adopted in the courts. In the clauses under consideration, greater care may have led to a different result. The addition to Clause 4 of a sentence, that any handing over of the vehicle to a person claiming the same will be conclusive evidence of the fact that the proprietors their servants or agents are satisfied by evidence produced, could have allowed a defence, based on that condition alone. The reading of Clause 1 as subject to the more specific circumstances in other clauses could have been avoided by the insertion of a sentence thus: 'The enumeration of particular circumstances in any of the following clauses shall not affect the generality of this clause.'

The courts are not powerless when confronted by blanket clauses, the techniques adopted by the majority in this case indicate one aspect of that power to avoid exemption clauses. More precise drafting would have made that task more difficult.

A. C. ARCHIBALD

WELLER & CO. AND ANOTHER v. FOOT AND MOUTH DISEASE RESEARCH INSTITUTE[1]

Negligence—Duty of care to whom?—Financial loss—Escape of virus—No proprietary interest in anything which could be damaged by escape. Rylands v. Fletcher—Liability of land-owner to auctioneer for loss of business.

This matter came before the court as a special case stated, under Rules of the Supreme Court, Order xxxiv, rule 1, for the opinion of the court on certain questions of law. The defendants carried out research on their premises into foot and mouth disease in cattle, and they were apparently responsible for the escape of some virus. As a result, there was an outbreak of foot and mouth disease in the area, and the Minister of Agriculture ordered two markets to be closed. This caused the plaintiffs, who were two firms of auctioneers, to suffer a loss of profits on a total of six market days, for which they sought to recover. However, Widgery J. found that the defendants owed no duty of care to the plaintiffs, hence they had no remedy in negligence. A claim under the doctrine of *Rylands v. Fletcher*[2] was also unsuccessful, because the plaintiffs had no interest in any land to which the virus escaped.

In deciding the case, the Court assumed the facts most favourable to the plaintiffs: that there had been negligence on the part of the defendants; that this resulted in an escape of the virus, which had caused financial loss to the plaintiffs; and that this financial loss was reasonably foreseeable. This latter point is particularly relevant: the effect of this assumption was to exclude the possibility of deciding the case on the grounds of remoteness of damage.

The loss to the plaintiffs was pecuniary. They suffered no physical harm to themselves or to any of their property—although the danger was of a kind that could have caused physical harm. The Court examined the

[1] [1965] 3 W.L.R. 1082. Queen's Bench Division; Widgery J.
[2] (1868) L.R. 3 H.L. 330.

proposition that an action in negligence does not lie except for a dircet act or omission that injures, or threatens to injure, the plaintiff's person or property. It looked at the case of *Simpson & Co. v. Thomson, Burrell*[3], *La Société Anonyme de Remorquage à Hélice v. Bennetts*[4] and *Best v. Samuell Fox*[5] and he came to the conclusion that the plaintiffs in each case failed, not because there can be no recovery for pecuniary loss, but because in each case the defendant owed no duty of care to the plaintiff. The reason why no duty of care was owed was that the plaintiff had no proprietary interest in anything directly harmed by the defendant's negligence. On the other hand, in *Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners)*[6] the plaintiffs recovered for the pecuniary loss they incurred because, in the Court's opinion of the facts, they had a proprietary interest in the property damaged.[7]

The Court said, that in cases where the negligent act of the defendant endangers property or person, a duty of care is owed only to those whose person or property is endangered:

> A duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may forseeably be injured by a failure to take care. If the plaintiff can show that the duty was owed to him, he can recover both direct and consequential loss which is reasonably foreseeable, and for myself I see no reason for saying that proof of *direct* loss is an essential part of his claim.[8]

It was argued that *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[9] had now altered this law, by eliminating the necessity to show a danger of direct physical injury in order to establish a duty of care. Widgery J. did not accept this. *Hedley Byrne,*[10] he said

> . . . recognises that a duty of care may arise in the giving of advice even though no contract or fiduciary relationship exists between the giver of the advice and the person who may act upon it, and having recognised the existence of the duty it goes on to recognise that indirect or economic loss will suffice to support the plaintiffs claim. What the case does not decide is that an ability to foresee indirect or economic loss to another as a result of one's conduct automatically imposes a duty to take care to avoid that loss.[11]

Thus, in *Weller* the plaintiff was not owed any duty of care because the danger was to property, and the plaintiff had no personal or proprietary

[3] (1877) 3 App. Cas. 279, H.L. (Sc.). Plaintiff insurance underwriters held unable to maintain in their own name an action against wrongdoer who caused damage to insured property.

[4] [1911] 1 K.B. 243. A was engaged in towing ship. B caused ship being towed to sink. A not able to recover from B profits that the towage contract would have returned.

[5] [1952] A.C. 716. A, B's husband, injured by C's negligence. B not able to recover from C for loss of *consortium*.

[6] [1947] A.C. 265. A, cargo owners, liable to B, shipowners, for general average contribution after ship has been in collision with C's ship. A majority in the House of Lords held A could recover from C, on the grounds that cargo when being carried on a ship on these terms was on a joint adventure.

[7] [1965] 3 W.L.R. 1082, 1089-1091.

[8] [1965] 3 W.L.R. 1082, 1094.

[9] [1964] A.C. 465.

[10] *Ibid.*

[11] [1965] 3 W.L.R. 1082, 1094.

interest endangered by the virus (such as danger to himself, or to cattle he owned). However, had he owned cattle, and a duty of care was owed to him, in the judge's opinion he would have been able to recover for any 'consequential' loss—such as loss of profits because of being unable to sell at the most profitable time—without having to first prove direct physical injury.

The situation, then, is there can be no recovery for any loss in the absence of a duty of care. (As Lord Esher said, 'A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.'[12]) Where there is direct physical danger to persons or to property, a duty of care will be owed only to those persons, or the owners of that property, that are foreseeably within the area of danger. (Foreseeability acts as the general determinant of the duty of care: *Glasgow Corporation v. Muir.*[13]) Once a duty of care is owed to a person, he may recover for both direct physical injuries, and consequential financial loss—such as loss of profits, so long as it is not too remote (this being governed by the foreseeability test as laid down in *Overseas Tankships (U.K.) v. Morts Dock & Engineering Co. (The Wagon Mound)*[14]), and in the opinion of Widgery J., recovery for such 'consequential' financial loss, is not dependant on first proving direct physical loss. Negligent statements are governed by *Hedley Byrne*[15], thus in some circumstances a duty of care will attach to the making of statements, and in such cases financial loss will be sufficient to support an action.

The judicial technique which is used to derive the final limits of the duty to take care is the criterion of foreseeability,[16] but it is evident from the decision in *Weller* that not all foreseeable financial loss comes within the range of care. *Weller* draws a line; makes a policy decision. This line is short of the final limit. That the extent of the duty of care is a policy decision was recognized in *Nova Mink v. Trans Canada Airlines*:[17]

> When upon analysis of the circumstances and application of the appropriate formula, a court holds that the defendant was under a duty of care, the court is stating as a conclusion of law what is really a conclusion of policy as to responsibility for conduct involving unreasonable risk.[18]

Leon Green also recognizes this, and he adds

> But judges are slow to confess even to themselves that the administration of law rests on so uncertain a foundation.[19]

However, even in the House of Lords it has been said (by Lord Pearce in *Hedley Byrne*[20]):

> How wide the sphere of the duty of care in negligence is to be made depends ultimately on the court's assessment of the demand of society

12 *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 497.
13 [1943] A.C. 448.
14 [1961] A.C. 388.
15 [1964] A.C. 465.
16 *Glasgow Corporation v. Muir* [1943] A.C. 448.
17 [1951] 2 D.L.R. 241.
18 [1951] 2 D.L.R. 241, 255, *per* Macdonal J.
19 Green, *Judge and Jury*, 58.
20 [1964] A.C. 465.

for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters when there is injury to person and property.[21]

In *Weller* it is difficult to see how the policy decision that had to be made could not have been influenced by the great repercussions that recovery in that case would have had. The Court looked at some of the consequences,[22] mentioning the slaughter of the affected animals, and others that might possibly have contacted the disease. Other farmers not allowed to move their animals may have missed the best prices; transport contractors and feed merchants suffered loss of business. Although Widgery J. specifically stated[23] that such considerations could not be permitted to deny the plaintiffs their rights, it would be impossible to exclude them when determining what the rights of the plaintiffs were—that is, when making the relevant 'policy' decision.

If the plaintiffs had succeeded it would have opened up a very great area of liability. For example, could an employee whose employer was injured in a motor car accident recover compensation from the negligent driver when he lost his job because the employer was no longer to carry on his business because of the injuries he sustained?

The law in *Weller* covers only the situation where a negligent act is likely to cause damage to the person or property of the plaintiff. On the other hand there is the situation where a negligent act is likely to cause financial loss as its only direct consequence. (Completely separate once again are negligent statements: such as those likely to cause physical loss, as in *Barnes v. The Commonwealth*;[24] and those likely to cause financial loss coming under *Hedley Byrne*.[25]) An example of a negligent act causing financial loss as its only consequence arose in *Revesz v. Commonwealth of Australia*.[26] In that case the plaintiff applied for an import licence, which was granted, but due to the careless handling it received in the administrative processes it was lost. As a result, the plaintiff had to pay a higher rate of duty on his imports. He sought to recover his financial loss in an action for negligence, but was unsuccessful. In his judgment, Maxwell J. said:

> I incline to the view that there is not that proximity between the parties which is necessary in a particular case to give rise to the duty; but I prefer to confine myself to an expression of the view that this action fails because neither the property of the plaintiff is affected.[27]

An extension of the rule in *Hedley Byrne*[28] to cover actions, as well as statements, would give a remedy here. Nothing in *Weller* would stand in the way of such an extension, although it would require another 'policy'

21 [1964] A.C. 465, 536.
22 [1965] 3 W.L.R. 1082, 1086.
23 *Ibid.*
24 (1937) 37 S.R. (N.S.W.) 511. A, wife of B, suffered nervous shock when negligently mis-informed by letter from C, that B, her husband, had been committed to lunatic asylum. Held, recovery from C.
25 [1964] A.C. 465.
26 (1951) 51 S.R. (N.S.W.) 63. Full Court of the Supreme Court of New South Wales.
27 (1951) S.R. (N.S.W.) 63, 70.
28 [1964] A.C. 465.

decision. But if it was made, it would cover a situation where the plaintiff relied on the defendant to act carefully, the defendant being aware of this and taking it upon himself to do so, but nevertheless, acted so negligently that the plaintiff suffered financial loss. It seems that, since the law views protection against acts with more favour than protection against statements, that *Hedley Byrne*[29] is wide enough to cover this anyway. Probably it is only a matter of waiting for the right fact situation.

The other argument advanced by the plaintiff was that of strict liability for the escape of dangerous things brought on to land: the doctrine of *Rylands v. Fletcher*.[30] This argument was not pressed, and it was rejected by Widgery J. on the authority of a dictum of Blackburn J. in *Cattle v. Stockton Waterworks Co.*[31] to the effect that *Rylands v. Fletcher*[32] is not available except to protect an interest in property. Whether or not the law is quite as narrow as that is open to doubt, although Lord MacMillan in *Read v. Lyons*[33] certainly thought it was. On the other hand, recovery has been permitted for personal injuries, in such cases as *Shiffman v. Order of St. John*[34] and *Hale v. Jennings Bros.*[35]. But there is certainly no authority giving recovery under *Rylands v. Fletcher*[36] for purely economic loss, nor does it seem desirable when that rule imposes strict liability.

G. J. HARRIS

IN Re LYSAGHT decd.[1]

Gift to found medical scholarships—Members of Jewish and Roman Catholic faiths excluded as beneficiaries—whether valid charitable trust or void for uncertainty or as contrary to public policy—whether general charitable trust intention—could the court order a scheme without religious discrimination due to impracticability.

In her will the testatrix said 'it has long been my wish to found certain medical scholarships . . . within the gift of the Royal College of Surgeons of England.' To further this end she directed that her trustees pay £5,000 of the net residue of her estate for an endowment fund which the Royal College of Surgeons were to hold on trust. The bequest included instructions that the money should be invested and the income used to establish and maintain studentships to benefit persons not of the Roman Catholic or Jewish faiths. The President and Council of the Royal College of Surgeons were to have sole discretion in selecting persons for such studentships.

The Council of the Royal College of Surgeons informed the trustees that it could not accept the bequest on the terms laid down in the will, since the stipulation designed to exclude people of the Roman Catholic and Jewish faiths was in the words of the Council 'so invidious and alien to the spirit of the college's work as to make the gift inoperable in its pre-

[29] *Ibid.* [30] (1868) L.R. 3 H.L. 330.
[31] (1875) L.R. 10 Q.B. 453. [32] (1868) L.R. 3 H.L. 330.
[33] *Ibid.* [34] [1936] 1 All E.R. 557.
[35] [1938] 1 All E.R. 579. [36] (1868) L.R. 3 H.L. 330.
[1] [1965] 3 W.L.R. 391. Chancery Division: Buckley J.