

THE FOUNDATION OF THE DUTY OF CARE IN NEGLIGENCE

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INTRODUCTION

Controversy as to the true jurisprudential foundation of the common law duty of care in negligence continues unabated. Nor is there any shortage of candidates for this role: on one recent occasion Lord Donaldson M.R. described the present state of the law as reflecting “a measure of authoritative chaos”.¹

When I addressed this subject five years ago,² the two-stage approach outlined by Lord Wilberforce in *Anns v. Merton London Borough Council*³ had gained wide acceptance and seemed likely to carry the day. By this view, proof of a “sufficient relationship of proximity or neighbourhood” between the parties gives rise to “a prima facie duty of care” which may, at the second stage, be displaced or curtailed if the court is satisfied that countervailing considerations of overriding weight require liability to be denied or limited. In my earlier paper⁴ I focused on the ambiguities inherent in Lord Wilberforce’s statement and sought to demonstrate that his recommended approach was susceptible to a number of different interpretations. As it happened, the popularity of the *Anns* test of duty was shortlived, and recent years have seen a steady withdrawal of judicial support for Lord Wilberforce’s proposition.

My present aim is, first, to assess the attractions and disadvantages of the *Anns* approach in order to explain the initial enthusiasm with which it was greeted and then the sudden change in judicial attitudes. Secondly, I will outline the process of the judicial withdrawal from *Anns* and assess the merits of the alternative approaches favoured in its place. I will conclude that none of these formulae, tests or “touchstones” is truly explanatory of judges’ reasoning or provides a helpful framework for analysis of the duty question. Rather they are used to express conclusions based on largely unarticulated and often intuitive value judgments which reflect differential weighting and balancing of competing moral claims and broad social welfare goals. I will argue that responsible determination of the duty question in a novel case requires open recognition of the nature of those competing claims and goals, clear identification of the more particular considerations to which the court has regard in

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¹ *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758, 786.

² J.A. Smillie, “Principle, Policy and Negligence” (1984) 11 N.Z.U.L.R. 111.

³ [1978] A.C. 728, 751–752.

⁴ *Loc. cit.*

assessing the relative weight to be attributed to those claims and goals, and reasoned justification of the ultimate value judgment as to where the balance of moral rightness and overall welfare lies.

Although judicial discussion of the duty question has often displayed an extraordinary level of confusion and vacillation, some recent judgments do show an inclination towards more open discussion of the underlying concerns which influence the decisions in difficult novel cases. However the analysis tends to be incomplete and shallow. In the final part of the paper I suggest that a revised and modified version of the two-stage approach recommended by Lord Wilberforce in the *Anns* case may provide a useful framework to guide identification and assessment of the considerations which should inform the duty determination.

THE ATTRACTION OF *ANNS*

The *Anns* approach gave courts much greater latitude to extend the scope of liability for negligence to meet what they perceived as changing social needs by providing a means of circumventing precedents of binding or highly persuasive authority which had laid down special more restrictive tests of duty in respect of particular categories of cases. Lord Wilberforce seemed to reject a "relational" view of negligence liability by which the tort consists of a number of distinct categories of duty situations, each capable of being defined at any given time by reference to reasonably clear formal criteria. Instead he indicated that liability for negligence is founded on a single universal principle of "proximity or neighbourhood", subject only to policy-based exceptions or limitations identified on a case-by-case basis. Since Lord Wilberforce referred to the *Hedley Byrne*⁵ and *Spartan Steel*⁶ cases as "examples" of the application of his two-stage approach, other leading cases could be treated in the same way; the special more restrictive requirements for liability laid down in such cases could now be treated not as invariable prerequisites of liability but merely factors relevant to (but not decisive of) the more fundamental question of whether the relationship between the parties was sufficiently "proximate" to raise a prima facie duty. This enabled courts to avoid the restrictive effects of inconvenient precedents without having to openly overrule them or refuse to follow them. As one judge put it, "the adoption of the *Anns* approach makes it unnecessary to consider specific cases in which the duty of care has been applied to create liability", characterising this development as a "move away from precedent to principle".⁷

Furthermore, while adoption of the *Anns* approach offered the courts much wider practical discretion to extend the scope of liability for negligence, it also tended to conceal the true extent of the courts' creative role. Extension of liability to new situations could be justified by reference to a fundamental

⁵ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

⁶ *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27.

⁷ *Allied Finance and Investments Ltd. v. Haddow & Co.* [1983] N.Z.L.R. 22, 34 per McMullin J. (C.A.).

principle which expressed a plaintiff's pre-existing legal right to compensation, while policy considerations of overall community welfare were presented as performing a purely negative role, requiring negation or limitation of the individual right expressed in the general principle only in rare cases where they apply with compelling force. So the real attraction of *Anns* lay in the fact that it provided courts with a *principled* basis for avoiding restrictive precedents and achieving substantive fairness between the parties in individual cases, and it is not surprising that the *Anns* approach was adopted with enthusiasm by many trial court judges.

However the *Anns* approach could also be expected to appeal to a strong, independently-minded court such as the New Zealand Court of Appeal which remains subject to the supervisory jurisdiction of the Privy Council; a body which is increasingly perceived as being insensitive to New Zealand's social conditions and needs. In a series of important decisions the New Zealand Court of Appeal made good use of the freedom offered by the *Anns* approach to achieve quite dramatic expansion of the tort of negligence. The duty of care owed in respect of statements was extended beyond strictly professional and business relationships⁸ and liability extended to broad classes of foreseeable users of information.⁹ The Court also refused to confine the duty to representations of fact; while a unilateral promise of future assistance may not support a strict contractual guarantee of performance, it may nevertheless give rise to a continuing tortious duty to do what is reasonable to protect the economic interests of the promisee.¹⁰ Negligent performance of a professional undertaking intended to benefit the plaintiff gave rise to liability for purely economic loss in the absence of any knowledge of or reliance by the plaintiff on the undertaking.¹¹ A duty of affirmative action was founded on a drainage board's established practice of warning other local authorities about flood risks, and the board was held liable for economic loss suffered by property owners who neither knew of nor placed any specific reliance on the board's practice.¹² A local authority was held to owe a positive duty to take reasonable steps to ensure that building construction conforms with the standards laid down in its building by-laws, the council's liability extending beyond removal of "dangerous" defects to include the cost of remedying defects which merely detract from the appearance and value of the building.¹³ When negligent failure by a city council to follow statutory planning procedures deprived the plaintiff of his right to object to the erection of a building on adjoining land which impaired his view, he recovered damages representing the value of the chance he had lost to oppose construction of the offending building.¹⁴ Finally, the Minister of Finance was held to owe a duty to take reasonable care to

⁸ *Meates v. Attorney-General* [1983] N.Z.L.R. 308; cf. *M.L.C. Ltd. v. Evatt* [1971] A.C. 793 (P.C.).

⁹ *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553.

¹⁰ *Meates v. Attorney-General* [1983] N.Z.L.R. 308, 379-380 per Cooke J.; *Shing v. Ashcroft* [1987] 2 N.Z.L.R. 154, 157-158 (C.A.).

¹¹ *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37.

¹² *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76 (C.A.), affirmed [1987] 1 N.Z.L.R. 720 (P.C.).

¹³ *Stieller v. Porirua City Council* [1986] 1 N.Z.L.R. 84.

¹⁴ *Craig v. East Coast Bays City Council* [1986] 1 N.Z.L.R. 99.

ensure that he acted within his statutory powers in denying an application which he knew to be of critical importance to the applicant's financial viability.¹⁵ This process of steady expansion of liability for negligence culminated in a thinly veiled challenge to the Privy Council. In *Brown v. Heathcote County Council*¹⁶ Cooke P. declared that when a New Zealand court is asked to recognise a duty of care in a fact situation not precisely covered by existing authority "the whole matter should be weighed against a background and in the spirit of what is now a not inconsiderable body of indigenous New Zealand case law",¹⁷ concluding that "in the negligence field we in New Zealand will have to continue mainly to hew our own way".¹⁸

Initial enthusiasm for the *Anns* approach by appellate courts was not confined to New Zealand. The House of Lords applied *Anns* in *McLoughlin v. O'Brian*¹⁹ to award damages for foreseeable nervous shock, and in *Junior Books Ltd. v. Veitchi Co. Ltd.*²⁰ to extend the scope of liability for purely economic loss outside a privity relationship. In *City of Kamloops v. Nielsen*²¹ a majority of the Supreme Court of Canada relied on *Anns* to free itself from earlier decisions which seemed to impose strict limits on duties of affirmative action and recovery of purely economic loss. Australian courts were alone in not sharing this early enthusiasm for *Anns*. To the High Court, in particular, the disadvantages associated with the *Anns* approach were both obvious and pronounced.

THE DISADVANTAGES OF THE ANNS APPROACH

A literal interpretation of Lord Wilberforce's statement treats the terms "proximity" and "neighbourhood" as synonymous and equates both concepts with Lord Atkin's²² principle of reasonable foreseeability of harm to the plaintiff. This is seen as a straightforward factual question, any consideration of other relevant matters being reserved for the second stage of the inquiry.²³ Since the benefit of hindsight renders almost any actual sequence of events foreseeable, application of this approach raises a prima facie duty in all but the most patently undeserving cases, leaving any limitation on liability to

¹⁵ *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22 (C.A.), reversed [1988] A.C. 473 (P.C.).

¹⁶ [1986] 1 N.Z.L.R. 76.

¹⁷ *Id.* 79.

¹⁸ *Id.* 80. The Privy Council responded to this challenge in *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501 emphasising that determination of the duty issue is "one upon which all common law jurisdictions can learn much from each other; because, apart from exceptional cases, no sensible distinction can be drawn in this respect between the various countries and the social conditions existing in them."

¹⁹ [1983] 1 A.C. 410.

²⁰ [1983] 1 A.C. 520.

²¹ [1984] 2 S.C.R. 2, (1984) 10 D.L.R. (4th) 641.

²² *Donoghue v. Stevenson* [1932] A.C. 562, 580.

²³ See, e.g., *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553, 574 per Woodhouse J.; *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1985] Q.B. 350, 392 per Robert Goff L.J. (C.A.).

ad hoc assessments of the current demands of "public policy" by individual judges freed from the constraints imposed by established authority.

This prospect has little attraction for more conservative judges, particularly those on the higher appellate courts. They are concerned to preserve the appearance, particularly at the trial court level, of neutral adjudication by application of clear rules, reserving to themselves the role of effecting significant changes in the law through incremental development of broader principles drawn from existing precedents. The *Anns* approach threatened the authority of appellate courts by seriously undermining the force of established precedents. Restrictive precedents of high authority would be exposed to constant re-examination in the light of alleged changes in social conditions and public expectations, and must be continually re-justified in those terms. Appellate courts were placed in the unhappy position of having to justify denying effect to a general principle of liability with an apparently strong moral foundation by explicit reliance on policy arguments reflecting controversial social goals. Consequently the notion of a universal test of prima facie duty based on factual foreseeability was criticised as a vague concept which did not assist meaningful analysis of difficult cases, and introduced an undesirable degree of uncertainty.

The House of Lords addressed this concern directly in *The Aliakmon*²⁴ case. Their Lordships attempted to eliminate the potential of *Anns* for reopening and challenging apparently well-settled limitations on the scope of liability by confining the application of the *Anns* approach to truly novel situations in which precedent provides no clear direction. Reaffirming the longstanding rule that economic loss resulting from negligently inflicted damage to a third person's property is not recoverable, their Lordships denied the relevance of *Anns* and emphasised the "utmost importance" of certainty in the law.²⁵

However many judges felt that even if the *Anns* approach were confined to truly novel situations its application still attracted serious disadvantages. They believed that application of the *Anns* approach results in excessive weight being given to the arguments in favour of compensating innocent victims of accidental loss, and too little weight being given to the countervailing arguments against liability. Applied literally, the *Anns* approach subsumes all arguments in favour of liability within the basic principle of foreseeability which, when viewed as a factual inquiry, is easily satisfied. But when a court recognises that arguments against liability cannot sensibly be assessed in isolation and probes beneath the foreseeability principle to identify the underlying considerations supporting a duty, it must then proceed to weigh and balance the competing arguments for and against liability in order to justify its decision.²⁶ This process exposes judicial reasoning to greater public scrutiny and it becomes more readily apparent that in difficult cases the courts are engaged in making highly controversial value judgments as to the priority that should be afforded to competing moral claims and social goals.

²⁴ *Leigh and Sullivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785 (H.L.).

²⁵ *Id.* 817.

²⁶ See, e.g., *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 47-52, 54-56.

Many judges seem to fear that if the true extent of their creative discretion becomes more overt and obvious, they will be increasingly exposed to charges that they are usurping the constitutional role of the legislature by engaging in retrospective undemocratic lawmaking uninformed by the full range of opinion and empirical data accessible to Parliament. It is not surprising, therefore, that many courts expressed serious reservations about *Anns* and sought to locate the foundation of the duty concept in other principles which could justify significant limitations on the scope of liability without the need for explicit articulation of the value choices involved.

ALTERNATIVES TO *ANNS*

1. The *Peabody* Standard: What is “Just and Reasonable” in all the Circumstances

In *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.*²⁷ the House of Lords seriously undermined the authority of *Anns* by emphasising that the two-stage approach described by Lord Wilberforce in *Anns* should not be treated as a comprehensive test of universal application for determining the existence of a duty of care. While the existence of “a relationship of proximity in Lord Atkin’s sense” is always an essential prerequisite of a duty, it is not sufficient in itself to establish even a prima facie duty in a novel situation. The ultimate question is whether, in light of all the circumstances of the case, it is “just and reasonable” that a duty of care of particular scope be imposed on the defendant.²⁸

But what is the content of this critical standard, and what considerations should inform its application? The only assistance provided in *Peabody* lies in a passage from the speech of Lord Morris in *Home Office v. Dorset Yacht Co. Ltd.*²⁹ which Lord Keith quoted with approval:

“I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink from being the arbiter. . . . [T]he court is ‘the spokesman of the fair and reasonable man’.”³⁰

Here Lord Morris denied that the duty determination in a novel case requires “a decision as to policy” (in the sense, one assumes, of a judicial assessment of overall community welfare). Nor, apparently, in view of his last sentence, is the judge to give effect to his own personal opinion of where the balance should be struck between the competing moral claims of the parties. It seems that Lord Morris saw the judge’s role in a novel case as being merely to reflect

²⁷ [1985] A.C. 210.

²⁸ *Id.* 240–241.

²⁹ [1970] A.C. 1004, 1039.

³⁰ [1985] A.C. 210, 241.

and give legal effect to dominant community values and expectations; to act as an instrument of majority opinion.³¹ It was this approach that the House of Lords apparently endorsed in *Peabody*.

But there is a fundamental problem with this approach. If the duty concept is intended simply to reflect community opinion as to who should bear accidental loss, there is no good reason to reserve the duty issue as a separate and distinct question of law for the judge to decide. The jury is meant to personify community values and standards and the factual determination whether a particular defendant has been guilty of negligence by failing to do what a reasonable person in his position would have done to avoid foreseeable harm to the plaintiff is assumed to reflect those values and standards. If Lord Morris and the House of Lords in *Peabody* are correct, then when a case is tried before a jury a separate judicial inquiry into the existence of a duty of care is unnecessary and should not be undertaken. A separate duty inquiry would add nothing to the inquiries into breach of duty and remoteness and Buckland's description of the duty concept as "the fifth wheel on the coach"³² would be entirely apt. Nor would the case for a separate duty inquiry be any more convincing where the trial is before a judge alone. It is difficult to accept that the capacity of trial judges to identify dominant community values is so markedly inferior to that of appellate court judges that their determinations should be reviewed de novo as decisions on questions of law rather than be treated as determinations of fact which can be reversed only if they lack any reasonable foundation.

In *Smith v. Littlewoods Organisation Ltd.*³³ Lord Mackay came close to conceding this point. He rejected the view (asserted strongly by Lord Goff) that an occupier of premises could be liable for negligently failing to prevent trespassers on his land causing damage to a neighbour only if the case fell within one of a narrow range of recognised duty categories. Lord Mackay considered that no separate inquiry into the existence of a legal duty of care was required in a case of this kind. Instead, liability should be determined simply by asking whether a reasonable person in the defendant's position would have anticipated the risk and taken action that would have prevented the damage occurring. He cited the speech of Lord Radcliffe in *Bolton v. Stone*³⁴ for the proposition that the fundamental principle of liability for negligence required a finding that the defendant was guilty of conduct "which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour . . .". In deciding this

³¹ This approach seems close to that of Lord Devlin who insisted that the proper role of the judge is to give effect to legal standards which conform to the consensus of moral values in the community: P. Devlin, *The Judge* (Oxford U.P., 1979) Ch. 1. See also Stephen J. in *Caltex Oil (Australia) Pty. Ltd. v. The Dredge 'Willemstad'* (1976) 136 C.L.R. 529, 575.

³² W. Buckland, "The Duty to Take Care" (1935) 51 L.Q.R. 637, 639. For similar sceptical views as to the value of the duty concept, see L. Green, "The Duty Problem in Negligence Cases" (1928) 28 *Col. L.R.* 1014, 1028-1029; Winfield, "Duty in Tortious Negligence" (1934) 34 *Col. L.R.* 41, 61-64; J. Stone, *The Province and Function of Law* (Sydney, Associated General Publications, 1946) 181-182.

³³ [1987] 2 W.L.R. 480 (H.L.).

³⁴ [1951] A.C. 850, 869.

question "much must depend on what the evidence shows is done by ordinary people in like circumstances to those in which the claim of breach of duty arises".³⁵ The ultimate determination was a matter of fact for the trial judge and one with which "an appeal court should be slow to interfere".³⁶

But of course the whole purpose of the separate duty concept is to remove ultimate responsibility for allocation of accidental losses from juries, and more recently with the decline of the civil jury, from trial judges also. The existence of a separate duty requirement represents a clear acknowledgement by appellate court judges that their personal assessments of what is "just and reasonable" in the circumstances do not always accord with the moral judgment of the community, and an insistence that in such a case it is the judge's personal views that take priority. The function of the separate duty requirement is to identify situations in which defendants are immune from liability no matter how blameworthy and unreasonable their conduct may have been; indeed use of the interlocutory motion to strike out frequently precludes any full examination of the true facts of the case.³⁷ In *Smith v. Littlewoods*³⁸ Lord Goff recognised that Lord Mackay's speech contained the seeds of the revolutionary notion that actionable negligence turns simply on the answer to the factual question whether the defendant did what was reasonable to expect of him in the circumstances to avoid foreseeable harm to the plaintiff. He rejected this view emphatically, insisting that "there are circumstances where considerations of practical justice impel us to reject a general imposition of liability for foreseeable damage",³⁹ and that "there is no general duty to prevent third parties causing damage to others, even though there is a high degree of foresight that this may occur".⁴⁰

So the "just and reasonable" standard invoked in *Peabody* is deliberately vague and misleading. While it appeals to community values and standards, in reality it permits appellate courts to enforce their own views of what is morally right and socially expedient without any need to clearly articulate and defend those views. Reduction of Lord Wilberforce's two-stage test of duty to a single vague formula allows the courts to avoid the expansionary effect of

³⁵ [1987] 2 W.L.R. 480, 501-502.

³⁶ *Id.* 491. Lord Griffiths expressed agreement with Lord Mackay's speech and was content "to leave it to the good sense of the judges to apply realistic standards in conformity with generally accepted patterns of behaviour to determine whether in the particular circumstances of a given case there has been a breach of a duty sounding in negligence". (*Id.* 484). Lord Brandon adopted a curious distinction between general and specific duties of reasonable care, but his conclusion seems to be based on a finding that the defendant's conduct conformed to that expected of a reasonable person in the circumstances. Strangely, Lord Keith expressed agreement with the reasons given by both Lord Mackay and Lord Goff. See generally B. Markesinis, "Negligence, Nuisance and Affirmative Duties of Action" (1989) 105 L.Q.R. 104.

³⁷ See e.g. *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175 (P.C.); *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53 (H.L.); *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624 (H.L.).

³⁸ [1987] 2 W.L.R. 480.

³⁹ *Id.* 511.

⁴⁰ *Id.* 510 (Emphasis in original). See also Brennan J. in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 478, objecting to the notion of a general duty based on foreseeability on the ground that: "[i]f foreseeability were the exclusive criterion of a duty to act to prevent occurrence of that injury, legal duty would be coterminous with moral obligation."

the *Anns* prima facie duty concept without having to place explicit reliance on public policy arguments, or even be very clear at all about the real reasons influencing their decisions.

However the vague nature of the standard ensured that it would pose no obstacle to a judge who wished to extend liability to a novel situation. The response of the New Zealand Court of Appeal is instructive in this regard. While Woodhouse P. and Richardson J. were prepared initially to defend strict adherence to Lord Wilberforce's two-stage approach,⁴¹ other members of the Court were content to accommodate *Peabody* with *Anns* while still progressively expanding the scope of liability for negligence.⁴²

2. An Extended Notion of "Proximity"

Until recently it had been accepted that in *Donoghue v. Stevenson*⁴³ Lord Atkin used the terms "proximity" and "neighbourhood" as interchangeable synonyms to describe the relationship established upon a showing that harm to the plaintiff was a reasonably foreseeable consequence of the defendant's conduct. Initially, it was also assumed that in *Anns* Lord Wilberforce used these terms in the same sense. However separation of the concepts of proximity and foreseeability presented a further means of limiting the potential of *Anns* for expansion of liability. This view holds that while the two concepts are related and will often overlap, they are nevertheless separate and distinct. While foreseeability alone will usually establish sufficient proximity where the complaint relates to positive conduct causing physical harm to the plaintiff's person or property, a closer relationship between the parties is required to establish proximity in the controversial developing areas of the law of negligence concerned with omissions, infliction of pure economic loss, and the legal responsibility of public authorities. Proximity is a wider and more demanding concept than foreseeability, and it is proximity which provides the foundation of the duty of care in negligence.

This notion of proximity was first advanced by Deane J. in *Jaensch v. Coffey*⁴⁴ where his Honour claimed that proximity is the fundamental "touchstone" of the duty requirement, and serves to impose "a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care".⁴⁵ This extended concept of proximity has since been adopted by a majority of the High Court of Australia,⁴⁶ and has also been

⁴¹ See *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22, 57.

⁴² In *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76, 79 the Court said that it found Lord Wilberforce's two-stage analysis "helpful in determining whether it was just and reasonable" to recognise a duty in the circumstances; in *Stieller v. Porirua City Council* [1986] 1 N.Z.L.R. 84, 95-96 the *Peabody* test was seen as being relevant to the finding of a prima facie duty under the first step of the *Anns* approach, while in *Craig v. East Coast Bays City Council* [1986] 1 N.Z.L.R. 99, 107 lip service was paid to *Peabody* following application of the *Anns* approach.

⁴³ [1932] A.C. 562.

⁴⁴ (1984) 155 C.L.R. 549.

⁴⁵ *Id.* 585-586.

⁴⁶ See *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424; *San Sebastian Pty. Ltd. v. Minister Administering the Environmental Planning and Assessment Act 1979* (1986)

employed by the Privy Council⁴⁷ and the House of Lords.⁴⁸ This reinterpretation of the authorities is explained either on the basis that it accurately reflects what Lord Wilberforce really intended in *Anns*,⁴⁹ or that Lord Wilberforce misinterpreted the critical passages from Lord Atkin's speech in *Donoghue v. Stevenson*.⁵⁰

However a concept of "proximity" which is not confined to mere "physical nearness" (and that much at least seems clear from *Donoghue v. Stevenson*), yet sometimes (but not always) requires a closer relationship than that established by reasonable foreseeability of harm, is incapable of meaningful definition and application. Deane J. has expended some thousands of words attempting to explain the content of the requirement of proximity but his efforts seem doomed to failure. In *Sutherland Shire Council v. Heyman*⁵¹ he declared:

"The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connexion or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance. Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case."⁵²

However the wide range of factors potentially relevant to proximity:

"does not mean that there is scope for decision by reference to idiosyncratic notions of justice or morality or that it is a proper approach to treat the requirement of proximity as a question of fact to be resolved merely by reference to the relationship between the plaintiff and the defendant in the particular circumstances."⁵³

Instead, Deane J. insisted that:

162 C.L.R. 340; *Cook v. Cook* (1986) 162 C.L.R. 376; *Hawkins v. Clayton* (1988) 164 C.L.R. 539.

⁴⁷ *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175.

⁴⁸ *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53; *Smith v. Bush* [1989] 2 W.L.R. 790.

⁴⁹ E.g. *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 441 per Gibbs C.J.

⁵⁰ E.g. *Jaensch v. Coffey* (1984) 155 C.L.R. 549, 584 and *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 506–508 per Deane J.; *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 192 per Lord Keith.

⁵¹ (1985) 157 C.L.R. 424.

⁵² *Id.* 497–498.

⁵³ *Id.* 498.

"The requirement of a relationship of proximity serves as a touchstone and control of the *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction."⁵⁴

At the same time, his Honour was careful to point out that:

"the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' . . . or from the considerations of public policy which underlie and enlighten the existence and content of the requirement."⁵⁵

So defined, "proximity" is a term of infinite variability which has no meaning at all unless qualified by adjectives such as "close and direct"⁵⁶ or "marked and distinctive",⁵⁷ and even then it serves only to indicate that liability is limited to relationships that are, in some way that is incapable of clear prior definition, closer than that raised by the foreseeability principle. The only clear message conveyed by Deane J.'s statement is that the duty question is one of law for judges to decide, and that certain developing areas of negligence are seen as comprising separate "categories", each governed by distinctive duty criteria which reflect value judgments by the courts, but are nevertheless informed and unified in some unexplained way by reference to the fundamental "touchstone" of proximity. But if this is so, surely the important task is to identify and define with some degree of precision the particular criteria (in addition to foreseeability of loss) which must be satisfied in order to establish a duty in respect of each "category". Not surprisingly, the extended notion of proximity has provided no practical assistance or insight in this regard. Instead, recent decisions of the High Court of Australia have been marked by extraordinarily prolix and confusing judgments which serve only to demonstrate that the members of the Court have sharply divergent views as to the particular factors that are critical to the existence of a duty of care in developing areas of the law of negligence.

In *Sutherland Shire Council v. Heyman*⁵⁸ the High Court were unanimous in holding that a local authority was not liable to a homeowner for failing to exercise its power to inspect the house in the course of construction so as to ensure that work complied with building requirements laid down by the council. However the force of this conclusion was weakened by the fact that it was justified by two members of the Court (Gibbs C.J. and Wilson J.) on the ground that although the council owed the plaintiffs a duty of care it had not been guilty of negligence, while a majority held that the council had failed to exercise reasonable care in the circumstances but that no duty of care was owed. Nor were the three judges who formed a majority on the duty issue

⁵⁴ *Ibid.* (Emphasis in original).

⁵⁵ *Ibid.*

⁵⁶ *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 194.

⁵⁷ *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76, 82 per Cooke P.

⁵⁸ (1985) 157 C.L.R. 424.

agreed as to their reasons. Brennan J. seemed to consider that the council would owe a duty of affirmative action only if it had undertaken to perform inspections and had induced specific reliance by the plaintiffs. Deane J. seemed to consider that reasonable actual reliance by the plaintiffs on the council to exercise its powers would be sufficient to attract a duty, but no such reliance was proved. Mason J. considered that, at least in the case of a public authority, a duty of affirmative action may arise where there is general public reliance or "dependence" on the authority and "a realization" by the authority of that general reliance or dependence.⁵⁹ His decision (and ultimately that of the Court) turned on the fact that the plaintiffs had not produced any evidence of such "general reliance or dependence".⁶⁰ That a decision comprising 89 pages of reported judgments should turn on such a narrow point of fact is somewhat alarming, and says nothing for the normative or descriptive utility of the concept of proximity.⁶¹

The positions taken by some members of the Court in *Heyman* must have proved something of an embarrassment in the later case of *Hawkins v. Clayton*.⁶² In *Hawkins* the High Court held that a solicitor who prepared and retained custody of a will was liable to the executor of the deceased estate for economic loss sustained by the estate due to the solicitor's failure to take reasonable steps to locate and notify the executor of the death of the testatrix. This unsurprising result produced a 3-2 division in the High Court and generated 45 pages of reported judgments. The dissenters (Mason C.J. and Wilson J.) held that the relationship of proximity required to found a duty of positive action to avoid economic loss demanded both a clear assumption of responsibility by the solicitor and actual reliance by the testatrix. Neither element was present here. Not surprisingly, the minority judgment makes no reference to the notion of general reliance or dependence floated by Mason C.J. in *Heyman*. The majority judges found it more difficult to justify their conclusions in view of *Heyman*, and once again there was little common ground between them. Deane J. now described the required relationship of proximity necessary to attract a positive duty to avoid purely economic loss as being founded on "some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility or a combination of the two".⁶³ Although Deane J. considered that he could not legitimately imply any *contractual* undertaking by the solicitor to notify the executor upon the death of the testatrix, he nevertheless felt able to impose a tortious duty on the ground that "[i]n accepting responsibility for custody of the testatrix's will after her death, the firm [of solicitors] effectively assumed the custodianship of the testatrix's testamentary intentions".⁶⁴ Deane J.'s acknowledgement that a solicitor's duty to disclose the existence of a will in his custody may extend to an

⁵⁹ Id. 464.

⁶⁰ Id. 470-471.

⁶¹ The confusion generated by *Heyman* is well demonstrated by the diversity of views apparent in *Parramatta City Council v. Lutz* [1988] 12 N.S.W.L.R. 293 (C.A.).

⁶² (1988) 164 C.L.R. 539.

⁶³ Id. 576 (emphasis added).

⁶⁴ Id. 580.

intended beneficiary,⁶⁵ made it clear that actual reliance was no longer an essential element of proximity; instead the critical factor was the nature and purpose of the defendant's undertaking. Brennan J., who in *Heyman* had insisted on proof of both a clear undertaking and actual reliance avoided reference to such concepts in *Hawkins*. In *Hawkins* he held that the duty arose from the nature of a will and the purpose for which the solicitor accepts custody — so that the will can be produced on the death of the testatrix and its directions given effect.⁶⁶ Gaudron J., the new member of the Court, considered that “[r]eliance and assumption of responsibility are not the sole or necessary determinants of proximity”.⁶⁷ Although reliance will often be necessary to prove a causative link between positive misstatements and the plaintiffs' loss, in the case of negligent *failure* to disclose information proximity may be founded on “the *reasonable expectation* of a person (including a reasonable expectation that would arise if he turned his mind to the subject)”⁶⁸ that the defendant will provide relevant information within his possession or control.

Heyman and *Hawkins* demonstrate that the extended concept of proximity provides no assistance in identifying the critical elements of the relationships that will attract a duty in controversial developing areas of the law of negligence. As a unifying “touchstone” of negligence it has proved spectacularly unsuccessful: not only has it failed to produce agreement between members of the High Court at the level of practical doctrine; it has also proved incapable of consistent interpretation and application by individual members of the Court.

Nor has the experience of the English courts with the extended notion of proximity proved any more fruitful. While the English courts tend to identify the relationship of proximity sufficient to attract a duty to avoid purely economic loss with the “special relationship” described in *Hedley Byrne*,⁶⁹ there is no agreement as to the essential elements of that relationship; i.e. whether an assumption of responsibility and/or reliance is essential, and how widely or narrowly those criteria should be interpreted and applied.⁷⁰

⁶⁵ Id. 581.

⁶⁶ Id. 552–553.

⁶⁷ Id. 593.

⁶⁸ Id. 596 (emphasis added).

⁶⁹ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

⁷⁰ In *Brown v. Heathcote County Council* [1987] 1 N.Z.L.R. 720 the Privy Council based a finding of “sufficient proximity” on an implied assumption of responsibility to an unknown plaintiff who placed no actual reliance on the defendant. In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175 actual reliance on a statutory undertaking was insufficient to establish the required relationship of “close and direct proximity”, the decisions in *Hedley Byrne* and *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 being described as turning on “the voluntary assumption of responsibility towards a particular party” (p.96). Subsequent Court of Appeal decisions took a narrow view of this requirement, insisting on clear assumption of a “direct responsibility” to the individual plaintiff: *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758; *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundations Ltd.* [1989] Q.B. 71. However in *D & F Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177, 215 Lord Oliver described the “close and unique relationship” which existed between the parties in *Junior Books* as resting “upon the *Hedley Byrne* doctrine of reliance”. More recently, in *Smith v. Bush* [1989] 2 W.L.R. 790 Lord Templeman founded the duty owed to a mortgagor by a valuer employed by the

It is apparent that the concept of proximity does not provide a touchstone by reference to which particular tests of duty governing particular categories of situations can be developed and explained. Instead of providing a base criterion for determining the existence of a duty, it merely records the result of a determination based on quite distinct (and often undisclosed) reasons. The sole utility of the proximity concept is to obscure the fact that decisions in hard cases are based on controversial value judgments by the courts, and to preserve the appearance of value-free adjudication by reference to a fundamental pre-existing legal principle. Whereas the *Anns* test provides a useful vehicle for concealing pragmatic *expansion* of the scope of liability for negligence, proximity is a useful device for concealing policy-based *limitations* on the scope of liability. Even then, the proximity concept has serious limitations. Some cases in which the courts consider it expedient to deny liability simply cannot be explained in terms of proximity. The best example is the refusal to hold lawyers liable to their clients for negligent conduct of litigation;⁷¹ even the High Court of Australia has been forced to acknowledge that this immunity can only be justified by explicit reference to public policy goals.⁷² Nor is it really necessary to invoke the proximity concept in order to conceal policy-based limitations on the principle of factual foreseeability. Conservative courts can achieve the same end simply by stressing that Lord Atkin's original formulation of the "neighbour" principle qualified foreseeability by the adjective "*reasonable*",⁷³ or by resorting to a strictly formalistic approach based on restrictive interpretation of selected precedents.⁷⁴

Nor does the proximity concept operate to limit the ability of a more creative and pragmatic court to extend the scope of liability for negligence in

mortgagee on a voluntary assumption of responsibility evidenced by the valuer undertaking the task, while Lords Griffiths and Jauncey emphasised the element of specific reliance, holding that responsibility is not voluntarily assumed but rather is imposed by law where the defendant undertakes a task knowing of probable reliance by the plaintiff. Finally, in *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1989] 3 W.L.R. 25, 104, 111 the Court of Appeal accepted that in some rare undefined cases the court may be prepared "to treat the defendant in law as having assumed a responsibility or duty to the plaintiff" even though in fact there was no such assumption and no actual reliance.

⁷¹ In *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193 the Privy Council cited *Rondel v. Worsley* [1969] 1 A.C. 191 as an example of "one of the rare cases" in which "notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability". See also cases such as *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473 (P.C.); *Jones v. Department of Employment* [1989] Q.B. 1 (C.A.); *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624 (H.L.); *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundations Ltd.* [1989] 1 Q.B. 71 (C.A.) where liability was denied despite direct dealings between the parties which surely gave rise to close relationships of "proximity".

⁷² *Giannarelli v. Wraith* (1988) 81 A.L.R. 417.

⁷³ See e.g. Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420; Lord Atkin's qualification of foreseeability by the term reasonable means that "foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation". See also *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 630 (H.L.): not reasonably foreseeable that negligent conduct of a criminal investigation by the police would cause injury to the health of a suspect.

⁷⁴ See e.g. *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177 (H.L.).

order to achieve what it believes to be a just result on the facts of a particular case. Members of the New Zealand Court of Appeal have had no difficulty explaining their expansionary decisions in terms of proximity. But instead of seeing proximity as the fundamental unifying "touchstone" of the law of negligence, the Court tends to treat proximity as a purely functional concept which draws attention to the fact that while factual foreseeability may be easily satisfied, it is important to consider the *degree of likelihood* that the defendant's conduct would harm the plaintiff.⁷⁵ Used in this sense, the term does capture one of the principal considerations which determine the strength of the plaintiff's moral claim to compensation, although it may be less confusing simply to refer to the "degree of foreseeability" of harm to the plaintiff.⁷⁶ However, the New Zealand Court of Appeal's tendency to list "special" factual features of the particular case which "in combination" are found to warrant imposition of a duty, without any real explanation of why they are special or of their relative weight and wider significance,⁷⁷ provides little more assistance in predicting future outcomes than does the more prolix and tentative approach of the High Court of Australia, or the wildly erratic attitude of the House of Lords.

In the High Court of Australia, Brennan J. has been an isolated but consistent opponent of the extended notion of proximity, describing it as "a Delphic criterion, claiming an infallible correspondence between the existence of the 'relationship of proximity' and the existence of a duty of care, but not saying whether both exist in particular circumstances".⁷⁸ One can only conclude that Brennan J. is right, and that the term "proximity" is unnecessary, unhelpful and confusing. It should be abandoned.

3. Return to a Strict "Category-based" Conception of the Tort of Negligence

Brennan J. insists that the critical question for a court faced with a novel case is whether, and if so, what particular factor or factors in addition to foreseeability of loss are essential prerequisites of a duty in that particular category of case. Such additional factors must be defined with precision because "it is only by reference to factors so precisely identified that it is possible to define the nature and content of the proposed duty".⁷⁹ New categories of negligence must be developed "incrementally and by analogy with established categories".⁸⁰ But although this desire for clear formal criteria that

⁷⁵ See e.g. *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 44 per Cooke J.; *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76, 79, 82; *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22, 74 per Somers J., 70 per Cooke J. See also *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316, 322 per Bingham L.J.

⁷⁶ In *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76, 79, Cooke J. qualified both terms by the word "degree": "we have considered first the degree of proximity and foreseeability of harm as between the parties."

⁷⁷ E.g. *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76, 82-83 where seven "special factors" (including "marked and distinctive proximity") looked at "in combination" were found to support a duty.

⁷⁸ *Hawkins v. Clayton* (1988) 164 C.L.R. 539, 555-556.

⁷⁹ *Id.* 556.

⁸⁰ *Ibid.*

can be applied relatively mechanically to the facts of particular cases is understandable, the history of the modern law of negligence (and Brennan J.'s own experience in *Heyman* and *Hawkins*) suggests that it is unwise to attempt precise definition of essential criteria which must always be present in order to attract a duty in particular defined categories of situations. Not only will new categories of duty demand recognition (as Brennan J. recognises), but the essential criteria for existing categories will almost inevitably require redefinition. The critical question is what underlying considerations inform the selection of particular criteria as essential or important indicators of a duty. Here Brennan J. is less forthcoming, observing only that:

“In a case where a novel category of duty is proposed and the factors which determine its existence must be identified, the court may have regard to a variety of considerations[:] the nature of the activity which causes the loss, the nature of the loss, the relationship between the parties and contemporary community standards . . .”⁸¹

But fully informed and responsible determination of the duty question requires clear identification of the deeper concerns of morality and public welfare to which such factual features as the nature of the defendant's activity, the loss suffered, and the relationship between the parties relate, and open recognition of the fact that resolution of the conflict between those deeper concerns requires a controversial value judgment that must be explained and justified.

4. *Rowling v. Takaro Properties Ltd.*

The Privy Council's decision in *Rowling v. Takaro Properties Ltd.*⁸² marks an important step in this direction. Takaro claimed that Rowling (The New Zealand Minister of Finance) had acted negligently and in excess of his statutory power in denying an application by Takaro to increase its capital by issuing shares to a foreign company, and that this decision forced the company into liquidation. The New Zealand Court of Appeal had no difficulty finding that the Minister owed a duty of care to the company, emphasising the direct contact between the parties and the Minister's full knowledge of the serious impact his decision would have on the company. They also found the Minister guilty of negligence in failing to take legal advice as to the legality of his decision, and imposed liability. The Privy Council reversed this decision, holding that the Minister had not acted in breach of any duty owed to the company. However, although not necessary for their decision, their Lordships took the opportunity to discuss the proper approach to the duty question, and indicated (without deciding) that the Court of Appeal was wrong in imposing a duty of care on the Minister. Their Lordships clearly rejected the two-stage *Ann's* approach to the duty determination. They explained that underlying the decisions in *Peabody* and *Yuen Kun Yeu v. Attorney-General of Hong Kong*⁸³ “is the fear that a too literal application of the well-known observation of Lord

⁸¹ *Ibid.*

⁸² [1988] A.C. 473.

⁸³ [1988] A.C. 175.

Wilberforce in *Anns* . . . may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed".⁸⁴ They insisted that the duty determination is "of an intensely pragmatic character", requiring "a careful analysis and weighing of the relevant competing considerations".⁸⁵

While this refreshingly frank and open approach by the Privy Council comes as something of a surprise,⁸⁶ it certainly has great attraction. The court must clearly identify all the competing considerations which they regard as relevant to the case, evaluate them carefully and assign a relative weight to each. The ultimate decision then turns on a pragmatic value judgment as to where the overall balance of justice and social welfare lies. Full disclosure by judges of their reasoning processes would enable counsel in subsequent cases to direct their evidence and argument to the critical matters that really concern the courts, leading to progressive refinement of legal arguments and development of firmly-grounded standards which provide meaningful guidance in broadly analogous cases.

But while the basic approach recommended by the Privy Council is sound, the manner in which it was applied to the facts of *Rowling* is open to criticism. Their Lordships confined themselves to stating a number of broad arguments against imposing liability for negligence on public officials exercising regulatory powers. Those arguments were not explored in any depth, and the countervailing arguments favouring recognition of a duty were mentioned only in passing or ignored. Although there was no need for the Privy Council to consider the duty question at all, once it chose to do so one could at least expect the Court to apply its recommended approach in a responsible and systematic manner by identifying *all* the relevant considerations and weighing them carefully one against the other.

First their Lordships held that some decisions of a "policy or planning nature" involving "discretionary decisions on the allocation of scarce resources or the distribution of risks" are completely immune from liability for negligence because they raise issues which are "unsuitable for judicial resolution" in the context of a negligence action.⁸⁷ The reasons justifying this broad immunity are not explained, although some explanation would seem to be required in view of the fact that the reasonableness of such decisions is routinely examined in proceedings for judicial review. While the particular allegation of negligence against the Minister in *Rowling* was not "of itself of such a character as to render the case unsuitable for judicial decision",

⁸⁴ [1988] A.C. 473, 501.

⁸⁵ *Ibid.*

⁸⁶ Perhaps it was dictated by their Lordships' concern to finally reject the *Anns* approach and put a brake on the potential liability of public officials in a case which did not lend itself to employment of any of the other standard devices for denying the existence of a duty. The relationship between the parties could hardly have been more "proximate", and since the claim was conceded to be completely novel a narrow precedent-based approach was not open. It is significant that these alternative approaches have been preferred by the House of Lords in subsequent cases: see *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177 (precedent); *Smith v. Bush* [1989] 2 W.L.R. 790 (proximity).

⁸⁷ [1988] A.C. 473, 501.

nevertheless the Privy Council identified five other “considerations which militate against imposition of liability in a case such as the present”.⁸⁸ However these considerations were not treated in any systematic way.

The first and last of these matters seem to relate to the strength of the plaintiff’s moral claim to compensation. The Privy Council pointed out that since the processes of judicial review are available to an aggrieved applicant, the only effect of a negligent *ultra vires* decision is delay. Furthermore, the Minister’s power was conferred “not for the benefit of applicants for consent to share issues but for the protection of the community as a whole”.⁸⁹ Consequently “the effect of the delay will only be to postpone the receipt by the plaintiff of a benefit which he had no absolute right to receive”.⁹⁰ In most cases of this kind these considerations will apply with considerable force to weaken the plaintiff’s moral claim. However they do not justify a flat denial of a duty in all cases. If one accepts the findings on which the New Zealand Court of Appeal’s decision was based, these considerations had no force since the Court found that the only valid decision open to the Minister was to grant the consent so that the company was legally entitled to the benefit claimed, and the delay precipitated the collapse of the company resulting in substantial loss.

The second and fourth considerations identified as relevant by the Privy Council also seem to be related. Their Lordships considered that “it is likely to be very rare indeed” that an error of interpretation by a public official as to the extent of his statutory authority “can properly be categorised as negligent”,⁹¹ and that it is very difficult to identify in advance those questions of interpretation on which an official should seek legal advice. Together these matters seem to relate to the strength of the defendant’s moral claim to be protected from an unduly burdensome level of legal responsibility. However in most cases this consideration can be given due weight in assessing the *standard* of care owed. In fact the Privy Council recognised this,⁹² and its decision turned on the quite defensible finding that the New Zealand Court had required the Minister to meet an unrealistically high standard of conduct. This consideration does not justify denying the existence of a duty in all cases of this kind so as to prevent recovery in the rare case in which it can be proved that an official was guilty of blatant negligence.⁹³

The remaining consideration identified by the Privy Council concerned the wider impact of recognition of a duty on overall community welfare, and was described rather graphically as “the danger of overkill”.⁹⁴ While exposure to liability for negligence may generally be expected to encourage higher standards of conduct and reduce the overall social costs associated with an activity, their Lordships considered that the reverse was true in this category of

⁸⁸ *Ibid.*

⁸⁹ *Id.* 502–503.

⁹⁰ *Id.* 503.

⁹¹ *Id.* 502.

⁹² *Ibid.*

⁹³ Compare the allegation of negligence pleaded in *Jones v. Department of Employment* [1989] Q.B. 1, 16.

⁹⁴ [1988] A.C. 473, 502.

case, and that "the cure may be worse than the disease".⁹⁵ The risk of liability may cause public officials to become overcautious, resulting in greater delays in processing applications and increased costs to the whole class of persons subject to regulation. The same consideration was said to militate against imposition of a duty on local authorities to enforce minimum building standards. So the Privy Council concluded that the increased costs flowing from the anticipated response of public officials to the risk of liability would exceed any savings likely to be achieved through higher standards of official performance. However this conclusion is far from obvious. An argument based on the inhibiting effect that the risk of liability would have on public officials was rejected summarily in the *Dorset Yacht*⁹⁶ case, Lord Reid insisting that English public servants "are made of sterner stuff" than to be diverted from efficient performance of their duties by the prospect of liability for negligence. In any case, the Privy Council's clear indication that extreme circumstances are required to justify a finding of negligence in cases of this kind means that the risk of liability must be very remote indeed and the inhibiting effect correspondingly low.

The Privy Council's discussion of the duty question in *Rowling* reflects a value judgment that economic efficiency is better served by completely uninhibited public officials than by legally responsible ones, and that pursuit of this utilitarian goal overrides the plaintiff's moral claim to compensation for negligently inflicted loss. Yet this value judgment is of a highly controversial nature; it can be argued that the Privy Council undervalued the plaintiff's moral claim to compensation and overvalued the adverse social effects of potential liability.⁹⁷ So the Privy Council's application of its recommended balancing approach in *Rowling* reveals a lack of appreciation of connections between the different matters identified as relevant for consideration, and of their impact on the deeper concerns to which they relate. This ensured that the analysis would be incomplete and shallow, and that reasonable consistency in the weight attributed to particular considerations in broadly analogous situations is unlikely to be achieved.⁹⁸

Clearly there is a need for some broad framework to guide both the identification of considerations relevant to the duty determination in particular cases, and assessment of the relative weight that should be assigned to them in the critical balancing process.

⁹⁵ *Ibid.*

⁹⁶ *Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004, 1033.

⁹⁷ Nevertheless, the Privy Council saw very little room for divergence between the different jurisdictions subject to its authority in terms of the outcomes produced by its recommended pragmatic balancing approach: "apart from exceptional cases, no sensible distinction can be drawn in this respect between the various countries and the social conditions existing in them" (p. 501). This strong reassertion of authority is unlikely to find favour with the New Zealand Court of Appeal: see text accompanying fnn. 16-18 *supra*.

⁹⁸ For example, while the inhibiting effect of exposure to liability (the "overkill" factor) has been given overriding weight in a number of recent cases involving public officials, it has been given very little weight in cases involving private professionals: see *infra*, fn. 147 and accompanying text.

5. *Caparo Industries PLC v. Dickman*⁹⁹: A Three-Part Test of Duty

In *Caparo* two members of the English Court of Appeal responded to the need for a broad framework to guide the duty analysis by attempting to synthesise recent pronouncements by the House of Lords and Privy Council into a new three-part test of duty based on:

- (1) foreseeability;
- (2) proximity, the “substance” of which is “the degree of closeness between the parties”¹⁰⁰; and
- (3) a finding that it is “just and reasonable to impose a duty”, this requirement covering “very much the same ground as Lord Wilberforce’s second stage in *Anns* . . . and what in cases such as *Spartan Steel* . . . was called policy”.¹⁰¹

Application of this approach in *Caparo* did lead to explicit identification and assessment of a wide range of considerations relevant to the duty owed by auditors of company accounts to different classes of investors, and is therefore to be welcomed. However the distinction between the three stages of the test is strained and artificial. Satisfaction of the foreseeability requirement being conceded by the defendant, attention focused on the second and third stages. The proximity inquiry provoked a lengthy analysis of precedents laying down such formal criteria as voluntary assumption of responsibility and knowledge of reliance by a limited class for a particular purpose. Bingham and Taylor L.JJ. concluded that none of these formal criteria of duty was decisive of the proximity determination, but found little to fall back on. In the end they distinguished between shareholder and non-shareholder investors on the ground that the class of shareholders, although potentially very large, was not “indeterminate” since each member of the class was capable of identification.¹⁰² Consequently the third stage inquiry into whether it was “just and reasonable” and desirable as a matter of policy to impose a duty involved consideration of a wide range of factors, some relating to the strength of the parties’ moral claims to compensation on the one hand and protection from unduly burdensome liability on the other; some relating to broad welfare interests in loss avoidance, maintaining the availability of useful services at reasonable cost, and efficient distribution of losses. In reality, of course, the accommodation between these disparate conflicting interests had already been foreshadowed by the finding on the “proximity” issue.¹⁰³

I believe that clear and fully informed analysis of the duty question requires the competing moral claims of the parties to be considered and weighed separately from the broader implications of a decision on the overall welfare of the community. A modified version of Lord Wilberforce’s two-stage test can be employed for this purpose.

⁹⁹ [1989] 2 W.L.R. 316 (C.A.).

¹⁰⁰ Id. 326 per Bingham L.J.

¹⁰¹ Id. 322.

¹⁰² Id. 329, 342–343.

¹⁰³ A similar approach was taken in *Smith v. Bush* [1989] 2 W.L.R. 790 where the House of Lords employed the “fair and reasonable” standard imposed by the *Unfair Contract Terms Act 1977* (U.K.) ss.2(2), 11(3) as a vehicle for considering a wide range of moral and welfare considerations.

A NEW TWO-STAGE APPROACH TO THE DUTY DETERMINATION

A new two-stage approach would be based on a broad distinction between the moral claims of the parties and the wider implications of liability for overall community welfare.

Stage One: The Relative Strength of the Parties' Moral Claims

The first stage would involve assessment of the relative strength of the plaintiff's moral claim to compensation on the one hand, and the defendant's moral claim to be protected from an unduly onerous burden of legal responsibility on the other. This would overcome the major disadvantage associated with stage one of the *Anns* approach: instead of a strong moral claim to compensation being raised merely by satisfaction of the relatively undemanding test of factual foreseeability, a wider range of relevant factors would arise for consideration at this stage.

1. *The plaintiff's moral claim*

The strength of the plaintiff's moral claim to recover compensation from the defendant depends on two primary considerations: the degree of likelihood that the defendant's conduct would cause harm to the plaintiff, and the seriousness of the effect of that conduct on the plaintiff's interests.

(a) The degree of likelihood (or foreseeability) that the defendant's conduct would cause harm to the plaintiff

The more particular factors relevant to this broad consideration are first, the extent to which the defendant occupied a position of power or control over the plaintiff's interests; second, the directness of the impact of the defendant's conduct on the plaintiff's interests; and third, the extent to which the plaintiff was likely to rely or depend on the defendant to protect his interests.

The controversial areas of liability concerning claims for pure economic loss and attempts to impose duties of affirmative action provide useful vehicles for illustrating the impact of these factors. Their combined effect is strongest in a situation of contractual privity where the plaintiff personally retains a skilled professional to perform a paid task the object of which is to protect the plaintiff from the very risk of economic harm to which he is left exposed by the defendant's negligence. The defendant has assumed a position of complete power or control over the plaintiff's interests knowing that carelessness on his part will inevitably cause the plaintiff loss, and the plaintiff, having paid for the service, places complete trust and reliance on the defendant to perform the undertaken task with reasonable skill and diligence. Indeed, in such cases the relationship of power and dependence between the parties is so strong as to warrant imposition of fiduciary duties.¹⁰⁴

¹⁰⁴ E.g. *Day v. Mead* [1987] 2 N.Z.L.R. 443 (C.A.).

As more contingencies intervene between the defendant's negligence and the plaintiff's loss and the nexus between them becomes more remote, the relationship of power and dependence is weakened. The likelihood of the plaintiff placing strong reliance on the defendant to protect his interests diminishes and the strength of the plaintiff's moral claim to compensation is correspondingly reduced.

The plaintiff's claim remains strong in a case like *Meates v. Attorney-General*¹⁰⁵ where he takes positive action to his detriment relying specifically on an express undertaking by the defendant which, although falling short of a contractual guarantee of performance, nevertheless involves an obvious and direct reciprocal benefit to the defendant, and the means of providing the promised benefit lie exclusively within the defendant's control. It is also strong in cases where the plaintiff and defendant are parties to interlocking contracts with an intermediary, and the defendant's contractual undertaking is not only intended to benefit the individual plaintiff but is also paid for indirectly by the plaintiff through the contractual intermediary. The relationships between building owner and subcontractor¹⁰⁶ (whether or not nominated by the owner), and between prospective mortgagor and a valuer employed by the mortgagee but paid from funds supplied by the mortgagor are of this kind.¹⁰⁷

While reciprocity of benefits enhances the likelihood of strong reliance, a strong relationship of power and dependence may nevertheless exist in its absence. The plaintiff's claim remains strong in the *Hedley Byrne*¹⁰⁸ situation where a defendant gratuitously makes available information within his exclusive possession knowing that an individual recipient will rely on it for a particular purpose. The power/dependence relationship is also strong in the "will cases" where the solicitor knows that negligent performance of his professional undertaking will inevitably inflict economic loss directly on a completely dependent beneficiary who is powerless to avoid the risk.¹⁰⁹ In such circumstances absence of actual knowledge of and reliance by the plaintiff on the defendant's undertaking does not weaken the relationship of power and dependence between them. These factors also support the plaintiff's claim in cases like *Rowling v. Takaro Properties Ltd.* where a public official is placed by statute in a position of complete power and control over the plaintiff's interests, and while the plaintiff can anticipate the risk of an adverse decision he is powerless to avert it.¹¹⁰

Where the defendant does not have the plaintiff in contemplation as a particular individual likely to rely on him, and the plaintiff claims as one of

¹⁰⁵ [1983] N.Z.L.R. 308.

¹⁰⁶ *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520. Cf. *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758 (C.A.).

¹⁰⁷ *Smith v. Bush* [1989] 2 W.L.R. 790 (H.L.).

¹⁰⁸ *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

¹⁰⁹ *Ross v. Caunters* [1980] Ch. 297; *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37 (C.A.). See also *Ministry of Housing and Local Government v. Sharp* [1970] 2 Q.B. 223 (C.A.).

¹¹⁰ [1988] A.C. 473 (P.C.). See also *Jones v. Department of Employment* [1989] Q.B. 1 (C.A.) and *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624 (H.L.).

a class of persons dependent on the defendant, the strength of the power/dependence relationship depends on a number of variables.

(i) The source of the defendant's power or control over the plaintiff's interests

Voluntary assumption of a position of control over the plaintiff's interests naturally generates reliance and dependence. While an express promise or representation provides the best evidence of such an assumption of control,¹¹¹ undertakings to act with due skill and care are inevitably inferred from the fact that a defendant has voluntarily embarked on performance of a skilled task¹¹² or that the defendant has an established practice of acting in certain circumstances.¹¹³ Similarly, the action of a manufacturer in releasing a product onto the market carries an implied undertaking that his power to control both the safety of the product and its fitness for ordinary intended purposes has been exercised with reasonable care.¹¹⁴

While many courts emphasise the importance of *voluntary* assumption of control, reliance may be stronger and more likely where the defendant is *required by statute* to assume a position of control over the plaintiff's interests. While it may be inappropriate to impose strict liability for breach of such a statutory duty, particularly where its discharge calls for the exercise of judgment by the defendant, its existence does strengthen the plaintiff's claim to be entitled to rely on the required function being performed with reasonable care.¹¹⁵

By way of contrast, where the defendant is placed in a position of power or control over the plaintiff's interests by entirely fortuitous circumstances (e.g. he happens to occupy land adjacent to the plaintiff through which thieves can gain access to the plaintiff's premises¹¹⁶) the plaintiff's claim to protection is much weaker.

(ii) The scope and purpose of the control asserted by the defendant

Where the primary purpose of the power of control assumed by the defendant is to protect or advance the particular interest held by the plaintiff, strong reliance is likely and the plaintiff's moral claim is correspondingly

¹¹¹ E.g. *Parramatta City Council v. Lutz* [1988] 12 N.S.W.L.R. 293 (C.A.).

¹¹² E.g. *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316, 327, 342.

¹¹³ E.g. *L. Shaddock & Associates Pty. Ltd. v. Parramatta City Council (No. 1)* (1981) 150 C.L.R. 225; *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76 (C.A.), [1987] 1 N.Z.L.R. 720 (P.C.).

¹¹⁴ Cf. *Muirhead v. Industrial Tank Specialities Ltd.* [1986] Q.B. 507 (C.A.); *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177.

¹¹⁵ E.g. *Craig v. East Coast Bays City Council* [1986] 1 N.Z.L.R. 99, 107 (C.A.). Cf. *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 196-197 where the Privy Council drew a distinction between "general" duties to the public and "special" duties to individuals which ignores the reality of the power/dependence relationship.

¹¹⁶ See *P. Perl (Exporters) Ltd. v. Camden London Borough Council* [1984] Q.B. 342 (C.A.).

strengthened.¹¹⁷ To the extent that protection of the plaintiff's interest is a secondary or merely incidental function of the defendant's undertaking, the likelihood of reliance is reduced and the plaintiff's claim weakened.¹¹⁸

(iii) Availability to the plaintiff of alternative means of protection and the likelihood that they will be employed

In the area of products liability, this factor is captured in the rule that a reasonable opportunity for intermediate inspection sufficient to disclose the defect negates liability. The age of the product, the nature of the defect and the resources available to the plaintiff are all relevant in this context. While the first purchaser of a new house will normally place strong reliance on the competence of the builder and the public regulatory body and is unlikely to conduct more than a cursory inspection sufficient to reveal patent defects, the purchaser of an older house can reasonably be expected to conduct a more thorough examination.¹¹⁹ Similarly, the purchaser of a substantial commercial building can be expected to have both the resources and the incentive to commission a detailed examination capable of detecting major latent defects.

Clearly a plaintiff's moral claim is weakest where it is founded merely on a general expectation that the defendant will act for his benefit or protection, without actual knowledge of or reliance upon any assertion of control by the defendant and in circumstances where effective alternative means of protection against an obvious risk were reasonably available to him. It is unlikely that such a claim will succeed against a private defendant. However it can be argued that public authorities are in a special position. They often occupy positions of special knowledge and control, and where their powers are intended to protect persons in the position of the plaintiff from the very kind of harm suffered, the likelihood of general public reliance and dependence may be strong.¹²⁰ This is reinforced where the authority is required by statute to perform a protective function.¹²¹

(b) The seriousness of the effect of the defendant's negligence on the plaintiff

Traditionally the courts have been most sympathetic to claims in respect of personal injuries — the injury is obvious and has a direct impact on personal autonomy in the sense that the victim's lifestyle is seriously disrupted. The

¹¹⁷ E.g. *Stieller v. Porirua City Council* [1986] 1 N.Z.L.R. 84; *Craig v. East Coast Bays City Council* [1986] 1 N.Z.L.R. 99. Cf. *Yuen Kun Yeu v. Attorney-General of Hong Kong* supra, fn. 115.

¹¹⁸ See the discussion of the scope and purpose of the statutory auditor's function in *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553 (C.A.) and *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316 (C.A.).

¹¹⁹ See *Bowen v. Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394, 412–413, 426 (C.A.).

¹²⁰ See, in particular, *Brown v. Heathcote County Council* [1986] 1 N.Z.L.R. 76 (C.A.), [1987] 1 N.Z.L.R. 720 (P.C.); *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 463–464 per Mason J.

¹²¹ See supra, fn. 115.

priority traditionally given to property damage and consequential economic loss is more open to question today, but at least such damage is readily proved and quantified. On the other hand, problems of proof and suspicion of fictitious or exaggerated claims have led the courts to be more cautious in imposing liability for nervous shock, and to deny "stand alone" claims for anxiety and loss of reputation.¹²² Purely economic losses span a wide range in terms of severity of impact and susceptibility to proof and quantification. Where it can be demonstrated that the plaintiff suffered substantial out-of-pocket loss as a direct result of the defendant's negligence, his moral claim to compensation is strengthened.¹²³ But where the plaintiff's loss is slight or highly speculative his moral claim to recover is weak.¹²⁴ Courts will normally be reluctant to allow claims that the defendant's negligence deprived him of a chance of averting a loss or achieving a prospective financial gain when realisation of that chance was already dependent on a number of other contingencies.¹²⁵

2. *The defendant's moral claim*

The plaintiff's moral claim to protection from avoidable harm must be balanced against the defendant's claim to reasonable freedom of action. The defendant has a legitimate moral claim to be preserved from an unduly onerous burden of legal responsibility which is out of all proportion to his moral culpability and the resources available to him. Two broad considerations are relevant in this context.

(a) The burden of taking precautions to guard against the risk

Where the alleged negligence consists of positive action from which the defendant derives benefit a claim that the difficulty and cost of eliminating the risk would be unduly burdensome is entitled to little weight at the duty level — this consideration can be given appropriate weight in fixing the standard of conduct required to discharge the duty. In some cases the courts have emphasised the difficulty of fixing a clear and appropriate standard of conduct in relation to a particular activity, the implication being that it is unfair to impose a duty unless the standard of conduct required to discharge it

¹²² See *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 630 (H.L.).

¹²³ E.g. claims for the cost of repairing defective buildings and products. This factor also supports recovery of repair costs by plaintiffs who carry the risk of physical damage to a third person's property: cf. *The Aliakmon* [1986] A.C. 785 (H.L.).

¹²⁴ See e.g. *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 631 (policeman's loss of overtime earnings during period of suspension from duty both small and speculative); *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501–502 (loss from delay in reversing invalid decision unlikely to be great).

¹²⁵ The courts' response to such claims is presently somewhat confused. Compare the judgments of Cooke and Woodhouse JJ. in *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 533, and the approaches of Quilliam J. and the Court of Appeal in *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22. See also *Hotson v. East Berkshire Area Health Authority* [1987] A.C. 750. Whether the result is explained in terms of duty or causation is, of course, immaterial.

is capable of being known in advance with reasonable certainty.¹²⁶ Since the negligence standard is founded explicitly on community expectations of reasonable conduct, this argument may warrant an appropriately relaxed standard of care but does not justify complete exclusion of liability by denial of a duty.

The potential for conflict between the duty claimed by the plaintiff and obligations owed by the defendant to other affected individuals or groups has sometimes been seen as strengthening the defendant's moral claim to immunity from liability.¹²⁷ Once again, the nature and effect of any constraints imposed on the defendant's conduct by any such conflict of obligations can usually be given adequate weight in assessing the standard of care required in the circumstances of the particular case.¹²⁸ Of course, where the content of the tortious duty proposed by the plaintiff merely parallels an existing duty owed to a third party the defendant's claim to protection under this head is weak.¹²⁹

The distinction between misfeasance and nonfeasance is often seen as important in this context and it is frequently asserted that the law imposes no general duty to prevent third persons or external agencies causing harm to others, even if the likelihood of such harm ensuing is very strong.¹³⁰ It is true that duties to take affirmative action for the protection of others are often more burdensome and involve greater interference with personal freedom of action than negative duties which call for restraint in the course of positive conduct. But once again, due allowance for the burdensome nature of affirmative obligations can be made in assessing the standard of care required to discharge the duty. Growing recognition of the reasonable expectations of positive conduct generated in modern society has led to an increasing number of exceptions to the traditional rule of no liability for nonfeasance, coupled with a subjective standard of care which takes account of the knowledge, capacity and resources of the individual defendant.¹³¹ Despite the strong

¹²⁶ This consideration was given weight by the Privy Council in *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 502, and the House of Lords' refusal to hold producers of products liable to ultimate consumers for non-dangerous defects which merely reduce the value of the product seems to have been influenced by this concern: see *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, 551–552 per Lord Brandon (dissenting), cited with approval by Lord Bridge in *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177, 203–204.

¹²⁷ E.g. the exclusive character of the duty owed by a solicitor to his client normally excludes a duty to his client's opponent (*New Zealand Social Credit Political League Inc. v. O'Brien* [1984] 1 N.Z.L.R. 84), although the court will enforce an obligation to a client's opponent which is voluntarily assumed by a solicitor (*Al-Kandari v. J.R. Brown & Co.* [1988] Q.B. 665). See also *Rondel v. Worsley* [1969] 1 A.C. 191 (possible conflict between a barrister's duty to the court and a duty to his client); *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 194–195 (conflict between claimed duty to potential investors and obligations to existing depositions).

¹²⁸ See e.g. *Meates v. Attorney-General* [1983] N.Z.L.R. 308, 379–380 per Cooke J.

¹²⁹ E.g. *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37; *Smith v. Bush* [1989] 2 W.L.R. 790; *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316, 331, 344.

¹³⁰ E.g. *Smith v. Littlewoods Organisation Ltd.* [1987] 2 W.L.R. 480, 509 per Lord Goff.

¹³¹ E.g. *Goldman v. Hargrave* [1967] 1 A.C. 645 (P.C.); *Herrington v. British Railways Board* [1972] A.C. 877 (H.L.).

opposition of Lord Goff in *Smith v. Littlewoods Organisation Ltd.*,¹³² I agree with Lord Mackay that the potentially burdensome nature of affirmative obligations does not, of itself, justify denial of a general duty to take reasonable positive steps to prevent likely harm to others.

(b) The burden of potential liability

The defendant may properly claim that imposition of the proposed duty would expose him to a burden of liability out of all proportion to his moral culpability and beyond his capacity to bear. The argument based on fear of indeterminate liability applies with most force in economic loss cases where a negligent statement or defective product has the potential to inflict substantial losses on large numbers of people over a considerable period of time. This concern does justify limiting the duty owed in respect of purely economic loss to limited classes of persons who are particularly likely to suffer loss of reasonably predictable nature and extent, and sometimes the decision as to where the cut-off line should be drawn may be rather arbitrary.¹³³ The need to confine exposure to liability in terms of duration may also justify a reasonably restrictive view of when the cause of action in respect of economic loss accrues and the limitation period begins to run.¹³⁴ Occasionally a defendant's potential liability for physical damage may be totally disproportionate to his moral culpability and this may justify limitation of the duty to persons who are not merely foreseeable victims but can be singled out as exposed to a much greater likelihood of harm.¹³⁵ A claim based on the burden of potential liability loses much of its force where the defendant is a professional or businessman who benefits directly from the conduct complained of and is able to spread the risk

¹³² *Supra*, fn. 130.

¹³³ Compare *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316 (auditor's duty limited to investors who are already shareholders of the company) with *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553 (auditor's duty extends to the maker of a successful takeover bid for the company). See also *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22 esp. at 70 per Cooke J. (duty owed by the Minister to the company did not extend to the principal shareholder suing in his personal capacity). The inability of the plaintiffs to distinguish their claims from those shared by a very large and indeterminate class provides the only justifiable ground for the decision in *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175 (P.C.): compare *Brown v. Heathcote County Council* [1987] 1 N.Z.L.R. 720 (P.C.) where the class of potential victims of the kind of negligence alleged was relatively small.

¹³⁴ Compare *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234 (C.A.) where the Court exposed builders to a very heavy burden of liability by holding that the cause of action in respect of a latent construction defect does not arise until it causes discoverable damage, and that separate causes of action may arise in respect of subsequent "distinct" incidents of damage caused by the same defect. Compare *Pirelli v. Oscar Faber and Partners* [1983] 2 A.C. 1 where the House of Lords went to the other extreme, and legislative action in the form of the *Latent Damage Act* 1984 (U.K.) was required in order to achieve a fair compromise between the claims of tortfeasors and victims. In Australia, see the somewhat inconclusive discussion of these issues by members of the majority in *Hawkins v. Clayton* (1988) 164 C.L.R. 539.

¹³⁵ E.g. *Home Office v. Dorset Yacht Co. Ltd.* [1970] A.C. 1004, 1070-1071 per Lord Diplock; *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53.

of liability through insurance (provided, of course, that the risk is not so indeterminate as to be uninsurable).¹³⁶

The ability of the defendant to confine his potential liability within reasonable and predictable bounds by disclaiming or limiting his legal responsibility to more remote users of his product or service also reduces the force of the argument based on unduly burdensome liability.¹³⁷ In the past the courts have tended to assume that if a disclaimer is brought to the notice of the consumer it automatically negates any assumption of responsibility and excludes a tortious duty.¹³⁸ On the other hand, if the terms of a disclaimer are not actually brought to the attention of the plaintiff it cannot be given any legal effect at all, and the defendant's apparent inability to confine potentially wide liability is seen to necessitate complete denial of a tortious duty of care.¹³⁹ This rigid "all-or-nothing" approach prevents the courts from achieving a fair compromise between the competing moral claims of the parties and a result which is broadly consistent with their reasonable expectations. Once proof of a voluntary assumption of responsibility is no longer seen as an invariable prerequisite of a duty to avoid economic loss, the existence and terms of a disclaimer can be given appropriate weight in assessing, on the one hand, the degree of likelihood that the plaintiff would nevertheless suffer harm (i.e. could the disclaimer reasonably be expected to deter reliance and avoid the loss), and on the other hand, the reasonableness of the defendant's attempt to confine his liability within manageable limits. While it will normally be appropriate to enforce a disclaimer between informed commercial parties of similar bargaining strength, even a disclaimer of which the plaintiff had clear notice may not be sufficient to override the moral claim of a private consumer who had no reasonable choice but to avail himself of the particular service on the terms offered.¹⁴⁰ At the same time, it may be appropriate to enforce a standard form of exclusion or limitation provision against a commercial party even in the absence of actual notice if the plaintiff could be expected to know that the product or service in question is normally supplied subject to

¹³⁶ See e.g. *Smith v. Bush* [1989] 2 W.L.R. 790, 810 per Lord Griffiths; *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316, 344 per Taylor L.J.; *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553, 572 per Woodhouse J.; *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 51 per Richardson J.

¹³⁷ See e.g. *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553, 580–581 per Cooke J.

¹³⁸ E.g. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465; *Smith v. Bush* [1989] 2 W.L.R. 790 (H.L.) per Lords Griffiths and Jauncey.

¹³⁹ See *The Aliakmon* [1986] A.C. 785, 817–819; *Simaan General Contracting Co. v. Pilkington Glass Ltd. (No. 2)* [1988] Q.B. 758; 782–783, 785–786 (C.A.).

¹⁴⁰ See *Smith v. Bush* [1989] 2 W.L.R. 790 where the House of Lords invoked the *Unfair Contract Terms Act 1977* (U.K.) to deny the defendant the right to rely on a disclaimer where it would not be "fair and reasonable" to do so. While Lords Griffiths and Jauncey (cf. Lord Templeman) considered that, apart from the Act, the disclaimer would have prevented any common law duty arising, this conclusion does not seem justified in view of the fact that the basic test of duty adopted in the *Peabody* case ("just and reasonable") mirrors the standard laid down in the Act.

such conditions.¹⁴¹ Similarly, it may be appropriate to allow a non-party to enforce a plaintiff's contractual waiver of liability.¹⁴²

Where the balance is struck between the plaintiff's claim to reasonable respect for his interests and the defendant's claim to reasonable freedom of action will depend on the relative weight assigned to the particular factors which underlie those competing moral claims. This determination will turn on the court's assessment of the relative value to be placed on personal autonomy and self-reliance on the one hand, and security and interdependence on the other. While broad legislative trends in such areas as consumer protection may provide some guidance as to how contemporary society values these competing interests, the ultimate value judgment is one which the judge cannot avoid and should not attempt to conceal.

Where the plaintiff's moral claim to compensation outweighs the defendant's moral claim to protection a prima facie duty is established. However it may still be necessary to consider the impact of a decision in favour of liability on the overall welfare of the community.

Stage Two: The Impact of Liability on Overall Community Welfare

A number of wider policy concerns relating to overall public welfare may arise for consideration at this stage. It is misleading to see these policy considerations as operating in a purely negative way to militate against recognition of a duty; in many cases their overall impact reinforces the plaintiff's claim.

1. *Administrative concerns*

Understandably, the courts are concerned to maintain the efficient administration of the civil justice system, and they will avoid embarking on a course which threatens to produce a flood of claims which they fear they may not be able to handle, or to raise new problems which have far-reaching and unpredictable implications. The concern to prevent relitigation of doubtful claims certainly underlies the barristers' immunity from negligence liability, and anticipated problems in relation to proof and assessment of harm influenced the courts' initial reluctance to recognise liability for nervous shock. But often the strength of this classical form of the "floodgates" argument is exaggerated. Every significant extension of liability for negligence has been opposed on the ground that the consequent increase in litigation would overwhelm the courts, yet this fear has never been realised in practice. Some courts seem all too ready to embrace a "brightline" cut-off rule which promises easy application and a significant reduction of litigation without giving adequate consideration to alternative approaches which more accurately reflect the relative

¹⁴¹ Such an approach was advocated by Robert Goff L.J. in the Court of Appeal in *The Aliakmon* [1985] Q.B. 350, 396-398, and see also *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, 546 per Lord Roskill. However this approach was firmly rejected by the House of Lords in *The Aliakmon* [1986] A.C. 785, 817-819.

¹⁴² See *Southern Water Authority v. Carey* [1985] 2 All E.R. 1077; *Norwich City Council v. Harvey* [1989] 1 All E.R. 1180 (C.A.).

strength of the parties' moral claims and are still capable of consistent future application.¹⁴³

2. *Deterrence and loss prevention*

Exposure to the risk of liability for negligence can normally be expected to encourage potential defendants to undertake cost-justified prevention measures, thereby reducing the overall social costs associated with the particular activity. So this factor generally supports recognition of a duty, and applies with particular force when denial of the duty proposed would prevent the law from exerting any deterrent effect on the activity in question.¹⁴⁴ However in some cases courts have accepted the "overkill" argument that increased social costs associated with imposition of liability would exceed any savings gained from higher standards of conduct, and result in an overall reduction in general welfare. At present English courts seem prepared to give overriding weight to this argument in cases alleging negligence by public officials in the exercise of statutory functions. The prospect of liability for negligence is said to have "a seriously inhibiting effect"¹⁴⁵ on the work of public officials, leading to overcautious attitudes, unnecessary delays and misallocation of resources which increase costs and discourage investment in socially useful activities.¹⁴⁶ The courts' sensitivity to these rather speculative consequences of exposing public officials to liability is somewhat surprising given their negative response to similar arguments advanced by private professionals. Claims by auditors and valuers that exposure to increased liability will increase the cost and reduce the availability of necessary information, lead to overcautious reports and inhibit investment in the share and property markets have been rejected on the grounds that the negligence standard of reasonable care in all the circumstances is not unduly demanding, and provided the number and amount of potential claims can be confined within reasonable limits such professionals are well placed to spread liability costs through insurance.¹⁴⁷

3. *Efficient distribution of loss*

One function of the law of negligence is to shift accidental losses from innocent victims to culpable professionals, businessmen and public bodies who are better placed to anticipate the loss and to spread it over the whole

¹⁴³ See e.g. *The Aliakmon* [1986] A.C. 785 where the House of Lords reaffirmed the rule that only a person holding a possessory or proprietary interest in property can sue for damage done to that property, rejecting the notion of transferred loss suggested by Robert Goff L.J. in the Court of Appeal.

¹⁴⁴ E.g. *Ross v. Caunters* [1980] Ch. 297; *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 51.

¹⁴⁵ *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 198 (P.C.).

¹⁴⁶ See e.g. *Yuen Kun Yeu* (fn. 145 supra) *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 502, 503 (P.C.); *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, 63 (H.L.); *Calveley v. Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 630-631 (H.L.).

¹⁴⁷ E.g. *Smith v. Bush* [1989] 2 W.L.R. 790 (H.L.); *Caparo Industries PLC v. Dickman* [1989] 2 W.L.R. 316 (C.A.).

class of persons who benefit from the loss-producing activity through private liability insurance, self-insurance or taxation.¹⁴⁸ However effective use of tort liability to promote wide distribution of loss is dependent upon future liability costs being reasonably predictable in extent, hence the courts' traditional concern to avoid exposing defendants to potential liability that is the indeterminate in terms of incidence, amount and time. Furthermore, the process of shifting losses according to fault itself involves substantial social costs, and it is more efficient to leave victims to spread their losses through first party insurance where this form of cover is readily available and widely held. Consequently the relative availability, incidence and cost of loss insurance as opposed to liability insurance in respect of particular risks of accidental harm is a relevant consideration in determining the existence and scope of a duty of care.¹⁴⁹ However a decision to deny liability in favour of encouraging potential victims to distribute the risk through loss insurance or self-insurance involves denial of the plaintiff's moral claim and some loss of deterrence, and a court must be sure that the combined weight of the defendant's moral claim to protection from unduly burdensome liability and the advantages in terms of efficient loss distribution is strong and compelling before adopting this course.¹⁵⁰

Nevertheless, the insurability factor may justify a broad distinction between commercial and non-commercial economic losses. For example, while a valuer should not be able to disclaim his relatively limited potential liability to a residential home-buyer who is required by the mortgagee to pay for the valuation and is highly unlikely to seek another independent valuation, a court may be justified in enforcing a disclaimer or limitation of liability attached to a mortgage valuation of expensive commercial property. In such cases the valuer's potential liability may far exceed the limit of any reasonable liability insurance cover, and a commercial purchaser can reasonably be expected to obtain an independent survey of the building.¹⁵¹ Indeed it may even be appropriate to confine the duty owed by mortgage valuers outside privity relationships to private residential purchasers. Similarly, the potential liability of manufacturers and builders of defective products could be confined within predictable and insurable limits by recognising a duty to avoid direct economic loss consisting of loss of product value (normally the cost of repairing or replacing a product which is not reasonably fit for its normal

¹⁴⁸ For explicit recognition of the loss-spreading function of negligence liability, see e.g. *Smith v. Bush* [1989] 2 W.L.R. 790, 810 per Lord Griffiths; *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 51 per Richardson J.; *Scott Group Ltd. v. McFarlane* [1978] 1 N.Z.L.R. 553, 572 per Woodhouse J.; *Bowen v. Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394, 419 per Woodhouse J.

¹⁴⁹ See *Smith v. Bush* [1989] 2 W.L.R. 790; *Day v. Mead* [1987] 2 N.Z.L.R. 443, 458 per Somers J. (C.A.); *Mayfair Ltd. v. Pears* [1987] 1 N.Z.L.R. 459, 462 per Cooke P.

¹⁵⁰ For example, a more efficient means of distributing the costs of accidental damage to property could be achieved simply by abolishing the collateral source rule and removing loss insurers' rights of subrogation in respect of such losses. While Scandinavian countries have largely adopted this approach (see e.g. I. Strahl, "Tort Liability and Insurance" (1959) 3 *Scandinavian Studies in Law* 200, 208-210) common law jurisdictions obviously regard the cost in terms of deterrence and denial of the moral claims of loss victims as too great.

¹⁵¹ See *Smith v. Bush* [1989] 2 W.L.R. 790, 810-811 per Lord Griffiths.

intended purpose), but denying recovery of indirect or consequential economic losses (e.g. business profits) which may be unpredictably large depending on the nature of the owner's intended use of the product and his contractual arrangements with third parties (matters within his exclusive knowledge and for which he can be expected to make due allowance).¹⁵²

4. Institutional limitations on judicial creativity

In its most shallow and least persuasive form, this consideration simply reflects a judicial desire to avoid public controversy and criticism by preserving the illusion that judges merely apply the law and that making new law is the exclusive preserve of the legislature. At a deeper level, however, this consideration reflects awareness of two important institutional constraints on judicial innovation.

(a) The lack of democratic authority for judicial lawmaking

Judicial decisions must command a minimum level of popular support, at least within the legal community and those sections of the public most immediately affected by them. While the very existence of a separate duty requirement involves acknowledgement that the incidence of liability for negligence will not always accord with community values, most judges are reluctant to stray too far from prevailing public opinion and expectations. Of course identification of the prevailing consensus on a given issue may be very difficult, and leave a wide area of practical discretion to the judge. Legislation provides the best evidence of public opinion, but even where a legislative trend is evident it can be used to support quite contradictory conclusions. For example, provision of a new statutory remedy in respect of a particular interest may be viewed either as encouraging the courts to develop further the protection provided at common law,¹⁵³ or as indicating a legislative intention that the statutory remedy should be treated as exclusive.¹⁵⁴

(b) The limitations of the trial process

It is appropriate for judges to have regard to the relative competence of courts and legislatures to deal with particular kinds of issues. The adversary trial process is not well suited to eliciting the full range of data and opinion upon which significant social reforms must be founded if they are to prove workable and acceptable. Sometimes the courts do fail to appreciate the wider social implications of a decision. For example, New Zealand courts may not have given adequate consideration to the consequences of subjecting builders

¹⁵² Compare the extreme approaches taken in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520 and *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177.

¹⁵³ E.g. *Gartside v. Sheffield, Young & Ellis* [1983] N.Z.L.R. 37, 42 where Cooke J. invoked the recent passage of the *Contracts (Privity) Act 1982* (N.Z.) to support his recognition of a tortious duty between a contracting party and a third-party beneficiary of the obligation.

¹⁵⁴ E.g. *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177, 193, 207–208 per Lord Bridge.

and local authorities to liability for the full range of economic losses caused by construction defects while at the same time allowing successive causes of action in respect of a single defect based on a "discoverability" test.¹⁵⁵ Of course unforeseen adverse effects of judicial innovation can be corrected by statute. However corrective legislative action is seldom prompt,¹⁵⁶ and unwise judicial experiments tend to provoke ill-considered over-reactions from superior courts.¹⁵⁷

Considerations of relative competence seem to underlie the concern of some courts to confer a special immunity on public authorities in respect of decisions of a "policy", "planning" or "discretionary" nature which are said to be "unsuitable for judicial resolution" in the context of a civil action for negligence.¹⁵⁸ On rare occasions this argument may be entitled to decisive weight. For example, a court might properly decline to consider a claim that a ministerial decision concerning relations with a foreign state was made negligently.¹⁵⁹ The decision in *Hill v. Chief Constable of West Yorkshire*¹⁶⁰ to strike out a claim alleging that careful conduct of a major police investigation would have identified a mass murderer before he killed the plaintiff's daughter may possibly be justified on the ground that a limited adversary hearing would not produce a fully informed appraisal of the methods of criminal investigation practised by the West Yorkshire police, and would not furnish the necessary basis for systemic change. But often the courts seem too ready to disclaim competence to assess the reasonableness of action taken by public officials. In *Hill* the House of Lords seems to have concluded that the police should enjoy a complete immunity from liability to citizens in respect of the conduct of criminal investigations. Yet Lord Keith acknowledged that some claims against police officers may raise relatively straightforward issues of individual carelessness which the courts are perfectly competent to assess.¹⁶¹ The existence of discretion merely indicates a capacity for choice between alternative courses of action. The nature of those alternatives, and the constraints imposed on public officials by administrative difficulties, limited resources and obligations to other sections of the public can usually be given due recognition and weight in assessing the standard of reasonable conduct required of an official in all the circumstances of the particular case.¹⁶²

¹⁵⁵ This is the combined effect of *Bowen v. Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394 (C.A.); *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234 (C.A.) and *Stieller v. Porirua City Council* [1986] 1 N.Z.L.R. 84 (C.A.).

¹⁵⁶ E.g. in July 1988 Cooke P. made an urgent plea for legislative adoption of a "longstop" limitation provision for building cases (*Askin v. Knox* [1989] 1 N.Z.L.R. 248, 256) but no action has yet been taken.

¹⁵⁷ E.g. *D. & F. Estates Ltd. v. Church Commissioners for England* [1989] A.C. 177 (H.L.) and see Duncan Wallace, "Negligence and Defective Buildings: Confusion Confounded?" (1989) 105 L.Q.R. 46.

¹⁵⁸ *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501 (P.C.). See also *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 468-469 per Mason J., 500 per Deane J.

¹⁵⁹ Equally, a court would be reluctant to exercise its inherent powers of judicial review in such a case; see *Ashby v. Minister of Immigration* [1981] 1 N.Z.L.R. 222, 231 per Richardson J. (C.A.).

¹⁶⁰ [1989] A.C. 53 (H.L.).

¹⁶¹ *Id.* 63.

¹⁶² See e.g. Cooke J. in *Meates v. Attorney-General* [1983] N.Z.L.R. 308, 379-380 and *Takaro Properties Ltd. v. Rowling* [1986] 1 N.Z.L.R. 22, 68.

CONCLUSION

None of the principles, tests or “touchstones” so far adopted by the courts provides a complete and satisfactory explanation of the courts’ function in determining the existence of a common law duty of care. In fact the search for a single universal “principle” to guide the duty determination would seem to be doomed to failure. By creating a separate duty requirement as a preliminary question of law, the courts have asserted the exclusive right to determine the range of interests entitled to protection from careless conduct. Performance of this function requires the courts to weigh and balance the competing moral claims of the parties and assess the impact of those claims on a range of broad social welfare goals. Responsible determination of the duty question requires open recognition of the nature of those competing claims and goals, and a framework to guide identification and assessment of the more particular considerations which determine their relative weight. I suggest that a revised and modified version of the two-stage approach recommended by Lord Wilberforce in *Anns* can serve this purpose.

