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DUTY OF CARE II: RECOGNISED HARM

KEY ISSUES

(1) Hierarchy of protected interests

The law of negligence reflects protective priorities in wider tort law; a duty of care is more readily recognised with respect to physical integrity than with respect to either mental or financial interests.

(2) Impact of European Convention

The extent of protection given to particular interests is apt to change over time and is open to influence by the requirements of the European Convention on Human Rights.

(3) Complex cases

This chapter considers the duty rules that have developed with respect to some complex damage cases. The courts deciding these cases have examined technical factors relating to the causation of damage, but have also been influenced by the desire to keep negligence liability within defensible limits – to prevent the 'floodgates' from opening.

(4) Psychiatric harm

Psychiatric harm cases have been divided into those concerning persons within the area of physical harm or exposure to toxic substances, termed 'primary victims', and those who have suffered illness as a result of witnessing the death, injury, or imperilment of others, termed 'secondary victims'.

(5) Pure economic loss

Pure economic loss cases include those arising by way of defective property and relational economic losses, and through misstatements and poor execution of services. In the latter two categories of case, courts have utilised the concept of 'assumption of responsibility' to determine whether or not to impose duties of care.

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SECTION 1 INTRODUCTION

Lord Atkin's famous axiom – '[t]he rule that you are to love your neighbour becomes in law, you must not injure your neighbour' – begs one vital question. What kinds of injury must one take reasonable care to avoid inflicting on one's neighbour? Failing

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to return his affection may offend him, but no one would suggest that he could sue on this basis. Accordingly, whereas the previous chapter considered the broad framework within which a duty of care will be imposed, this chapter focuses on the kinds of interest that are subjected to such duty.

In the modern era, duties may be imposed to protect against injury to the person (including psychiatric harm), damage to property, and pure economic losses. But such a simple statement provides no hint as to the many intricacies in the law. As we shall see, not always are the distinctions between these categories obvious, nor is each of the various interests afforded the same level of protection. The following points must be borne in mind throughout the chapter.

(1) There are kinds of harm which are currently irremediable in English law even if intentionally and maliciously inflicted: privacy, per se, continues for the present to be an interest not protected in negligence.[1] Furthermore, when the harm of which the claimant complains does not give rise to a tort if committed intentionally, the courts are naturally reluctant to say that such harm gives rise to a cause of action if inflicted carelessly.

(2) The proper functions of tort and contract and the borderline between them may be in issue. Where the substance of the claimant's action is that the defendant failed to provide value for money in terms of services rendered, and where no contract existed between the parties, would imposing a duty of care in such circumstances trespass too greatly on the privity of contract principle (or such of it as remains in the wake of the Contracts (Rights of Third Parties) Act 1999)?[2]

(3) Since the Human Rights Act 1998 came into force, the courts have been forced to rethink some of tort law's foundational principles. The (potential) negligence liability of public authorities has had to be reappraised quite significantly in the light of the decisions of the European Court of Human Rights in *Z v United Kingdom*[3] and *TP and KM v United Kingdom*.[4] And since it became independently possible to hold public authorities liable in respect of breaches of the European Convention on Human Rights,[5] it has been necessary for the courts to show a new-found tolerance in hearing the claims of those seeking to sue public authorities on the basis of common-law negligence.[6]

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[1] Over the years, via ad hoc applications of several existing torts and the Human Rights Act 1998, many privacy-related interests have received increased protection. But no common-law tort based solely on the invasion of privacy has yet emerged. *Campbell v MGN* [2005] 2 AC 457 seems to create an action for the misuse of private information but *Douglas v Hello! Ltd (No 6)* [2006] QB 125 makes clear that no tort based on an invasion of privacy more generally has yet emerged. See Wacks, 'Why there will never be an English common law privacy tort' in Kenyon and Richardson (eds), *New Dimensions in Privacy Law* (2006), ch 7.

[2] See *White v Jones* [1995] 2 AC 207, at 262–5.

[3] (2002) 34 EHRR 97.

[4] (2002) 34 EHRR 42.

[5] Human Rights Act 1998, s 7.

[6] *D v East Berkshire Community NHS Trust* [2005] 2 AC 373.

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(4) Having made the last point, the highest courts in England and Wales have yet properly to determine the appropriate relationship between developments under the Convention and the tort of negligence. One judicial view is that European developments make it unnecessary to expand liability in negligence; if redress is available under the Convention, the domestic law of negligence has no more work to do.[7] This was the view of Lord Brown in *Smith v Chief Constable of Sussex Police*:

> [C]onvention claims have very different objectives from civil law actions. Where civil actions are designed essentially to compensate claimants for their losses, convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights.[8]

The contrary view is that the two areas of law should develop in harmony with each other.[9] There are good arguments each way; but domestic courts will have to be wary of allowing large disparities in protected interests to develop. This is especially so given that negligence is a relatively flexible tort encompassing many forms of damage arising in a wide spectrum of contexts; and given that a failure to provide an adequate domestic remedy to a breach of Convention rights is itself a breach of Article 13 of the Convention.[10]

(5) Claimants are always attempting to test the limits of actionability. In an increasingly complicated world, it is possible to argue that various new interests should be protected. The advent of the Human Rights Act 1998 and protection of European Convention rights has been a catalyst for such arguments. Thus it is that various speculative claims have been made for protection of such things as educational development and even the rather wide interest of 'autonomy'.[11] One issue is whether claims that purport to be about these things are better addressed according to the well-recognised heads of damage in negligence, viz personal injury, property damage, or pure economic loss.[12] With respect to claims for negligent failure to promote the educational development of children, for example, it may be that these are most easily analysed in terms of the diminished earning capacity of the child-cum-adult or expenditure by the relevant parent or guardian to rectify the inadequate provision (both financial losses). The argument against this is that existing categories of damage are too limited and in need of expansion. Thus, it might be argued that the failure of a public authority or school to promote the educational development of the child results

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[7] *Jain v Trent Strategic HA* [2009] UKHL 4, at [39]; *Smith v CC of South Sussex Police* [2008] UKHL 50, at [136] and [138].

[8] *Smith v CC of South Sussex Police* [2008] UKHL 50, at [138]

[9] Ibid at [58].

[10] *MAK and RK v UK* [2010] ECHR 363, criticised in Greasley (2010) 73 MLR 1026. See also McIvor [2010] CLJ 133, 149–50.

[11] See survey of novel claims in Nolan (2007) 70 MLR 59.

[12] Ibid at 85–6.

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in more than just financial loss – in literary, artistic, and social deprivation.[13] True this may be. But it must be accepted also that the law of negligence cannot be seen as the stairway to the Garden of Eden.[14] The aims of this tort are limited and prosaic.[15]

SECTION 2 HARM TO PERSONS

(A) DUTY TO THE UNBORN

Whether a duty of care was owed to a child damaged by another's negligence before its birth remained unresolved at common law until 1992. In *Burton v Islington Health Authority*[16] the Court of Appeal finally held that a duty is owed to the unborn child, but that the duty does not crystallise until the live birth of the child. Prior to that decision, however, Parliament had intervened in the form of the Congenital Disabilities (Civil Liability) Act 1976. There it is provided that a child who is born alive but disabled as a result of an occurrence before its birth may in certain circumstances have a cause of action against the person responsible for that occurrence.[17] Section 4(5) provides that the 1976 Act supersedes the common law in respect of births occurring after its passing. Thus the common-law rule in *Burton, in so far as it is superseded* by the 1976 Act, applies only in relation to children born before 1976.

On the other hand, the Act only applies in respect of children born with a 'disability', and 'disability' is defined in terms of 'any deformity, disease or abnormality including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future'.[18] It is therefore arguable that any injury which falls short of a disability remains governed by the common law rule established in *Burton*.[19] There are also other limits to the scope of the Act that leave untouched a still wider residual role for the common law. It is therefore necessary to provide some account of the Act.

The duty imposed under the Act relates to any occurrence, whether it is one affecting the reproductive capacity of either parent before conception, or one affecting the mother during pregnancy. The peculiarity of the duty to the child is that it is derivative only. The relevant occurrence must have been capable of giving rise to liability in tort to the affected parent. But it is no answer that the parent suffered no actionable injury

[13] There is no injury as such in ignorance: *Donoghue v Copiague Union Free School District* 407 NYS 2d 874, 880 (1978); Nolan (2007) 70 MLR 59, 84–5.

[14] The same can be said for the European Convention of Human Rights: eg, *A v Essex CC* [2010] UKSC 33.

[15] See, eg, *White v CC of South Yorkshire Police* [1999] 2 AC 455, at [98].

[16] [1993] QB 204; and see *De Martell v Merton and Sutton HA* [1992] 3 All ER 820.

[17] Congenital Disabilities (Civil Liability) Act 1976, s 1(1). Note that s 44 of the Human Fertilisation and Embryology Act 1990 extends the 1976 Act to cover negligently inflicted disability in the course of licensed fertility treatment.

[18] Congenital Disabilities (Civil Liability) Act 1976, s 4(1).

[19] See Murphy (1994) 10 PN 94.

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so long as 'there was a breach of legal duty which, [had it been] accompanied by injury, would have given rise to . . . liability'.[20]

Not surprisingly, mothers are made immune from general liability under the Act.[21] How could a mother damaging her baby by smoking or drinking too much be in breach of a duty to herself? Would she be in breach of a duty to the father in damaging his child? Section 2 does expressly provide for the only direct duty owed to her unborn child under the 1976 Act. A woman may be liable for damage to her child inflicted by her negligent driving of a motor vehicle when she knows or ought to know herself to be pregnant. The justification for this exceptional instance of maternal liability is probably that, in such circumstances, her insurers will meet the cost of the child's claim.

One crucial question in the context of pre-natal injuries is the extent to which negligence law recognises 'wrongful life' claims. In *McKay v Essex Area Health Authority*,[22] it was held that English common law recognises no such claims.

> C was born before the 1976 Act with terrible disabilities resulting from her mother having contracted rubella during pregnancy. The mother had undergone pregnancy tests when she realised that she had been in contact with the disease and had been negligently told that the tests were negative. She would have opted for an abortion had tests proved positive. Subsequently, the child sued in respect of the harm caused to her by being born disabled. The Court of Appeal held that it was impossible to measure the harm resulting from entry into a life afflicted by disability where the only alternative was no life at all. They were therefore unprepared to impose on doctors a duty of care that was in essence a duty to abort.

In relation to births subsequent to the 1976 Act, Ackner LJ said in *McKay*[23] that the Act gave a cause of action only in respect of occurrences causing disabilities which would otherwise not have afflicted the child. It did not afford a remedy to a child whose birth was caused by the defendant's alleged negligence (even though the child born was afflicted by a disability). His Lordship also emphasised the fact that the Act was equally unsupportive of a claim for 'wrongful life'.[24]

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(B) A DUTY TO RESCUERS?

Recognition of a duty in respect of physical and emotional injury to rescuers raises two important questions about the ambit of the duty to avoid harm to persons since the rescuer is only indirectly at risk from the negligent conduct. First, is he a foreseeable claimant? Second, if he is, and given that he 'elects' to undertake the rescue, can he

[20] Congenital Disabilities (Civil Liability) Act 1976, s 1(3).

[21] See Congenital Disabilities (Civil Liability) Act 1976, s 1. Fathers are not immune. But what sorts of circumstance could create paternal liability – infecting the mother and baby with AIDS?

[22] [1982] QB 1166.

[23] Ibid at 1187.

[24] See likewise *Harriton v Stephens* (2006) 226 CLR 52; Symmons (1987) 50 MLR 269. Cf Witting (2007) 31 MULR 569.

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properly claim that the originator of the danger owes him any obligation in respect of his safety since he has 'chosen' to imperil himself?

In 1935 the Court of Appeal held for the first time that a defendant who owed a duty to another also owed a duty to those who might foreseeably attempt to rescue him from the acute peril in which the defendant's negligence had placed him.[25] Subsequent case law has consistently confirmed the notion that rescuers are foreseeable claimants since it is well understood that '[d]anger invites rescue ... [and] [t]he cry of distress is a summons to relief'.[26] Whether the rescuer is a member of the emergency services, whose public duty it is to embark on the rescue mission, or a well-meaning member of the public,[27] the courts will now hold that a duty is owed to him personally.[28] On the other hand, there is no especially favourable duty owed to such persons. It suffices to note here that the usual rules apply[29] and that the controversial question of whether it is generally appropriate to compensate professional servicemen in circumstances where ordinary citizens would recover nothing for psychiatric harm in respect of witnessing a tragic event is considered fully in the following section.

The duty to a rescuer is imposed not only on those who endanger other people or their property so as to invite rescue, but also on anyone endangering himself or his own property so as to make rescue likely. Thus, a householder who negligently set his own roof alight was held liable to the fireman who was later burnt when fighting the blaze.[30]

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(C) LIABILITY FOR PSYCHIATRIC HARM

A psychiatric harm is a medically recognised condition of a sustained nature that disturbs the normal functioning of the mind. It might or might not be accompanied by overt physical symptoms.[31] As a broad category, the term 'psychiatric harm' encompasses many more specific illnesses. The relevant case law has, for the most part, concerned physical events (or 'stressors') leading to the onset of post-traumatic stress disorder (PTSD). However, the courts have recognised that this is not the only kind of

[25] *Haynes v Harwood* [1935] 1 KB 146.

[26] *Wagner v International Rly Co* 232 NY Rep 176 (1921).

[27] *Baker v T E Hopkins & Son Ltd* [1959] 3 All ER 225; *Chadwick v British Transport Commission* [1967] 2 All ER 945.

[28] In *Videan v British Transport Commission* [1963] 2 QB 650 it was held that a duty was owed to a stationmaster rescuing his small son who had been trespassing on the lines. At that time, no duty was owed to the child trespasser. But the duty owed to the stationmaster was not derived from, or dependent upon, any duty owed to the son. An emergency requiring a rescue was foreseeable, thus creating a direct, personal duty towards the stationmaster.

[29] *White v CC of South Yorkshire Police* [1999] 1 All ER 1.

[30] *Ogwo v Taylor* [1988] AC 431.

[31] See American Psychological Association, *American Diagnostic and Statistical Manual of Mental Disorder* (4th revised edn, 2000), xxxi. See also Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd edn, 2006), chs 2–3. The latter work indicates that the term preferred in psychiatry is 'psychiatric disorder': ibid at 30.

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compensable psychiatric harm. Thus, in *Vernon v Bosley*, Thorpe LJ stated that while PTSD is a useful classification, it could not 'be adopted in personal injury litigation as the yardstick by which the plaintiff's success or failure is to be measured'.[32] Indeed, more recent times have seen the courts considering arguments for redress in negligence not based upon any external 'event' giving rise to claims for psychiatric illness, including cases in which the claimant has been exposed to some substance (such as asbestos) which causes him to 'fear for the future'.[33]

In terms of what counts as *compensable psychiatric harm* within the law of negligence, consider *Rothwell v Chemical & Insulating Co Ltd*:[34]

> Cs were negligently exposed to asbestos by their employers. They developed pleural plaques, which are 'areas of fibrous thickening of the pleural membrane which surrounds the lungs'.[35] These caused no symptoms. However, because the plaques indicated the presence of asbestos fibres in the lungs, Cs developed anxiety about their conditions, fearing that they would eventually suffer from a life-threatening disease, such as asbestosis or mesothelioma.

The House of Lords affirmed a number of important propositions. First, the claimants had not suffered any form of compensable *physical* harm.[36] Second, the mere *risk* of physical injury arising in the future was not a form of compensable harm.[37] Third, there could be no recovery for mere *grief or anxiety*.[38] These temporary emotional states the law expects persons to endure without compensation. Fourth, the court rejected the claim that it was permissible to *aggregate* the various hurts that the claimants had suffered – the pleural plaques and the anxiety derived from fear for the future – because the sum was greater than its individual parts.[39] Lord Scott put it most bluntly in stating that 'nought plus nought equals nought'.[40]

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Consider next the companion case of *Grieves v FT Everard & Sons Ltd*, in which the claimant *had* suffered a psychiatric illness. The concern here was not that the claimant failed to meet the threshold of recognised harm, but about the *manner in which that harm was caused* (its aetiology):

> Again, C was negligently exposed to asbestos dust by his former employers. Following an x-ray examination, he developed clinical depression as a result of his fears that he would eventually develop a life-threatening asbestos-related illness.

[32] [1997] 1 All ER 577, at 610. See also ibid at 607.

[33] The full breadth of such claims in considered in Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd edn, 2006), ch 27.

[34] [2008] 1 AC 281.

[35] Ibid at [1].

[36] Ibid at [2], [50], [63], and [88].

[37] Ibid at [67], and [88]. See also *Gregg v Scott* [2005] 2 AC 176.

[38] [2008] 1 AC 281, at [2], [66], and [89]. See also, eg, *McLoughlin v O'Brian* [1983] AC 410, at 431; *White v CC of South Yorkshire Police* [1999] 2 AC 455, at 465 and 491; *W v Essex CC* [2001] 2 AC 592, at 600.

[39] [2008] 1 AC 281, at [17] and [73].

[40] Ibid at [73].

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Absent some special knowledge about the claimant's durability, it had to be assumed that the claimant was of ordinary mental fortitude.[41] The problem was that it was not reasonably foreseeable to an employer that the claimant would suffer illness in this manner.[42] There was no relevant external event, such as occurs in the more usual psychiatric illness case, with respect to which it had been foreseeable that he might suffer a psychiatric reaction.[43]

Grieves cannot be taken to rule out the possibility that an employer (or other defendant) may be liable in negligence for exposure to asbestos or other substance causing a psychiatric illness because of the claimant's fears of developing a fatal or other disease.[44] However, it does emphasise the importance in such cases of knowledge on the part of the claimant of a susceptibility to psychiatric illness.[45] Unless there was some reason for the defendant to know or have reason to suspect, prior to a failure in care, such vulnerability, claims of this nature will be unavailable.

Much of the case law in this area has concerned allegations of negligence involving some *external event that has occurred* and as a result of which the claimant has suffered a psychiatric illness. In such cases, the claims frequently involve causation of PTSD. As a general proposition, the courts have been very wary of permitting a wide ambit of liability. The reasons for caution are easy to catalogue. They include the risk of fictitious claims and excessive litigation, the problems of proving the causal link between the defendant's negligence and the injury to the claimant, and the difficulties of putting a monetary value on such harm. Gradual, if belated, judicial recognition of the genuine nature of psychiatric harm led to the abandonment of the nineteenth-century attitude that non-physical harm to the person was totally irrecoverable.[46] The courts began to award damages for what was for many years called 'nervous shock'.[47] A claimant who became mentally ill because of the shock to his nervous system caused by an incident that either threatened his own safety,[48] or involved witnessing exceptionally distressing injuries to others,[49] could in certain circumstances[50] recover compensation for psychiatric harm.[51] PTSD can follow from an external incident in a number of ways. First, and most obviously, a claimant who suffers severe physical injury, for

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41 [2008] 1 AC 281, at [26] and [99].

42 Ibid at [57], [75], and [99]–[100].

43 Ibid at [30].

44 Cf *Grieves v FT Everard & Sons Ltd* [2008] 1 AC 281, at [2].

45 See the test laid out in *Hatton v Sutherland* [2002] ICR 613 (applied in *Barber v Somerset CC* [2004] 1 WLR 1089).

46 For the nineteenth-century view see *Victorian Railways Comrs v Coultas* (1888) 13 App Cas 222. For an analysis of how the law has always 'limped behind medicine' see Sprince [1998] LS 55.

47 The phrase can be misleading and should be regarded as no more than a customary means of grouping together cases where C becomes mentally ill as a consequence of an assault upon his nervous system: see *Alcock v CC of South Yorkshire* [1991] 4 All ER 907, at 923. See also *McLoughlin v O'Brian* [1982] 2 All ER 298, at 301.

48 *Dulieu v White & Sons* [1901] 2 KB 669.

49 *Hambrook v Stokes Bros* [1925] 1 KB 141.

50 Note the refusal of damages in *Hay (Bourhill) v Young* [1943] AC 92.

51 The term now preferred to nervous shock: *Attia v British Gas plc* [1987] 3 All ER 455, at 462.

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example in a road accident, may well also succumb to mental illness triggered by the terror of the accident and his consequent pain and suffering. Second, a person may be so badly treated following a traumatic event that psychiatric harm ensues.[52] Third, an accident may occur in which the claimant is involved but in which he suffers no bodily injury, only shock and fear that cause psychiatric illness. Fourth, the claimant may not be directly involved in the original accident, and be at no personal risk of physical injury, but nonetheless witness injury to others and suffer psychiatric harm in consequence. (A good example would be a mother who witnesses an horrific injury to her children.)[53] In such cases, the claimant is classified as a *secondary* victim of the defendant's negligence. A series of decisions have set limits, often referred to as 'control mechanisms', on who may claim as a secondary victim of psychiatric harm.[54] These limits will be discussed fully later. But here it suffices to note that they are primarily intended to keep litigation in this area within manageable limits. In essence, and very briefly, to recover damages, a *secondary* victim must generally establish (1) a close tie of love or affection with the primary victim (such a tie being presumed to exist between certain persons such as spouses, or parents and their children) and (2) proximity in time and place to the accident.

Victims of psychiatric illness in the first three categories are *regarded as primary* victims of the defendant's negligence. A person who suffers psychiatric illness as well as physical injury causes us no problems. Such psychiatric harm is part and parcel of his claim for injury. There is no decided case in which liability has been imposed for a claimant in the second category, which leaves only the third category. Here *Page v Smith*[55] is the leading case.

> C was involved in a collision with a car negligently driven by D. He suffered no physical injury. However, almost immediately, he succumbed to a revival in an acute form of the chronic fatigue syndrome (ME) from which he had periodically suffered in the past. He became so ill that he was unable to work. D argued that, as C suffered no physical injury, he was not liable for injury through shock. A normal person with no previous history of psychiatric illness would not be expected to become ill as a result of a minor collision.

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The House of Lords found for the claimant. In cases involving 'nervous shock', they said, a clear distinction must be made between primary and secondary victims. In claims by the latter, certain 'control mechanisms' limit the potential liability for psychiatric harm. Shock in a person of normal fortitude must be foreseeable. But Mr Page,

[52] See, eg, *Brooks v MPC* [2005] 1 WLR 1495 (although on the facts, there was no duty owed by the police to C, a murder witness). Consider, too, *McLoughlin v Grovers* [2002] QB 1312 where the traumatic occurrence was C's wrongful conviction due to the negligence of his solicitors; it was held that C had an arguable case that he may be entitled to recover in negligence for the psychiatric illness he developed as a consequence of that wrongful conviction.

[53] Eg, *Hambrook v Stokes Bros* [1925] 1 KB 141.

[54] *Bourhill v Young* [1943] AC 92; *McLoughlin v O'Brian* [1983] 1 AC 410. The leading case is now in *Alcock v CC of South Yorkshire Police* [1992] 1 AC 310.

[55] [1996] AC 155, neatly dissected in Bailey and Nolan [2010] CLJ 495.

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the claimant, was a primary victim of the defendant's negligence. It was readily foreseeable that he would be exposed to personal injury, and physical and psychiatric harm were not to be regarded as different kinds of damage. Once *physical* injury to a primary victim is foreseeable, he can recover both for any actual physical harm that he suffers and for any recognised psychiatric illness ensuing from the defendant's breach of duty. Indeed, even if only distress to the claimant is foreseeable, he or she may nonetheless sue in respect of any recognised form of psychiatric harm that goes beyond *mere distress* even though that specific illness was not foreseeable.[56] Even so, in the case of primary (just like secondary) victims, damages are available only in relation to a recognised psychiatric illness.[57]

Page v Smith has been subject to criticism,[58] in part because tests for foreseeability in negligence usually encompass a specific form of damage (as discussed in the previous chapter). The test in *Page* conflates two kinds of damage, which are caused (in typical cases) in different ways. Personal injuries usually arise from external impact, whereas psychiatric illness always develops indirectly through a *reaction* to events. The limitations of the *Page* test have become obvious in subsequent cases. It was held in *Grieves v FT Everard & Sons Ltd*, considered already, to be confined to the kind of factual situation that it involved – that is, an external traumatic event. It would not apply in cases of negligent exposure to asbestos, radiation, or contamination of food which had caused no proven physical harm, but which led to anxiety and subsequent psychiatric illness.[59]

The conditions for liability to a *secondary victim* established by the case law up to 1982 generally required that the claimant should be present at the scene of the accident, or very close by, so that he perceived what happened with his unaided senses. But then *McLoughlin v O'Brian*[60] was decided, the facts of which were as follows:

> C's husband and three children were involved in a car accident caused by D's negligence. All four of her family were injured, one so seriously that she died almost immediately. An hour later, a friend told her of the accident at her home two miles away. They went to the hospital where C was told of the death and then saw the three remaining family members before they had been properly cleaned up. Though a woman of reasonable fortitude, C suffered severe shock, organic depression, and a change of personality.

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[56] *Essa v Laing* [2004] ICR 746.

[57] But where the primary victim suffers physically and psychologically, the psychological harm need not be a recognised psychiatric condition. Thus, in *Gregg v Scott* [2005] 2 AC 176, it was held that C could claim for the anxiety caused by a physical condition for which D was answerable in negligence: the anxiety merely falls within the recognised head of 'pain and suffering' that have long been recognised as recoverable in conjunction with physical injuries.

[58] See Jones 'Liability for Psychiatric Damage: Searching for a Path between Pragmatism and Principle' in Neyers (ed), *Emerging Issues in Tort Law* (2007), ch 5; Bailey and Nolan [2010] CLJ 495.

[59] [2007] UKHL 39, at [31]–[34], [53]–[54], [77], [95], and [97]. This ruling has been argued to be arbitrary, adding 'further complexity and uncertainty to the law': Bailey and Nolan [2010] CLJ 495, 524.

[60] [1983] 1 AC 410. For more recent insistence on first-hand experience of traumatic sights, see *Palmer v Tees HA* [1999] Lloyd's Rep Med 351.

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The House of Lords insisted that the claimant should demonstrate her proximity in time and space to the traumatic events. But they held also that, in coming upon the 'immediate aftermath' of the accident in which her family had been so grievously injured, she was well within the scope of the duty to avoid nervous shock. Witnessing the aftermath, they said, was equivalent to witnessing the incident itself since nothing in the horror of the sight that met her had changed.

Beyond that, there were distinct differences of approach among their Lordships. But, since the decision was made within the now discredited test for the imposition of a duty laid down by Lord Wilberforce in *Anns v Merton London Borough Council*,[61] these divergent views need not concern us here.[62]

The leading case on liability to secondary victims for psychiatric harm is now *Alcock v Chief Constable of South Yorkshire Police*.[63]

> In April 1989, 95 people died and over 400 were injured when South Yorkshire police allowed an excessive number of spectators to crowd into Hillsborough football ground. People were quite literally crushed to death. Cs' actions were for psychiatric illness ensuing from the horror of what had happened to their relatives (or in one case, a fiancé).

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In the House of Lords, two issues were pre-eminent: first, could relatives other than parents or spouses bring an action for psychiatric harm? Second, could those who witnessed coverage of the disaster on television recover?

(1) Their Lordships refused to prescribe rigid categories of potential secondary claimants in nervous shock claims. They held that there must generally be a close tie of love and affection between the claimant and the primary victim of the sort normally enjoyed by spouses and by parents and children.[64] Siblings and other more remote relatives, it was held, would generally fall outside such a relationship in the absence of special factors. Consequently, claims by brothers, sisters, and brothers-in-law failed in *Alcock*, while the claim on the part of a fiancé was allowed. However, claims by more distant relatives were not totally debarred. So, for instance, a grandmother who had brought up a grandchild since infancy might qualify upon proof of the required bond of love and affection.

(2) Lord Ackner suggested that, in cases of exceptional horror, where a reasonably strong-nerved individual would suffer shock-induced psychiatric injury, even a bystander unrelated to the victim should be able to recover.[65]

(3) A degree of proximity in time and space between the claimant and the accident is required. The claimant must normally either witness the accident himself or come upon the aftermath within a very short period of time.[66] Identifying a

[61] [1978] AC 727, considered in ch 2.
[62] Details can be found in the 10th edition of this work.
[63] [1992] 1 AC 310.
[64] [1991] 4 All ER 907, at 914, 919–20, 930, and 935.
[65] Ibid at 919. See also at 930.
[66] Ibid at 914–15, 920–21, 930–2, and 936. See also *Hunter v British Coal* [1998] 2 All ER 97.

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relative several hours after death will not usually suffice. Nor will witnessing the accident via the medium of television generally be sufficient.[67] Parents who watched the Hillsborough disaster unfold on television had their claims rejected. Television pictures cannot normally be equated with actual sight or hearing of the event or its aftermath, especially since the broadcasting code of ethics prohibits graphic coverage of individual suffering.[68] Once again, there might be exceptional cases where simultaneous broadcasts of a disaster that cannot be edited will equate to personal presence at the accident.[69] Indeed, in the Court of Appeal, Nolan LJ gave the example of a balloon carrying children at some live broadcast event suddenly bursting into flames.[70]

(4) The relevant psychiatric illness must be shown to result from the trauma of the event or its immediate aftermath.[71] Psychiatric illness resulting from being informed of a loved one's death, however gruesome the circumstances, is not recoverable in English law.[72] So, if a young child is crushed by falling masonry at school and, within an hour, her mother comes to her deathbed at the hospital, the mother may recover for the trauma of coming upon the immediate aftermath of the accident. But, if the child's father has a heart attack when told over the phone of the girl's fate, his loss remains irrecoverable.[73]

Their Lordships in *Alcock* adopted an avowedly pragmatic approach to psychiatric harm. They rejected a simplistic approach based on fixed categories of who can recover, and in what circumstances. They also refused to extend liability for psychiatric harm indefinitely. Lord Oliver expressly conceded that he could not 'regard the present state of the law as either satisfactory or logically defensible'.[74] He suggested further that Parliamentary intervention may be timely.[75]

A nice point was left open following *Alcock*. Could a primary victim be liable for harm to another person caused by shock where he was the author of his own injury? In *Ogwo v Taylor*,[76] a negligent householder was liable to a fire-fighter injured in a fire caused by his carelessness. But, in *Greatorex v Greatorex*,[77] it was held that a drunk

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[67] [1991] 4 All ER 907, at 937.
[68] Ibid at 921.
[69] Ibid at 921 and 931.
[70] [1991] 3 All ER 88, at 122.
[71] After *Vernon v Bosley* [1997] 1 All ER 577 it is no longer necessary that it be exclusively shock that triggers C's illness.
[72] [1991] 4 All ER 907, at 914–15. Cf *Tame v NSW* [2002] HCA 35 and *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33. Now that the rule in *Wilkinson v Downton* [1897] 2 QB 57 has been viewed as anomalous (see ch 8), and preferably seen as a case involving negligence, it is a moot point whether in future this rather arbitrary obstacle to recovery for shock-induced psychiatric illness will be upheld in any pertinent future litigation.
[73] As it would be if his illness were precipitated by identifying his daughter at the mortuary next day.
[74] [1991] 4 All ER 907, at 932.
[75] Ibid at 931.
[76] [1988] AC 431.
[77] [2000] 1 WLR 1970.

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driver who caused an accident did not owe a duty of care to his father (who happened to be the fireman called to the scene of the accident) in respect of his father's psychiatric harm. To impose such a duty would be, the court said, too much of an imposition on the drunken man's right to conduct himself broadly as he pleased. Our self-determination, the court reasoned, involves the 'right' to injure ourselves without owing others a duty when they witness our injury. Perhaps one distinction between the two cases is that, in *Ogwo*, the claimant suffered physical harm (burns), whereas the fireman in *Greatorex* suffered only psychiatric harm. But as the House of Lords, relying on the formulations contained in the Limitation Acts pointed out in *Page v Smith*,[78] psychiatric harm is merely part of the broader species, 'personal injury'. A second possible distinction is that, in *Ogwo*, the fireman would have satisfied the test of primary victim set out in *White v Chief Constable of South Yorkshire Police*,[79] whereas the claimant in *Greatorex* was in no personal danger (nor in a position to claim reasonably that he thought he was in personal danger). But this, too, is unconvincing, for the primary/secondary victim distinction operates to differentiate between two types of claimant, both of whom are suing for *psychiatric harm*. A third explanation might be that a person rescuing property (as in *Ogwo*) will be owed a duty more readily than a person rescuing fellow human beings (as in *Greatorex*). But such a distinction – if we accept that the law seeks to treat rescuers kindly – runs counter to the usual hierarchy of protected interests in tort law. Perhaps the simplest explanation of the decision in *Greatorex* is the one implicit in the fact that not a single mention of *Ogwo* was made in that case!

Alcock might, at first sight, appear to have settled some firm principles delimiting liability for psychiatric harm. But the decision provoked as many questions as it answered. Let us look, first, at liability to bystanders. Lord Ackner, as we have noted, suggested that a truly horrific disaster might entitle even unrelated bystanders to recover damages for psychiatric illness. Yet consider *McFarlane v EE Caledonia Ltd*.[80]

> C witnessed the destruction of an oil rig from aboard a support vessel involved in attempts to rescue survivors of the explosion which tore apart the rig. He was not himself involved in the rescue effort and was far enough away from the burning rig to be in no personal danger. However, a more horrifying spectacle is difficult to imagine.

The Court of Appeal refused his claim. A rescuer personally at risk in such circumstances would have been entitled to compensation as a participant in the terrifying event. But, crucially, the claimant was neither a rescuer nor otherwise a participant (that is, at no objective risk nor in a position reasonably to believe himself to be at risk).[81] As a bystander only, it was not foreseeable that he would suffer such shock.

[78] [1996] AC 155.

[79] [1999] 1 All ER 1.

[80] [1994] 2 All ER 1. For critique, see Murphy [1995] LS 415. See also *Hegarty v EE Caledonia Ltd* [1996] 1 Lloyd's Rep 413.

[81] [1994] 2 All ER 1, at 13.

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Stuart-Smith LJ effectively sought to close the door, left ajar in *Alcock*, on liability to bystanders. Practical and policy reasons, he said, militated against such liability: reactions to horrific events were 'entirely subjective'.[82]

White v Chief Constable of South Yorkshire Police[83] further explored the boundaries of *Alcock*.

> Cs were police officers who claimed damages for psychiatric illness resulting from their professional involvement in events at the Hillsborough disaster in which many died or were seriously injured in the crush at the football ground. Five of the six claimants assisted the injured and sought to ensure that, subsequent to the full height of the disaster, no further danger faced those leaving the ground. The sixth claimant was on duty at the mortuary. None of the officers were exposed to any personal risk of physical injury. The Court of Appeal held by 2–1 that a duty of care was owed to the officers actually present at the ground (but not to the one at the mortuary).[84] The decision provoked outrage from the many relatives of those killed and injured at Hillsborough who had been refused compensation in the *Alcock* case. The House of Lords reversed the findings of the Court of Appeal, openly acknowledging the argument that it would be perceived as unacceptable to compensate police officers at the ground in the course of their job and, yet, deny any remedy to brothers and sisters who saw their relatives die horrifically.[85]

By a majority of 4–1, their Lordships ruled that the claimants were not to be classified as primary victims of the defendants' negligence. They observed that an employer's duty to safeguard his employees from personal injury is simply part of the ordinary law of negligence. The claimants' argument (resting upon the assertion that their relationship with the chief constable was akin to a contract of employment) therefore failed: they were in no better position than normal bystanders to sue in respect of psychiatric harm simply by virtue of this relationship. Employers undoubtedly owe a duty where an employee is subjected to such a burdensome workload that stress-related illness is readily foreseeable.[86] But, where it is a form of psychiatric harm (as opposed to mere distress) that results, not from anything directly done to the employee by the employer but, rather, from his traumatic experience of what is done to others, he is to be treated in exactly the same way as any other secondary victim.[87] The Hillsborough police

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[82] [1994] 2 All ER 1, at 14.

[83] [1999] 1 All ER 1, overturning the decision of the Court of Appeal.

[84] *White v CC of South Yorkshire Police* [1997] 1 All ER 540.

[85] [1999] 1 All ER 1, at 48.

[86] See, eg, *Walker v Northumberland CC* [1995] 1 All ER 737; *Hatton v Sutherland* [2002] 2 All ER 1. (Analogous principles apply in relation to the duty owed by a school to a bullied pupil: *Bradford-Smart v West Sussex CC* [2002] 1 FCR 425.) It may be material to the question of negligence whether, in a job that is known to be stressful, the employer failed to provide counselling services: *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] ICR 782.

[87] In *Farley v Skinner* [2002] AC 732 it was held that C would have a contractual claim in respect of distress arising out of a breach *where the contract was specifically designed to protect C from distress*. Extrapolating from this, there seems no reason in principle why a tort claim could not be brought in respect of distress if a *tortious duty* to protect C from distress could be found.

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officers witnessed the disaster at close quarters, but lacked the requisite close ties of love or affection with the victims in order to be able to sue.

The claimants' alternative argument was that they were owed a duty of care in their capacity as rescuers. Yet here, too, the House of Lords insisted that, *in relation to psychiatric harm*, rescuers must meet the same conditions as any other witnesses of injury to third parties. They must either objectively have exposed themselves to danger or have reasonably believed themselves to have done so.[88] They must also meet the other conditions limiting recovery by secondary victims outlined above.

It appears, then, that *White* has to some extent closed the door on further expansion of liability for psychiatric harm. On the other hand, the courts' repeated insistence upon shock-induced injury now enjoys a lenient enough interpretation so as to embrace a reaction to a protracted event that lasted some 36 hours.[89] Equally, a further important issue that has never much troubled the judiciary in this context is that of the application of the 'egg-shell skull' rule. It may be invoked with respect to psychiatric harm just as it may in relation to physical injury.[90] Thus, if psychiatric harm would have been foreseeable in respect of a reasonably mentally tough individual, the extended degree to which the claimant actually suffers psychiatric harm is irrelevant.[91] And even if psychiatric harm per se is not foreseeable, so long as the physical injury which triggers, or otherwise leads to, psychiatric harm is foreseeable, the claimant may nonetheless recover for the psychiatric illness.[92]

As adumbrated, until the decision in *Vernon v Bosley*,[93] the courts had insisted that a secondary victim of psychiatric harm must show PTSD. In that case, the facts were as follows:

> C's two young children were passengers in a car driven by D, their nanny, when it veered off the road and crashed into a river. C did not witness the original accident, but was called to the scene immediately afterwards and watched unsuccessful attempts to salvage the car and rescue his children. These efforts failed and the children drowned. C became mentally ill and his business and marriage both failed. D accepted that C's illness resulted from the tragic deaths of his children, but argued that his illness was caused not by the shock of what he experienced at the riverside, but by pathological grief at his loss in an illness, distinct from PTSD, called pathological grief disorder.

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[88] See also *Cullin v London Fire and Civil Defence Authority* [1999] PIQR P314.

[89] In *North Glamorgan NHS Trust v Walters* [2003] PIQR P232, the Court of Appeal allowed a claim in respect of a woman who 'reeled under successive blows [to her psyche]' as the condition of her child visibly worsened before her eyes when medics failed to diagnose that the child was suffering from acute hepatitis.

[90] *Brice v Brown* [1984] 1 All ER 997; *Vernon v Bosley* [1997] 1 All ER 577.

[91] *Brice v Brown* [1984] 1 All ER 997.

[92] *Simmons v British Steel Plc* [2004] ICR 565 at [55], per Lord Rodger (with whose speech the remaining members of the House of Lords agreed). For the argument that the egg-shell skull principle is inappropriately applied in the context of psychiatric harm, see Jones, 'Liability for Psychiatric Damage: Walking a Path Between Pragmatism and Principle' in Neyers (ed), *Emerging Issues in Tort Law* (2007), ch 5.

[93] [1997] 1 All ER 577.

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The Court of Appeal held that, although damages for ordinary grief and bereavement remain irrecoverable,[94] a secondary victim can recover damages for psychiatric illness where he establishes the general pre-conditions for such a claim (set out above), and that the negligence of the defendant caused or contributed to his mental illness. The claimant in this case was able to do so and could recover compensation regardless of the fact that his illness consisted partly of an *abnormal* grief reaction.[95] On the other hand, the decision in *Vernon v Bosley* does not imply that every person who loses a loved one and becomes ill through grief can sue the negligent individual responsible for the death of the primary victim. For example, the grandmother in Newcastle who is told of the death in a car crash of her grandson in Norwich has no claim in negligence. She cannot establish the requisite conditions limiting any claim by secondary victims.

As Lord Steyn admitted in *White v Chief Constable of South Yorkshire*, 'the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify'.[96] Even after judicial attempts to clarify the principles governing liability for psychiatric harm and to package claims neatly according to a scheme of primary and secondary victims, loose ends remain. Reflect on the following examples:

(1) A final year student arrives home to witness her hall of residence burning to the ground. In her room are all her revision notes and the only copy of her dissertation. Unsurprisingly, she succumbs to clinical depression. Can she recover damages? If the fire was caused by faulty wiring and the university can be shown to have been negligent in its maintenance of the residence, could she argue that she is a primary victim because her psychiatric illness is consequent on the damage to her property? Might she assert, if a secondary victim, 'a close tie of love and affection to her work'? In *Attia v British Gas plc*,[97] decided before *Alcock*, a woman did win damages after suffering a nervous breakdown caused by witnessing her home burn down.

(2) A second, equally unlucky, student is working in a university laboratory when an explosion rocks the building. He feels the shockwaves and hears the blast, but only minimal damage ensues in the laboratory where he is at the time. Even so, it is immediately clear that the neighbouring laboratory has been completely destroyed and his four closest friends were working there. His fears are justified.[98] All four were killed in the blast. The surviving student succumbs to

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[94] See also *Alcock v CC of South Yorkshire Police* [1991] 4 All ER 907, at 917.

[95] Note that the courts are prepared to make a discount in the award of damages where C's grief merges with a recognisable psychiatric disorder: see, eg, *Rahman v Arearose Ltd* [2001] QB 351. Furthermore, D will only be liable for that part of C's psychiatric harm that he actually caused: *Hatton v Sutherland* [2002] 2 All ER 1.

[96] [1999] 1 All ER 1, at 38.

[97] [1988] QB 304.

[98] For a case on broadly analogous facts, where C succeeded, see *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271. In *White*, Lord Hoffmann suggested that this case might have to be treated as falling outside the general rules and control mechanisms for secondary victims.

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> psychiatric illness. If he shows that his illness resulted from reasonable fear to himself, does he recover as a primary victim? If he admits that it was the shock of his friends' fate which triggered his illness, does he fail because of the absence of the requisite 'close tie of love and affection'?

This area of the law is unquestionably very complex. Reform is often called for. Three very different solutions have been advanced. Stapleton advocates the abolition of recovery in tort for pure psychiatric harm.[99] She argues the case for a return to the harsh, but clear rules of the Victorian judges contending that 'no reasonable boundaries for the cause of action [can] be found and this [is] an embarrassment to the law'. Handford contends that no special rules should limit claims for psychiatric illness.[100] Foreseeability of psychiatric injury should be the only condition of recovery of compensation. Finally, the Law Commission recommends a 'middle way'.[101] The condition that secondary victims enjoy a close tie of love or affection with the individual who suffers physical harm would stay. All other 'control mechanisms' would be abolished.[102]

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SECTION 3 DAMAGE TO PROPERTY

Recognition of a duty to avoid physical damage to another's property, as much as to his person, raises no unique problem of principle.[103] Should a negligent driver manage by the narrowest of margins to prevent his vehicle actually injuring me, but the vehicle does tear a hole in my new designer suit, I may recover the cost of the suit without problems. Should the careless driver, swerving to avoid me, crash into my colleague's front wall, he may recover the cost of repairing the wall. Whether the damaged property is a chattel or real property, a duty to take reasonable care not to inflict that kind of harm arises.[104] Having said so much, we need to examine two assumptions behind these statements: (1) that the subject matter of the claim is property damage and (2) that the claimant is the right person to sue.

In its core conception, property damage involves some deleterious change in the physical state or structure of property.[105] These changes impair the functional characteristics of the thing in question. Whether the law will regard the physical change

[99] Stapleton, 'In Restraint of Tort' in Birks (ed), *Frontiers of Liability* (1994), 83.

[100] *Mullany and Handford's Tort Liability for Psychiatric Damage: The Law of Nervous Shock* (2nd edn, 2006). See also Teff [1998] CLJ 91.

[101] *Liability for Psychiatric Illness*, Law Com No 249 (1998).

[102] For the argument that most of the extant control mechanisms can be rationalised in terms of the general test for the imposition of a duty of care, see Murphy [1995] LS 415.

[103] But note that foreseeability alone is not enough: *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211.

[104] [1986] AC 785. See also *The Mineral Transporter* [1986] AC 1; *Tate & Lyle Industries Ltd v Greater London Council* [1983] 2 AC 509. Where, however, the parties are neighbouring property owners, the action may lie in nuisance rather than negligence.

[105] Witting [2002] CLJ 189.

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as damage will, at the borderline, depend on 'the evidence and the circumstances'.[106] There are some rather difficult borderline cases. For example, the need to decontaminate a ship after it has been doused in acid, which causes no tangible damage to the ship, has been characterised as physical damage.[107] A similar interpretation has been placed on the ingress of water into a gas supply line such that householders become deprived of a gas supply for several days.[108] In order to be able to recover for property damage, the claimant must suffer more than merely trivial harm.[109]

Property damage is often the result of the operation of some external force, but this need not be so. Cases like *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*[110] indicate that the positive acts of the defendant might make it foreseeable that the claimant will react in a certain way causative of damage, perhaps in order to avoid worse consequences occurring. Alternatively, the very failure of the defendant to do something that should have been done might cause damage to property.

The House of Lords in *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd* confirmed the rule that a duty in respect of loss or damage to property is owed only to a person having 'legal ownership of, or a possessory title to, the property concerned at the time when the loss or damage occurred'.[111] Should an old house in the process of conversion to flats be destroyed by a fire caused by negligence, only the owner of the house, or a tenant, may recover compensation. The builders, the plumbers, the decorators, all of whom lose out on valuable contracts to convert the property, are left remediless. Contractual rights in relation to property may well be adversely affected by loss or damage to that property, but they are insufficient to give rise to a duty of care.

It has always been clear that physical damage to, or defects in, property which simply render it less than value for money, but *not* dangerous, will be classified as economic loss. So, if one buys a central heating boiler which heats the house inefficiently and at vast expense, the loss one suffers is economic loss alone, readily recoverable in contract, but not normally in tort. Where the defective property is dangerous, however, a line of authority relating to buildings suggests that, if there is an imminent danger of damage to person or other property, the cost of rectifying the defect and avoiding the danger could be categorised as physical damage, although no tangible physical damage has yet materialised.[112] The decision of the House of Lords in *Murphy v Brentwood District Council*[113] rejected that line of authority as being close to heresy. Physical damage means just what it says: actual physical harm to other property. Where no

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[106] *Hunter v Canary Wharf Ltd* [1997] AC 655, 676.

[107] *The Orjula* [1995] 2 Lloyd's Rep 395.

[108] *Anglian Water Services Ltd v Crawshaw Robbins Ltd* [2001] BLR 173.

[109] Reaffirmed in *Rothwell v Chemical & Insulating Co Ltd* [2008] 1 AC 281, a case concerned with personal injury.

[110] [1973] 1 QB 27.

[111] [1986] 2 All ER 145, at 149. See also *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] QB 758.

[112] *Batty v Metropolitan Property Realisations Ltd* [1978] QB 554; *Anns v Merton LBC* [1978] AC 728.

[113] [1991] 1 AC 398.

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such damage has materialised, the loss caused by the need to repair defective property, to obviate the danger to person or property, constitutes merely an economic loss.

> C had purchased a house built on an in-filled site over a concrete raft foundation. In 1981 he discovered cracks in the house threatening the whole fabric of the property. Had he done nothing, the house might have collapsed on top of him. He sued the local council for negligently approving the plans for the foundations. The House of Lords held (inter alia) that the council could not be liable unless the builder would have been so liable.[114]

The first question to address was: what was the nature of C's loss? Their Lordships conceded that a builder of premises is subject to the same duty of care in tort as the manufacturers of chattels to 'avoid injury through defects in the premises to the person or property of those whom he should have in contemplation as likely to suffer such injury if care is not taken'.[115] So, to illustrate the points made, if the ceiling had actually collapsed on Mr Murphy, injuring him or destroying his piano, he might have had a claim for personal injuries or property damage against the builder. However, unless and until such actual physical damage occurs, the loss associated with the cost of making the house safe (or any diminution in its value) is purely economic.

One matter must be made clear. Mr Murphy's house at the time of his action was already suffering from serious cracks in the internal walls. Physical damage, you might have thought. Not so; for that damage arose from a defect in the very property in question. There was no question of the defective property causing damage *to* quite separate property. In an earlier decision of the House of Lords, it had been suggested that, where there was a 'complex structure', defects in one part of the structure causing damage to some other part might be regarded as having damaged 'other property'.[116] In *Murphy* this doctrine was questioned, yet not in terms rejected.[117] It has since received further tacit judicial approval.[118] There are, however, limits to this so-called complex structure exception. It can only apply if some distinct and separate item, which is combined with, but distinct from, the product in question, causes damage to the latter. For example, it might apply where C buys a house built by X with a central heating system made and installed by Y, and some months after the purchase an explosion damages the house (but injures no one). In such a circumstance, an action would lie against Y for his negligently manufactured item that has damaged separate property, the house itself.[119]

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[114] For direct authority on the liability of builders see *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 AC 499.

[115] [1991] 1 AC 398, at 461. Note that the question of the liability of the council even for physical injury was left open.

[116] In *D & F Estates Ltd v Church Comrs for England* [1988] 2 All ER 992, at 1006–7.

[117] [1990] 2 All ER 908, at 926–8, 932–3, and 942.

[118] *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 Lloyd's Rep 62.

[119] *Murphy v Brentwood DC* [1990] 2 All ER 908, at 928.

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Another limit to the complex structure approach applies where distinct product X is combined with distinct product Y to make product Z – for example, where two products (one a gas, one a liquid) are combined to make a carbonated drink. In such circumstances, it has been held to be inappropriate to speak in terms of the first product damaging the second because there is merely the production of a defective third product (product Z in our example).[120]

Where defective design causes another form of harm to occur – for example, fire damage that would have been avoided if a firewall had been properly designed and constructed – a duty of care *may* be imposed on the architects responsible. But the scope of their duty to a subsequent occupier of the premises is determined by reference to the extent of their original contractual duty. Thus, if they were only contracted to provide the plans for such a wall, but not to supervise its actual construction, no duty would be imposed in respect of the negligent erection of the wall.[121]

Finally in this context, it is worth noting that there can be some strange consequences to applying the *Murphy* doctrine. Assume an impecunious house-owner becomes aware of the worsening condition of her property, but she does nothing about it because she cannot afford to pay for the necessary repairs. Several months later the house collapses injuring her and damaging her priceless furniture. It seems she may then sue to recover compensation for that physical damage.[122] It should be noted that, in a number of cases, Commonwealth jurisdictions have declined to follow the *Murphy* 'doctrine' and preferred to allow claimants in circumstances analogous to Mr Murphy's to succeed.[123]

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SECTION 4 UNPLANNED PREGNANCIES AND ECONOMIC LOSSES

Earlier in this chapter, we considered cases in which a duty of care was alleged to be owed to persons when unborn. Another category of case, not far removed from those, concerns the question whether damages are recoverable in respect of the birth of an unplanned baby subsequent to a negligently performed sterilisation. In *Udale v Bloomsbury Area Health Authority*,[124] Jupp J refused the mother compensation towards the upkeep of the child despite the defendant's admission of negligence. Limiting her damages to compensation for the discomfort of her pregnancy, he said that the child's

[120] *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] 1 Lloyd's Rep 62. See further Tettenborn [2000] LMCLQ 338.

[121] *Bellefield Computer Services v E Turner & Sons Ltd* [2002] All ER (D) 272 (Dec).

[122] See *Nitrigin Eireann Teoranta v Inco Alloys Ltd* [1992] 1 All ER 854. Would D be able to plead contributory negligence? See ch 6.

[123] See, eg, *Invercargill CC v Hamlin* [1996] 1 All ER 756; *Bryan v Maloney* (1995) 182 CLR 609. Cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

[124] [1983] 2 All ER 522.

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birth was a 'blessing' and that the financial cost associated with such a 'blessing'[125] was irrecoverable. It offended both society's notion of what is right and the value afforded to human life. Jupp J also thought that the knowledge that his parents had claimed damages in respect of his birth might later distress and damage the child emotionally as he grew to maturity.

A year later, the Court of Appeal in *Emeh v Kensington Area Health Authority*[126] overruled Jupp J on the policy issue. They were unconvinced that the policy objections should prevent recovery of damages. Then, subsequently, in *McFarlane v Tayside Health Board*[127] – another case involving an unplanned child – the House of Lords suggested that damages could be made payable in respect of the pain and suffering associated with an unwanted pregnancy and confinement, but that the costs of bringing up the child were irrecoverable. Largely attempting to side-step the policy issues, their Lordships took the view that child-rearing costs were a form of pure economic loss and thus irrecoverable.[128] Furthermore, it would seem to make no difference if the woman who undergoes a negligently performed sterilisation operation and gives birth is herself disabled: the costs of rearing a healthy child remain irrecoverable.[129] On the other hand, the woman will now be able to recover a fixed sum of £15,000 for the loss of autonomy associated with having the child;[130] and if the child is born with a disability, the *special costs* associated with bringing up that disabled child following a negligently performed sterilisation will be recoverable.[131] Even so, the courts continue to take the view that the birth of *any* child is an unquantifiable benefit at least equivalent to the costs associated with raising a healthy child.[132]

Goodwill v British Pregnancy Advisory Service[133] is also worthy of mention in this context.

> C sued the clinic which she alleged had failed to warn her lover of the potential failure rate of vasectomy. Their relationship had begun some time after his surgery. But C nonetheless argued that, had her partner been adequately advised by D, he would have communicated the relevant information to her so that she would then have taken appropriate

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[125] 'I would have to regard the financial disadvantages as offset by her gratitude for the gift of a boy after four girls': [1983] 2 All ER 522, at 531, per Jupp J.

[126] [1985] QB 1012.

[127] [2000] 2 AC 59.

[128] On the other hand, Lord Steyn ([2000] AC 59, at 82) did recognise the cogency of the policy arguments against the imposition of liability based on the sanctity and value of human life, and Lord Hope (at 97) acknowledged the benefits associated with having a child that (were they calculable) would have to be set off against the costs of bringing up a child (were they recoverable, which they were not).

[129] *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, at [9] and [18].

[130] Ibid at [123]. A subsequent endorsement of compensation for loss of autonomy can be found in the speech of Lord Steyn in *Chester v Afshar* [2005] 1 AC 134, at [18].

[131] *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266. This is so regardless of whether it is a matter of pure bad luck that the child comes to be born with a disability, or whether it manifests within a few weeks of birth: *Groom v Selby* (2001) 64 BMLR 47.

[132] *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

[133] [1996] 2 All ER 161.

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contraceptive precautions. She argued that the birth of her child was a consequence of the defendants' negligence.

It was held that the defendants owed no duty of care to the claimant because the claimant was not a person whom they could have been expected to identify as immediately affected by the services they rendered to her lover. The man's future sexual partners were not persons for whose benefit the vasectomy was performed.

Classifying failed sterilisation as economic loss to the parent(s) – whether or not that claim succeeds – has a certain logic to it. The main purpose of compensation will be to meet the costs of raising the child. Yet classifying the loss in this way does not simplify the question of recoverability. The special costs of raising a disabled child, or the special costs of a disabled woman raising *any* child, are equally forms of pure economic loss, yet recoverable according to the Court of Appeal. It is submitted that these decisions were reached only by somewhat clumsy judicial manipulation of 'convenient aspects' of the tripartite *Caparo* test and the extended *Hedley Byrne* assumption of responsibility test. We considered each of these tests in general terms in the previous chapter and will return to their respective applications in the context of pure economic loss in due course. But it is worth setting out in full the compound reasoning of Brooke LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust*.

> I would apply the battery of tests which the House of Lords has taught us to use . . . My route would be as follows: (i) for the reasons given by Waller LJ in *Emeh v Kensington and Chelsea and Westminster Area Health Authority* the birth of a child with congenital abnormalities was a foreseeable consequence of the surgeon's careless failure to clip a fallopian tube effectively; (ii) there was a very limited group of people who might be affected by this negligence, *viz* Mrs Parkinson and her husband (and, in theory, any other man with whom she had sexual intercourse before she realised that she had not been effectively sterilised); (iii) there is no difficulty in principle in accepting the proposition that the surgeon should be deemed to have assumed responsibility for the foreseeable and disastrous economic consequences of performing his services negligently; (iv) the purpose of the operation was to prevent Mrs Parkinson from conceiving any more children, including children with congenital abnormalities, and the surgeon's duty of care is strictly related to the proper fulfilment of that purpose; (v) parents in Mrs Parkinson's position were entitled to recover damages in these circumstances for 15 years between the decisions in *Emeh's* case and *McFarlane's* case, so that this is not a radical step forward into the unknown; (vi) for the reasons set out in (i) and (ii) above, Lord Bridge of Harwich's tests of foreseeability and proximity are satisfied, and for the reasons given by the Supreme Court of Florida in *Fassoulas v Ramey*[134] an award of compensation which is limited to the special upbringing costs associated with rearing a child with a serious disability would be fair, just and reasonable; (vii) if principles of distributive justice are called in aid, I believe that ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child's disability.[135]

[134] 450 So 2d 822 (1984). [135] [2002] QB 266, at [50].

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SECTION 5 'PURE' ECONOMIC LOSS

We now turn to more orthodox cases of pure economic loss, arising with respect to business-oriented transactions and industrial accidents. Pure economic loss can be defined in the negative as a loss which is not physical damage or injury to intellectual property rights or reputation. It is, furthermore, not merely consequential upon these kinds of injury. The concern is with loss not immediately bound up in one of the primary interests of person, property (including intellectual property), or reputation. In positive terms, pure economic loss involves such things as money expended and opportunities to profit forgone as a result of the defendant's failure to take care. In the hierarchy of protected interests, the law of negligence offers a higher degree of protection to physical interests (and mental integrity) than to purely financial interests.[136]

Classifying the claimant's loss as purely economic does not preclude recovery of that loss altogether. But it does require the claimant to convince the court that the defendant owed him a duty to safeguard him against just that sort of loss. The courts are generally much less willing to find the existence of such a duty than a duty to protect others from physical injury or damage.[137] According to Lord Fraser in *The Mineral Transporter*, 'some limit or control mechanism has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage as a consequence of his negligence'.[138] This restrictive approach to economic loss means that, in practice, economic loss is generally only recoverable when the claimant can establish a 'special relationship' between himself and the defendant,[139] or where the loss is consequential upon physical damage also suffered by the claimant. It is as well to note at the outset that 'special relationships' exist not just where the defendant has made a statement or proffered advice upon which the claimant relies, but also where he has undertaken to perform various forms of service. However, historical development of the law in this area makes it simpler to begin by examining economic loss resulting from inaccurate statements and advice.

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(A) STATEMENTS AND 'SPECIAL RELATIONSHIPS'

Two difficulties beset the imposition of any duty to avoid making careless statements. First, there is generally a difference in the potential effects of careless words and careless acts. For while negligent acts will generally have a limited range of impact, negligent words may be widely broadcast without the consent or foresight of the speaker. Second, careless statements are, in general, likely to inflict only economic loss. (But it

[136] Reputation is protected through the tort of defamation, as to which see ch 20. Intellectual property rights are protected in torts such as passing off, as to which see ch 13.

[137] See Stapleton (1991) 107 LQR 249; id (1995) 111 LQR 301; Witting [2001] LS 481.

[138] [1985] 2 All ER 935, at 945. See also *White v CC of South Yorkshire Police* [1999] 1 All ER 1, at 31.

[139] *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

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should not be overlooked that careless words, whether written or spoken, do have the potential to cause harm to the person.[140] Thus, a doctor whose negligent certification of one claimant as a person of unsound mind leading to his detention in a mental hospital was held liable,[141] while a similar result was reached in a more recent case involving the negligent certification of a light aircraft as suitable to fly.)[142]

The development of the duty to avoid statements causing financial loss is inextricably linked to the troubled history of liability for pure economic loss in general. The original difficulty relating to economic loss resulting from careless statements was this. A person suffering economic loss through relying on a fraudulent statement could sue in the tort of deceit. In *Derry v Peek*,[143] the House of Lords held that to establish deceit the claimant must prove fraud – that is, broadly, that the defendant knew that his statement was untrue, or was reckless as to its untruth. Mere negligence was considered insufficient.[144]

The fallacy in this early case law was exposed by the House of Lords in the landmark decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[145]

> Cs asked their bankers to inquire into the financial stability of a company with which they were having business dealings. Their bankers made inquiries of Ds, the company's bankers, who carelessly gave favourable references about the company. Reliance on these references caused Cs to lose £17,000. Cs sued Ds for the careless statements. The action failed only because Ds had expressly disclaimed any responsibility.

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All five Law Lords re-examined the authorities on liability for careless statements. They rightly limited the rule in *Derry v Peek* to its proper function of defining the limits of the tort of deceit and thus held it to be irrelevant to the issue of whether a duty of care arose in negligence. The absence of a contract was also irrelevant. As Lord Devlin said:

> [a] promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently the promisee can recover in an action in tort.[146]

Their Lordships were not however prepared to recognise a duty of care in respect of negligent statements on the basis of the *Donoghue v Stevenson* neighbour principle alone. For liability for statements resulting in economic loss to be imposed, some narrower test than that of foreseeability of the loss had to be satisfied.[147] The House was careful not to formulate rules that might expose a maker of careless statements to liability to a large indeterminate class of claimants. For instance, newspapers were

[140] See, eg, *Perrett v Collins* [1998] 2 Lloyd's Rep 255; *Sharp v Avery and Kerwood* [1938] 4 All ER 85; *Bird v Pearce* (1979) 77 LGR 753; *Clayton v Woodman & Son (Builders) Ltd* [1961] 3 All ER 249 (reversed on other grounds [1962] 2 All ER 33).

[141] *De Freville v Dill* (1927) 96 LJKB 1056.

[142] *Perrett v Collins* [1998] 2 Lloyd's Rep 255.

[143] (1889) 14 App Cas 337.

[144] *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

[145] [1964] AC 465.

[146] Ibid at 526.

[147] Ibid at 483 and 537.

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not to be accountable to everybody who read their advice columns and suffered loss through relying on their negligent advice.[148] Instead, their Lordships said that the claimant seeking to recover for negligent misstatements must establish that the statement was made within a relationship where the claimant could reasonably rely on the skill and care of the defendant in making the statement. He must show some 'special relationship' with the defendant which properly resulted in the defendant undertaking responsibility for the accuracy of the statements made. These concerns were captured succinctly by Lord Reid:

> [q]uite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally, or in a business.[149]

Subsequent case law elucidated to some extent the crepuscular phrase 'special relationship'. In *Mutual Life and Citizens' Assurance Co Ltd v Evatt*,[150] Lord Diplock suggested that liability for misstatements should arise only in the context of certain professional relationships where giving advice was the primary purpose of the relationship. So, solicitors would be responsible for legal advice offered to clients, and stockbrokers for financial guidance, but an insurance company volunteering financial advice to a policyholder should not be liable.

The Court of Appeal, however, largely ignored *Evatt*. In *Chaudhry v Prabhakar*[151] the defendant who considered himself something of an expert on motor cars was held liable to his friend whom he agreed to assist with the purchase of a car when his advice proved to be negligent. Indeed, the trend up until 1989 appeared to be to allow a liberal interpretation of what constituted a special relationship. But two subsequent decisions of the House of Lords – *Caparo Industries plc v Dickman*[152] and *Smith v Bush*[153] – outlined more authoritatively the parameters of liability for economic loss arising from negligent advice.

Although *Caparo* was decided subsequently to *Smith v Bush*, it helps to consider *Caparo* first.

> Ds were auditors who acted for Fidelity plc. They had prepared annual accounts on the strength of which Cs bought shares in Fidelity and then mounted a successful takeover bid. Cs alleged that the accounts were inaccurate and misleading showing a large pre-tax profit when they should have recorded a sizeable loss. Had Cs been aware of this, they would never have bid for Fidelity.

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[148] [1971] AC 793. A trade association making available certain information about its members' products does not owe a duty of care to those who use that information to contact a member and with whom a contract is subsequently entered into, given that the website itself 'urges independent inquiry': *Patchett v Swimming Pools & Allied Trades Association Ltd* [2009] EWCA Civ 717.

[149] [1964] AC 465, at 487.

[150] [1971] AC 793.

[151] [1988] 3 All ER 718. See also *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

[152] [1990] 2 AC 605.

[153] [1990] 1 AC 831.

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The House of Lords found against the claimants on a preliminary point of law. The auditors owed no duty of care in respect of the accuracy of the accounts either to members of the public who relied on the accounts to invest in the company or to any individual existing shareholder who similarly relied on those accounts to increase his shareholding.[154] Auditors prepare accounts, not to promote the interests of potential investors, but to assist the shareholders collectively to exercise their right of control over the company.[155] Their Lordships held that four conditions must be met for a defendant to be liable for economic loss resulting from negligent advice or information. (1) The defendant must be *fully* aware of the nature of the transaction which the claimant has in contemplation as a result of receipt of the information. (2) He must either communicate that information to the claimant directly, or know that it will be communicated to him (or a restricted class of persons of which the claimant is an identifiable member). (3) He must specifically anticipate that the claimant will *properly* and *reasonably* rely on that information when deciding whether or not to engage in the transaction in question. (4) The purpose for which the claimant does rely on that information must be a purpose connected with interests that it is reasonable to require the defendants to protect.

No duty is owed to all potential investors for such a duty would, in truth, result in unlimited liability. If auditors were liable to *any* investor who relied on the published accounts to deal with the company simply because such conduct is foreseeable, they would equally be liable to anyone else who dealt with the company to his detriment, for example, banks lending the company money, or tradesmen extending credit terms.[156] Caparo sought to argue that the vulnerability of Fidelity to takeover should have alerted the auditors to the likelihood of a company, such as Caparo, mounting a takeover bid, and that they were not just *any* potential investor, but existing shareholders. Their Lordships held that the defendants were under no duty to safeguard the economic interests of corporate predators,[157] and that the statutory duty imposed on them by Parliament was to protect the interests, and existing holdings, of the shareholders in the client company,[158] not to facilitate investment decisions whether by existing shareholders or others.[159]

A positive avalanche of cases on the limits of *Hedley Byrne* liability followed. Just a few examples are given here to illustrate the application of the *Caparo* principles. In one case, it was held that directors of a company who issued a prospectus to invite shareholders to take up a rights issue were not under a duty to those shareholders

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[154] The Court of Appeal had held that existing shareholders were owed such a duty, distinguishing the shareholder investors from other members of the public: [1989] 1 All ER 798.

[155] [1990] 1 All ER 568, at 580–1 and 600–1.

[156] See *Al Saudi Banque v Clark Pixley* [1990] Ch 313.

[157] Why should auditors be responsible for the success of those actively seeking to destroy their client?

[158] As to whether an existing shareholder might sue if his existing proprietary interest was damaged by negligence on the part of the auditors (ie, sold at an undervalue) see Lord Bridge [1990] 1 All ER 568, at 580–1 (probably yes) and Lord Oliver, at 601 (leaving the question open).

[159] See also *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2007] EWCA Civ 910.

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who relied on the prospectus to make further investments.[160] Nor were accountants advising a creditor company on the appointment of a receiver liable to that company's debtors.[161] In both cases, the relationship between the parties lacked the necessary proximity. The defendants had done nothing to make themselves responsible for the financial welfare of the claimants.

But, what if some express representation has been made directly to the claimant, on the basis of which he argues that he then decided to go ahead with a particular transaction? Much may turn on the facts of the case. In *James McNaughton Paper Group v Hicks Anderson*[162] the defendant accountants became aware that the claimants were considering a takeover of their clients. At a meeting between the two companies, the defendants were asked to confirm the accuracy of draft accounts, and they did this in very general terms. The Court of Appeal found that no duty was owed to the claimants. The draft accounts were not prepared for their benefit, and the defendants would reasonably expect a party to a takeover bid to take independent advice and not rely exclusively on draft accounts. However, in another case where it was pleaded that the defendants had prepared profit forecasts expressly in order to induce the claimants to increase their bid for a company at risk of takeover, the Court of Appeal refused to strike out the claim and ordered a full trial on the facts.[163]

Perhaps the key question in this sort of case is whether advice given by the defendant has been given in a context in which the assumption that claimants should generally look after their own financial interests can be displaced. Have the defendants in effect induced the claimants to place faith in their judgment? In *Henderson v Merrett Syndicates Ltd*,[164] managing agents at Lloyds, who placed monies entrusted to them by Names at Lloyds in underwriting contracts, owed a duty of care to 'their' Names. The agents undertook responsibility for advising the claimants and finding appropriate investments for their money. They effectively 'took over' the claimants' financial affairs.

Williams v Natural Life Health Food Ltd[165] is also instructive. The second defendant set up a company to franchise out health food businesses. The claimants approached the company to obtain a franchise. Having received from the company, Natural Life, a glowing brochure and prospectus which included testimonies to the second defendant's experience and success, the claimants went ahead and obtained a franchise. At no stage in the pre-contractual negotiations did they have any contact with the second defendant personally. The enterprise was a disaster and the claimants' shop failed to make money, resulting in severe financial loss to the claimants. The claimants sued both the company, Natural Life, and the second defendant personally. The company

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[160] *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321.
[161] *Huxford v Stoy Hayward & Co* (1989) 5 BCC 421.
[162] [1991] 2 QB 113.
[163] *Morgan Crucible v Hill Samuel Bank Ltd* [1991] 1 All ER 148.
[164] [1995] 2 AC 145. As to concurrent liability in tort and contract see ch 2. See also Whittaker [1997] LS 169.
[165] [1998] 2 All ER 577.

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went into liquidation so the action proceeded against the second defendant alone. The House of Lords found that there was no special relationship between the second defendant and the claimants because there were no personal dealings between them and neither directly nor indirectly did the second defendant convey to the claimants that he assumed personal responsibility for their affairs. Nor was there evidence that the claimants relied on his personal undertakings to safeguard their economic well-being as franchisers. The dealings were all with the company. Unlike the Lloyds' agents, the second defendant took on no role as an individual in 'managing' the claimants' business interests.

We move now to look at *Smith v Bush*; but we do so noting that in *Caparo*[166] Lord Oliver described *Smith v Bush*[167] as the outer limit of *Hedley Byrne* liability.

> Ds were surveyors acting for the mortgagees. They gave favourable reports on properties to be purchased by C, the mortgagor. An express disclaimer denied any liability to C.[168] Nonetheless the evidence was that 90% of house purchasers do in fact rely on the mortgagees' report[169] and do not engage their own surveyor. C paid the surveyor's fee and Ds were well aware that C (whose identity they knew) would rely on the report and would suffer loss if that report were negligently prepared.

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The House of Lords unanimously found that, in such circumstances, a duty of care was owed to the mortgagor. Unlike in *Caparo*, the defendants were well aware of the identity of the claimant, knew that their advice would be transmitted to the claimant, and appreciated exactly how the claimant would act in reliance on that advice. There was no element of uncertainty relating to the transaction consequent on that advice. There was no question of liability other than to one identifiable claimant.[170] There was no conflict between the interests of the surveyors' client and the mortgagors.[171] If the surveyors had done the job properly and produced a proper valuation, they would have discharged their duty to both mortgagee and mortgagor. The claimants who paid their fees were properly entitled to rely on their professional skill and advice.[172]

It is important, of course, to remember that proof of a duty to act carefully in giving advice or information is only the first stage in the claim. Claims may, of course,

[166] [1998] 2 All ER 577, at 598. [167] [1990] 1 AC 831.

[168] The disclaimer was invalid under the Unfair Contract Terms Act 1977.

[169] *Smith v Bush* was a consolidated appeal concerning two separate claimants. In one case the mortgagee showed the actual report to C1. In the other, the report itself was not disclosed to C2.

[170] The likelihood that *a* purchaser may emerge in the future who will suffer loss if a survey is carelessly conducted is insufficient. A particular individual who will almost inevitably place faith in the report and act to his detriment must be within D's contemplation: *The Morning Watch* [1990] 1 Lloyd's Rep 547. Contrast *Smith v Bush* with *Goodwill v British Pregnancy Advisory Service* [1996] 2 All ER 161.

[171] Cf *West Bromwich Albion FC Ltd v El Safty* [2007] PIQR P7.

[172] Lord Griffiths and Lord Jauncey both made references to the reasonableness of purchasers at the lower end of the market relying on the building society survey rather than facing the additional expense of an independent report. Yet the *Smith v Bush* approach was applied to a mid-range property in *Beaumont v Humberts* [1990] 49 EG 46. Cf *Scullion v Bank of Scotland plc* [2011] EWCA Civ 693, where the Court of Appeal rejected a claim that a surveyor providing a valuation for the mortgagee owed a duty of care to the mortgagor of a buy-to-let property.

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fail for other reasons. If, for example, it can be shown that the duty extended merely in respect of the provision of information (eg the value of property suggested as security for a loan) upon which the claimant could (but need not) base his financial decisions, the defendant will not be liable for he has not advised upon the wisdom of the financial decision finally taken (because, for instance, the market value of property is susceptible to rapid drops in price).[173] Equally, as with other actions in negligence, want of care may not be proved.[174] Or, alternatively, the claimant may fail to show that his loss resulted from the defendant's carelessness,[175] or, more problematically, that all his loss resulted from the defendant's carelessness.[176] Thus, if the claimant, even though he believed the information, would have acted as he did regardless of the defendant's negligence, his loss is not caused by that negligence.[177]

(B) THE EXTENDED *HEDLEY BYRNE* PRINCIPLE

What, then, is the basis of *Hedley Byrne* liability? Lord Griffiths, in *Smith v Bush*, dismissed as unhelpful the notion that liability rests on an assumption of responsibility by the defendant.[178] Indeed, the defendants in *Smith v Bush* manifested every intention to the contrary, attempting expressly to disclaim liability. A duty, Lord Griffiths argued, can arise, not only where the defendant either expressly or implicitly undertakes responsibility to the claimant for advice or information, but also where the particular relationship between the two is such that it is just that the defendant be subject to such responsibility.[179] Lord Griffiths' criticism of any principle of assumption of responsibility was strongly supported by a number of academic commentators.[180]

However, subsequent decisions of the House of Lords have forcefully endorsed the 'assumption of responsibility' test as the basis of an extended *Hedley Byrne* principle, which embraces negligent performance of services as much as negligent statements

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[173] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191; *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157.

[174] *Stafford v Conti Commodity Services Ltd* [1981] 1 All ER 691; *Argy Trading Developments Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785.

[175] *Banque Financière de la Cité v Westgate Insurance Ltd* [1991] 2 AC 249 (note that their Lordships also found no duty in that case).

[176] The most problematic issues arise where C's financial losses are attributable partly to D's negligent advice and partly to fluctuations in market prices; only those properly attributable to the former are recoverable: *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191; *Aneco Reinsurance Underwriting Ltd v Johnson & Higgins Ltd* [2002] 1 Lloyd's Rep 157.

[177] *J E B Fasteners Ltd v Marks, Bloom & Co* [1983] 1 All ER 583. See also *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, at 836.

[178] [1998] 2 All ER 577, at 865, confirming the decision of the Court of Appeal in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

[179] See *Al Saudi Banque v Clark Pixley* [1989] 3 All ER 361, at 367.

[180] See, eg, Barker (1993) 109 LQR 461; Hepple (1997) 50 CLP 69. For a limited defence see Murphy, 'The Juridical Foundations of Common Law Non-Delegable Duties' in Neyers (ed), *Emerging Issues in Tort Law* (2007), ch 14.

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and advice;[181] and which – if the courts have not erred in applying the principle – now extends to cases characterised by *both* dependency *and* reliance on the part of the claimant.[182] In *Henderson v Merrett Syndicates Ltd*,[183] for example, Lord Goff rested his finding of liability on the part of the managing agents on their assumption of responsibility towards those who relied on their special expertise in underwriting. In *White v Jones*, Lord Browne-Wilkinson affirmed the centrality within *Hedley Byrne* liability of discovering whether the defendant had assumed responsibility for the advice or task undertaken. Notably, however, he stressed that what is crucial is 'a conscious assumption of responsibility for the *task* rather than a conscious assumption of legal responsibility to the claimant for its careful performance'.[184] (This approach, however, is difficult to square with the notion that an assumption of responsibility is really only a way of characterising the relationship of proximity necessary for the imposition of a duty of care.)[185]

More generally, the three decisions of the House of Lords in *Henderson v Merrett Syndicates Ltd*, *White v Jones*, and *Williams v Natural Life Ltd* have confirmed that *Hedley Byrne* opened the doors to much wider liability in respect of economic loss in tort than had previously been available.[186] In *Hedley Byrne* itself, Lord Devlin stated:

> [c]ases may arise in the future in which a new and wider proposition, quite independent of contract, will be needed. There may, for example, be cases in which a statement is not supplied for the use of any particular individual.[187]

Just such a duty of care came to pass in *So v HSBC Bank plc*,[188] although liability was not established because causation of economic loss could not be proved:

> An employee of the defendant bank signed and stamped a document supplied by and returned to their client, 5th Avenue. The document, which purported to be a letter of instruction relating to the payment of money out of 5th Avenue's bank account for the strict purpose of investment, was obviously capable of misleading third parties. The document was used in order to defraud 5th Avenue's customers, who believed that their payments would be safeguarded by the defendant bank.

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181 *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577.

182 Even with this description of the extended *Hedley Byrne* principle problems can arise in explaining the decided cases. In some, the courts have had to alight upon tenuous notions of 'an assumption of responsibility' (see, eg, *White v Jones* [1995] 2 AC 207). Equally, there are some rather fictitious instances of reliance to be found in the cases. For some judicial recognition of this, see *Customs and Excise Commissioners v Barclays Bank plc* [2005] 1 WLR 2082 (reversed on other issues [2006] UKHL 28).

183 [1995] 2 AC 145, at 182.

184 [1995] 2 AC 207, at 274.

185 See Murphy [1996] CLJ 43. Note, however, that *White* has been followed in this respect in an analogous case: *Gorham v British Telecommunications plc* [2000] 1 WLR 2129.

186 But note that 'extended *Hedley Byrne*' liability is not necessarily confined to economic loss. It has been accepted, for example, that it could in principle be invoked in relation to psychiatric illness caused by being wrongfully convicted due to the negligence of C's solicitors: *McLoughlin v Grovers* [2002] QB 1312.

187 [1964] AC 465, at 530.

188 [2009] EWCA Civ 296.

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The Court of Appeal held that a duty of care was owed to non-clients of the defendant bank on the basis that HSBC had, by providing the document, represented that it 'intended to carry out and had accepted the instructions'.[189]

Seeking to extend yet further the boundaries of a duty to avoid inflicting financial loss on others, a robust approach was taken by Megarry V-C in *Ross v Caunters*.

> D, a solicitor, negligently drew up a will and thereby failed to fulfil his client-testator's instruction to benefit C. C then sued D in negligence.[190]

The claimant could in no sense be said to have relied on the solicitor, yet his action succeeded. The judge held that the law had by 1979 so developed that he should apply the neighbour principle in *Donoghue v Stevenson* in the absence of any policy factors negativing or limiting the scope of such a duty. There was close proximity between the claimant and the defendant. His contemplation of her was 'actual, nominate and direct', so proximity arose out of the duty he undoubtedly owed to the testator. It was in no way 'casual, accidental or unforeseen'. The liability arising from the duty was to one person alone.[191] Accordingly, the spectre of indeterminate liability did not arise.

In *White v Jones*,[192] the House of Lords found for the claimant on facts reminiscent of (but different from) those in *Ross v Caunters*.

> After a family quarrel, the testator (aged 78) disinherited Cs (his two daughters). A few months later, the family was reconciled and, on 17 July, the testator instructed Ds (his solicitors), to draw up a new will including legacies of £9,000 to each daughter. Ds failed to act on those instructions before the testator died some months later. As a result of Ds' negligent delay in acting on the testator's instructions, Cs failed to be awarded their legacies.

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The House of Lords held that the claimants could recover. Lord Goff made it clear that their Lordships did not endorse Megarry V-C's simplistic approach basing liability on the neighbour principle alone.[193] The claim by the claimants in *White v Jones*, as in *Ross v Caunters*, posed a number of conceptual difficulties,[194] but principally the following.

(1) D's contractual duty was owed only to his client, the now dead testator. Privity of contract rules excluded the extension of *this* duty to the disappointed beneficiaries.

(2) Cs' actions, being founded on pure economic loss, could succeed only on the basis of some form of application of *Hedley Byrne*; yet there was no obvious assumption of responsibility towards Cs and, still less obviously, any corresponding

[189] [2009] EWCA Civ 296, at [40].

[190] [1980] Ch 297. And see *Al-Kandari v JR Brown & Co* [1988] QB 665.

[191] See *Caltex Oil (Australia) Pty Ltd v Dredge Willemstad* (1976) 136 CLR 529 (note the importance in relation to economic loss of there being a single identifiable C rather than a diffuse class of potential Cs).

[192] [1995] 2 AC 207.

[193] Ibid at 268.

[194] Detailed in full in Ibid at 260–2.

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reliance on their part. For this reason, it was straining logic to suggest that Cs had actually lost anything at all.[195]

(3) If liability were to be imposed, establishing clear and manageable limits to such liability would be near to impossible to achieve.

The majority in the House of Lords thought these difficulties could be surmounted;[196] but the conceptual grounds on which their Lordships did in fact establish liability must be read with some caution.[197] Lord Goff was entirely frank in admitting that he was strongly motivated by an impulse to do practical justice. He pointed out the 'extraordinary fact' that if no duty in tort were owed to the claimants, the only persons who might have a valid claim (the testator and his estate) had suffered no loss, and the only persons who suffered any kind of loss (the disappointed beneficiaries) would have no claim.[198] Lord Browne-Wilkinson warned that his analysis was only what was necessary for the purposes of this case. He made clear that he was 'not purporting to give any comprehensive statement of this aspect of the law'.[199]

So what did *White v Jones* decide? (1) The existence of a contract between the defendants and a third party (the testator) did not by virtue of the rules on privity of contract exclude a duty in tort to the claimant. (2) Such a duty could arise if, quite apart from the contract, the circumstances of the case gave rise to a special relationship between the parties. (3) On the facts of *Hedley Byrne* itself, proof that the claimant relied on the advice given, or statements made, by the defendants, and that the defendants should have foreseen such reliance, was an 'inevitable' condition of liability. However, reliance is *not* a necessary condition for the creation of a special relationship in every case giving rise to a duty to safeguard another from economic loss. (4) A special relationship will arise when the defendant assumes responsibility for providing services knowing and accepting that 'the future economic welfare of the intended beneficiary is dependent on his careful execution of the task'.[200] (5) On the facts of *White v Jones*, there were no reasons of policy why such a duty should not be imposed on the defendants, and indeed very good reasons why it should be so imposed. The actual outcome of the decision in *Ross v Caunters* imposing liability on solicitors for negligently executed wills had worked well and had not given rise to unlimited claims. In such cases there was no conflict of interest[201] between the duty owed to the testator in contract, and the duty owed to the claimants in tort. Fulfilling

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[195] See Benson, 'Should *White v Jones* Represent Canadian Law?' in Neyers (ed), *Emerging Issues in Tort Law* (2007), ch 6.

[196] Note the powerful dissent of Lord Mustill.

[197] See Murphy [1996] CLJ 43.

[198] [1995] 2 AC 207, at 259–60.

[199] Ibid at 274. But see the application of *White v Jones* in *Gorham v British Telecommunications plc* [2000] 1 WLR 2129.

[200] [1995] 2 AC 207, at 275.

[201] Cf *White v Jones* with *Clarke v Bruce Lance & Co* [1988] 1 All ER 364.

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the contractual obligation to the defendant at one and the same time would have discharged the duty of care owed to the claimants.

White v Jones does, therefore, make clear at least three crucial principles. (1) A duty to avoid causing economic loss is confined to special relationships within which the defendant has assumed responsibility for protecting the claimant's economic welfare.[202] (2) Such a relationship will arise only where the claimant is readily identifiable as an individual or a member of a class of persons for whom the defendant undertakes responsibility (in the loosest sense)[203] in the performance of a particular task. (3) 'Extended *Hedley Byrne*' relationships are not confined to negligent misstatements and careless advice. Provision of services, including services provided at the behest of a third party, may create a special relationship in appropriate conditions.[204] Reliance is not an essential ingredient of a special relationship,[205] though in its absence there must be dependency on the part of the claimant (in the sense that the claimant's well-being depends upon the care and skill of the defendant).

A willingness to give a liberal, extended interpretation to *Hedley Byrne* liability married to an apparent impetus to do justice to a hard-done-by claimant is once again apparent in *Spring v Guardian Assurance plc*.[206]

> C sued his former employers for negligence (among other things). The reference D provided for him when he sought to be appointed as an agent for another insurance company was so unfavourable that the company refused to appoint him. The reference suggested that C was dishonest. The trial judge found that the reference had been carelessly (but not maliciously) prepared and found for C in negligence. In the House of Lords, the majority held that there had been an implied term in the contract of employment that any subsequent reference be supplied with due care. The Law Lords also ruled in C's favour in tort. In supplying a reference – at least in circumstances such as those in the instant case where references were required as a matter of regulation[207] – D assumed the responsibility to prepare the reference with care.

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[202] Whether all the cases supposedly decided according to this principle actually meet this requirement upon close scrutiny of their particular facts is, however, questionable. See, eg, *Merrett v Babb* [2001] QB 1174.

[203] See Murphy [1996] CLJ 43.

[204] In *West Bromwich Albion FC v El-Safty* [2005] EWHC 2866, it was held that, *if* the three limbs of the *Caparo* test were met, a surgeon whose treatment of a professional player that had been arranged through the club's physiotherapist *would* owe a duty of care to the club in respect of the economic loss it would suffer if the player were to receive negligent treatment ending his career. On the facts, however, the *Caparo* test was not satisfied (affirmed [2006] EWCA Civ 1299). See also *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577; *Carr-Glynn v Frearsons* [1998] 4 All ER 225.

[205] C's reliance is often the means by which causation can be established, but it has no normative significance of its own; it tells us nothing about the nature of D's conduct such that it is appropriate for D to be made liable to C.

[206] [1995] 2 AC 296. Note also the growing impetus in negligence law simply to do justice in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, and *Chester v Afshar* [2005] 1 AC 134.

[207] The regulatory authority (LAUTRO) which governs the conduct of insurance companies required both that the company seeking to appoint C must seek a reference and that Ds must supply such a reference.

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That the defendants owed such a duty to the recipient of the reference was established by *Hedley Byrne*. But in the instant case, the duty claimed was one owed to the person about whom it was written, not the person to whom it was sent. It therefore represented an extension of the *Hedley Byrne* principle that could be justified on the basis that an employee relies on his employer to carry out this service with appropriate care. His interests are 'entrusted' to the skill of the referee. His financial prospects are significantly in the hands of that person.

But we must not lose sight of the fact that in *Spring* there was a significant policy issue present that arguably militated against the imposition of liability. Allegations of dishonesty are clearly defamatory. Yet had the claimant sued in defamation, his claim would have been met by a defence of qualified privilege (given the absence of malice). Indeed, the giving of references prepared without malice is a classic example of qualified privilege. It was at least arguable, therefore, that to allow the claimant's action in negligence would be to undermine the principles of defamation law. This, conceivably, might cause employers and others supplying references to be inhibited in what they were prepared to say, and possibly even lead to them being unprepared to supply references at all. Their Lordships nonetheless were dismissive of this line of argument. Lord Woolf acknowledged that public policy required that references be full and frank but countered that public policy also required that references 'should not be based upon careless investigations'. If a negligently written favourable reference could give rise to liability, thought his Lordship, there should be no objection in principle to imposing liability for a negligently written adverse reference. The law should encourage referees to act carefully with proper regard for the interests of both the recipient and the subject of the reference.

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A strong desire to offer the claimant redress for a perceived injustice can be seen in the opinions of the Law Lords.[208] Addressing the need to prove malice to succeed in defamation, Lord Woolf declared that:

> [t]he result of this requirement is that an action for defamation is a wholly inadequate remedy for an employee who is caused damage by a reference which due to negligence is inaccurate. This is because it places a wholly disproportionate burden on the employee. Malice is extremely difficult to establish . . . Without an action for negligence, the employee may, therefore, be left with no practical prospect of redress even though the reference may have permanently prevented him from obtaining employment in his chosen vocation.[209]

Williams v Natural Life Health Foods Ltd[210] confirmed the terms of extended *Hedley Byrne* liability. Lord Steyn made three crucial points. (1) Once it is established that a case falls within the extended *Hedley Byrne* principle – that is, where there is a special relationship between the parties[211] – 'there is no need to embark on any further

[208] Cf *Kapfunde v Abbey National plc* [1999] ICR 1.
[209] [1994] 3 All ER 129, at 172.
[210] [1998] 2 All ER 577.
[211] Ibid at 581.

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inquiry whether it is fair, just and reasonable to impose liability for economic loss'.[212] (2) He acknowledged, and commended, the 'essential gap-filling role' of the law of tort so that, while contractual privity rules might prevent substantial justice being done in that branch of law, this should not prevent torts from filling that gap. *Spring*, indeed, illustrates that this interstitial role may operate between different torts as well. For, there, negligence was utilised to correct what their Lordships regarded as a deficiency in defamation law. (3) Outside any special relationships blessed by the extended *Hedley Byrne* principle, claimants suffering pure economic loss will not, it seems, recover that loss in tort. Lord Steyn declared:

> The extended *Hedley Byrne* principle is the rationalisation or technique adopted by English law for the recovery of damages in respect of economic loss caused by the negligent performance of services.[213]

(C) OTHER PURE ECONOMIC LOSS CATEGORIES

Outside the extended *Hedley Byrne* principle, it seems that the courts take the view that no duty to protect others from pure economic loss will arise however predictable that loss may be,[214] and however just and reasonable it might appear that the defendant should bear the loss. There is no obvious reason for this stance;[215] yet the judicial sympathy for the claimant abundantly evidenced in *White v Jones* was notably absent in *Murphy v Brentwood District Council*.[216]

First, in *Murphy v Brentwood District Council*, as we have seen, their Lordships classified the loss suffered by the claimant (a subsequent purchaser of a defective dwelling) as pure economic loss. This was notwithstanding the fact that his home, if not repaired, would ultimately have collapsed. Such financial loss is irrecoverable in tort whether the defendant is the builder or the local council approving the original building plans. In the absence of a special relationship of proximity, neither manufacturers of chattels nor builders of property are subject to a duty of care in relation to the quality of their work. To impose any such general duty would introduce into the law of tort transmissible warranties of quality.[217] Such guarantees are provided only by contract. Thus, there was generally perceived to be no need for tort to fulfil an interstitial role.[218] However, the simplicity of this statement is marred somewhat by

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[212] How this is to be reconciled with the clear emphasis on the endeavour to do practical justice in both *Spring* and *White v Jones* is by no means clear. See also the approach of Brooke LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, at [17].

[213] *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, at 581.

[214] See, eg, *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 All ER 791.

[215] But see McBride and Bagshaw, *Tort Law* (2005), 140–8.

[216] [1991] 1 AC 398. See also *Department of the Environment v Bates* [1991] 1 AC 499; *D & F Estates Ltd v Church Comrs for England* [1988] 2 All ER 992.

[217] *D & F Estates Ltd v Church Comrs for England* [1988] 2 All ER 992, at 1010.

[218] See *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577.

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a dictum of Lord Bridge suggesting that, even in the absence of a special relationship with the builder:

> if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or the highway, the building owner ought, in principle, to be entitled to recover in tort . . . the cost of obviating the danger . . . *to protect himself from potential liability to third parties*.[219]

The Lord Bridge exception, doubted by Lord Oliver,[220] could theoretically drive a coach and horses through the *Murphy* rule. Assume Mr Murphy had children. The cracks in the walls of his house, if left unrepaired with the family remaining in the house, posed a potential source of injury to them. Could Mr Murphy argue he should recover the cost of protecting himself against liability to the children or his visitors? On the one hand, beyond *Hedley Byrne*, the courts strive to provide predictability and restrict claims for economic loss; yet on the other hand they want to retain the ability to meet the really 'hard case'.

A second category of cases where the House of Lords have declared that economic loss is *never* recoverable is more straightforward. A claimant who suffers economic loss consequent on physical damage to another person, or consequent on damage to property in which, at the time damage occurred, he had no proprietary or possessory interest, cannot recover that loss in tort.[221] These are cases of 'relational economic loss'. Loss to the claimant arises because of his dependence upon the continuing integrity of another person or of property owned by another.

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In *Weller & Co v Foot and Mouth Disease Research Institute*,[222] the defendants had carelessly allowed cattle to become infected by foot and mouth disease. The claimants were auctioneers, whose business suffered badly when quarantine restrictions prevented them holding auction sales of cattle. Widgery J said that no duty of care was owed to the claimants for their loss of profits. The scope of any duty owed was limited to cattle owners who suffered physical damage to their property when cattle had to be destroyed. The loss occasioned to the auctioneer was readily foreseeable, but so was economic loss to countless other enterprises: the pubs, the cafés, the car parks, the shops which would benefit from the influx into the town of crowds on market day. Policy required that a cut-off point be set. Widgery J set it at those suffering physical harm and, on the facts of *Weller*, it is easy to understand why.

A series of decisions on the damages recoverable when services such as water, gas, or electricity were negligently interrupted confirmed Widgery J's finding that economic loss unrelated to physical damage was irrecoverable. In *British Celanese Ltd v*

[219] [1990] 2 All ER 908, at 926 (emphasis added).
[220] Ibid at 936.
[221] For a statutory exception in relation to C's economic loss arising from harm to another, see the Fatal Accidents Act 1976. Note also the Latent Damage Act 1986, s 3.
[222] [1966] 1 QB 569. And see *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453.

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Hunt[223] and *S C M (UK) Ltd v W J Whittall & Son Ltd*,[224] the cutting off of electricity supplies damaged the claimant's machines and materials resulting in a loss of production. The claimants recovered both their additional expenditure in replacing and repairing machinery and their loss of profits on the lost production run. The Court of Appeal in the latter case held that the economic loss (that is, loss of profits) was recoverable, as it was immediately consequent on physical damage to the claimant's property.

In 1973 the Court of Appeal again considered economic loss in *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd*,[225] the facts of which were as follows:

> The defendants' negligence caused the cable carrying electricity to the claimant's factory to be cut through, interrupting the supply for 14½ hours. To avoid molten metal solidifying in the furnaces, the claimants used oxygen to melt it and pour it out of the furnaces. This reduced the value of the metal and lost the claimants the £400 profit they would have expected to make on that melt. The claimants also lost a further £1,767 on the other four melts which they would normally have completed in the time that the electricity was cut off.

The majority of the Court of Appeal held that they could recover only the loss in value of the metal actually in the furnaces and the loss of profit on that melt. The remaining loss was financial loss unrelated to any physical damage and thus irrecoverable. Edmund-Davies LJ, dissenting, considered that such foreseeable and direct economic loss should be recoverable. For him, the occurrence or non-occurrence of physical damage was a fortuitous event with no relevance in legal principle. In language similar to that later employed by Megarry V-C in *Ross v Caunters*, he argued that if that very kind of economic loss to that claimant was a reasonably foreseeable and direct consequence of want of care, a duty to avoid that kind of loss arose.

Firm endorsement of the majority opinion in *Spartan Steel* was nonetheless supplied by the Court of Appeal in *Muirhead v Industrial Tank Specialties Ltd*.[226]

> C, a fish merchant, devised a plan to buy lobsters in the summer when prices were low and store them to sell at profit on the Christmas market. The lobsters had to be stored in tanks through which seawater was constantly pumped, filtered, and re-circulated. The pumps proved to be defective because the electric motors were not suitable for use in the UK. C sued the manufacturers of the electric motors for (1) the loss of several lobsters that died in the tanks, (2) expenditure on attempts to correct the fault, and (3) loss of profits on the enterprise.

The Court of Appeal affirmed *Spartan Steel*. The claimant could recover only for the loss of his property (dead lobsters) and any loss of profit consequent on those dead lobsters. Only that economic loss directly consequent on physical damage could be

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[223] [1969] 2 All ER 1252. [224] [1971] 1 QB 337.

[225] [1973] QB 27 and see *Electrochrome Ltd v Welsh Plastics Ltd* [1968] 2 All ER 205; *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352.

[226] [1985] 3 All ER 705.

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recovered in tort. In the absence of any evidence of express reliance on, or close proximity to, the defendants, the defendants owed no duty to protect the claimant against financial loss (whether that loss be wasted expenditure or loss of profit). Manufacturers owe no duty in tort to ensure products are value for money.

In *Leigh & Sillivan Ltd v Aliakmon Shipping Ltd*[227] the claimant had contracted to buy a cargo of steel coils to be shipped from Korea. The cargo was damaged at sea. The contractual and credit arrangements between the claimant and the sellers of the steel coils were such that, although the risk in the cargo had passed to the claimant, it did not own the coils. (Such arrangements, where the party likely to suffer loss is not the owner of a cargo, are not uncommon.) Loss to the claimant was readily foreseeable. Nonetheless, the loss was held to be irrecoverable at common law. Three reasons may explain the refusal to countenance recovery of economic loss in such circumstances:

(1) The indeterminate liability which would otherwise arise requires a fixed cut-off point in the interests of clarity: recall *Weller v Foot & Mouth Institute* where the list of potential claimants – café owners, local shop owners, etc – was virtually endless.

(2) The claimants in *Leigh & Sillivan* suffered damage to their *business* interests. True, the defendants 'caused' that damage, but on what grounds should they have undertaken responsibility for protecting the claimants' business? The risk was as foreseeable to the claimants as it was to the defendants, so they could have protected themselves against that risk via insurance. The defendants had done nothing to indicate their willingness to shoulder the responsibility themselves.[228]

(3) An individual's personality is to some extent constituted by the property he owns. That property thus can be seen as integral to that person's self-definition. Accordingly, damage to his property can be seen as a form of personality damage. It follows, so the argument runs, that such a form of 'consequential' economic loss (as distinct from pure economic loss) 'can be viewed as little more than extra compensation for those who have suffered property damage'.[229] Any loss not thus associated with the claimant's property (and hence his personality) can be viewed as less deserving of compensation in accordance with the general hierarchy of protected interests described in this chapter.

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[227] [1986] AC 785. Note that in this case as in others, an essential difficulty in imposing a duty in tort derives from the relationship between D's contractual duty to a third party and the purported tortious duty to C. If D (the shippers) had excluded or limited their duty in contract to the sellers, how would that exclusion or limitation affect their duty in tort? See the judgment of Robert Goff LJ in the Court of Appeal: [1985] QB 350, at 399.

[228] But what happens where there is a gap between the time at which D is negligent (C having no proprietary interest at that stage) and the time at which the negligence causes harm (by which time C does have a proprietary interest)? For the suggestion that an interest at the time of harm occurring is enough see *The Starsin* [2001] 1 Lloyd's Rep 437.

[229] Witting [2001] LS 481, 489.

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At the beginning of the chapter, we remarked upon the fact that claimants are always seeking to test (through the ingenious argument of their lawyers) the boundaries of actionability in negligence. And so we finish discussion of the relational economic loss cases by noting that the range of potential claimants for pure economic loss was extended by the Court of Appeal in *Shell UK Ltd v Total UK Ltd*[230] in a way that is potentially problematic. The facts were:

> The claimant company, with three other oil companies, was the holder of shares in certain service companies. The service companies held legal title to fuel storage and pipeline facilities that were damaged in a fire caused by the negligence of the defendant. The assets were held 'on trust' for the four oil companies. The oil companies had entered into certain contractual agreements for the use of these facilities but had no possession or immediate right to possession. The claimant argued that it should be entitled to claim as beneficial owner of the damaged property for the economic losses 'consequent' upon the physical damage caused by the fire. These economic losses consisted in increased costs of supply and profits lost from the claimant's reduced ability to supply customers.

The Court of Appeal held that the claimant was indeed the 'beneficial owner' of the damaged property and could, thus, recover its financial losses, at least in circumstances where the legal owner could be joined in the proceedings. The Court explained that 'it would be a triumph of form over substance to deny a remedy to the beneficial owner of that property where the legal owner is a bare trustee for that beneficial owner'.[231] The court effectively set aside the separate legal personality of the service companies and created a new area of liability for financial loss inconsistent with cases we have examined in this section of the book. It can only be hoped that this development is overturned by the Supreme Court.[232]

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FURTHER READING

Bailey and Nolan, 'The *Page v Smith* Saga: A Tale of Inauspicious Origins and Unintended Consequences' [2010] *Cambridge Law Journal* 495

Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd edn, 2006)

Nolan, 'New Forms of Damage in Negligence' (2007) 70 *Modern Law Review* 59

Stapleton, 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 *Law Quarterly Review* 249

Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 *Law Quarterly Review* 301

Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (2008)

Witting, *Liability for Negligent Misstatements* (2004)

[230] [2010] EWCA Civ 180.

[231] Ibid at [143]. The problem with this is that is completely ignores the very real advantage of limited liability enjoyed by a shareholder in another company.

[232] See Turner [2010] CLJ 445.