having entered into the contract on the basis that the assignor would be entitled to enforce contractual rights against the builder on behalf of those third parties who would suffer from defective performance of the contract but were unable to acquire rights under it.71 An owner who sues and recovers will be obliged to account to the assignee as constructive trustee.72

Finally, just as the existence of a contractual relationship is by no means a conclusive reason for denying a duty of care owed by one contracting party to another, so also it does not in itself create any such duty. Thus dealings pursuant to contract cannot create a duty to warn which does not otherwise exist. For

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67 [1994] 3 NZLR 513 at 520; and see Simaen General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758.
69 See Duncan Wallace “Assignment of Rights to Sue: Half a Loaf” (1994) 110 LQR 42.
70 Darlington BC v Wilshier Northern Ltd [1995] 1 WLR 68.
71 Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85.
72 Darlington BC v Wilshier Northern Ltd [1995] 1 WLR 68 at 75.
example, an insurer was not obliged to warn a bank about fraud by the bank’s insurance broker, nor that a car lessee’s insurance cover had been cancelled. Neither case fell into a category where there could be a duty to speak or to warn, nor was such obligation imposed by the terms of the contract itself.

Maintaining other heads of liability

Recognising a duty of care in tort concurrently with a duty imposed by contract does not tend to undermine established principles of law. Where the duty in contract is to take care its ambit is the same as in tort, and where the duty in contract is strict its ambit is wider. By contrast, where the ambit of an existing head of liability is narrower than a duty to take care, and such a duty would cover the same ground, this can be a persuasive reason for rejecting it. Clearly enough an expanding law of negligence is likely increasingly to encroach upon existing rules, thereby undermining the policy reasons for recognising only the more limited basis for liability. The problem has arisen in a number of different fields, and sometimes it has been downplayed or disregarded. So one of the elements to liability for the tort of misfeasance in a public office is that the defendant should act with malice or knowledge of the invalidity, yet in *Takaro Properties Ltd v Rowling* the Court of Appeal was prepared to recognise a duty on a minister to take care to act validly in deciding on a matter affecting the plaintiff’s economic interests. However the Privy Council, while not finally deciding the question, thought that it had to be a serious question whether it would not be in the public interest that citizens should be confined to their remedy in those cases where the minister or public body had acted in bad faith. In more recent cases the Court of Appeal has accorded greater emphasis to the problem of overlapping causes of action, and indeed it arguably is the primary reason for the decision in *South Pacific*. It is ironic, perhaps, that during the late 1980s and early 1990s the House of Lords appeared to regard the Court of Appeal as dangerously adversarial, yet the recent cases show the House of Lords accepting a novel cause of action notwithstanding its expansionist impact on other fields while the Court of Appeal has erred on the side of caution.

On three occasions the Court of Appeal has considered, and rejected, giving recognition to a cause of action in negligence concurrently with a cause of action in defamation, or malicious prosecution, or injurious falsehood. In *Bell-Booth Group Ltd v A-G* the Ministry of Agriculture and Fisheries had issued a report about the plaintiff’s fertiliser product in which it was concluded that the product did not work. Insofar as the statement was defamatory the defendant could rely on the defence of truth, yet the plaintiff argued that the defendant owed a duty of care at least to consult with the plaintiff before publishing the report. The court unanimously rejected this contention. Cooke P remarked that the common law rules regarding defamation and injurious falsehood represented compromises gradually worked out by the courts over the years, where personal reputation on the one hand is balanced against freedom to speak or criticise on the other. He considered that the law in this area is a field of its own, and to impose the law of negligence on it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element. In *Balfour v A-G*, the second case, the plaintiff brought an action alleging, inter alia, negligence by the Department of Education in maintaining a note on his file stating that he was homosexual, which he claimed had jeopardised his employment

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75 *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716.
76 [1986] 1 NZLR 22.
77 [1987] 2 NZLR 700.
prospects as a school teacher. Hardie Boys J, delivering the judgment of the court, said that any attempt to merge defamation and negligence was to be resisted. Both branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned but not necessarily appropriate to each other. An inability to bring a particular case within the criteria of a defamation suit was not to be made good by the formulation of a duty of care not to defame. The objections are further clarified in Mortensen, the third of the trilogy. Cooke P noted that the investigator’s report might be defamatory of the plaintiff in suggesting that she was responsible for the fire, and defamation also was pleaded, yet the report would be protected by qualified privilege. Such privilege could be defeated by proof of malice but not by proof of negligence. The suggested cause of action in negligence would, therefore, impose a greater restriction on freedom of speech than existed under the law worked out over many years to cover freedom of speech and its limits. By a side wind the law of defamation would be overturned. Again, a person who maliciously and without reasonable and probable cause sets in motion a criminal prosecution of the plaintiff may be liable for malicious prosecution. A negligence duty could cover the same ground yet certainly would be easier to establish. Cooke P pointed out that a person who goes as far as to set the law in motion cannot be liable to the plaintiff without proof of malice and want of reasonable and probable cause. It would be very odd, he thought, if a person whose involvement falls short of setting the law in motion were liable for mere negligence. So also in a recent decision in England the Court of Appeal struck out a claim alleging that the Crown Prosecution Service owed a duty of care in the conduct of its prosecution of a defendant. The court declined to hold that a prosecutor could never owe any such duty, but took the view that in most cases its imposition would inhibit the CPS in the performance of its functions and would lead to an unwarranted diversion of valuable time and resources in defending civil actions. Spring v Guardian Assurance Plc raised the question whether an employer owed a duty of care when writing a reference for an ex-employee. A majority in the House of Lords was not persuaded by the reasoning in the New Zealand cases and thought that a duty ought to be recognised. Lord Woolf took the view that defamation and negligence were not primarily directed at the same mischief, for one was concerned with loss of reputation and the other with economic loss, that the policy fear that admitting a duty in negligence will undermine the law of defamation was overstated, and that justice required that the employee should have a remedy. The availability of a remedy without having to prove malice would not open the floodgates, for the employee would still have to prove negligence. His Lordship could see no justification for erecting a fence around the whole of the field to which defamation could apply and treating any other tort as a trespasser. The advantage of it being appreciated that a referee must exercise reasonable care and the strictly limited nature of any intrusion on freedom of speech meant that public policy came down firmly in favour of the employee in these circumstances.

The policy underlying the defence of qualified privilege in defamation is the removal of a disincentive to speak caused by a fear of legal liability and the promotion of frankness or candour, which policy would seem as relevant to an action for negligence as to an action for defamation. The argument in Spring that the ingredients of the tort of negligence are not the same as those of defamation and that the two torts cover different ground and may compensate for different damage does not answer this point. Denying a remedy in negligence to the subject of an incorrect reference may be seen as unjust, but this is as true of a claim in defamation. In the end a policy choice must be made as between specially protected speech on the one hand and individual accountability for negligence on the other. The Court of Appeal has favoured the first and the House of Lords the second. The implications of the latter view are significant.

80 However it had not been shown that the allegation had caused the plaintiff to fail to get a job and so the claim had to be rejected for this reason.


Lord Keith, the dissentient in *Spring*, thought that on the majority view the negligence principle logically should extend to cover all situations where the defence of qualified privilege would be available if the action were one for defamation.

The debate recently has been taken up in Australia, although not yet in the higher courts. In *Sattin v Nationwide News Pty Ltd* Levine J, in a carefully reasoned judgment, expressed his approval for the New Zealand cases and Lord Keith’s dissent and rejected the majority view in *Spring*.

**Promoting consistency with statute**

In developing the law of negligence the courts seek consistency with statute as well as with existing principles of the common law and equity. The provisions of a statute may be influential both in favour of and against a duty. In *South Pacific Cooke* P noted that the true interpretation of a statute may be that it covers the field to the exclusion of the common law. He said also that where the statute is not intended to inhibit the courts in developing the common law it can be a real help in deciding whether there is a common law duty, and in particular its provisions may encourage the court to hold that certain interests warrant protection. We can point to examples of both arguments. As regards the former, the test can be expressed in terms of whether a duty of care is consistent with what the statute requires or empowers the public body to do. So in *X v Bedfordshire CC* Lord Browne-Wilkinson observed that a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties. His Lordship was satisfied that a common law duty of care imposed on a local authority in relation to the performance of its statutory duties to protect children would cut across the whole statutory system set up for the protection of children at risk, and the duty accordingly was denied. As regards the latter, care must be taken before allowing the common law to be influenced by ephemeral statutes of little enduring social or political significance. If this is not seen as a danger, the courts may be prepared to fill a gap in any statutory protection by developing the principles of the common law. In *South Pacific* itself the statutory regulation of private investigators favoured recognition of a duty of care. In *Burton v Islington HA* legislation giving a cause of action to a child in respect of pre-birth injury helped recognition of a common law duty in respect of injury arising before the Act came into force. So also, in another field, the various statutes protecting aspects of a person’s privacy arguably show a broad legislative concern which can support the development of a general common law tort of invasion of privacy.

Bringing statute into account does not necessarily contribute to the goals of certainty and predictability, because it may be quite unclear whether the statute or statutes in question ought to be regarded as covering the field. So taking the privacy example, it might also be argued that legislative inaction as regards a general remedy should dissuade the courts from developing one of their own.

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81 [1995] 2 AC 633 at 739.

82 See Burrows *Statute Law in New Zealand* (1992) at pp 259-263.

83 [1992] 3 All ER 833.

84 For example the Summary Offences Act 1981, s 30 (peeping toms); Postal Services Act 1987, s 14 (intercepting postal communications); Privacy Act 1993 (collection, access to and disclosure of personal data held by prescribed bodies); Domestic Violence Act 1995 (harassment).

85 As to which see *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415.

86 This view has been taken in Australia: see *Australian Consolidated Press Ltd v Ettingshausen* NSW CA, CA 40079, 13 October 1993.
Encouraging care: deterring wrongdoing

There are many references in leading cases to the need for the courts by their decisions to encourage the taking of care and to deter wrongdoing. So imposing a duty on a solicitor for giving negligent advice has been seen to help in promoting professional competence and in enhancing public confidence in the efficacy of the statute with which the advice was concerned. The need to promote professional standards of care similarly has been put forward as a justification for holding a solicitor liable to a disappointed legatee for negligent delay in executing a will. Yet sometimes the opposite argument is advanced - that the imposition of liability will lead professional persons to be unduly circumspect in their work or to avoid responsibility by declining to take hard decisions. The argument has been influential in giving barristers immunity from suit for negligence in the conduct of litigation. A rule of liability, it has been said, would discourage counsel from pruning a case of irrelevancies, lead to escalating case loads and hinder the administration of justice with reasonable despatch. Similarly, holding a minister to be under a duty of care in construing a statute might lead the cautious civil servant to go to extreme lengths in taking advice leading to unnecessary delay in a considerable number of cases; and the creation of a duty of care on a public authority for failing to remove a restriction on visibility adjoining a highway was thought to be likely to promote defensive measures to avoid liability, to the detriment of other public services.

It is difficult to find any pattern or consistency in the decisions which can show why the courts might choose one line of argument in preference to the other. Whether a duty is recognised or denied is likely to be determined in the light of other policy concerns and there may be reference alternatively to deterrence or to the danger of encouraging defensive behaviour in order to bolster these concerns. Possibly, however, predictability would be enhanced if the courts moved beyond mere assertion and sought to evaluate the impact of their decisions specifically in terms of economic efficiency. While the concept is hardly supportable as a fundamental objective of tort, it might still be recognised as a relevant consideration in the balancing process involved in the duty inquiry. There are hints of this in South Pacific, where Richardson J in particular gives special emphasis to the consensual allocation of risk in the contracts between the insured, the insurer and the investigator to the exclusion of tort duties. Promoting individual choice arguably is efficient insofar as parties act in pursuit of their own self-interest in the belief that a private arrangement will make them better off. So where a party has an opportunity to allocate a risk by contract and does not do so, that risk should not be shifted by imposing a duty in tort for which that party has not paid. Of course the analysis may be flawed where one party lacks free choice in the matter or full information as to consequences, and it cannot apply at all where harm is suffered by third parties. Here a broader cost-benefit analysis is needed, and again Sir Ivor Richardson sees merit in this kind of approach. Yet the problems which it raises verge on the insuperable. Professor Smillie has noted that a judge can never be sure that all relevant material is before him and that the analysis is both complete and accurate. Any assessment of the likelihood of an accident occurring will necessarily be speculative, a prediction of the impact of a decision must extend beyond the parties before the court to all who will be affected by it, and concentration on questions of

90 Connell v Odum [1993] 2 NZLR 257.
95 Sir Ivor Richardson "Lawyers and Economic Consequences" NZ Law Conference Papers (Wellington 1993), Vol 1 p 351.
96 Op cit fn 26 at 270-271.
efficiency overlooks the human dimension in determining who should bear the cost of an accident. Further, if moral values also come into play, predictability and efficiency is compromised and the very substantial effort and expense which may be involved in formulating a cost-benefit analysis may in any event be wasted. In short, the game is unlikely to be worth the candle.

Encouraging responsibility

The *Hedley Byrne* duty often has been seen as founded upon the speaker having voluntarily assumed responsibility for what he or she says. Indeed this test, or something like it, is found in all of the speeches in *Hedley Byrne* itself and is put forward as the basis for the duty in *Henderson v Merrett Syndicates Ltd*. The test also was advanced by the Court of Appeal in *Trevor Ivory Ltd v Anderson* in deciding whether a director of a company who negligently causes harm while in the course of carrying out company responsibilities may be held personally liable in tort. Used in this way, however, it is difficult to regard it as helpful. Like the concept of proximity, it can be used descriptively, as shorthand for the kinds of circumstances in which a duty is owed, but it does not tell us very much about how we can identify those circumstances. In *Henderson* Lord Goff suggested that the concept provides an explanation for the recovery of economic loss in respect of the negligent performance of a service and indicates too that in some circumstances there may be no assumption, as where the adviser disclaims responsibility. However quite how the concept can provide special insight as regards the recovery of economic loss is not explained - in many such cases it is not mentioned and there is nothing special about misstatement cases as regards the defendant's ability to disclaim liability for his or her negligence. In his judgment in *Caparo Industries Plc v Dickman* Lord Oliver surely was correct in saying that an assumption of responsibility means no more than that the act of the defendant in making a statement or tendering advice was voluntary and that the law attributes an assumption of responsibility if the statement or advice is inaccurate and is acted upon. So there is no general liability for failures to act or to speak - as Lord Keith has remarked, one who sees another about to walk over a cliff is not obliged to shout a warning - yet a person who voluntarily takes on a task or who chooses or undertakes to speak must thereafter take care in carrying out his or her self-imposed responsibilities.

Another basis for a duty positively to act can be found in the concept of reliance. The focus here is not so much on the responsibility taken on by the defendant but on the effect of that assumed responsibility on the plaintiff. In *South Pacific Cooke P* regarded the element of reliance as relevant to the duty issue and observed that the prospect of indirect reliance on the carefulness of a general practice may be enough, at least if the factors point otherwise to a duty of care. This idea has been referred to in a number of decisions both here and overseas, most recently in the judgment of Lord Hoffmann *Stovin v Wise*. The case raised the difficult question as to the proper foundation for imposing liability on a public body for failing to exercise a statutory power. Lord Hoffmann held that the answer was to be found in the body's public law duty to act rationally, so an irrational failure to exercise the power would

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100 Murphy v Brentwood DC [1991] 1 AC 398 is an example, yet we may ask why there was no assumption of responsibility by a builder or local authority in building or inspecting a house. Compare *Bryan v Maloney* (1995) 182 CLR 609.
101 [1990] 2 AC 605 at 637; and see per Lord Roskill at 628; *Smith v Eric S Bush* [1990] 1 AC 831 per Lord Griffiths at 862.
102 Yuen Kun Yeu v A-G of Hong Kong [1988] AC 175 at 192.
be in breach of a public law duty to act, coupled with an analysis of the policy of the statute, which should require that compensation be paid to persons suffering loss because the power was not exercised. However, whether public law concepts are an appropriate basis for private law duties certainly is open to debate. Public law principle as applied to the holder of a statutory discretion does not impose a duty to do specific things: it simply requires the holder to act reasonably or rationally in deciding whether to do those things. Arguably the question whether a public body has acted rationally or within the ambit of a statutory discretion bears upon whether it has in fact been negligent. The prior question is whether it was under any positive duty to act, and this can be determined by reference to the concepts of reliance and assumption of responsibility. The cases show that only rarely can a public body be adjudged to have assumed a responsibility in a sufficiently specific context and in relation to a specific person or group as to create a duty.\(^{104}\) The one category of case where a duty has been recognised is building inspection, and in Stovin the idea of general reliance is put forward in explanation. Lord Hoffmann observed that the concept appears to refer to general expectations in the community which the individual may or may not have shared. He noted that a widespread assumption that a statutory power will be exercised may affect the general pattern of economic and social behaviour. The judgment of Richardson J in Invercargill CC v Hamlin\(^{105}\) was an outstanding example of an inquiry into this question. It was essential to the doctrine that the benefit or service provided should be of a uniform or routine nature, so that one can describe exactly what the public body was supposed to do. Powers of inspection for defects clearly fell within this category. However in the present case (where a highway authority failed to remove an obstruction upon visibility next to a road junction and which allegedly contributed to an accident) the plaintiff was not arbitrarily denied a benefit which was routinely provided to others, but was treated in exactly the same way as any other road user.

Perhaps assuming control and responsibility on the one hand and general reliance on the other can be seen as opposite sides of the same coin. The authority has taken on the responsibility to inspect, and because of that assumed responsibility there is a non-specific community reliance on inspections being carried out with care.\(^{106}\) In Stovin the absence of these elements provides a more convincing reason why the authority was under no duty to remove the danger than a public law analysis.

**Conclusion**

Lord Cooke’s first major contribution to the law of torts as a member of the Court of Appeal was in Bowen v Paramount Builders (Hamilton) Ltd.\(^{107}\) In this decision the Court of Appeal held that a builder who put up a house on inadequate foundations owed a duty of care to a subsequent purchaser of the building. Liability was founded on the builder having negligently created a hidden defect which was a source of danger to persons whom he could reasonably foresee were likely to suffer damage in the form of personal injuries or damage to property. In the course of his judgment Cooke P remarked that he did not see why the law of tort should necessarily stop short of recognising a duty not to put out carelessly a defective thing, nor any reason compelling the courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it. However for the purposes of the instant case he was satisfied that the damage was basically physical.


\(^{105}\) [1994] 3 NZLR 513.

\(^{106}\) A link of this nature was recognised in Bryan v Maloney (1995) 182 CLR 609, where the High Court of Australia thought that the relationship between a builder and a house owner was characterised by an assumption of responsibility by the former and reliance by the latter.

\(^{107}\) [1977] 1 NZLR 394.
The decision in *Anns* followed just under 5 months later. Thereafter, of course, the lines of authority in New Zealand and in England pursued sharply divergent courses. In this country the courts built upon the decision in *Bowen* but moved away from the “danger to health or to property” analysis. So in *Stieller v Porirua City Council* the Court of Appeal affirmed that an inspecting council’s obligations were not confined to defects affecting health and safety, nor to defects damaging or threatening to damage other parts of the structure. It was enough that they reduced the value of the premises. In England, on the other hand, the courts started having second thoughts, and eventually, in *D & F Estates Ltd v Church Commissioners for England* and in *Murphy v Brentwood DC* the *Anns* principle was comprehensively rejected. The cause of action was seen as being in the nature of a claim founded upon a warranty of quality, the damage being the loss of a hoped-for benefit. An action of this kind, it was held, could lie only in contract. The objection has not been regarded as insuperable elsewhere, and *Murphy* has since been rejected both in Canada and Australia. In *Winnipeg Condominium Corporation No 36 v Bird Construction Co* the Supreme Court of Canada held that where negligence in planning or constructing a building caused the building to be dangerous, the owner could recover the costs of making it safe. The decision thus revives the debate which started in *Bowen* and *Anns* about whether a defect must necessarily pose a “danger to health” and, generally, whether tort should give a remedy with respect to property which is merely shoddy. In *Bryan v Maloney* the High Court of Australia held that a builder owed a duty to a subsequent purchaser arising out of the proximate relationship between them, which was supported by analogy with the duty owed to those suffering physical injury to person or property by reason of the defect. Their Lordships’ opinions in *Murphy* were dismissed as resting upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than was acceptable in Australian law. Most recently, in *Invercargill CC v Hamlin*, the Court of Appeal decided that notwithstanding *Murphy* it would adhere to its existing stance and the Privy Council accepted that it was entitled to do this. Their Lordships did not seek to analyse the reasoning in the earlier decisions, but accepted that conditions in New Zealand were different from those in England and that there was no warrant for requiring that *Murphy’s* case should apply in this country.

The Privy Council’s judgment in the *Invercargill* case was delivered four days before Lord Cooke stepped down as President of the Court of Appeal and took up his new position in the House of Lords. Having made a major contribution to the start of the debate in *Bowen*, it is fitting that his Lordship’s tenure on the Court of Appeal should end with a clear affirmation of perhaps the most important principle of negligence liability developed during that 20 year period. It is fitting also that in other recent decisions their Lordships have recognised the importance of policy in their analysis of duty

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108 [1986] 1 NZLR 84 at 94; *Brown v Heathcote CC* [1986] 1 NZLR 76 at 80 (on appeal [1987] 1 NZLR 720 (PC)). See also *Askin v Knox* [1989] 1 NZLR 248 at 253, where Cooke P observed that negligence liability had been a difficult and in some respects a controversial development in the building control field, but in the view of the court a necessary one.


114 (1994) 3 NZLR 513.

problems, in line with the approach which has been adopted by the Court of Appeal under Lord Cooke. In my view this must inevitably be part of an inquiry into the limits of negligence. To say that the exercise is aimed at reaching a result which is “fair” or “just” is not to discard certainty and predictability as desirable goals. On the contrary they are near the heart of the duty question, by the importance accorded to decided cases and by the recognition accorded to the fear of indeterminate liability and to existing bases for liability in determining whether a duty ought to be recognised. Unless, contrary to the opinion of Lord MacMillan in Donoghue v Stevenson, the categories of negligence are now closed, developments in negligence should proceed by way of a clear understanding of existing limits, of the policies sought to be promoted by a decision for or against a duty and, thus far a somewhat neglected consideration, of the weight to be accorded to the different policies. The decision in South Pacific, I think, marks a significant step forward in giving clarity to this process. As more cases are decided we can expect them to assist in refining the principles and enhancing the predictability of judicial decision-making.