Public Authorities, Negligence and Pure Economic Loss in Australia: The San Sebastian Case

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I. INTRODUCTION

The recent decision of the New South Wales Court of Appeal in *Minister Administering the Environmental Planning and Assessment Act, 1979* v. *San Sebastian Pty Ltd*[1] represents a significant development in the law regarding the negligence liability of public authorities in Australia. The case concerned the liability for economic losses suffered by various investors following the abandonment of a plan for the redevelopment of the Woolloomooloo area in Sydney in 1972. In three separate and lengthy judgments, the Court of Appeal reversed the decision at trial which had found both defendants liable for a total of approximately $1.4 million in damages.[2] The case raises important questions both as to the liability of planning authorities in negligence and as to the proper scope of recovery for pure economic loss in negligence. In particular, it provides an opportunity for the Australian courts to consider and test the principles established by the House of Lords in *Anns* v. *Merton London Borough Council*.[3]

II. THE FACTS

The plaintiffs were land development companies whose principal promoter was a Mr Baker. The two initial defendants were the State Planning Authority ('the Authority') and the

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1. [1983] 2 N.S.W.L.R. 268 (Hutley, Glass and Mahoney JJ.A.) (hereinafter *San Sebastian*). Currently on appeal to the High Court of Australia.
2. *San Sebastian*, judgment at trial, released 17 December, 1981, unreported, Ash J. For a comment on the trial judgment, see G. Walker, "Negligent Words: the San Sebastian case" [1983] *N.Z.L.J.* 63.
3. [1978] A.C. 728 (hereinafter *Anns*).

Council of the City of Sydney ('the Council').[4] In 1968, representatives of the Authority and the Council established a joint committee to oversee the preparation of a plan for the comprehensive redevelopment of the Woolloomooloo area. In July 1969, the Woolloomooloo Redevelopment Study ('the Study') was completed and was soon after adopted by the Council as its plan for the redevelopment of the area. The Study proposed that mixed commercial and residential development occur in the area and envisaged that private enterprise would play a large role in the project.

The Study was placed on public display in the Sydney Town Hall for a four-week period commencing 19th August, 1969. The display actually involved three relevant documents: the Study, the "Development Control Proposals" and a brochure which summarized in popular language various important aspects of the Study. It was found that the purpose of the display was "to stimulate the interest of developers in the purchase of properties in the area, the consolidation of sites and the making of development proposals."[5] Mr Baker attended the exhibition, obtained and perused copies of all three documents, and formed the view that commercial development of the type he was contemplating was possible in the area. As a result, between 8th December, 1969 and 28th October, 1971, he caused the corporate plaintiffs to purchase various plots of land in Woolloomooloo. Mr Baker suffered substantial losses when the Council ultimately abandoned the Study in 1972.

It was held by the trial judge that the Study had not been prepared with the degree of professional skill and care required of persons in the position of the defendants.[6] The particular allegations of negligence revolved around what was referred to as the "transport/workforce deficiency" contained in the Study. The brochure had stated that "a workforce of 35,000 and a resident population of 9-10,000 is envisaged when the area is fully developed." The transportation authorities had advised the defendants that this was the maximum population which the existing transportation system could service in the Woolloomooloo area. However, it was alleged that if maximum development had occurred in accordance with the office space base ratio and bonuses actually envisaged by the Study, the total

4. The Minister administering the Environmental Planning and Assessment Act 1979 (N.S.W.) had since succeeded to the liabilities of the Authority.
5. Note 1 *supra*, 294 *per* Glass J.A.
6. *Id.*, 302.

workforce attracted to the area would be between 50,000 and 90,000. This would effectively render the proposals and the plan incapable of implementation.

Although the Council had from the outset utilized the Study in considering applications for land development in Woolloomooloo, the plan had no particular statutory force until the Sydney Planning Scheme Ordinance No. 172 of 1971 ("City Ordinance") was adopted by the Council on 2nd August, 1971. Clause 32(e) of the Ordinance provided that, in determining any application for development consent, the Council should take into account, *inter alia*, any detailed plan or design adopted by resolution of the responsible authority for the development of a given locality.

The Council became aware of the "transport/workforce deficiency" in September, 1970. However, the Study continued in place until it was abandoned by the Council in November, 1972. This occurred after the plaintiffs' first development proposals had been submitted and after the Commonwealth government, for reasons which included the transportation problem, decided to abandon plans to erect an office building in Woolloomooloo. The Council eventually adopted another plan calling for predominantly residential development in the Woolloomooloo area.

The plaintiffs sought damages in negligence on the basis of the principles contained in both *Donoghue* v. *Stevenson*[7] and *Hedley Byrne and Co. Ltd* v. *Heller and Partners Ltd.*[8] Although various issues are canvassed by the judgments in the Court of Appeal, the bulk of this comment will focus on the Court's treatment of the question of duty of care. In addition, the paper will discuss the Court's holding that the Study did not contain information or advice which could form the basis of a claim under the *Hedley Byrne* tort.

III. THE DUTY ISSUE

There are two general problems raised by the facts of this case which underlie the determination of the duty question. First, the scope of potential plaintiffs and the magnitude of their claims present a challenging case for the application of the principles pertaining to the recovery of pure economic loss in negligence. At the same time, the question arises as to whether the type of activity

7. [1932] A.C. 562 (hereinafter *Donoghue*).
8. [1964] A.C. 465 (hereinafter *Hedley Byrne*).

carried on by the public authorities in this case ought to remain immune from civil liability. Although there are points of intersection in the various judgments on these issues, the judgments of Glass and Mahoney JJ.A. tend to approach the duty question from the "economic loss" perspective, while the judgment of Hutley J.A. focuses primarily on the "public authorities" aspect of the case. Before these various judgments are discussed, a brief summary of the recent developments in the law relating to these issues will be attempted. The summary will proceed upon two separate lines of inquiry. First, what are the special rules which govern the liability of public authorities in negligence? Second, what are the current trends in the law regarding the recovery of pure economic loss?

1. Public Authorities, Negligence and Economic Loss

(a) In what circumstances may the existence of a statutory power give rise to a common law duty of care?

The concept of duty supplies the relational component of a negligence action. It is the legal formulation under which the courts exercise what is in essence a policy choice as to whether, in the circumstances of a given case, a defendant ought to be held liable for damage caused to a plaintiff by the defendant's negligence. This notion was expressly recognized by Lord Wilberforce in the *Anns* case, in which he articulated a two-step approach to the analysis of duty:

> Through the trilogy of cases in this House — *Donoghue* v. *Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, *per* Lord Reid at p. 1027.[9]

In the *Anns* case, the House of Lords acknowledged that there were considerations which militated against invoking Lord

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9. Note 3 *supra*, 751-752.

Atkin's proximity test in all circumstances involving the performance of statutory functions by public bodies. These considerations stem from the public nature of powers and duties possessed by statutory bodies. Lord Wilberforce adopted the approach of distinguishing between the "policy" and "operational" aspects of statutory functions as an aid to the determination of the circumstances in which discretionary statutory decisions will attract liability in negligence. The terminology is similar to the "planning-operational" dichotomy utilized by the American courts.[10]

Lord Wilberforce recognized that the distinction is necessarily imprecise and a matter of degree. Thus, the distinction can be conceptualized as a continuum, such that "the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care".[11] At one end of the spectrum, policy or planning decisions typically require the allocation of scarce resources and the balancing of various political, economic or social interests and objectives. By their very nature, such decisions are less easily analyzed under the test of reasonableness contemplated by the negligence action.[12] However, acts done in the execution of a policy decision — the operational aspect of statutory power — are more amenable to negligence analysis. A relatively clear example of the distinction can be derived from *Dorset Yacht Co. Ltd* v. *Home Office*.[13] While the decision to operate an open rather than a closed borstal system is a matter of

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10. *Dalehite* v. *United States* 346 U.S. 15 (1953); *Indian Towing Co.* v. *United States* 350 U.S. 61 (1955). The planning-operational distinction has been adopted by the American courts to assist them in determining the scope of the "discretionary function" exception to governmental liability contained in the Federal Tort Claims Act, 28 U.S.C. § 2680 (a). For a discussion of these cases and their more recent progeny, see K.C. Davis, *Administrative Law Treatise* (1955) iii, ss25.08-25.10, 472-482, and Davis, *1982 Supplement to Administrative Law Treatise*, 403-410. For an analysis of the American and English approaches, see P.P. Craig, "Negligence in the Exercise of a Statutory Power" (1978) 94 *Law Q. Rev.* 428. In the earlier Canadian case of *Welbridge Holdings Ltd* v. *Greater Winnepeg* (1970) 22 D.L.R. (3d) 470, the Supreme Court of Canada adopted a perhaps more restricted distinction between the "legislative" or "quasi-judicial" and the "operating" or "business" powers of public authorities in holding a municipal council not liable for damages suffered when a zoning by-law was declared invalid for procedural irregularities. See also *Bowen* v. *City of Edmonton* (1977) 80 D.L.R. (3d) 501 (Alta. C.A.) (invalid resolutions concerning sub-division control).
11. Note 3 *supra*, 754.
12. For a full discussion of this problem, see Craig, note 10 *supra*.
13. [1970] A.C. 1004.

government policy which ought not to be the subject of civil liability, the relevant authority might still be held liable for the negligence of its officers within the framework of an open borstal system.

Lord Wilberforce also recognized that both policy and operational functions contain an element of discretion which will vary in nature and degree. He held that it was a pre-condition to the establishment of a common law duty of care that the particular action — whether it be "policy" or "operational" — was taken outside the limits of a discretion *bona fide* exercised.[14] Such a finding would not end the inquiry for, under Lord Wilberforce's general, two-step approach to the analysis of duty, the court would consider whether there were any supervening policy factors which ought to oust a duty of care or further to restrict its scope.[15] For example, the court might also consider the policy factors associated with delineating the scope of the duty of care in cases involving pure economic loss.[16]

The approach adopted by Lord Wilberforce to the determination of the duty question in cases involving statutory functions can be summarized as follows. First, one asks whether the relationship between the parties satisfies the Atkinian test of proximity so as to raise a *prima facie* duty of care. Second, one characterizes the particular function in question and asks whether the impugned action was taken outside the limits of a discretion conferred upon the relevant authority or officer. Third, one asks whether there are any other policy considerations which ought to negative or qualify the existence of a common law duty of care.

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14. Note 3 *supra*, 755. Lord Wilberforce also stated, at 757:
> My noble and learned friend points out that the accepted principles which are applicable to powers conferred by a private Act of Parliament, as laid down in *Geddis* v. *Bann Reservoir Proprietors*, 3 App. Cas. 430, cannot automatically be applied to public statutes which confer a large measure of discretion upon public authorities. As regards the latter, for a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion: in such a case "Its actionability falls to be determined by the civil law principles of negligence": see [1970] A.C. 1004, 1068.

15. Support for this interpretation can be found in the judgment of Richardson, J. in *Takaro Properties Ltd* v. *Rowling* [1978] 2 N.Z.L.R. 314, 334 (hereinafter *Takaro Properties*).

16. In the *Anns* case, note 3 *supra*, at 759, Lord Wilberforce did not feel compelled to consider this problem, having held that "If classification is required, the relevant damage is in my opinion material, physical damage ....".

The courts in Canada[17] and New Zealand[18] have applied the *Anns* approach to the treatment of governmental liability in negligence. A case originating in New South Wales which applied *Anns* is currently on appeal to the High Court of Australia.[19]

(b) How have the courts approached the problem of recovery of pure economic loss in negligence?

The *San Sebastian* case arises at a time of rapid development in judicial approaches to the recovery of pure economic loss in negligence. The initial priority of negligence law was to compensate for harm done to person or property. Thus, before 1963, the courts consistently denied recovery for pure economic loss, that is loss not consequential upon injury to the plaintiff's own person or property.[20] The principal rationale underlying the exclusionary rule was that the allowance of recovery for pure economic loss on the basis of traditional negligence principles had the potential to expose defendants to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[21] Concern over the spectre of indeterminate liability has accompanied the cautious and gradual erosion of the exclusionary rule in recent years. Traditional negligence analysis supplies two

17. *Barratt* v. *District of North Vancouver* (1980) 114 D.L.R. (3d) 577 (S.C.C.); *Nielsen* v. *City of Kamloops* (1981) 129 D.L.R. (3d) 111 (leave to appeal to the Supreme Court of Canada granted, 1 February, 1982); *Diversified Holdings Ltd* v. *The Queen in Right of the Province of British Columbia* (1982) 143 D.L.R. (3d) 529 (B.C.C.A.).
18. *Takaro Properties*, note 15 *supra*; *Mount Albert Borough Council* v. *Johnson* [1979] 2 N.Z.L.R. 234 (C.A.).
19. *Council of the Shire of Sutherland* v. *Heyman* [1982] 2 N.S.W.L.R. 618 (special leave to appeal to the High Court of Australia granted, 11 March, 1983). The court is treating the matter as a "test case": (1983) 4 *Legal Rep.*, 31 March, 1983, 3. See also: *Wollongong City Council* v. *Fregnan* [1982] 1 N.S.W.L.R. 244. Recent English decisions which consider *Anns* on this question include: *Dennis* v. *Charnwood B.C.* [1982] 3 All E.R. 486 (C.A.); *Acrecrest Ltd* v. *Hattrell and Partners* [1983] 1 All E.R. 17 (C.A.); *Fellowes* v. *Rother D.C.* [1983] 1 All E.R. 513; *Peabody Donation Fund* v. *Sir L. Parkinson* [1983] 3 All E.R. 417 (C.A.).
20. *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453. For a general discussion of this rule, see P.S. Atiyah, "Negligence and Economic Loss" (1967) 83 *Law Q. Rev.* 248.
21. *Ultramares Corporation* v. *Touche* 174 N.E. 441, 444 (1931) (*per* Cardozo C.J.).

conceptual tools for the accommodation of such policy considerations: duty and remoteness. The vast majority of recent judicial decisions has utilized the concept of duty as the most appropriate control mechanism on the recovery of pure economic loss.[22] The role of duty in this context is to place limitations on the classes of plaintiffs and defendants to which an action for negligently caused economic loss will apply.

The landmark decision of the House of Lords in *Hedley Byrne* jettisoned the exclusionary rule for cases involving negligent statements. However, their Lordships rejected the *Donoghue* proximity principle as inappropriate to the determination of the existence of a duty of care in such situations. Instead, they fashioned a more circumscribed duty of care based on the requirement of a 'special relationship' between the parties, the assumption of responsibility by the defendant for the accuracy of the statement, and the plaintiff's reasonable reliance on the statement. Although *Hedley Byrne* largely concerned the placing of control mechanisms on the class of defendants in this context, subsequent decisions have attempted to define the class of plaintiffs which ought to recover damages for losses suffered in reliance upon negligent statements.[23] However, with certain exceptions mentioned below, the courts for a time continued to apply the exclusionary rule to purely economic losses caused by

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22. *Caltex Oil (Australia) Pty Ltd* v. *The Dredge 'Willemstad'* (1976) 136 C.L.R. 529 and cases cited therein, especially in the judgments of Gibbs and Mason JJ.; *Junior Books Ltd* v. *Veitchi Ltd* [1982] 1 W.L.R. 477 (H.L.). See generally, P.P. Craig, "Negligent Mis-statements, Negligent Acts and Economic Loss" (1976) 92 *Law Q. Rev.* 213; R. Hayes, "Duty of Care and Liability for Pure Economic Loss" (1979) 12 *Melb. U.L. Rev.* 79; D. Partlett, "Recovery of Economic Loss for Negligence in Australia" (1980) 9 *Sydney L. Rev.* 121; J.A. Smillie, "Negligence and Economic Loss" (1982) 32 *U. Toronto L.J.* 231. Some commentators have argued that economic loss ought to be treated solely as a question of remoteness: J.C. Smith, "Clarification of Duty-Remoteness Problems Through a Physiology of Negligence: Economic Loss, A Test Case" (1974) 9 *U.Brit.Colum.L.Rev.* 213; J.C. Smith and P. Burns, "*Donoghue* v. *Stevenson* — The Not So Golden Anniversary" (1983) 46 *Mod. L. Rev.* 147, 152.

23. This issue has arisen most often in connection with the activities of accountants in auditing company financial statements: *Haig* v. *Bamford* (1976) 72 D.L.R. (3d) 68 (S.C.C.); *Scott Group Ltd* v. *MacFarlane* [1978] 1 N.Z.L.R. 553 (C.A.); *J.E.B. Fasteners Ltd* v. *Marks, Bloom and Co.* [1981] 3 All E.R. 289, affirmed [1983] 1 All E.R. 583 (C.A.).

negligent acts[24] so that liability for pure economic loss remained restricted to cases of negligent mis-statement which satisfied the narrow *Hedley Byrne* test.

These rules were not always applied consistently to the various activities of public authorities. It is now accepted in most Commonwealth jurisdictions that public authorities are subject to *Hedley Byrne* liability for economic loss suffered in reliance upon negligently supplied information or advice.[25] In the Australian context, this was confirmed by the High Court of Australia in *Shaddock (L) and Associates Pty Ltd* v. *Parramatta City Council.*[26] The *Anns* case was not mentioned in *Shaddock* and it may be presumed that the provision of the information in that case was regarded as being within the "operational" sphere of governmental activity.

However, some public authorities were held liable for economic loss in cases where not all the prerequisites of a *Hedley Byrne* duty of care were present. This occurred most often in connection with the certification and approval functions performed by local authorities. The approach of the courts in these cases was essentially two-pronged: the particular governmental conduct would be characterized as a "statement" so as to bring the case nominally within the *Hedley Byrne* exception to the exclusionary rule, but the court would simultaneously invoke the *Donoghue* proximity principle in order to find a duty of care.

In *Ministry of Housing and Local Government* v. *Sharp*,[27] a local council was held liable for financial losses suffered by the plaintiff, an encumbrancer of certain land, when the council's clerk negligently searched the land register and issued a clear certificate of title to the land to intending purchasers. The facts placed the case clearly outside the narrow scope of the *Hedley Byrne* doctrine: at no time did the plaintiff rely on the certificate of title, nor could it be said that the authority had undertaken

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24. *S.C.M. (U.K.) Ltd* v. *W.J. Whittal and Son Ltd* [1971] 1 Q.B. 337 (C.A.); *Spartan Steel and Alloys Ltd* v. *Martin and Co. (Contractors) Ltd* [1973] Q.B. 27 (C.A.).
25. *Windsor Motors Ltd* v. *District of Powell River* (1969) 4 D.L.R. (3d) 155 (B.C.C.A.); *Hodgins* v. *Hydro-electric Commission of the Township of Nepean* (1975) 65 D.L.R. (3d) 1 (S.C.C.); *Jung* v. *District of Burnaby* (1978) 91 D.L.R. (3d) 594 (B.C.S.C.); *Sharadan Builders Inc.* v. *Mahler* (1977) 79 D.L.R. (3d) 439, reviewed (1978) 93 D.L.R. (3d) 480 (Ont. C.A.); *Grand Restaurants of Canada Ltd* v. *City of Toronto* (1981) 32 O.R. (2d) 757, affirmed 39 O.R. (2d) 752 (C.A.).
26. (1981) 36 A.L.R. 385 (hereinafter *Shaddock*). See also *South Australia* v. *Johnson* (1982) 42 A.L.R. 161 (H.C.A.).
27. [1970] 2 Q.B. 223 (C.A.) (hereinafter *Sharp*).

responsibility for the accuracy of the certificate. Nevertheless, the English Court of Appeal applied the Atkinian test of proximity to hold the defendant vicariously liable for the breach of a duty of care owed to the plaintiff.

The *Sharp* case was applied in a line of cases in New South Wales which concerned invalid planning approval. In *Hull* v. *Canterbury Municipal Council*[28] and *G.J. Knight Holdings Pty Ltd* v. *Warringah Shire Council*,[29] the courts applied *Donoghue* and *Sharp* to find the local authorities liable for losses suffered by landowners after development approvals had been nullified for procedural irregularities. In *Freeman* v. *Shoalhaven Shire Council*,[30] the court applied these principles to hold the local authority liable to an adjacent landowner adversely affected by the failure to observe procedures established for granting development consent to the subject property.

In *Dutton* v. *Bognor Regis U.D.C.*,[31] the defendant council's officer carelessly inspected and approved the foundations for a house which was ultimately built on an old rubbish tip. The English Court of Appeal again applied the *Donoghue* proximity rule to find that the council, through its officer, had breached a duty of care owed to a subsequent owner of the house. For both Lord Denning M.R. and Stamp L.J., the classification of the damage was largely irrelevant, as it was thought that the council should be liable for the costs of rectifying the defective condition of the premises.[32]

In *Sharp* and *Dutton* and their progeny,[33] the classification of the particular activity as either words, acts or omissions was often

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28. [1974] 1 N.S.W.L.R. 300 *per* Nagle J.
29. [1975] 2 N.S.W.L.R. 796 *per* Yeldham J.
30. [1980] 2 N.S.W.L.R. 826 *per* Kearney J.
31. [1972] 1 Q.B. 373 (C.A.) (hereinafter *Dutton).*
32. *Id.*, 396 (*per* Lord Denning M.R.), 415 *per* Stamp L.J.
33. In *Rutherford* v. *Attorney General* [1976] 1 N.Z.L.R. 403 (C.A.), the *Dutton* case was applied to hold the authority liable to a subsequent owner of a truck for the cost of repairs when the defendant had negligently issued a certificate of fitness in respect of the vehicle. In *Collins* v. *Haliburton-Kawartha Pine Ridge District Health Unit* [1972] 2 O.R. 508 (H.C.J.), the plaintiff carried on the business of freezing, storing, processing and packaging poultry offal for mink ranchers. After receiving complaints and without giving the plaintiff notice or conducting a proper inspection of his premises, the defendant health authority wrote to the plaintiff and informed him that his business constituted an "offensive trade" within the meaning of s.94 of the Public Health Act, R.S.O. 1960 (Ontario) c. 321. After the notice became public knowledge, the plaintiff's business collapsed. The court applied *Donoghue* and *Dutton* to find the defendant liable for the plaintiff's business losses.

difficult and ultimately irrelevant. Moreover, since the facts of the cases did not raise the spectre of indeterminacy — one or two plaintiffs suffered limited losses — the distinction between physical and economic damage was insignificant and there was no reason to exclude a duty of care. Although the utilization of the Atkinian formula was probably justified on policy grounds, the courts in these cases did not have to consider the wider ramifications of adopting the proximity rule as the general test for determining the existence of a duty of care in all cases involving pure economic loss. Thus, arguably just results were achieved in these particular cases through a cross-fertilization of the principles of *Donoghue* and *Hedley Byrne* at the expense of promoting the consistent development of general principles in this area of the law.

However, the more profound inconsistency in the law was that the rules respecting the recovery of pure economic loss differed according to the type of conduct involved. It would not seem logical that the existence of a duty of care in such cases should depend on whether the alleged negligence is in respect of words or acts. It has been suggested that one of the reasons for the slower development of the law respecting negligent acts is that, in contrast to the built-in control mechanisms of the *Hedley Byrne* tort, it is relatively more difficult to place workable limitations on a duty of care in cases involving negligent acts.[34] In any event, the High Court of Australia, in *Caltex Oil (Australia) Pty. Ltd* v. *The Dredge 'Willemstad'*,[35] recognized the inconsistency in the law and grappled with the various problems in an effort to construct a new principle of general application to cases involving economic loss caused by negligent acts. Although it is difficult to draw a consensus of opinion from the five judgments delivered in the case, it may be generally concluded that the court rejected the Atkinian rule in favour of a test which would restrict recovery to situations in which the defendant knew or ought to have known that the plaintiff, as a "specific individual" as opposed to a member of an "unascertained"[36] or "general"[37] class, was likely to suffer economic loss. This case will be discussed further in the context of the analysis of the judgments in the *San Sebastian* case.

The most recent trend in this area can be traced to the speech of Lord Wilberforce in the *Anns* case. As was mentioned above,

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34. Craig, note 22 *supra*, 218; Partlett, note 22 *supra*, 133.
35. Note 22 *supra* (hereinafter *Caltex*).
36. *Id.*, 555 *per* Gibbs J.
37. *Id.*, 593 *per* Mason J.

he advocated a general, two-tiered approach to the analysis of duty in negligence cases. Under his concept of *prima facie* duty of care, the requirement of a relationship of proximity is merely the starting point of the analysis. Lord Wilberforce's approach requires the courts to articulate openly the policy considerations upon which every decision on the question of duty ultimately depends. He actually cited the *Hedley Byrne* case as an example of this process in operation.[38]

The "Wilberforce approach" has been applied in many subsequent cases involving pure economic loss. It was utilized in *J.E.B. Fasteners Ltd* v. *Marks, Bloom and Co.*[39] and in *Scott Group Ltd* v. *MacFarlane*[40] where the courts adopted the *Donoghue* reasonable foreseeability test to define the class of plaintiffs to whom an accountant will owe a *Hedley Byrne* duty of care for the negligent auditing of financial statements. In both cases, the courts were of the view that the requirement of reliance was a sufficient control mechanism to address the problems of indeterminacy. The plaintiff will be obliged to prove that it was reasonable and foreseeable that he would rely on the negligent statements, and that his reliance on the statements caused his loss.[41] In *Ross* v. *Caunters*[42] the two-step inquiry was employed by Sir Robert Megarry V.-C. to hold a solicitor liable in negligence to a beneficiary under a will whose bequest was void under the relevant wills legislation. This case was followed in the Western Australian case of *Watts* v. *Public Trustee*.[43] However in *Seale* v. *Perry*,[44] the Full Court of the Supreme Court of Victoria refused to follow *Ross* v. *Caunters* and held that there was no duty of care in circumstances similar to those found in *Ross* v. *Caunters*. It is interesting to note that, of the three judges in *Seale* v. *Perry*, only McGarvie J. was prepared to endorse Lord Wilberforce's two-step test. In a series of cases, the New Zealand courts have embraced the Wilberforce approach to the analysis of duty of care.[45]

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38. Note 3 *supra*, 752.
39. Note 23 *supra*.
40. *Ibid.*
41. *Scott Group Ltd*, note 23 *supra*, 572 (*per* Woodhouse J.); *J.E.B. Fasteners*, note 23 *supra*, 296-297 *per* Woolf J.
42. [1980] Ch. 297.
43. [1980] W.A.R. 97.
44. [1982] V.R. 193.
45. *Takaro Properties*, note 15 *supra*; *Port Underwood Forests Ltd* v. *Marlborough County Council* [1982] 1 N.Z.L.R. 343 (H.C.); *Bruce* v. *Housing Corporation of New Zealand* [1982] 2 N.Z.L.R. 28 (H.C.). In two recent cases, the New Zealand Court of Appeal applied Lord Wilberforce's approach to hold solicitors liable to third parties outside the solicitor-client

The House of Lords recently applied the Wilberforce approach in *Junior Books Ltd* v. *Veitchi*,[46] a case which was treated by a majority of their Lordships as a claim in damages for pure economic loss. In considering the second branch of the test, Lord Roskill stated:

> But in the present case the only suggested reason for limiting the damage (ex hypothesi economic or financial only) recoverable for the breach of the duty of care just enunciated is that hitherto the law has not allowed such recovery and therefore ought not in the future to do so. My Lords, with all respect to those who find this a sufficient answer, I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called during the argument "damage to the pocket" simpliciter should be disallowed when "damage to the pocket" coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences.[47]

In the *Anns* and *Junior Books* cases, the English courts have adopted a comprehensive approach to the analysis of the concept of duty. Under this approach, emphasis is placed less on the maintenance of separate categories of duty corresponding to the species of loss and type of negligence involved, and more on the utilization of a general, more flexible framework within which new situations can be analyzed. In the *Caltex* and *Shaddock* cases, the High Court of Australia appears to have preferred the categorical approach. However, the High Court has not as yet given express consideration to the Wilberforce approach to the duty question.

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contractual relationship: *Allied Finance and Investments Ltd* v. *Haddow and Co.* [1983] 1 N.Z.L.R. 22; *Gartside* v. *Sheffield, Young and Ellis* [1983] 1 N.Z.L.R. 37. In the Canadian context, the Ontario Court of Appeal, in *Berger* v. *Willowdale A.M.C.* (1983) 145 D.L.R. (3d) 247, without express mention of the *Anns* case, adopted the two-step approach to hold that in certain circumstances a duty of care can be owed by the president of an employer to any employee to maintain a safe working place.

46. Note 22 *supra* (hereinafter *Junior Books*), 482 *per* Lord Fraser of Tullybelton, 484 *per* Lord Keith of Kinkel, 489 *per* Lord Roskill. Lord Russell of Killowen agreed with the speeches of Lords Fraser and Roskill. Lord Brandon of Oakbrook dissented. See also *Schiffart und Kohlan GmbH* v. *Chelsea Maritime Ltd* [1982] Q.B. 481. However, a subsequent decision of the House of Lords in *Tate and Lyle Industries Ltd* v. *Greater London Council* [1983] 1 All E.R. 1159 adds some judicial confusion as to what was at issue in *Junior Books*. In his speech, Lord Templeman stated that "in the cited relevant cases from *Donoghue* v. *Stevenson* to *Junior Books Ltd* v. *Veitchi* the plaintiff suffered personal injury or damage to property." *Id.*, 1165. Lords Roskill and Keith of Kinkel, who had sat on the *Junior Books* case, agreed with Lord Templeman.

47. Note 22 *supra*, 495.

2. *The Judgments of the Court of Appeal in* San Sebastian

A threshold question in the *San Sebastian* case, which appears to have determined the shape of the argument and the structure of the judgments on the duty issue, was how to characterize the defendants' conduct. The approach taken by the plaintiffs was to isolate specific actions, roughly according to the chronology of events, and to allege that each act or omission raised a separate duty of care. It must have been considered necessary to frame the argument in this way so as to render the facts amenable to legal analysis according to the categorical approach to the recovery of pure economic loss which was discussed above. There were three distinct aspects to the argument. First, it was alleged that the defendants' negligent preparation of the Study was a negligent act and constituted a breach of a *Donoghue* duty of care. Second, it was claimed that the defendants were liable under *Hedley Byrne* principles for the negligent publication of the Study. In addition, it was sought to hold the Council liable under this head in respect of certain statements alleged to have been made to Mr Baker by Council officials in conversations subsequent to the publication of the Study. Third, the defendants were alleged to have breached a *Donoghue* duty of care when, after the defects of the Study became known to the defendants, they continued to adhere to the Study and failed to warn the plaintiffs that it might be abandoned in the future. For the most part, their Honours' treatment of the duty issue accorded with this scheme of characterization.

Two observations will be made at this point. First, the judgments contain much theoretical discussion of the claim based on the negligent preparation of the study. However the decision on this part of the case turned ultimately on the holding that mere negligent preparation without additional publication of the Study could not of itself attract civil liability. In other words, their Honours were of the view that the preparation-publication characterization reflected a false distinction. As a result, the case was viewed primarily as one of negligent words. Second, this concern over the preparation-publication distinction points up the problems often associated with attempting to categorize the conduct of public authorities in a way which conforms to the various tests of duty in cases involving pure economic loss. An alternative characterization of the case could be that what lay at the core of the plaintiffs' complaint was that the Council, with the advice and co-operation of the Authority, had made a negligent *decision* in adopting a plan which was infeasible of implementation. Only Hutley J.A. seemed prepared, at least to some extent, to consider the case on this alternative footing.[48]

48. *San Sebastian*, note 1 *supra*, 278.

The judgment of Glass J.A. contains a lengthy discussion of the principles to be applied in determining whether and to what extent a duty of care will arise in a given situation. Adopting the categorical approach to this issue, Glass J.A. was of the view that, on the present state of the authorities in Australia, the law in relation to duty must be subdivided into "three mutually exclusive areas"[49] defined with reference to the species of damage and the type of conduct. This tripartite formulation can be summarized as follows: where careless acts or statements cause physical loss, the question of duty is to be determined according to the *Donoghue* proximity principle; where careless acts cause pure economic loss, the restrictive test in the *Caltex* case will apply; and where negligent statements cause pure economic loss, the principles in *Hedley Byrne* and *Shaddock* will be applicable.

A necessary consequence of this analysis was the outright rejection by Glass J.A. of a number of authorities which fall outside this framework because they applied the Atkinian proximity rule in cases involving pure economic loss. The casualties included: *Ministry of Housing and Local Government* v. *Sharp*, *Hull* v. *Canterbury Municipal Council*, *G.J. Knight Holdings Pty Ltd* v. *Warringah Shire Council*, *Ross* v. *Caunters*, *Scott Group Ltd*, *J.E.B. Fasteners Ltd* and *Junior Books*.

The strange irony is that the judgment of Glass J.A., like many of these decisions, purported to apply the Wilberforce approach to the analysis of duty. It will be recalled that under this approach one asks first, whether the relationship between the parties satisfies the *Donoghue* proximity test so as to raise a *prima facie* duty of care, and second, whether there are any considerations of policy which ought to operate to negative or restrict the scope of this duty. The "special relationship" tests developed in *Hedley Byrne* and *Caltex* could be seen as examples of the second branch of the inquiry in operation.

However, in contrast to the global *prima facie* duty of care espoused by Lord Wilberforce, Glass J.A. postulated three *prima facie* duties of care which are then subject to displacement or alteration by supervening policy considerations. It is for this reason that it is respectfully submitted that Glass J.A. has misconceived the Wilberforce approach. His Honour cited Lord Wilberforce's dictum in support of his contention that "policy considerations have no role to play in determining whether the plaintiff and defendant are so placed in relation to each other that a *prima facie* duty of care is owed."[50] Yet policy considerations

49. *Id.*, 300.
50. *Ibid.*

clearly motivate the more restrictive principles in Glass J.A.'s second and third *prima facie* duties of care. Indeed, His Honour recognized this in an earlier part of his judgment, when he noted that:

> it was clearly a threshold policy decision that the duty of care to avoid infliction of economic loss simpliciter (whether by statement or action) should be more difficult to establish than a duty of care to avoid physical damage. The decision was the cautious outcome of an appreciation that economic harm by its nature has a capacity for widespread and ramifying dissemination through the community which greatly exceeds that of physical damage. It was because of this that the courts had refused to recognize a duty of care respecting economic loss before 1964.[51]

His Honour correctly pointed out that, at the second stage of Lord Wilberforce's inquiry, a *prima facie* duty of care may be negatived or qualified "because some social interest transcending the circumstances of the litigants so requires".[52] As examples of cases where policy considerations have operated to oust a duty of care, Glass J.A. cited, *inter alia*, the case of *Rondel* v. *Worsley*,[53] which affirmed the notion of barrister's immunity from suit, and the *Anns* case itself, where the need to insulate the exercise of discretionary statutory powers from civil liability in certain circumstances was recognized. Surely the spectre of indeterminate liability for pure economic loss will in many circumstances constitute a "social interest transcending the circumstances of the litigants". This is the stuff of which policy considerations are made. However, Glass J.A.'s interpretation of Lord Wilberforce's dictum effectively precludes consideration of such issues at the second stage or, for that matter, at either stage of the inquiry.

The judgment of Glass J.A. is a courageous attempt to rationalize the Australian law in relation to the recovery of damages in negligence. However it does not follow Lord Wilberforce's approach in all respects and must be seen as diverging from the post-*Anns* trend of English and New Zealand decisions in this area of the law. Glass J.A.'s tripartite framework for the analysis of duty emphasizes the need to establish a coherent set of principles which will promote certainty and uniformity in the law. While these goals are laudable in themselves, the effect of this approach is that the policy considerations surrounding the problem of pure economic loss are subsumed in these principles and thus defined off the agenda of

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51. *Id.*, 297.
52. *Id.*, 301.
53. [1969] A.C. 191 (H.L.).

inquiry. Moreover, the requirement that the facts of a case fit within one of these seemingly watertight compartments may unduly hamper the ability of the law to deal justly and effectively with novel situations, especially those in which the damage or the conduct is not easily characterized. In this respect, Glass J.A.'s approach lacks the inherent dynamism of Lord Wilberforce's flexible model.

His Honour then proceeded to apply the 'three duties' formulation to the various claims advanced by the plaintiffs. On this approach, since the negligent preparation of the study was an act allegedly causing pure economic loss, the duty issue fell to be determined under the principles enunciated in *Caltex*. In that case, Gibbs J. stated that:

> there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act.[54]

Mason J. formulated the duty of care as follows:

> A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct.[55]

In this judgment, Glass J.A. culled the following proposition from the judgments in the *Caltex* case:

> A defendant will incur a duty to take care that his actions do not cause financial loss to the plaintiff when he has knowledge or means of knowledge that the plaintiff as an individual person and not as an undifferentiated member of a class will probably suffer financial loss as a consequence of his careless conduct.[56]

It is important to contrast the phrase "undifferentiated member of a class" with the phrase "a member of an unascertained class" chosen by Gibbs J. and with the phrase "a general class of persons" employed by Mason J. The latter two expressions are open to the interpretation that a duty in this context could extend to a specific and limited class of individuals of which the defendant had actual or constructive knowledge.[57] Thus, if there had been twenty users of the pipeline in *Caltex*, presumably all of them would have been owed a duty of care by the defendants. However, under Glass J.A.'s interpretation of the *Caltex* test, a

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54. *Caltex*, note 22 *supra*, 555.
55. *Id.*, 593.
56. *San Sebastian*, note 1 *supra*, 297.
57. P.F. Cane, "Recovery in the High Court of Purely Economic Loss Caused by Negligent Acts" (1977) 13 *UWALR* 243, 248-252.

duty of care would arise only in favour of a plaintiff who was himself a "differentiated" member within a specific and limited class.

The significance of this narrow formulation became apparent when it was applied by Glass J.A. to the facts before him. His second and more compelling reason for denying the existence of a duty of care in respect of the preparation of the study was that no loss could be contemplated until the study had actually been published.[58] However, his first reason was that:

> the defendants when preparing the study had no knowledge of the plaintiffs as specific individuals. Any knowledge of them which they possessed was as undifferentiated members of the class of developers.[59]

It is at least arguable that the class of local developers, of which the plaintiffs were members, was a specific and limited class which would or ought to have been within the contemplation of the defendants when they were preparing the study. Indeed, it was accepted by all sides that the study envisaged a major role for private investment in the future development of Woolloomooloo. However, Glass J.A. would require that the defendants have specific knowledge of the individual plaintiffs, rather than constructive knowledge of the plaintiffs as members of a limited class, before a duty of care would be held to exist in these circumstances. This test seems more restrictive than the *Caltex* test itself. It also exposes the problems inherent in the *Caltex* formulation, under which a defendant might have actual or constructive knowledge of individual members of a limited class of potential plaintiffs and still be exposed to burdensome liability.[60] In accordance with his tripartite duty framework, Glass J.A. concluded his discussion of this aspect of the case by noting that, since no *Caltex prima facie* duty of care had arisen, it was unnecessary to consider whether a duty was excluded "by reason of the considerations of statutory discretion adverted to in *Anns*".[61]

His Honour then considered the claim based on the negligent publication of the study. After surveying the law of negligent misstatement, he concluded that:

> a *Hedley Byrne* special relationship may exceptionally be established where the information and advice is volunteered without enquiry and where the plaintiff, personally unidentified, is a member of an identifiable class.[62]

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58. *San Sebastian*, note 1 *supra*, 302.
59. *Ibid.*
60. Cane, note 57 *supra*, 249.
61. *San Sebastian*, note 1 *supra*, 302.
62. *Id.*, 305.

He was of the view that the circumstances of this case gave rise to such a special relationship. The plaintiffs were members of an identifiable class of developers to which the exhibition of the Study had been directed, and it would be reasonable for the plaintiffs to rely on any information or advice contained in the Study for the purposes of a particular type of transaction, that is, investment in the Woolloomooloo area.[63] Glass J.A. also noted that, since the High Court decision in *Shaddock*, the susceptibility of public authorities to *Hedley Byrne* liability is no longer in doubt in Australia.

It had been argued that the defendants ought to be immune from liability for the publication of the study because the publication was a policy decision within the meaning of the *Anns* policy-operational continuum. In rejecting this contention, Glass J.A. stated:

> But in my opinion none of these factors make the council decision a discretionary or policy decision within the meaning of Lord Wilberforce's propositions. I understand his observations to be limited to those council actions which are not operational because they involve the exercise of a discretion reposed in it by statute. It is not contended that in publishing the study the council was exercising a discretion of that kind. Nor am I impressed by the argument that policy considerations of a broader kind should protect the council from liability.[64]

This seemingly narrow interpretation of the *Anns* decision can be contrasted with the approach of Hutley J.A. discussed below. The focus on the preparation and publication of the study has the effect of deflecting the inquiry from what, it is submitted, is the essential question in this case: whether and in what circumstances ought the development planning functions of public authorities be immune from civil liability. The question of whether the study contained an actionable misrepresentation will be considered separately below.

The other aspect of the plaintiffs' claim related to the Council's continued adherence to the study. The plaintiffs alleged that, once the Council had specific knowledge of the plaintiffs and of their interest in investing in Woolloomooloo, and after the Council became aware of the problems associated with the feasibility of the Study, there existed a relationship between the parties which was such as to require the Council to take care to avoid causing economic loss to the plaintiffs. The breach of the duty alleged was the failure to warn the plaintiffs of the almost certain

63. *Ibid.* It is interesting to note that Glass J.A. was following the test enunciated by Richmond P. in his dissenting judgment in *Scott Group Ltd* v. *MacFarlane*, note 23 *supra*.

64. *Id.*, 307.

abandonment of the study. In denying that these circumstances gave rise to a *Caltex* duty of care, Glass J.A. held that:

> [the defendant Council] did not at any stage in that period of two years have knowledge or means of knowledge that if it did not act carefully the plaintiff companies would probably suffer loss. No such knowledge was possessed by the council since there could be no loss unless the plan were abandoned, it was aware that it had the powers to keep the plan on foot and it was determined for policy reasons to exercise those powers.[65]

In addition to containing an element of circularity, this reasoning comes quite close to saying that the decision to adhere to the plan was a policy decision which ought not to attract civil liability. Indeed, Glass J.A. went on to state that a *Caltex prima facie* duty, even if it could arise in such circumstances, ought to be nullified by "policy considerations". He articulated two grounds upon which this conclusion was based.

First, he found that the continued adherence to the study was a discretionary act within the meaning of the tests formulated by Lord Wilberforce in the *Anns* case.[66] The statutory basis for the exercise of this discretion could be found in the City of Sydney Planning Scheme Ordinance proclaimed in July, 1971. It will be recalled that, under clause 32 (e) of that Ordinance, a local council was directed to consider, in connection with the granting of development approval, any detailed plan which had been adopted. Glass J.A. dealt with the problem that the Council had adhered to the plan with knowledge of its defects for some ten months before the proclamation of the ordinance, by making the somewhat tenuous point that, during this hiatus period, the Council was exercising "a discretion which the ordinance was on the point of investing in it".[67] It is unfortunate that His Honour had to adopt such reasoning in order to be consistent with his view of the meaning of 'policy decisions' expressed earlier in the context of the *Hedley Byrne* claim.

In any event, Glass J.A. was of the view that policy considerations of a "more general kind" should exclude a *Caltex prima facie* duty of care in these circumstances:

> In exercising the power either to adopt or to rescind a development plan the council owes no duty to developers owning or about to own land in the area and this, I consider, comes about because there is an overriding social interest that legislative acts of that kind should not be inhibited by an obligation to exercise care for the interests of those who may be adversely affected in a financial sense.[68]

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65. *Id.*, 312.
66. *Id.*, 313.
67. *Ibid.*
68. *Ibid.*

It is unclear whether this statement articulates a more general policy consideration within Lord Wilberforce's two-pronged analysis of duty in *Anns*, or whether it is merely another way of saying that the adoption of a development plan is a "policy decision", within Lord Wilberforce's continuum of statutory discretion, which ought to remain immune from civil liability. In any event, it is surely the most compelling reason for denying the existence of a duty of care in this case, regardless of whether the particular activity is characterized as "words", "acts" or "omissions". However, in view of His Honour's holdings on this and other aspects of the case, the above proposition cannot be regarded as an operative *ratio* of Glass J.A.'s judgment.

Mahoney J.A. adopted a more general approach to the duty issue. He canvassed the authorities in the area of recovery of pure economic loss and observed a divergence between the English cases of *Anns* and *Junior Books* and the Australian cases of *Caltex* and *Shaddock* on this issue.[69] However, he was not prepared merely to apply the *Caltex* test to the facts of this case.[70] Instead, His Honour proposed to treat the case as a general claim in negligence for recovery of economic loss. The bulk of his judgment is devoted to a discussion of the problems of constructing an appropriate duty of care in such cases.

One assumption upon which Mahoney J.A.'s analysis proceeded is that the process of defining such a duty of care:

> should be seen not as formulating the circumstances in which negligence should be the basis for recovery for interference with existing rights, but as one involving, in substance, the formulation of new rights.[71]

In His Honour's view, the reason for distinguishing between property and pecuniary damage is that, in the former, "the loss arises from an infringement of a recognized and pre-existing right", whereas in the latter case the loss "has no such basis".[72]

> In the conventional case of careless injury, the defendant's careless act affects the plaintiff's property. The owner of property has the right to have that property free of damage and to be able to derive profits from the use of it: the defendant has, in the Hohfeldian sense, the correlative obligation not to damage it or prevent its use. That obligation is qualified to the extent only that he is not liable for, e.g. a pure accident. Where a property right of such a nature, e.g. a right in rem, is infringed, it may readily be seen that the defendant should be liable and that, where liability lies in negligence, but where, by holding that there is no duty of care, the court

69. *Id*, 322-325.
70. *Id.*, 325.
71. *Ibid.*
72. *Id.*, 328.

> excludes such liability, the duty concept performs the function, or provides the occasion, merely of qualifying the generality of an existing right.[73]

However, he continued, the reason for allowing recovery for pure economic loss in negligence is that the defendant has not exercised reasonable care. As a result, "the focus has shifted from the protection of the right of the plaintiff to placing sanctions upon an (unacceptable) action of a defendant".[74]

Surely this is the focus of all negligence actions. It is unfortunate that Mahoney J.A. spoke in terms of the "infringement" and "protection" of "rights" in the context of a discussion of negligence law. Unlike, for example, the torts of trespass or conversion, the tort of negligence is not primarily a "rights based" theory of liability; it is rather a "conduct-based" theory which ascribes fault liability for certain conduct which causes legally recognized damage.[75] The "right" which the law of negligence accords to an aggrieved plaintiff is to receive compensation in the form of a monetary award for certain injuries suffered as a result of the defendant's failure to conduct its affairs in accordance with the prescribed standard of care. The courts have historically been more willing to compensate for damage to property and person than for purely financial loss. This is based not so much on the legal status of "property rights" as on both the initial preference of the law to compensate such harms and the recognition by the courts of the inherent capacity of economic loss to burden defendants with liability out of all proportion to fault.

In any event, Mahoney J.A. was clearly of the view that the *Donoghue* proximity test is inappropriate for cases involving pure economic loss. Two separate rationales were advanced in support of this view. First, the proximity test would "require the adoption of an attenuated and unsatisfactory view of the causal relationship between the carelessness and the loss".[76] His Honour continued:

> Where the loss is from injury to the property of the plaintiff or, as in the *Caltex* case, to that of a third party, the relationship between the carelessness and the loss is, in general, easily seen. But this is, in general, not so where pure economic loss is in question. The present proceeding illustrates the difficulties which arise in determining causal questions in such cases. I shall assume that the study was one of the things which led the plaintiffs to buy the land and do what they did. But, as the defendants correctly submitted, it was only one of a number of things which influenced the decision. But, although it was only one of a number of

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73. *Ibid.*
74. *Ibid.*
75. P.F. Cane, "Justice and Justifications for Tort Liability" (1982) 2 *Oxford J. Legal Stud.* 30, 31-33.
76. *San Sebastian*, note 1 *supra*, 334.

> matters, it was affected by lack of care, and the plaintiffs seek recovery from the whole of the loss resulting from their decision.[77]

In this passage, the duty issue appears to be mixed in with the notions of causation and remoteness. The implicit concern of Mahoney J.A. in this passage is the spectre of extensive liability for pure economic loss. The principal mechanisms by which negligence law addresses this problem are the concepts of duty and remoteness. The problem of causation will remain regardless of how wide or narrow the scope of eligible plaintiffs is drawn by use of the duty concept or of the extent to which damages are considered too remote. In this particular case, the plaintiffs would still have to prove that their reliance on the study was a substantial cause of their loss.[78]

Mahoney J.A.'s second objection was a more general one which strikes at the heart of the duty concept. In his view, the Atkinian formula possesses a fundamental weakness which transcends the distinction between physical, proprietary and pecuniary loss. He observed that:

> the proximity test, if applied according to its terms, is of little assistance in distinguishing between cases in which there should be a duty and those in which there should not. If there is to be a duty in every case where the possibility of injury can be foreseen "far fetched" exceptions excepted: cf the *Caltex* case, (at 573, 574), then there will be a duty in every relevant case: where injury in fact occurs, it is difficult to deny that, as a possibility, it could have been foreseen.[79]

He noted further that a perusal of the cases demonstrates that not every relationship of proximity will give rise to liability in negligence. Thus, the duty requirement "has become the means, or more accurately the occasion, for a value judgment as to the fact situations in which carelessly caused loss should, or should not, be recoverable."[80] A related shortcoming of the proximity rule in Mahoney J.A.'s view is that it focuses the inquiry on the interests of the plaintiff, to the virtual exclusion of those of the defendant.[81] He concluded that:

> I would, with respect, agree with Mason JA that the determination of whether and what pure economic loss should be recovered is best dealt with through the duty complex: see the *Caltex* case (at 592). But if this be so, then the existence of a duty should be determined by an overt examination of it according to principles which have regard, in terms, to the interests

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77. *Ibid.*
78. Note 39-41 *supra*, and accompanying text.
79. *San Sebastian*, note 1 *supra*, 327.
80. *Ibid.*
81. *Id.*, 336.

> of both plaintiff and defendant and to the social effects apt to follow from it.[82]

His Honour did not feel compelled to elaborate upon these principles because in his view the Study contained no actionable mis-statement.[83] He was also of the view that there was no duty of care owed by the defendants to the plaintiffs in all the circumstances surrounding the continued adherence to the study.[84]

Although the above formulation is somewhat analogous to the Wilberforce approach, Mahoney J.A. considered *Anns* in this context and stated:

> The proximity test has now been qualified, at least in England, but I do not think that the attachment of that qualification justifies the use of the proximity test as the test for the recovery of pure economic loss.[85]

His Honour's reticence to endorse Lord Wilberforce's two-step inquiry appeared to stem from his uncertainty as to the intended meaning of "any considerations" in the second branch of the test. He concluded that if the expression contemplates "a balancing of all relevant interests and considerations", then:

> this will mean, in substance, that the existence of a duty will be determined, not by the proximity test, but by such a weighing of interests. If this be so, it would, in my respectful view, be better to put aside the proximity test and concentrate overtly upon the weighing of interests which, I am inclined to think, has in fact been the process for determination of the matter.[86]

Mahoney J.A. clearly recognized the reality of judicial decision-making that, especially in cases involving pure economic loss, the notion of 'duty' is a convenient label for describing the process of analysis under which loss is allocated in accordance with the balancing of competing interests and objectives. This would also seem to be the purport of Lord Wilberforce's dictum. Mahoney J.A.'s emphasis on policy is to be contrasted with Glass J.A.'s emphasis on principle in dealing with pure economic loss.

Mahoney J.A. also considered the case on a separate "statutory powers" basis: that public authorities are liable for pure economic loss resulting from the exercise of statutory power. He considered this to be one view of the decision in the *Anns* case, although he was uncertain as to the basis upon which that decision rested:

> The House of Lords held that the loss could be recovered. But, with respect, their Lordships did not make clear why. Thus, the reasoning might

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82. *Ibid.*
83. *Id.*, 337-338.
84. *Id.*, 333-334.
85. *Id.*, 335.
86. *Ibid.*

> have been that all such economic loss, if the result of carelessness, could be recovered and the fact that its cause lay in a statute created no exception. Or the view may have been that, while all carelessly caused economic loss cannot be recovered, that caused by the exercise of a statutory power can.[87]

It is submitted that neither of these alternative characterizations represents what was held in the *Anns* case. The species of damage was not the primary focus of the *Anns* case. Lord Wilberforce was propounding a set of principles to be applied in determining whether the exercise of a statutory power will give rise to a common law duty of care. There is nothing in the judgment to suggest that, once the conduct is characterized as being outside the limits of a statutory discretion *bona fide* exercised, the liability of the public authority is to be determined by other than general negligence principles applicable to all defendants. In such a case, supervening policy considerations — such as those which surround the granting of recovery for pure economic loss — may still require the elimination or further limitation of the duty of care.

In any event, Lord Wilberforce was prepared to characterize the damage in that case as physical:

> To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.[88]

These damages could arguably be characterized as being in respect of economic loss. However, in view of Mahoney J.A.'s interpretation of *Anns*, two points should be borne in mind. First, Lord Wilberforce restricted the scope of recovery of such loss in this context to the costs of repairing the defective condition of the premises. Second, in so doing Lord Wilberforce acknowledged the assistance, *inter alia*, of the dissenting judgment of Laskin J. in *Rivtow Marine Ltd* v. *Washington Iron Works*,[89] a case involving private litigants. Thus, his treatment of the damage issue cannot be seen as having any unique application to public authorities.

In any event, Mahoney J.A. held that the defendants ought not to be liable in negligence for pure economic loss solely on the basis that they were exercising statutory power. His Honour did not give direct consideration to the question of where the defendants'

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87. *Id.*, 330.
88. Note 3 *supra*, 759.
89. [1973] 6 W.W.R. 692 (S.C.C).

actions in preparing and publishing the study should be placed along the policy-operational continuum contemplated in the *Anns* case. However, his reason for rejecting the separate "statutory powers" basis of the claim would appear to have been that the redevelopment study, having regard to its nature and purpose, was not the type of undertaking which should expose the defendants to potential civil liability. He emphasized that it was intended merely as a guideline for the giving of development consent, that it had no operative effect and was subject to variation at any time, and that its proposals were based on "value judgments as well as on quantifiable calculations".[90] On this branch of the case, His Honour concluded:

> In my opinion, if there is to be recovery of pure economic loss and if the fact that the power which was carelessly exercised derived from statute is a matter of significance, I do not think that, having regard to the power in question, the way in which it was exercised, and the significance of the carelessness in the exercise of it, I should come to the conclusion that the defendants owed to the plaintiffs a duty of care.[91]

In contrast to the judgments of Glass and Mahoney JJ.A., the judgment of Hutley J.A. focuses principally on one particular question raised by the case: whether the process of town planning ought to render the responsible authorities susceptible to potential civil liability. The difference in perspective is apparent even from the use of terminology: while the other two judgments generally refer to the "preparation" and "publication" of the "study", Hutley J.A. prefers to use terms such as "planning" and "adoption" of the Woolloomooloo Redevelopment "Plan".

After reciting the facts, Hutley J.A. commenced his analysis of the case by examining the nature and purpose of the Woolloomooloo plan. He was of the view that:

> The correct legal analysis of the status of the plan is, in my opinion, fundamental to the understanding of its operation and the way it is to be construed. It operates as part of the process of the control of the development of land by local government. The Plan was clearly not considered final by the State Planning Authority ... on its face, the plan was tentative or flexible in vital aspects.[92]

His Honour noted that the plan was initially devoid of any statutory force, and that its only official role was "that of a guide adopted by the Council as to how it would exercise its powers in granting approval to development in the Woolloomooloo

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90. *San Sebastian*, note 1 *supra*, 333.
91. *Ibid.*
92. *Id.*, 276-277.

area".[93] In holding that the defendants ought not to be liable for the mere preparation of the plan, Hutley J.A. concluded:

> The plan for Woolloomooloo was a social plan; it was a plan for changing the face of Woolloomooloo and involved complex evaluation of the public interest. The pursuit of the public interest involves the disregard or, perhaps, the crushing of other interests. In this situation it is, in my opinion, impossible to impose a duty of care to those who may be affected.[94]

Like the other judges, Hutley J.A. was prepared to decide the *Hedley Byrne* claim on the basis of whether the plan had conveyed actionable information or advice. However, His Honour articulated an alternative basis upon which the claim could be decided. He termed this the "*Anns* Qualification":

> There is an independent basis for rejecting the existence of any duty of care apart from contract in relation to planning. It is a recognition that there are types of decision, the making of which should not subject the decision makers to restraints for the benefit of individuals, as the planning, if translated into action, must harm individuals. Even if there are established standards for such planning, the question whether such plans are prepared according to such standards is a non-justiciable issue.
>
> The object of laying down plans is to achieve political goals and the courts, assuming there has been no departure from procedure so as to bring the doctrine of ultra vires into play, have no role in the field.[95]

In this passage, Hutley J.A. emphasized that the essence of the activity giving rise to the litigation was the *decision* to adopt a particular course of action embodied in a plan to guide future development in Woolloomooloo. Such a decision was to be located on the "policy" end of Lord Wilberforce's classificatory spectrum. He was mindful of the fact that, while Lord Wilberforce had been concerned with discretion in the exercise of statutory power, the plan in *San Sebastian* had not originally been adopted or utilized in pursuance of any particular statutory power. He addressed this problem in the following way:

> Though Lord Wilberforce spoke of statutory powers, the exception cannot, in my opinion, be confined to those directly granted by the statute itself. A statute may do little more than authorize the making of regulations, which, in turn, confer wide policy discretions on "X". If "X" promulgates a code of behaviour to give effect to policy, it would seem to me that the reason which justifies the distinction should apply to what "X" did in promulgating the code. It does not apply to any individual decision made by "X", each of which in such a case is an operational decision.[96]

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93. *Id.*, 278.
94. *Id.*, 279.
95. *Id.*, 286.
96. *Id.*, 287.

This approach is to be contrasted with that of Glass J.A., in which it was held that the "publication" of the study was an "operational" decision.

Hutley J.A. also dealt with the contention that the plan had been published with the specific intention of attracting private developers. He stated:

> There is, perhaps a difference between the formulation of rules for self guidance and their publication in circumstances under which it is known that people will act upon it. However, an unpublished policy decision is unthinkable in a democratic society outside the area of State security. In my opinion, the formulation and the publication are part of the one enterprise and should carry with them the same immunities.[97]

In this passage, Hutley J.A. appeared to reinforce his view that the impugned activity should be considered in total as a town planning venture which ought to remain immune from civil liability. The claim respecting the continued adherence to the plan was also rejected on this basis.[98] Although Hutley J.A. had relatively little to say on the "economic loss" aspect of the case, he apparently followed the categorical approach evidenced by the Australian decisions in *Caltex* and *Shaddock*.[99]

IV. INFERENTIAL STATEMENTS UNDER THE *HEDLEY BYRNE* TORT

A great deal of discussion in all three judgments was devoted to the question of whether, even assuming the existence of a *Hedley Byrne* duty of care, the study had imparted 'information or advice' which could form the basis of an action in tort. At issue was the extent to which inferences from statements were amenable to *Hedley Byrne* liability. In the *Shaddock* case, the plaintiff had requested information from the defendant local authority as to whether there were any road widening proposals which might affect a certain piece of land. The return of a certificate which was silent on the issue of road widening proposals was held by Gibbs C.J. to be "tantamount to giving information that there were no proposals"[100] and thus to constitute a statement for the purposes of the *Hedley Byrne* tort.

In the instant case, it will be recalled that the principal allegation of negligence related to the "transport/workforce

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97. *Id.*, 288.
98. *Id.*, 299.
99. *Id.*, 279-80.
100. Note 26 *supra*, 388-389. In the context of accountants' liability under *Hedley Byrne*, see *Sacca* v. *Adam* (1983) 33 S.A.S.R. 429, 437 *per* Zelling J.

deficiency". One of the study documents had contained the statement that "a workforce of 35,000 and a resident population of 9,000 to 10,000 is envisaged when the area is fully developed". It was accepted that a workforce of 70,000 could not be accommodated by the existing transportation system. The study had proposed certain density ratios for the redevelopment of the area. The plaintiff alleged that, if maximum development were allowed in accordance with these ratios, the workforce attracted to the area would necessarily exceed 70,000, thus rendering the study infeasible of implementation. In essence, the allegation under the *Hedley Byrne* claim was that the study had represented that the proposals were feasible of implementation including the capacity of the transportation system to accommodate the projected workforce implicit in the density ratios.

Glass J.A. was of the view that this characterization of the representation contained in the study depended more on the inferences, assumptions and expectations of the developers than on what the study actually said. It involved the making of an assumption that the study had implictly assured that maximum development in accordance with the proposals would be allowed.[101] Yet the study had indicated that the proposed maximum workforce was 35,000. Moreover, Glass J.A. was of the view that the plantiffs' extrapolation of the probable workforce yielded by the recommended density ratios was based on assumptions that would promote profit maximization for developers, whereas the question was "what development the Council in the exercise of its powers as a responsible authority would have allowed".[102] His Honour observed that the Council was alive to the need to restrict the amount of workforce attracted to the area and had the power to do so.[103] In the result, the inferences drawn by the plaintiffs were held to involve a degree of abstraction beyond the limited sphere of "inferential statements" recognized in the *Shaddock* case:

> I would take it to be fundamental that a defendant, being aware that the plaintiff intends to rely on the accuracy of information given, cannot assume responsibility for its accuracy, cannot know that he is being trusted to give accurate information and cannot let it be known that he is willing to exercise reasonable care that his information is accurate except with respect to information expressly imparted by him to the plaintiff. Conduct which is tantamount to the giving of express information, *Shaddock* (at

101. *San Sebastian*, note 1 *supra*, 308.
102. *Id.*, 310.
103. *Ibid.*

> 715), will suffice but movement beyond that point will not, I believe, satisfy the requirements of principle.[104]

The claim in relation to the conversations between Mr Baker and a Council officer and an alderman was rejected by Glass J.A. on the same basis.[105]

Mahoney J.A. was also of the view that, given the current state of the authorities, the representation which the study was alleged to have made could not be considered an actionable statement. However, in the following passage, he appeared to suggest that similar circumstances in the future could give rise to liability:

> It may, for purposes of the argument, be accepted, as the argument suggested, that the defendants would hardly put forward the study unless they believed a development carried out in accordance with it would accord with town planning principles and produce an acceptable result. It may be that, the study having been published, warranties as to its feasibility might, in some circumstances, be implied and imposed. But that, as I have said, is not within the cases relied on.[106]

Hutley J.A. agreed that *Shaddock* represented "the outer limit of inference" and added that he "would be most reluctant to extend it".[107] In keeping with his overall approach to the case, Hutley J.A. emphasized that the plan "merely stated goals to which the then Council committed itself to strive",[108] and that no representation had been made as to its total feasibility. Like Glass J.A., Hutley J.A. referred to the fact that the Council had retained its power to control development by amending or withdrawing the plan altogether.[109]

> Indeed, the only thing which a man in Mr Baker's position is concerned with is whether there is the continuing will to use political power which is expedient for the realization of his objectives, and, as to that, he got correct advice and information. In my opinion, the attempt to extract from these documents a statement that the plan is feasible of implementation fails. The most which could be implied is a statement by the appellants that "we believe this is feasible now" but it is flexible and, therefore, may not be feasible without amendment.[110]

The holding of the Court of Appeal on this aspect of the case has ramifications both for local authorities which publish plans and other information about their activities and for the general law of negligent mis-statement. It would seem correct as a matter

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104. *Id.*, 309.
105. *Id.*, 311.
106. *Id.*, 338.
107. *Id.*, 281.
108. *Id.*, 282.
109. *Id.*, 285.
110. *Id.*, 285-286.

of principle that a defendant should be liable only for the accuracy of a statement which is made expressly or by direct implication from the circumstances of the case. However, the holding leaves open the theoretical possibility of more explicitly worded plans being subject to negligence liability in the future.

V. SUMMARY AND CONCLUSIONS

The holdings of the Court of Appeal in the *San Sebastian* case can be summarized as follows. Although for different reasons, all judges were in agreement that no duty of care was owed in respect of either the preparation of the study or the continued adherence to the study. Glass J.A. was prepared to hold, and Mahoney and Hutley JJ.A. were prepared to assume, that the publication of the study gave rise to a *Hedley Byrne* special relationship between the parties. The one holding which was common to all judgments was that the study had not contained a statement which could form the basis of liability under the *Hedley Byrne* doctrine. However, Hutley J.A. decided the case on the more general basis that the defendants' action was a "policy" decision within the meaning of the test formulated in the *Anns* case.

It is interesting to note the differing views expressed in *obiter* by Glass and Mahoney JJ.A. regarding the duty of care in cases involving pure economic loss. Although both judges rejected the use of the proximity rule *simpliciter* in such cases, the categorical approach adopted by Glass J.A. is to be contrasted with the more general "balancing" approach favoured by Mahoney J.A. The judgment of Glass J.A. on this point clearly signals a break between the Australian law and the law as it is developing in England and New Zealand. In addition, in view of Glass J.A.'s judgment, the validity of the New South Wales invalid planning approval cases of *Hull* and *G.J. Knight* must be placed in doubt.

It is also important to note that a majority of the court, Glass and Mahoney JJ.A., decided the *Hedley Byrne* claim on the narrow basis that the study did not contain an actionable misstatement. The implication that the publication of development plans may in certain circumstances attract *Hedley Byrne* liability should be a source of concern for local authorities.

By contrast, the decision of Hutley J.A. focused on the implications of holding public authorities liable in negligence for planning activities. It is submitted that Hutley J.A.'s interpretation and application of the *Anns* case is to be preferred. The threat of a civil damage suit by individuals adversely affected by a particular plan would have the potential to prejudice the

effective discharge of functions undertaken by the relevant authority in the public interest. In addition, the adoption of a development plan, which inevitably involves the making of value judgments and the weighing of competing policy objectives, should not normally be subjected to the scrutiny of a negligence action. One would be hard-pressed to find a clearer example of a "policy" decision, within Lord Wilberforce's classificatory continuum, for which public authorities ought to be immune from civil liability.

Currently on appeal to the High Court of Australia, the *San Sebastian* case raises important issues for modern negligence law. In the area of recovery of pure economic loss, it raises the question of extensive, if not indeterminate liability, and highlights the problems of attempting to classify the activities of public authorities for the purposes of legal analysis. In addition, it raises the general question of the appropriate scope of public authority liability in negligence. It is for these reasons that a decision of the High Court in this case is of potentially greater significance than the decisions in *Caltex* and *Shaddock*.