PRODUCTS LIABILITY: TORTIOUS RECOVERY FOR ECONOMIC LOSS

I. The Status of the General Principle

Ever since *Donoghue* v. *Stevenson*[1] it has undoubtedly been the law that a manufacturer of chattels owes to the ultimate consumer a duty to take reasonable care not to expose him to physical danger. The facts of that case are too well-known to bear repeating. Suppose, however, that Mrs. Donoghue had simply sued for the value of the ginger-beer; could she succeed in a negligence action today, and if not, is this a desirable result? This is the question to which an attempted answer will be given in the following pages; the answer to which ultimately depends on the applicability of Lord Atkin's neighbour principle to this hitherto neglected area of recovery. The principle, that is, that one owes a duty to avoid acts or omissions which one can reasonably foresee may injure one's "neighbour", "neighbour" being defined as "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."[2]

What, then, is the status and value today of Lord Atkin's general principle as a criterion for opening new fields of liability? There appear to be two schools of thought. The traditional view proceeds from the basis that the function of the judge is to derive the components of liability by an inductive process from an analysis of previous decisions *on their facts*.[3] In the absence of any case decided on those facts, the judge is faced with a policy decision. General principles such as Lord Atkin's may be useful here as a guide to the characteristics which are commonly present in those relationships which do give rise to a duty.[4] But insofar as they were not necessary to the decision in the case in which they were enunciated, statements of such width and generality are to be regarded with some suspicion. The fear has been expressed that for jurists to give Lord Atkin's principle too wide an interpretation or application would be to "treat it as an open invitation to them to depart from their traditional role as expounders and interpreters of the law and to assume the function of legislators."[5]

Of course, the notion that common law judges are mere interpreters of the law can hardly even be accorded the status of a fiction today. Consequently the newer, more vigorous, and certainly more realistic approach is welcome. Under this approach the law of

1. [1932] A.C. 562.
2. Ibid., 580.
3. E.g., *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1104 at 1058-1060 per Lord Diplock.
4. Idem.
5. The *"Ogopogo"* [1970] 1 Lloyd's Rep. 257; (Supreme Coutrt of Ontario), per Schroder J. A. at 262.

negligence should now be regarded as depending on principle and not merely on whether the point is covered by authority.[6] Lord Atkin's principle is to be applied unless there is some valid reason for its exclusion. In this way the public policy factors are given more importance than under a strictly legal analysis of former cases. This view has been accepted in New Zealand.[7] It cannot be doubted that the decisive factor in the Court's decision where it has a choice as to whether to extend the duty concept will be its assessment of the demands of society at that time for protection from the carelessness of others.

In summary, although Lord Atkin's principle is not to be regarded as a statutory definition and nor can it explain all the cases of negligence,[8] it is a powerful weapon for the implementation of decisions based on public policy. Against this background it is proposed to set out the development of the law of negligence in this specific area, both in the English jurisdictions and in the United States. Then the precise effect of two recent cases[9] will be examined and, in the light of a discussion of policy considerations, the desirability of the attitude taken in each of them towards the extensions of the negligence concept. But firstly, the subject of the discussion must be elucidated.

II. Definition of the Problem

The discussion centres around the possibility of recovery in tort from the manufacturer for economic loss, direct or consequential, flowing from the defective state of the purchased article. This area is of continuing importance for New Zealand, as it will continue to be governed by the common law after the inception of the Accident Compensation legislation. For our purposes economic loss may be considered to be that loss arising out of original damage which is confined to the defective article itself. A duty of care already exists in cases where the defect damages also the purchaser's person or property other than the defective article itself.[10] Such loss is not considered to be economic. Economic loss may be caused by deterioration after the time of purchase or simply by the presence of a defect which renders the goods unsuitable for their normal usages and of less value. Especially in the former case the damage can also be considered to be property damage, since it has occurred to the property while it is in the purchaser's ownership. But whenever the damage is confined to the defective article itself, the loss is in essence economic. It can be considered as a loss on the bargain or a frustrated expectation. Any action brought, whether phrased in terms of lost value, cost

6. *Dorset Yacht Co. Ltd.*, supra., n. 3 at 1026-1027 per Lord Reid.
7. *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741 at 757.
8. R.F.V. Heuston, *"Donoghue* v. *Stevenson: A Fresh Appraisal"* (1971) 24 C.L.P. 37 at 51.
9. *Dutton* v. *Bognor Regis United Building Co. Ltd.* [1972] 1 All E.R. 462; *Rivtow Marine Ltd.* v. *Washington Iron Works* (1972) 26 D.L.R. 3d 559.
10. *Grant* v. *Cooper, McDougall & Robertson Ltd.* [1940] N.Z.L.R. 947; *Pack* v. *County of Warner* (1964) 44 D.L.R. 2d 215.

of repair or cost of replacement, is at bottom an attempt to gain full value for the purchase.

For the purposes of analysis a distinction must be drawn between two types of economic loss. *Direct economic loss* is loss out of pocket, or loss of bargain, caused by the product injuring itself or being unfit for its general purposes.[11] It includes all loss based on insufficient product value alone. It is the type of loss which would be suffered by any purchaser, regardless of any status which might make him vulnerable to further loss, and will be measured in terms of loss of bargain, cost of replacement or cost of repair. *Consequential economic loss* means damage extrinsic to the defective product itself, usually caused by the inability to use that product in a commercial setting, e.g. loss of profit or loss of customer goodwill. It must be economic loss. Therefore it does not include damage to person or property, which is also *consequential* upon the defect.

III. The Development of English and Commonwealth Law — Pre 1972

Firstly, are all the strictly legal pre-requisites met, and are there any obstacles to the application of the neighbour principle apart from questions of public policy? Without a doubt the foreseeability criteria are met. If a manufacturer can be deemed to have foreseen the likelihood of physical damage to the consumer, he can also be deemed to have foreseen the likelihood of direct economic loss. The trend in recent cases[12] has been to use the principle to define new relationships which give rise to a duty of care. Perhaps even less is required in this case, as the manufacturer/consumer relationship was one of the first to be recognised as giving rise to a duty. The crux of the issue is the *extent* or *character*[13] of this existing duty. In other words, does the fact that economic loss is foreseeable mean that the duty of the manufacturer extends to those acts likely to cause economic harm, or is it confined to acts likely to cause physical damage? The foreseeability principle is a flexible concept, capable of many uses provided that the court deems them justifiable on policy grounds. It has been used to define more precisely the extent or character of an existing duty,[14] and doubtless could be put to similar use in this area.

Only one real objection remains. There has been much argument as to whether the principle can apply at all to loss which is purely economic. Lords Atkin and MacMillan certainly did not impose

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11. For an analysis of these terms see comment (1966) 66 Colum. L. Rev. 917, at 995 et seq.; note in (1966) 41 St. Johns L. Rev. 401 at 405.
12. *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465; *Bognuda,* supra., n. 7; *Bognor Regis,* supra., n. 9; *Dorset Yacht Co. Ltd.,* supra., n. 3.
13. For a valuable statement of the problem, see *Bognor Regis Building Co.,* supra., n. 9 at 490 per Stamp L. J.
14. *King* v. *Phillips* [1953] 1 Q.B. 429 at 437, 438, per Denning L. J. Foreseeability of emotional shock, not physical injury, was adopted as the determinant of the duty.

any such limitation in their enunciation of the principle, although Lord Atkin did speak of "injury to the consumer's *life or property*".[15] Is it not a fair interpretation of this to say that damage to the defective article itself, where it has occurred through deterioration after sale, is included? Although such loss is in essence economic, it manifests itself in the form of physical damage to property which the purchaser undoubtedly owns. The two notions are not necessarily mutually exclusive.

Even assuming that such loss is solely economic, it is doubtful that there is an automatic exclusion of it from within the ambit of Lord Atkin's principle. In New Zealand it has been stated that "on the authorities as they now stand, I must accept, and do accept, that Lord Atkin's principle is limited to physical injury to person or property."[16] Since then, the validity of the distinction between physical and economic loss has been severely criticised in the highest quarters.[17] This line of authority has culminated in a recent decision in which it was stated that a duty to take care "no longer depends upon whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care."[18] Atiyah[19] has examined the possible effects of the *Hedley Byrne*[20] case and he concludes that there is now no possible reason for denying to the consumer the right to recover for the cost of putting right a defective article.[21] Nevertheless the English courts have persisted in refusing to admit a duty of care in the absence of physical loss, in a line of cases[22] in which disproportionately large and widespread pecuniary damage was caused by single, rather trivial, acts of carelessness. A manufacturer however, is in a better position to assess and control his liability. The two classes of case are different and that line of authority should not be regarded as barring recovery for economic loss in the field of products liability. In *Dorset Yacht Co. Ltd.*[23] Lord Reid specifically mentioned economic damage as an example of cases where foreseeability should not be the sole determinant of a duty relationship. But he was there, it is submitted, referring only to the type of case exemplified by *S.C.M. (United Kingdom) Ltd.* v. *Whittal & Son Ltd.*[24] There is no legal obstacle preventing the imposition of such a duty on the manufacturer. But there has been virtually no attempt to take

15. *Donoghue* v. *Stevenson,* supra., n. 1 at 599 per Lord Atkin, and at 619 per Lord MacMillan.
16. *Furniss* v. *Fitchett* [1958] N.Z.L.R. 396, 402 per Barrowclough C. J.
17. *Hedley Byrne,* supra., n. 12, at 517 per Lord Devlin.
18. *Minister of Housing* v. *Sharp* [1970] 2 W.L.R. 802, at 824 per Salmon L. J.
19. Atiyah, *"Negligence and Economic Loss"* (1967) 83 L.Q.R. 248.
20. [1964] A.C. 465.
21. Note 19, 263-264 and 276
22. *Weller* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569; *Electrochrome* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205; *S.C.M. (United Kingdom) Ltd.* v. *Whittal & Sons* [1971] 1 Q.B. 337; *Spartan Steel & Alloys Ltd.* v. *Martin & Co.* [1972] 2 All E.R. 557.
23. [1970] A.C. 1004 at 1027 a-b.
24. Supra., n. 22.

advantage of this possibility. In all the English jurisdictions the question had, prior to 1972, been raised only four times and only indirectly at that.

In the *Diamantis Pateras*[25] the plaintiffs purchased a ship from a third party, stipulating that certain oil-burning equipment designed and manufactured by the defendants be installed. That equipment was defective and caused damage to itself and to the boilers. The plaintiffs claimed for the cost of repairing the damage and also for consequential loss of trading profits.

Although he decided for the defendants on another ground, Lawrence J. did find that a duty of care existed as the plaintiffs were within the area of foreseeable harm. The case is not of strong authority, for the plaintiffs, although not in a contractual relationship with the defendants, nevertheless had been in contact with them and had received advice from them.[26] Furthermore, the defendants supplied only the oil-burners, and the damages claimed included loss to the boilers, i.e. loss to property other than the defective chattel itself.

It has been suggested[27] that this case supports the proposition that in some circumstances damages for injury to the defective product itself can be recovered in tort. But the factors above, allied to the fact that the judge did not appear to realise the novelty of the claim, make this view doubtful.

In *Young & Marten Ltd.* v. *McManus Childs Ltd.*[28] the respondent, a building firm, was developing a housing estate. It hired the appellant as sub-contractor to construct the roofs of the houses, specifying tiles of a certain brand. The appellant purchased the tiles from the manufacturer and constructed the roofs, but the tiles were latently defective and the purchasers of the houses sued the respondent in contract. The issue in this case was whether or not the appellant was liable to provide an indemnity under its contract with the respondent. If so, it could in turn bring in the manufacturer. The House of Lords held that the appellant could be brought in. Lord Pearce gave as one of his reasons the fact that, in his opinion, the respondent could not sue the manufacturer directly in tort and would therefore be left to bear the entire loss alone. He said[29] "I see great difficulty in extending to an ultimate consumer a right to sue the manufacturer in tort in respect of goods which create no peril or accident but simply result in sub-standard work under a contract which is unknown to the original manufacturer." The statement is purely obiter. Furthermore, although he speaks of the "ultimate consumer" his remarks are really confined to cases where that consumer is a commercial person. It is unlikely that the same considerations apply to ordinary consumers. In particular, loss to a commercial person will often be

25. [1966] 1 Lloyd's Rep. 179 (Q.B.).
26. Whether a collateral warranty could have been established is a moot point.
27. Atiyah, supra., n. 19 at 263.
28. [1969] 1 A.C. 454.
29. Ibid., 469.

consequential economic loss. The dictum is also confined to goods which "create no peril or accident." As will be seen, this is by no means a total prohibition of recovery for all economic loss.

The issue was indirectly raised in two Canadian cases. In *Western Processing & Cold Storage Ltd.* v. *Hamilton Construction Co. Ltd.*[30] the defendant contractors built cold storage bins for the plaintiffs from materials supplied by the defendant manufacturers. These materials were unsuitable and consequently the bins were unsuitable. As well as the direct loss incurred, the claim also included consequential economic loss caused by the inability to use the bins. The plaintiffs recovered these damages in contract from the contractors, who could in turn recover an indemnity from the manufacturer. But it was held that the plaintiffs could also recover directly fom the manufacturers in tort. In *Algoma Truck & Tractor Sales Ltd.* v. *Bert's Auto Supply Ltd.*[31] the plaintiff was in the business of hiring out machines and servicing them. It was able to recover repair costs and loss of rental from the manufacturer of a cylinder head, purchased through an intermediary, when it turned out to be defective and the machine in which it was installed was returned to it by the hirer. In neither case was there any attempt at analysis of the special problems involved in allowing such recovery. In the former case the negligence decision appears to be almost an after-thought. It is debatable also whether the damage caused was in fact to the articles as purchased, or to the storage bin as a whole, when completed. If it impaired the physical condition of the subject matter known as a storage bin, it is arguable that it was not what we have termed *economic loss*, but was instead damage to other property belonging to the plaintiff.[32] If so the case is not remarkable.

None of these four cases is of strong authority on this point. They do not even give a satisfactory indication of the way the law might develop. Suffice it to say that as of 1971 the point remained completely undecided, the preponderance of academic opinion seeming to be in favour of allowing recovery at least for certain types of economic loss.[33]

IV. The American Experience

In contrast to the dearth of authority in English Law jurisdictions, the United States courts have built up a considerable body of case law on the subject of recovery for damage to the defective article itself. Their law of products liability is relatively highly-evolved. Several alternative methods of recovery exist and the state of the law is different in regard to each.

30. (1965) 51 D.L.R. 2d 245.
31. (1968) 68 D.L.R. 2d 363.
32. See comment in (1957) 32 N.Y.U.L. Rev. 1242 footnote 2.
33. Fleming *"The Law of Torts"* (4th ed.) 165 and 444; Salmond, *"Law of Torts"* (15th ed.) 399; Atiyah, n. 19; Atiyah, *"The Sale of Goods Act"* (4th ed.) 109.

A. NEGLIGENCE

The foundation of negligence liability for products is *MacPherson* v. *Buick Motor Corp.*[34] The test in that case was more stringent than in *Donoghue* v. *Stevenson,* its English counterpart. Liability was restricted to those goods that are "reasonably certain to place life or limb in peril when negligently constructed." Despite this, recovery for economic loss is allowed in certain circumstances. Negligence liability is, however, regarded in the United States as the most fruitless avenue for recovery for damage to the product itself.[35]

1. Direct Loss:

Where there is no danger to persons and the loss has occurred through slow deterioration there is no recovery, e.g. a claim for repairs necessary to restore a car to its normal mechanical capacity, or for repairs to a carpet.[36] Even if the defect creates a risk to personal safety, the cost of repairs necessary to avert the accident is generally not recoverable. An extreme example of this is a case[37] in which the failure of aero engines used by the plaintiff airline company had already caused one major disaster, but the claim for the cost of repairing the same defects in the engines of the other aircraft was rejected. It was held that even though the engines had the potential for catastrophic disaster, "no actionable wrong is committed if the danger is averted" and that recovery should be confined to warranty.

If, however, the deterioration is not arrested and an accident results, damage to the article itself may be recovered despite the fact that the plaintiff has escaped personal injury. In *Fentress* v. *Van Etta Motors*[38] a motor accident was caused by the negligent manufacture of the brakes in the plaintiff's car. The car was damaged but the plaintiff escaped injury. The Court allowed recovery in tort from the manufacturer. It was influenced by the anomalies which would result from the failure to allow recovery where another party is involved in the accident, i.e. the other party to the accident would have a better right against the manufacturer, at least in tort, than the purchaser himself, who is not a total stranger, has perhaps been induced to purchase by the manufacturer's advertisements, and whose purchase certainly promotes the manufacturer's business. The principle has been applied to cases of accidents involving no other party.[39] To come within it, however, the damage must be caused by "casualty

34. 217 N.Y. 382 (1916).
35. Prosser *"Law of Torts"* (4th ed.) 665; (1966) 66 Colum. L. Rev. 918 at 929.
36. *Wyatt v. Cadillac Motor Car Division* 302 P. 2d 665 (1956); *Sperling* v. *Miller* 47 N.Y.S. 2d 191 (1944).
37. *Transworld Airlines Inc.* v. *Curtiss-Wright Corp.* 148 N.Y.S. 2d 284 (1955); see also *A.J.P. Contracting Corp.* v. *Brooklyn Builders' Supply Co.* 11 N.Y.S. 2d 662 (1939).
38. 323 P. 2d 227 (1958); see also *Quackenbush* v. *Ford Motor Co.* 153 N.Y. Supp. 131 (1915).
39. *International Harvester* v. *Sharoff* 202 F. 2d 52 (1953).

involving some violence or collision with external objects, not a mere marked deterioration or even complete ruin brought about by an internal defect."[40] Generally, in the absence of an accident, such purely economic losses as cost of repairs, loss of value or loss of the use of the article are not recoverable. The collision theory is the only exception. Some courts have criticised its validity, and have allowed recovery regardless of collision.[41] It does appear to be an arbitrary distinction, arising from a desire to avoid anomalies rather than to separate two logically distinct categories of damage.

2. Consequential Loss:

Almost inevitably such loss will occur in a commercial setting. It has been held that there can be no recovery for loss of customer goodwill, lost business or business profits.[42] Consequential economic loss is not, it appears, recoverable in a negligence action.

B. STRICT LIABILITY

This doctrine, recently established,[44] was justified mainly on the ground that the public interest demands maximum protection for consumers against dangerous products which they must buy and which they are helpless to protect themselves against. It has been accepted by over two thirds of the states and extends to any kind of product which is recognisably dangerous to those who come into contact with it.[45] In those areas to which it applies it has tacitly replaced the tort of negligence. But it appears to have been intended to apply only to personal injury.[46] It was extended to products likely to cause harm only to property, and somewhat surprisingly, has been applied in some cases to types of economic damage which the ordinary law of negligence would not have encompassed. It has been stated[47] that it is now generally accepted that damage to the defective article itself (i.e. direct economic loss) is recoverable. But the courts have drawn no distinction between this and consequential loss. The cases show that they have on occasion compensated all economic loss; on other occasions, none at all. This conflict has by no means been settled and is well illustrated by reference to the two most important cases.

In *Santor* v. *A. & M. Karagheusian Inc.*[48] the plaintiff had purchased carpet which was of substantially lower quality than he

40. Supra., n. 38 at 229.
41. *Fisher* v. *Simon* 112 N.W. 2d 705 at 711 (1961); *Lang* v. *General Motors Corp.* 136 N.W. 2d 805 (1965).
42. *Karl's Shoe Stores* v. *United Shoe Mach. Corp.* 145 F. Suppl. 376 (1956).
43. *Donovan Const.* v. *General Electric Co.* 133 F. Supp. 870 (1955).
44. Restatement of Torts 2d para. 402A; *Greenman* v. *Yuba Power Products Inc.*, 377 P. 2d 897 (1963).
45. Prosser, supra., n. 35 at 658.
46. Restatement, para. 402A comment g.
47. Prosser, supra., n. 35 at 666.
48. 207 A. 2d 305 (1964).

expected, or indeed the price suggested. There was no subsequent deterioration, the carpet being in a defective state when purchased Such loss is obviously purely economic. The Court said that it would interest itself only in "originating causes" and not in whether personal injury or simply loss of bargain resulted. Consequently they allowed recovery in strict tort of the difference between the price paid by the plaintiff and the market value of the defective carpet.

In *Seely* v. *White Motor Co.*[49] however the Court took a more conservative view. The plaintiff, who ran a small business, purchased a truck for business purposes. It proved to be totally unsuitable for his purposes, and he lost profits because of it. Finally the truck crashed. The Court disallowed recovery for the cost of repairs as they found that the accident had not been caused by the vehicle's unsuitability. Claims for loss of profits and return of part of the purchase price, both incurred before the accident, were also disallowed. The Court expressly disapproved of *Santor's* case. Recovery was limited to warranty. In an important judgment Peters J. dissented on this issue. In his opinion the type of plaintiff, not the type of loss, should be the determining factor. As long as the plaintiff could truly bring himself within the class of "ordinary consumer" which the strict liability rule was intended to benefit, he should be able to recover damages for economic loss. However, the approach taken by the majority appears to have been more popularly accepted.[50] In most states the prospects of recovering economic loss in strict liability are little better than the prospects of recovering it under negligence liability.

C. MANUFACTURER'S EXPRESS WARRANTY

The courts will infer an express warranty if a representation by the manufacturer induces the consumer to purchase his product, despite the fact that the manufacturer is not privy to the contract of sale. In effect such liability has more affinities to tort than to contract, for unlike the New Zealand collateral contract or warranty, express warranties are relatively easy to establish. If the manufacturer makes meaningful factual representations in brochures, advertisements, etc., and the consumer relies upon these when buying, there will be a warranty despite the absence of direct or personal contact. If an express warranty can be founded, both direct and consequential loss is recoverable, e.g. the purchaser of a defective car can recover for loss on the bargain[51]; the plaintiff in the *Seely* case recovered all the damages he claimed because he could prove reliance on claims by the manufacturer.

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49. 403 P. 2d 145 (1965).
50. *Price* v. *Gatlin* 405 P. 2d 502 (1965); *Anthony* v. *Kelsey-Hayes Co.* 102 Cal. Rept. 113 (1972).
51. *Inglis* v. *American Motor Corp.* 209 N.E. 2d 583 (1965); Restatement of Torts, para. 402B.

V. The English and Commonwealth Position: 1972

For the first time the exact issue has been raised in two recent decisions. Two questions are important. Firstly, what exactly do these cases stand for? Secondly, in the light of the discussion of policy, are these results desirable?

A. DUTTON v. BOGNOR REGIS UNITED BUILDING CO. LTD.[52]

A builder was developing a housing estate upon an old and disused rubbish-tip. By virtue of certain by-laws and regulations the County Council was required to give permission through an inspector before foundations could be built upon. This permission was given, the house was built and sold to a third party, who sold it to the plaintiff, Mrs. Dutton. The condition of the house deteriorated rapidly due to inadequate foundations. Mrs. Dutton was forced to spend money to repair the damage already done and to prevent further damage which may have been to her person as well as to the house. She claimed against the builder and the County Council for the cost of repairs, plus £500 for diminution in value. The action against the builders was settled out of Court for a relatively small amount on the basis of an old common law rule that a builder/vendor cannot be liable in tort for defects in any house he sells. The action against the Council was pursued in the Court of Appeal. The main argument centred around the novel question of whether any duty at all was owed by the Council. The Court held that the requirements of foreseeability and proximity were met, and since there was no reason in policy not to apply Lord Atkin's principle, the council did owe a duty to the ultimate purchaser, Mrs. Dutton. However, for the first time a British Court had to decide on the submission that even if a duty was owed, no damages were recoverable since the damage was confined to the house itself and was therefore solely economic. Both Lord Denning M. R. and Sachs L. J.[53] held that the damage to the house was physical damage and rejected the submission that it was, on analysis, the equivalent of a diminution in value of the premises. This would have been sufficient to dispose of the issue, but both judges went on to make further observations.

Lord Denning, M. R. said, "If counsel's submission were right, it would mean that, if the inspector negligently passes the house as properly built, and it collapses and injures a person, the council are liable; but if the owner discovers the defect in time to repair it — and he does repair it — the council are not liable. That is an impossible distinction. They are liable in either case".[54]

Sachs, L. J. was prepared to hold that, in any case, physical damage, is not a *sine qua non* before a cause of action in negligence

52. [1972] 1 All E.R. 462.
52. Ibid., 480-481.
54. Ibid., 474.

can arise. In this case, however, he relied also on the fact that there was a specific duty imposed on the council and he stated that the proper test should be "what range of damage is the proper exercise of the power designed to prevent?"[55] He held that the measure of damages should be that necessary to raise the house to the standard required by the Act plus a sum for general inconvenience, but should not include loss of value.

Stamp, L. J.[56] considered that a builder is not liable, except in contract and then only to an immediate purchaser, for defects in goods which render them unfit for their purposes. "To hold that either the builder or the manufacturer was liable, except in contract, would be to open up a new field of liability, the extent of which could not I think be logically controlled." The distinction, he said, lies in the character of the duty. "I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it, but the duty does not extend to putting out carelessly a defective or useless or valueless thing." Nevertheless, he rejected the submission in this particular case for reasons shown below.

What emerges from this case? Although recovery was favoured by all three judges there is no general or unanimously accepted principle to be derived from it.[57] The most cogent of the judgments on this issue was that of Stamp L. J. who disapproved of the extension of the duty concept to this type of loss. It must also be stressed that the judgments were closely related to the fact that there was a statutory duty binding on the Council, the very object of which was to prevent the faulty construction of houses.[58] However, Stamp L. J.[59] was the only judge to rely exclusively on this fact, enabling him to reach the same decision as the rest of the court despite his opinion that builder or manufacturer would not be liable under the general law of negligence for such loss. As mentioned above, Sachs L. J. also relied on the specific nature of the duty, but not exclusively, for he had already rejected the submission in general. Both he and Lord Denning M. R. felt that it would be anomalous to impose liability on the Council unless the builder was also liable.[60] They both held that the builder might be liable. If a builder might be liable, so by analogy might a manufacturer. This is implicit in the judgment of Sachs L. J. and Lord Denning specifically stated[61] "I would say the same about the manufacturer of an article. If he makes it negligently with a latent defect (so that it breaks to pieces and

55. Ibid., 481.
56. Ibid., 489-490.
57. Jolowicz, *"Law of Tort and Non Physical Loss"* (1972) J. Soc. Pub. Teach. Law 91 at 97 footnote 3. "It is respectfully submitted that Lord Denning M. R.'s dictum to the effect that the manufacturer of a defective article is liable for the cost of repair cannot refer to a liability in tort."
58. [1972] 1 All E.R. 462 at 475 h, 477 i, 483 a-b and 485 h.
59. Ibid., 490 d-e.
60. Ibid., 472 c-e and at 479.
61. Ibid., 474 f-g.

injures someone) he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair."

This statement highlights yet another qualification to be placed on the case. Whenever this general issue has arisen, courts have drawn a distinction between defects which pose a threat only to economic or property interests and those which also threaten personal safety. In the latter case certain anomalies arise from a refusal to allow recovery where for some reason the damage that results is economic only. As noted above, the American courts have minimised these anomalies only in cases where the damage has been caused by collision, usually involving some other party. This is a somewhat arbitrary line to draw, for anomalies arise also where the dangerous defect is noticed and rectified before accident. A refusal to allow recovery would be tantamount to penalising alertness and discouraging attempts to mitigate the damage. It could be said that there was no legal incentive to avoid personal injury for it is only in this way that damages for economic loss are recoverable. There is a general sentiment that the defendant, having created this risk, should not be able to escape liability merely because the damage is ultimately economic only. Neither Lord Denning nor Sachs L. J. do more than attempt to avoid these particular anomalies. Neither of their judgments would apply so forcefully if the defect were innocuous. However, insofar as they do not restrict this to collision cases, their approach is more liberal than that of the United States.

Moreover, by simply classing such loss as "physical" both judges seem to have failed to realise the novelty of the claim and its true nature. If this was a genuine oversight, it might weaken the authority of the case. If it was deliberate, it is to be applauded in the light of the following discussion of policy factors. Apart from all these qualifications, the case may be regarded as good authority in cases where the defect poses a threat to human safety, regardless of whether there has been a collision.

B. RIVTOW MARINE LTD. v. WASHINGTON IRON WORKS[62]

The defendants manufactured cranes, one of which was sold via dealers to the plaintiff. They installed it on a barge and used it for the purposes of their business of transporting logs up and down waterways. Upon learning that a crane of similar design, made by the defendants, had collapsed due to faulty design the plaintiff ordered the barge to return for inspection. An action was taken in tort to recover the cost of the repairs and consequential loss of the services of the barge for thirty days which happened to be during the most profitable time of the year.

Surprisingly, in the lower Court the plaintiffs recovered the consequential loss but not the direct loss. On appeal Tysoe J. A. decided

62. (1972) 26 D.L.R. 3d 559.

against the plaintiffs on both heads. In his opinion none of the landmark cases[63] justified the imposition of such liability and "to give effect to any of the claims made by Rivtow, (the Court) would have to extend the rule to harm of a different kind and character to that to which it has yet been applied".[64] In rejecting the plaintiff's claim he was influenced by a fear that not to do so would open an indefinitely wide area of potential liability[65] and he foresaw that a stranger to the contract, from whom no consideration passes, would perhaps possess a greater right than an actual party to the contract of sale, since any exclusion clauses would not apply to him.[66] Both of these reasons are open to criticism as will be seen later. The *ratio decidendi* of the case is taken from the judgment, "Neither the manufacturer of a potentially dangeous or defective article, nor any other person who is within the proximity of relationship contemplated by *Donoghue* v. *Stevenson* is liable in tort, as distinct from contract, to an ultimate consumer or user for damage arising in the article itself, or for economic loss resulting from the defect in the article, but only for personal injury or damage to other property caused by the article or its use."[67]

Several points are to be noted. Firstly, it is almost imposible to imagine a more all-embracing prohibition than this. No distinction was drawn between direct and consequential loss. Nor did the presence of danger to persons make any difference, but because this conflicts with the dicta in *Dutton's*[68] case it is unlikely to be accepted in New Zealand. Secondly, the United States law of negligence was considered and the judge relied on it in making his decision. If the defect in the crane had caused an accident, although nobody was injured, it is arguable that the Court may have felt itself able to allow recovery under the "collision" theory. Finally, the decision that none of the landmark cases justified such an extension is doubtful. It has been shown already that there are no legal obstacles to overcome. The determining factor should be whether policy considerations favour the extension or not. This question is now considered.

VI. Arguments For and Against: Policy Considerations

A. ARGUMENTS

The following are the main arguments and considerations which have influenced the courts in reaching the decisions outlined above:

1. The fear that the new field of liability would be too large and

63. *Donoghue* v. *Stevenson* [1932] A.C. 562; *Grant* v. *Australian Knitting Mills* [1936] A.C. 85; *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.
64. Note 62, 571.
65. A fear also expressed by Stamp L. J. in *Dutton,* [1972] 1 All E.R. 462, 489.
66. Note 62, 578.
67. Ibid., 579.
68. Note 65.

uncontrollable for the courts.[69] Closely related is the fear that it would place too heavy a burden upon industry. Similar statements in the past have often proved in hindsight to be totally unfounded.[70] It is true, however, that if all non-physical loss consequent upon a negligent act were to be actionable provided only that it was foreseeable, the burden on the manufacturing industry would be unbearable. In particular, third party insurance cover might be difficult to obtain. This does not justify a blanket refusal to allow recovery for non-physical loss. Liability for direct economic loss would not place too large a burden on industry, mainly because it can be insured against. There is simply no reason why the courts cannot impose a cut-off point at this stage and disallow recovery only for consequential loss. It would be a less arbitrary line to draw than has been drawn in other cases.[71] In any case, since manufacturers are already indirectly liable for much of the contemplated loss by way of indemnity actions, the new liability is unlikely to result in a dramatic increase in the quantum of their liability and the advantages of a direct remedy are manifold.

In two other respects the courts already possess adequate devices with which to control the extent of the manufacturer's liability. Firstly, they require the plaintiff to show that there existed a defect which, on the balance of probabilities, arose in the course of manufacture. The plaintiff is not required to put his finger on the specific act of negligence[72] but before advantage can be taken of this rule it must be shown that the defect did cause the loss. Where there is a possibility of other causes, such as ordinary wear and tear, the plaintiff must negative them.[73] Secondly, the manufacturer is liable only for defects not discoverable on ordinary examination.[74] This does not work injustice as the consumer has not been, or should not have been, induced by the manufacturer's claims in such a case. The courts do have the ability successfully to limit the extent of liability so that the burden on the manufacturer is not intolerable. The most potent threat is the possible flood of nuisance suits.[75] These could be discouraged by a strict application of the above devices.

2. Recovery for economic loss arising from defective goods should be based on contract because:

(a) Such damages notionally belong to the law of contract as they involve vindication of economic expectations. This argument can be shortly dealt with. The function of tort is to compensate, but

69. *Rivtow*, supra., n. 62 at 578; ante, n. 65.
70. *Winterbottom* v. *Wright* (1842) 10 M. & W. 109; *Donoghue* v. *Stevenson* [1932] A.C. 562, per Lord Buckmaster (dissenting).
71. E.g. *S.C.M. (United Kingdom) Ltd.* v. *Whittal & Sons,* supra., n. 22; Jolowicz, supra., n. 57 at 97.
72. *Grant* v. *Australian Knitting Mills* [1936] A.C. 85; *Mason* v. *Williams & Williams Ltd.* [1955] 1 W.L.R. 549.
73. *Evans* v. *Triplex Safety Glass* [1936] 1 All E.R. 283.
74. *Clay* v. *A. J. Crump & Sons Ltd.* [1963] 3 All E.R. 687.
75. Note in (1965) 19 Vand. L. Rev. 214 at 218.

there is no inherent reason why this should not include compensation for financial detriment,[76] and this surely exists when a consumer pays a considerable price and receives in return a worthless article, or an article which deteriorates into a state of worthlessness. This may also be described as an unfulfilled expectation which may be the source of a contractual claim, but the two fields of law are not notionally mutually exclusive.

(b) A manufacturer should be liable for the failure of his products to meet the consumer's demands only if he has warranted that the products are of that quality.[77] Yet this proposition has been rejected in the cases of both personal injury and damage to property other than the article itself. Why then should it be a valid argument in cases of economic loss? Any possible distinction can be found only upon policy grounds. Yet the better view today is that the public interest demands protection of a consumer's economic interests as well as his interests in personal safety. In both spheres the need is for the law to take a more active role. The argument loses further force when it is noticed that the main contractual avenue of recovery, the implied conditions under the Sale of Goods Act 1908, is in effect imposed by law and does not depend upon the express agreement of the parties except insofar as they may modify or exclude its operation.

(c) "Damages for inferior quality should be left to suits between vendors and purchasers since they depend upon the bargain between them."[78] This is a commonly stated reason[79] for disallowing recovery. It must be admitted that this has a certain limited validity. The rationale is that there must exist some standard of quality against which the court can measure the article in question. But it cannot be regarded as universally applicable. There are many cases where it may be regarded as obvious that the purchaser has received less than he bargained for, e.g. in cases where the defective article is dangerous to life or limb, it can safely be assumed that the customer would not be satisfied with his purchase. A similar assumption can be made where the defect renders the article absolutely worthless. In such cases the law should take into account the quality which would be contemplated by the ordinary and reasonable purchaser who purchases the article with the knowledge common to the community as to its character, and should not be deterred from allowing such claims merely because of the difficultiies which may arise in borderline cases.

Difficulties do arise when the claim is based on the fact that the goods, while free from defects which render them unfit for their general purposes, are not of the quality demanded by a particular purchaser. The manufacturer should not be held accountable for the

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76. Fleming, *"Law of Torts"* (4th ed.), 164.
77. *Seely,* supra., n. 49 at 151.
78. *T.W.A. Airlines Inc.* v. *Curtiss-Wright Corp.,* supra., n. 37 at 290.
79. *Seely,* supra., n. 49 at 151; *Price* v. *Gatlin,* supra., n. 50; Prosser, *"The Fall of the Citadel"* 50 Minn. L. Rev. 791.

failure of his goods, which are otherwise sound, to meet a consumer's particular needs where those needs are unknown to him.[80] This problem can be largely avoided by making the requisite standard akin to *merchantable quality* rather than to *fitness for particular purpose*.[81] In other words, a duty not to produce goods which are not reasonably fit for the ordinary purposes for which such goods are sold or used could be imposed, and the price would be a relevant factor.[82] The courts have proved that they are capable of defining and applying such standards. The problem cannot be regarded as insurmountable.

3. The imposition of liability would result in ousting the provisions of the commercial codes.[83] The validity of this contention rests upon the assumption that this is unnecessary, as sufficient avenues of recovery for economic loss exist already. What are these remedies; are they sufficient, and are they appropriate?

The main remedy is under the implied conditions of *merchantable quality* and *fitness for purpose* contained in section 16 of the Sale of Goods Act 1908. Only parties privy to the contract can rely on the implied conditions. In general purchasers will be the only persons to suffer economic, as opposed to physical, damage if the goods are defective, as only they have paid for them. But suppose that the original purchaser resells the goods privately. Since the legislation does not apply to private sales, there will be no contractual remedy unless the sub-purchaser can rely on an express term in his contract with the purchaser. Alternatively, the transaction might for some other technical reason fall outside the ambit of the Act. The defect in the goods might be just as latent, just as clearly due to carelessness in manufacture or design, as in a case which is covered. The public interest demands protection for the consumer-public as a whole, and not just for purchasers who are lucky enough to be covered by the legislation. Proposals to remove some of these difficulties in the United Kingdom have now been abandoned.[84]

More importantly, the doctrine of privity of contract confines the buyer's remedy to the immediate vendor. Yet it is the manufacturer who has created the defect and who can most easily distribute the cost of the defect among the general consumer-public. The retailer is often a mere conduit through which the goods pass on their way to the public. In these cases the layman's view would certainly be that the manufacturer is responsible.[85] Yet there is at present no

80. *Seely*, supra., n. 49 at 150.
81. Ibid., at 156 per Peters J. (dissenting on this issue).
82. *Santor*, supra., n. 48 at 313; note in (1966) Colum. L. Rev. 914 at 938.
83. Ibid., at 149-150; Kessler, *"Products Liability"* (1967) 76 Yale L.J. 897 at 910. "Tort liability, according to the Court, was not designed to undermine the warranty provisions of the Sales Act or of the Uniform Commercial Code, but rather to govern the distinct problem of physical injuries".
84. Law Commission and Scottish Law Commission Provisional Proposals Relating to Amendments to ss. 12-15 Sale of Goods Act, para. 39; Law Commission (No. 24) para. 23 (U.K.).
85. Jolowicz, *"The Protection of the Consumer"* (1969) 32 M.L.R. 1 at 4-5.

satisfactory alternative to the Sale of Goods Act as a means of recovery, and the courts in their desire to accommodate the consumer have therefore given to many of the requirements of that Act a more liberal interpretation than the legislature intended.[86] The result is that the retailer has imposed upon him liability which should more properly belong to the manufacturer. It is true that this is often achieved indirectly by way of indemnity actions, and the defects in this system will be mentioned later.

Exclusion clauses are expressly permitted by section 56 of the Act. Limitation of liability might not be reprehensible in purely commercial transactions. The ordinary consumer however is more often than not unable to protect himself against insidious provisions foisted upon him by enterprises whose bargaining strength he cannot match. The Courts have attacked harsh exemption clauses in a variety of ways,[87] but since the *Suisse Atlantique*[88] case it cannot be taken as settled that a clause, if unambiguously stated, will not effectively protect the retailer even against liability for the breach of a fundamental term. Consequently, it has been recommended in the United Kingdom that the legislation be amended to prevent contracting out of the implied conditions in "any sale of consumer goods to a private consumer."[89]

The commercial law is based on the doctrine of the freedom of contract. This is largely a myth in consumer transactions. The remedies offered by the commercial law are both inadequate and inappropriate in the consumer environment. A modification of commercial law concepts might obviate some of these defects temporarily. But such measures would in the long term prove inadequate and require constant readjustment. "[W]e must at last recognise that it is no longer possible for the same body of general law to govern both consumer and commercial transactions."[90] The public interest demands that the law take a more active role in imposing duties upon the manufacturer. It cannot continue to allow the parties to determine their own obligations and liabilities. The extension of the negligence concept to include loss to defective chattels is the most convenient method of achieving this.

The other possible mode of recovery is the collateral contract or warranty. This device might apply where the purchaser has been induced by the manufacturer's representations as to quality or quantity of goods to enter a contract to purchase those goods from a third party. It has been suggested[91] that this principle might be used to allow recovery for damage to the goods themselves by applying it to

86. Ibid., 12-13.
87. E.g. strict construction of the clause as in *Wallis, Son* v. *Pratt & Haynes* [1911] A.C. 394.
88. [1967] 1 A.C. 361.
89. Note 85, para. 50.
90. Jolowicz, supra., n. 86 at 8.
91. Tobin, *"Products Liability: A United States, Commonwealth Survey"* 3 N.Z.U.L. Rev. 377 at 398.

statements made by or on behalf of the manufacturer in advertisements, prospectuses, brochures, etc. Two obstacles make it doubtful whether this is possible. Firstly, there is the problem of distinguishing representations to which the law will impute contractual intention from "mere puffs"[92] or sales-talk. Secondly, in every case of collateral warranty[93] there has been a specific and personal assurance by the manufacturer directly to the plaintiff. To base the liability on a mere advertisement the courts would have to *imply* a collateral warranty. It is doubtful whether, in the absence of direct and personal contact, they would be prepared to do so, despite the ease with which this is done in the United States.[94]

4. It would be anomalous to allow such recovery in tort because a stranger to the contract, from whom no consideration passes, might then possess better rights than a purchaser under the provisions of the Sale of Goods Act 1908, since in the latter case the retailer can exclude liability.[95] Surely this is a misconception. The manufacturer, not the vendor, is the defendant envisaged by the new proposals and the vendor can limit liability only on his own behalf. One of the prime reasons for advocating that the consumer should have more extensive rights against the manufacturer is the very fact that he may have none against the retailer if there is an exclusion clause. Moreover, a stranger to the contract (e.g. a sub-purchaser under a private sale) appears at present to have virtually no remedy at all for economic loss and even on the doubtful assumption that the new liability would cause anomalies, they are unlikely to be greater than those presently existing.

5. An argument in favour of imposing tortious liability is that liability for the same loss is often already fixed on the manufacturer by operation of third party indemnities, and the circuity of litigation necessary to achieve this result causes unnecessary waste of time and money.[96] The practical advantages of a direct remedy are manifest. Moreover, it is not true that such circuitous litigation will invariably yield the same result as a direct remedy. The manufacturer might escape liability if the action fails through insolvency, disclaimer or effluxion of time at any link in the chain of liability.[97]

B. POLICY CONSIDERATIONS

In the United States much discussion has centred around the question of whether the same policy considerations which justified the imposition of strict liability for personal damage apply also to economic

92. *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.
93. E.g. *Wells (Mersthem) Ltd.* v. *Buckland Sand and Silica Ltd.* [1965] 2 Q.B. 170; *Brown* v. *Sheen and Richmond Car Sales Ltd.* [1950] 1 All E.R. 1102.
94. *Baxter* v. *Ford Motor Co.* 12 P. 2d 409 (1932); and ante, n. 51.
95. *Rivtow,* (1972) 26 D.L.R. 3d 559.
96. *Santor,* supra., n. 48 at 310; the classic case is *Kasler and Cohen* v. *Slavouski* [1928] 1 K.B. 78 involving five separate actions with eventual liability for £68 and legal costs £350.
97. *"After the Fall of the Citadel"* (1967) 19 Syracuse L. Rev. 1 at 15.

damage. It is not our purpose to discuss the desirability of strict liability in New Zealand, but inasmuch as they are relevant to our discussion these arguments are reflected below. They are relevant because if policy considerations favour the imposition of strict liability for economic loss, they necessarily also favour the imposition of the less onerous negligence liability for the same loss.

1. The modern marketing structure is such that the purchaser is at the mercy of the manufacturer. He lacks the technical skill and ability to evaluate the quality of the goods and often must rely on the manufacturer's advertisements.[98] Even in the absence of advertisements, the manufacturer, by putting the goods on to the market, is actively inducing sales.[99] Therefore ,the public interest demands that the consumer be protected.

The consumer already has protection from invasions of his personal or property interests. Why should the application of the above principles be dependent upon the type of loss suffered? It has been stated that "one is not nearly so sympathetic towards a buyer with a ruined carpet as one is toward a user with permanent physical injuries."[100] Be this as it may, the reason is the gravity of the injury in each individual case; a gravity which is not automatically determined by reference to whether the loss is physical or economic. In fact, the contention that physical loss justifies the imposition of liability because it always places a particularly heavy out-of-pocket burden upon the sufferer[101] surely lacks even superficial validity. It is not difficult to imagine cases where overwhelming hardship is placed upon the financially-injured plaintiff. In contrast, relatively light misfortune may have befallen the personally-injured consumer.[102] Even accepting that personal injury does place a more intolerable burden upon the consumer, it is difficult to see any such distinction between damage to property other than the defective article, which is recoverable, and damage to the article itself, which may not be.[103]

If the imposition of tort liability could be regarded as a deterrent there might be some basis for distinction, at least between personal injury and property loss.[104] The prevention of harm to persons should be of a higher priority than the prevention of economic harm. However the importance of the tort of negligence as a deterrent to acts which create the risk of personal danger is negligible. Its acknowledged function is to distribute equitably the cost of the injuries which the law recognises as the inevitable toll of life in today's society[105] and ultimately compensation for all types of loss is made in the same

98. *Randy Knitwear Inc.* v. *American Cyanamid Co.*, 11 N.Y. 2d 5 (1962).
99. Tobin, supra., n. 92 at 383.
100. Ante, n. 98 at 14.
101. Comment in (1966) 64 Mich. L. Rev. 1350 at 1382-1383.
102. *Seely*, supra., n. 49 at 155, per Peters J.
103. Tobin, *"Products Liability: Recovery of Economic Loss"* 4 N.Z.U.L. Rev. 36 at 40.
104. *Seely*, supra., n. 49 at 154, per Peters J.
105. Jolowicz, supra., n. 57 at 97 et seq.

monetary terms.[106] Any distinction between the different types of loss must depend for its validity not upon a consideration of the function of the law in each area but upon the gravity of the loss in each category. Such a distinction has little validity.

2. The loss should fall on the manufacturer because he is in the most advantageous position to insure against liability and distribute the cost thereof to the consumer public by incorporating it into his pricing structure.[107] The consumer on the other hand is often totally unprepared and unable to meet the cost of these losses. In other words, the issue is one of determining who can most easily bear the loss. The importance of the role of insurance cannot be over-stated, and if the field of liability is indefinitely wide, full insurance cover might be difficult to obtain.[108]

(a) Direct Loss

This is a predictable area of loss, the maximum possible being the cost of the article in every case.[109] That being so, the manufacturer can insure against it and distribute the cost. In contrast the plaintiff will often be an ordinary consumer who will have difficulty insuring every single item he buys. One survey of insurance companies has shown that there are available to consumers no policies which cover defects arising in the appliance itself.[110] The ordinary consumer is in no position to distribute either the cost of any insurance he can arrange, or the cost of any losses he suffers if he is uninsured. He must bear them all alone. When the plaintiff is a commercial man he may often be able to distribute his losses through his business, although once again insurance cover for this particular type of loss may be difficult to obtain.[111] The damages claimed are also likely to be much larger. One view[112] is that the combination of these two factors places commercial consumers outside the ambit of the policy considerations. However, the manufacturer is still in the better position to bear the loss. It is still he who has caused the loss. Furthermore, the problems of definition of "commercial consumer" are formidable. The better view is that recovery should be allowed for direct loss regardless of the plaintiff's status.

(b) Consequential Loss

This is too "elusive and illusory to be the proper subject of insurance."[113] How can the manufacturer predict with reasonable

106. *Seely*, supra., n. 49 at 155, Peters J. was therefore led to the conclusion that no valid distinction could be drawn between the different types of loss on the basis of public interest.
107. *Escocola* v. *Coca Cola Bottling Co.* 150 P. 2d 436 (1944).
108. Jolowicz, supra., n. 57 at 97.
109. Ante, n. 83 at 957-8; Tobin, supra., n. 104 at 40.
110. Tobin, ibid., 40.
111. Tobin, ibid., 52 footnote 13. The same survey showed that there were no such insurance policies available to merchants either.
112. Tobin, ibid., 41.
113. Anderson, *"Current Legal Problems in Products Liability Insurance"* (1964) 31 Ins. Council J. 436 at 446; see generally ante, n. 83 at 953-958.

certainty the amount of damage his goods will cause to the businesses of the purchasers of his goods? In the absence of insurance, the manufacturer would have to become a self-insurer by estimating the likely amount of damage and including it in his costing. But the unpredictability of the amount of loss, plus its enormous potential, make this impossible. The manufacturer would be forced to tread an intolerably thin line between over-funding himself out of competition on the one hand and under-funding himself at the risk of financial ruin on the other. Merchants and businessmen are the people most likely to suffer consequential economic loss. Generally they will be in a position from which they can to some extent distribute their losses. Less frequently an ordinary consumer may suffer consequential loss, e.g. travelling expenses incurred in trying to secure reparation. The suggestion has been made[114] that an "ordinary consumer" should be able to recover even consequential loss, since generally it will be minimal.

VII. Conclusion

We are now in a position to answer the original question. There is no valid reason for a blanket refusal to apply Lord Atkin's principle to economic loss of any type. The *Rivtow* case is therefore unwelcome. Where there is a risk of personal injury, recovery should be allowed if only to prevent anomalies arising. The *Dutton* case is a good indication that this is in fact the direction which the law is taking. Where the defect is innocuous the issue is less clear-cut, but policy considerations once again favour the extension of the duty concept to this area. But there do seem to be good reasons for limiting the recovery to direct economic loss, at least for the time being. At the same time, commercial consumers do not qualify to the same extent for the benefit of the extension. In their case the commercial law still provides adequate remedies. If the law does take this attitude, the greatest difficulty it will face will be to distinguish between "commercial consumers" and "ordinary consumers". But whatever else is uncertain, the law *will* soon have to grapple with these issues. The two recent cases show an increasing awareness of the possibilities of the tort of negligence as an instrument for consumer protection in this area. It is to be hoped that the courts fully realise its potential and utilise it accordingly.

P. W. BENNETT*

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114. Tobin, n. 104 at 43.

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