RECOVERY OF PURE ECONOMIC LOSS

IN THE MARITIME CONTEXT

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INTRODUCTION

Due principally to fears of "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (Ultramares Corporation -v- Touche (1931) 174 NE 441 per Cardozo J.), the common law set its face against permitting recovery of damages for negligently inflicted pure economic loss, that is, economic loss not consequential upon physical damage to person or property. It was said in 1983, that "fears aroused by the floodgates argument have been unfounded" (1) but, whether or not it be right to fear their coming, applicants for damages for pure economic loss have become far from scarce. The plethora of cases in recent years indicates that any aperture in the floodgates will quickly be filled by a struggling mass of claimants.

Of particular relevance to maritime law is the question of whether damages may be recovered for pure economic loss suffered as a result of damage done by a wrongdoer to the property of a third party. However, pure economic loss caused in other circumstances can have equal relevance in a maritime context. Negligent misrepresentations concerning creditworthiness or other matters are just as likely to occur in this context as in others. Similarly, the law as to manufacturers' liabilities will determine the responsibility in tort of shipbuilders and suppliers of equipment to ships. The recent cases concerning local councils may have relevance to the position of classification societies and other recent decisions have considered the

* (1) Junior Books Ltd -v- Veitchi 1983 1 AC 520 at 545 per Lord Roskill

position of a consignee of cargo who has no cause of action in contract against the shipowner.

2. THE TRADITIONAL RULES

Historically, the common law drew a line so as to permit the recovery of compensation for physical injury or damage to the plaintiff's person or property and economic loss consequent on such injury or damage, but to preclude recovery of economic loss not so consequential. Insofar as it was conditioned upon damage to property, the rule reflected the importance attached by nineteenth century society to notions of property. It also provided a reasonably distinct, although in many respects arbitrary, line demarcating the area of permitted recovery. In the field of interference with contractual rights, the principles were stated as follows:-

> At common law, there is no doubt about the position. In case of wrong done to a chattel, the common law does not recognise a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. Such a person cannot claim for injury done to his contractual right...It is for this reason also, that charterers under a charter not amounting to a demise, do not and cannot sue in the Admiralty Court, a wrongdoer who has sunk by collision their chartered ship" (Elliott Steam Tug -v- The Shipping Controller 1922 1 KB 127 at 139 per Scrutton L.J.)

Thus, a time charterer has no right of recovery from the wrongdoer (Chargeurs Reunis -v- English & American Shipping

Co. 1921 9 LI LR 464; The World Harmony 1967 P. 341) The time charterer has a contractual right to use the subject vessel, but has no rights of ownership nor, because it is not the employer of the master and crew, does it have possession of the vessel.

The first authoritative exposition of the principle seems to have been in Cattle -v- Stockton Waterworks Co. (1875) LR 10 QB 453 where the plaintiff's contract to build a tunnel on the land of another was made less profitable as a result of flooding of the land caused by the negligence of the defendant. The principle was confirmed by the House of Lords in Simpson -v- Thomson (1877) 3 App Cas 279 where it was held that an underwriter had no direct right of action against the wrongdoer for the underwriter's economic loss caused by the wrongdoer's negligence. Similarly, in Societe Anonyme -v- Bennetts 1911 1 KB 243, a tug owner was held to have no rights to recover his economic loss from a third party who negligently sank his tow. Other cases applied the same principle.

The principle of Cattle -v- Stockton Waterworks Co. was applied by the United States Supreme Court in Robins Dry Dock & Repair Co. -v- Flint (1927) 275 U.S. 303, in which a time charterer failed in his action against a dock owner for delay caused by negligent repairs to the time chartered vessel.

In other areas, liability for negligently inflicted economic loss was also denied.

For example, prior to the landmark decision of the House of Lords in Hedley Byrne & Co. Ltd -v- Heller & Partners (1964) AC 465, recovery was refused in relation to negligent, although honest, misrepresentations (Candler -v- Crane, Christmas & Co. 1951 2 KB 164).

Again, a consignee who had not acquired title to cargo at the time that it was negligently damaged by a shipowner was held to have no right of action in tort against the shipowner (Margarine Union -v- Cambay Prince Steamship 1969 1 QB 19 - "The Wear Breeze").

3. INROADS INTO THE COMMON LAW PRINCIPLES

(a) The Greystoke Castle

The decision of the House of Lords in Morrison Steamship Co. Ltd - v - Greystoke Castle (Cargo Owners) 1947 AC 265 has been open to misinterpretation. In that case, cargo owners became liable to the owners of the carrying ship for general average contribution following a collision with another vessel. That other vessel was partly to blame for the collision. The cargo owners were held to be entitled to make a direct claim against the owners of the other vessel for recovery of a

portion of the general average contribution. Superficially, the result of this case may be taken as indicating that recovery was permitted of pure economic loss suffered by the cargo owners (whose cargo was not damaged) in flagrant disregard of the Cattle -v- Stockton Waterworks principle. A closer analysis of the speeches however indicates otherwise.

The decision turned on the existence of what was found to be a common or joint adventure between the ship and cargo owners. The cargo owners' obligation was said to be a "direct obligation to share the expenses incurred by reason of the common danger and acts done to meet it" (at 281, 294, 312). In light of these reasons the decision is best understood as one in which the cargo owners incurred expenditure (the shipowner acting as their agent in this respect) for the purpose of averting harm threatened to their cargo. This was the manner in which the decision was interpreted by Widgery J. In Weller & Co. -v- Foot and Mouth Disease Research Institute 1966 1 QB 569.(2)

* 2. Compare Junior Books (ibid at 540). /7

It thus did not represent a wholesale departure from traditional principles, but nevertheless did extend them to embrace economic loss incurred to avert physical harm. That the law now permits recovery of such loss has subsequently been confirmed (see Junior Books -v- Veitchi 1983 AC 520 at 535 E and 544 E-G).

(b) Negligent misrepresentation and related cases

The next incursion was made by the House of Lords in Hedley Byrne (ibid). It was held in that case that a duty of care arose where a party seeking information from a party possessed of a special skill trusted him to exercise due care and that party knew, or ought to have known, that reliance was being placed on his skill and judgment. Where such a duty existed, "pure" economic loss was held to be recoverable. The principle has subsequently been confirmed and refined (Mutual Life & Citizens Assurance Co. Limited -v- Evatt (1968) 122 CLR 556; 1971 AC 793; L. Shaddock & Associates Pty. Limited -v- Evatt (1968) (1980-1) 150 CLR 225).

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Apart from its great importance in the field of negligent misrepresentations, the decision has a wider significance in making it plain that negligently inflicted economic loss unrelated to actual or threatened harm to person or property is not absolutely barred from recovery. One breach in the principle having been made, it has proved difficult to deny others.

Central to the decision in the Hedley Byrne was the fact that the plaintiffs had suffered loss by reason of their reliance upon the defendant. The decision was however sought to be taken one step further in Ministry of Housing -v- Sharp (1970) 2 Q.B. 223 in which the plaintiff suffered loss as a result of not his, but someone else's, reliance upon the defendant - a holder of a charge over land lost his interest when purchasers relied upon a certificate negligently issued by the Ministry stating that the land was clear of charges. Whether the decision would be followed in an ultimate appelate court is open to doubt - it was criticised, as being inconsistent with higher authority, in Minister for Environmental Planning -v- San Sebastian (1983) 2 NSW LR 268 at 29. Nevertheless, it was followed by Megarry J. in Ross -v- Caunters 1980 1 Ch 297 in which solicitors were held liable to a disappointed beneficiary for failing to advise their client that his will should not be witnessed by the spouse of the beneficiary.

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A similar result was reached in Watts -v- Public Trustee for Western Australia 1980 WAR 97*2A (compare Seale -v- Perry 1982 VR 193). The fate of this extension to Hedley Byrne must await decisions of higher courts.

(c) Manufacturers' Liability

Another encroachment upon traditional principles was effected by the decision of the House of Lords in Junior Books -v- Veitchi (ibid). In that case, a sub-contractor was held to have owed a duty of care to a factory owner in relation to the laying of a floor. It was not alleged that the floor had given rise to, or was likely to give rise to, any danger of injury to people or property in the factory. The factory owners' loss was the economic loss of repairing the floor. In the principal majority speech, Lord Roskill rejected the distinction between physical and economic or financial loss as "artificial" (at 545) and decided that because "the requisite degree of proximity" existed, recovery should be allowed. The relationship between the parties was described as "as close as it could be short of actual privity of contract", with importance being attached to the fact that the factory owner relied upon the skill and experience of the sub contractor (at 546). "Some degree of reliance" it was said, "was always,

*2A See also the judgment of McHugh J.A. in Hawkins -v- Clayton, N.S.W. Court of Appeal, 2/5/86, unrep.

at least in most cases, involved in the concept of proximity" (at 546) which was the control mechanism adopted to prevent unrestricted recovery of pure economic loss.

Junior Books was distinguished by the English Court of Appeal in Muirhead -v- Industrial Tank Specialties Limited 1985 3 WLR 993 where a wholesale fish merchant lost his stock of lobsters when the electric motors used to operate pumps, which oxygenated the plaintiff's tank, failed. The motors were manufactured by the relevant defendant, but were not acquired directly by the plaintiff from it. The relevant proximity referred to by Lord Roskill was said not to be present, an important factor being that the plaintiff had relied, not upon the relevant defendant, but upon his immediate supplier.

If taken at face value, Junior Books constitutes an important step in the development in the law in this area because it recognises the recoverability of damages for pure economic loss subject only to satisfaction of the touchstone of proximity. Although the majority expressly treated the case as one of pure economic loss, (at 532, 542), the facts revealed either a situation involving physical damage in the sense in which that expression had been used in previous authorities or at least

circumstances not far removed from it.

The case was not one in which faulty work threatened or caused harm to other property, but simply one in which faults were present in the work itself. One view which had been opened was that the "neighbour principle" enunciated in the seminal decision of Donoghue -v- Stevenson 1932 AC 562 applied in its terms to such a situation (for example Megaw L.J. in Batty -v- Metropolitan Property Realisations Limited 1978 QB 554 at 570 ; Lord Wilberforce in Anns -v- Merton London Borough Council 1978 AC 729 at 759). Furthermore, in the subsequent House of Lords decision in Tate & Lyle Industries Limited -v- Greater London Council 1982 AC 509, Junior Books was treated as being not a case of pure economic loss, but one of damage to property (at 531).

Even if this view be incorrect, the case might simply be regarded as dealing with a situation analogous to one where physical damage to property was suffered. The decision thus leaves considerable scope for argument as to its significance.

(d) Liability of regulatory authorities

Another related category of cases is that in which local authorities have been sought

to be held liable for defects in buildings erected with their approval. To some extent these actions have been successful (Dutton -v- Bognor Regis Urban District Council 1972 1 QB 373; Batty -v- Metropolitan Property Realisations Limited 1978 QB 554; Anns -v- Merton London Borough Council.1978 AC 728; compare Peabody -v- Sir Lindsay Parkinson & Co. Limited 1985 AC 210). However, they have involved difficult and often arbitrary determinations as to whether or not physical damage to property was involved.

In Sutherland Shire Council -v- Heyman (1985) 59 ALJR 564, Gibbs C.J. treated the case as one concerning physical damage because the hidden defect in the foundations caused cracking and distortion to the building after the plaintiffs became owners. He distinguished Junior Books where the floor was defective from the very time when the plaintiffs in that case acquired it. (at 573). Mason J. appears not to have sought to attach significance to the question of whether the damage was physical or economic, although he did see the loss as reflecting expenditure which averted personal injury to those who occupied the building (at 581).

The case was decided against the plaintiff upon the ground that there was an absence of reliance by the plaintiff upon

the careful exercise by the local council of its powers of supervision and inspection of the building work. At least so far as Deane J. was concerned, the element of reliance was crucial because its absence negated a finding of proximity between the parties. He treated the case as one of economic loss (at 597-8) and would have been prepared to permit recovery of such loss if the requisite proximity existed.

Another recent case in this line is Investors in Industry Limited -v- South Bedfordshire District Council 1986 2 WLR 927. The plaintiff's loss was acknowledged to be pure economic loss. The liability of the local council was rejected, not simply because of the characterisation of the loss in that way, but because it was considered to be neither reasonable nor just to impose upon the local authority a liability to indemnify the building owner against damage which resulted not from its reliance upon the local authority, but from its reliance upon its own architects, engineers and contractors.

These cases illustrate the constant pressure which is being placed upon the courts to expand the boundaries of recovery for negligently caused economic loss. The pressure however is not confined to actions to recover economic loss, it reflects a trend generally in the tort of negligence as is illustrated by the recent decisions in McLoughlin

-v- O'Brian 1983 1 AC 410 and Jaensch -v- Coffey (1984-5) 155 CLR 549, concerned with the duty of care in relation to nervous shock suffered by relatives of accident victims, and Hackshaw -v- Shaw (1984) 155 CLR 614 in relation to duties of care to trespassers.

(e) Economic Loss Consequential Upon Damage to the Property of a Third Party.

No less subject to pressure for change has been the principle in Cattle -v- Stockton Waterworks Co. (ibid) preventing the recovery of economic loss consequential upon damage to the property of a third party. In large measure, the English Courts have maintained the strictness of the principle. In Australia however a significant inroad was made in Caltex Oil (Aust) Pty Limited -v- The Dredge Willemstad (1976) 136 CLR 529. In that case a dredge negligently broke a submarine pipeline used to carry oil from a refinery to Caltex's terminal. The owners of the dredge were aware of the pipeline and knew, or should have known, of the purpose for which it was used. Clatex did not own, nor was it in possession of, the pipeline.

In that case, Mason J. said:

> "....economic damage is, no less than property damage, a very real detriment. Now that recovery of economic damage not consequential upon property damage is recognised in the case of negligent mis-statement, there is no sound reason for accepting the traditional rule that only financial loss which is consequential upon property damage can be recovered. The traditional rule is not only at odds with Hedley Byrne, it is based on an absolute distinction between property damage and economic damage which is diffficult to justify...." (at 591).

His Honour, recognising the force of Cardozo J's caution concerning liability in "an indeterminate amount....to an indeterminate class" sought to identify the principle upon which recovery should be conditioned. "It is preferable", he said, "that the delimitation of the duty of care in relation to economic damage through negligent conduct be expressed in terms which are related more closely to the principal factor inhibiting the acceptance of a more generalised duty of care in relation to economic loss, i.e., the apprehension of an indeterminate liability". This lead his Honour to state the principle as follows:

> "A defendant will then be liable for economic damage due to his negligent conduct where 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" (at 593).

Gibbs J. (as he then was) reached a very similar conclusion as to the relevant principle (at 555).

These tests were criticized by Lord Fraser in Junior

Books. He said that "whether the defenders' knowledge of the identity of the person likely to suffer from his negligence is relevant for the present purpose may with respect be doubted" (at 532-3). However, this, with respect, overlooks the expressed reason of Mason J. for adopting such a test, namely to condition liability in terms related to the principal factor inhibiting the acceptance of a more generalised duty of care, the apprehension of an indeterminate liability. Nevertheless, the tests are open to criticism in being arbitrary in their operation (see the criticisms in this respect by the Privy Council in Candlewood Navigation Corporation -v- Mitsui OSK Lines). Thus in The Mineral Transporter evidence had been directed at the hearing to the colours painted on the funnel of the innocent vessel (they being the time charterer's colours) and submissions put that an experienced master would have recognised those colours and concluded that Mitsui was the time charterer of the vessel.

It would be highly arbitrary to have a negligent vessel's liability solely dependant in this way upon accidental knowledge or means of knowledge of the name or identity of person associated by contract with the owners of the innocent vessel. It is submitted that the better view is that knowledge or means of knowledge (and the means

by which it is or may be acquired) is a factor relevant to but not conclusive as to liability.

Stephen J. in Caltex based his finding of liability upon the "degree of proximity between the tortious act and the injury" (at 575). The manner in which Stephen J. expressed this test to some extent reflects the suggested "directness" test of Edmund Davies L.J. in his dissenting judgment in Spartan Steel -v- Martin 1973 QB 27. His conclusion was that "an action lies in negligence for damages in respect of purely economic loss, provided that it was a reasonably foreseable and direct consequence of failure in a duty of care" (at 45, emphasis added). Stephen J's formulation also contains echoes of the "directness" test as to remoteness of damage rejected by the Privy Council in The Wagon Mound 1961 AC 388. As Mason J. pointed out in Caltex, there is little to recommend a return to such notions and the approach "is at odds with the philosophy which underlies The Wagon Mound and Hedley Byrne, namely, that liability for damage is ultimately to be resolved by reference to the existence of a duty of care and breach of that duty" (at 591).

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Jacobs J., in also permitting recovery, did so upon a basis more consonant with traditional principles. He held that Caltex could succeed because the act of the dredge had a "physical effect" on the property of Caltex in that its oil stored at the refinery was immobilized and alternative means of delivery to Caltex's terminal had to be found (at 604). This was described by the Privy Council in The Mineral Transporter as "the original test of physical propinquity" (at 769). It does appear however to involve some extension of the traditional rules, albeit small. In any event, the extension would not arouse the Cardozo fears of indeterminate liability, but would permit recovery in a case such as Caltex where the merits strongly favoured that result. It should be noted in passing that the extension, if accepted, would not, as the Privy Council pointed out, have assisted the time charterer in The Mineral Transporter.

The remaining member of the Court in Caltex, Murphy J. reached the unsurprising conclusion that, "there is no satisfactory general principle governing recovery of economic loss caused by negligence" (at 605). He did not attempt to formulate one.

The difficulty of formulating any satisfactory principle in this area, other than the strict, "no recovery" principle of Cattle -v- Stockton Waterworks, was illustrated by the dichotomy of views expressed by the United States Court of Appeals, Sixth Circuit in State of Louisiana -v- MV Testbank (1985) 752 F. 2d. 1201. That case concerned a collision between two vessels in the Mississippi River Gulf outlet causing a chemical spill and the subsequent closing of the outlet for over two weeks. It was thus one of the all too familiar "blocking" cases. By a narrow majority, it was concluded that Robins Dry Dock -v- Flint, referred to above, should be applied and recovery denied to various shipping interests, mariner and boat operators, seafood enterprises, tackle and bait sellers and fishermen who suffered no physical damage to their property but suffered commercial loss. The majority referred to the "wave upon wave of successive economic consequences and the managerial role plaintiff would have us assume" and said:

> "The vessel delayed in St. Louis may be unable to fulfill its obligation to haul from Memphis, to the injury of the shipper, to the injury of the buyers, to the injury of their customers. Plaintiffs concede, as do all who attack the requirement of physical damage, that a line would need to be drawn - somewhere on the other side, each plaintiff would say in turn, of its recovery" (at 1028).(3)

* 3. See also Hercules Carriers Inc. -v- State of Florida (1983) 720 F. 2d 1201 and compare Miller Industries -v- Caterpillar Tractor Co. (1984) 733 F. 2d 813.

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The principal minority opinion would have permitted recovery where requirements as to proximate cause for "sueability" and "particular" damage were satisfied. The latter requirement invokes a concept applicable to the law of nuisance, that is, that in respect of a public nuisance, a plaintiff must prove "particular" damage different in kind and degree from that suffered by the general public. It was said that:

> "In a maritime accident, a business suffers 'particular' damages to the extent that the accident prevents the business from engaging in primary maritime activities, such as fishing or use of the waterways, or supplying commodities or services vital to primary maritime activities, such as those of bait and tackle, drydock, mariner and seafood wholesalers and processors" (at 1049).

Apart from the uncertainty inherent in its application (for example, the minority would have allowed recovery by seafood wholesalers who provided services for the condemned area but not seafood restaurants because they were not providers of a "vital service" to the afflicted area), the suggested test insufficiently restricts the range of recovery and leaves open a spectre of extensive and indeterminate liability which is unlikely to be countenanced in Australia.

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In the Mineral Transporter, the Privy Council rejected the approach of the High Court in Caltex and confirmed that the rule in Cattle -v- Stockton Waterworks should be adhered to, it being said that it had the "merit of drawing a definite and readily ascertainable line" (at 769). Their Lordships did however somewhat diffuse the "brightness" of the line by saying:

> "Almost any rule will have some exceptions, and the decision in Caltex may perhaps be regarded as one of the 'exceptional cases' referred to by Gibbs J. in the passage already quoted from his judgment. The exceptional circumstances may be those referred to by Stephen J. already mentioned. Certainly the decision in Caltex does not appear to have been based upon a rejection of the general rule stated in Cattle's case" (at 769).

The decision of the Privy Council thus does little to clarify the principles to be applied in this area. Exceptions were contemplated, but not sought to be defined. The Privy Council's attitude to the correctness of the actual decision in Caltex was left unstated, although an inference of agreement with the result could be inferred from the passage last quoted above. However, the principle which the Privy Council would say should have led to that result was left in the realms of obscurity.

4. THE FLOODGATES ARGUMENT

Although its force has been acknowledged time and time again in decisions of high authority, the House of Lords in Junior Books somewhat surprisingly sought to denigrate the "floodgates" arguement, accepting a description of it as "specious" and "in terrorem or doctrinaire" (at 545-6). Lord Roskill said that the scope of the tort of negligence should be determined by principle rather than by policy and that he did not see any reason why a remedy should be denied simply because it would become available "to many rather than to few" (at 539). These comments aside, the cases exhibit a consistent fear of opening the floodgates. These range from Cattle -v- Stockton Waterworks Co. where Blackburn J. said that:

> "In the present case, the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish the authority for saying that, in such a case as that of Fletcher -v- Rylands, the defendant would be liable, to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage, made less wages than he would otherwise have done" (LR 10 QB 453 at 457).

to Weller and Co -v- Foot and Mouth Disease Research Institute (1966) 1 QB 577, where Widgery J. said that if the plaintiff's arguments were sound:

> "the defendant's liability is likely to extend far beyond the loss suffered by the auctioneers. In an agricultural community, the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from losing their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by their transport of animals are out of work; dairymen may go short of milk, and sellers of cattle feed suffer loss of business" (at 577).

Similarly, Stephen J. in Caltex in rejecting reasonable forseeability as a sufficient limitation on recovery, gave the following illustration as exemplifying the need for some more restrictive control mechanism:

> "...if by negligent navigation a bridge is destroyed, can it be the policy of the law that every member of the public, who is a regular user of the bridge and in consequence incurs increased transport costs because now obliged to travel by a more circuitous route, is to be entitled to recover resultant economic loss, a loss which will perhaps continue until, at some distant future date, the bridge is restored?" (at 574).

The blocking cases, of which the Testbank decision is an example, further illustrate the need for some restrictions, as does The Mineral Transporter where the possibility of claims by entities other than the time-charterer was envisaged if recovery by the time-charterer were allowed. The "not uncommon" case of a vessel subject to a chain of subcharters and sub-subcharters was referred to, as were claims by "any person with a contractual interest in any goods being carried in the damaged vessel, and by any passenger

in her, who suffers economic loss by reason of delays attributable to the collision" (59 AL JR 763 at 766). To these may be added many other examples of possible claimants who have made contractual arrangements with the ship, such as tug owners, stevedores, ship repairers, surveyors, and pilots amongst many others.(4)

5. THE RULE IN CATTLE -v- STOCKTON WATERWORKS RECONSIDERED

Whilst accepting the force of these consideration, it cannot be denied that the rule in Cattle -v- Stockton Waterworks is at times harsh and even, as Stephen J. in Caltex described it, "draconian" (at 568). The courts have, for good reason, on a number of occasions, of which the Caltex decision is the most notable, striven to formulate a principle which ameliorates the harshness of the traditional rule and at the same time marks a reasonably logical and certain boundary for the area of recovery. No formulation has at yet received universal, or even any generalised, acceptance.

It is, it is submitted, important that one does not aspire to too high a level of logic and certainty of application in formulating the test. After all, the Cattle -v- Stockton Waterworks principle has not set a particularly high standard in these respects.

So far as logic is concerned, the Cattle principle adopts as what must be considered an arbitrary benchmark, the relationship of the economic loss to physical injury,

*(4) These are referred to in "Economic Loss in the Maritime Context" by N.J.J. Gaskell: 1985 Lloyd's Maritime and Commercial Law Journal, page 81.

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or damage. As Stephen J. points out in Caltex the principle "operates to confer upon such physical injury, a special status unexplained either by logic or by common experience" (at 568).

Furthermore, the Cattle rule is by no means always free of difficulty in its application. For example, in the defective building cases referred to above, views differed on many occasions as to whether what was involved could properly be described as physical damage. Again, in the situation dealt with in the cargo claim cases which will be referred to later, because title to sue is said to be dependant upon ownership of the cargo at the time of its damage, difficult and, in one sense, pointless factual enquiries will arise as to the precise day during a voyage upon which cargo suffered damage and as to whether that occurred before or after a time (to be ascertained by another factual enquiry) at which property passed. (5)

Yet another example is provided by the recent decision of the United States Court of Appeals, Fifth Circuit, in Cargill Inc -v- Doxford and Sunderland Limited (1986) 782 F 2d 496 where a time charterer claimed damages from an allegedly negligent repairer of the subject vessel's engine. Robins was sought to be distinguished upon the basis that the time charterer suffered physical damage to its property because portion of its grain cargo rotted due to moisture which accumulated before

* (5) See Leigh and Sillivan Ltd -v- Aliakmon Ltd 1986 2 WLR 902 at 913B.

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discharge of the cargo and also portion was damaged by the discharge itself (which had become necessary as a result of the engine failure). The court concluded that such physical damage was not of a character which came within the Cattle and Robins rule because it was relevantly caused by delay.

6. THE SUGGESTED TEST

To attempt to identify a satisfactory principle to be applied, which satisfies the competing considerations involved and accords with underlying principles of the tort of negligence, it is instructive to return, as Deane J. has done in a number of recent cases in the High Court, to the statements of Lord Atkin in Donoghue -v- Stevenson, 1932 AC 562.

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called in question. This appears to me to be the doctrine of Heaven -v- Pender as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity..." (at 580-1, emphasis added)."

Lord Atkin went on to explain that proximity was not to be confined to "mere physical proximity" but was to be understood as extending "to such close and direct relations that the act complained directly affects a person, that the person alleged to be bound

to take care would know would be directly affected by his careless act" (at 581).

Deane J. has described the requirement of proximity in the following terms:

> "Reasonable forseeability of loss or injury to another is an indication and in the more settled areas of the law of negligence involving ordinary physical injury or damage caused by the direct impact of positive act, commonly an adequate indication that the requirement of proximity is satisfied. Lord Atkin's notions of reasonable forseeability and proximity were however distinct and the requirement of proximity remains as the touchstone and control of the categories of case in which the common law of negligence will admit the existence of a duty of care. Lord Atkin's 'proximity' or 'neighbourhood' requirement... was a substantive and independant one which was deliberately and expressly introduced to limit or control the bare test of reasonable forseeability.
>
> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the alleged negligent act or omission of the defendant and the loss or injuries sustained by the plaintiff. It involves the notion of nearness 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 over-riding relationship of employer and employee or of a professional man and his client and what may (loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection 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" (Sutherland Shire Council -v- Heyman (1985) 59 AL JR 564 at 594-1: see also Jaensch -v- Coffey (1984-5) 155 CLR 549 at 579-85; Hackshaw -v- Shaw (1984) 155 CLR 614 at 654; Stevens -v- Brodribb (1986) 63 ALR 513 at 537-8 /28 and see Hawkins -v- Clayton ibid per McHugh J.A.).

This approach accords with that taken by the House of Lords in Junior Books -v- Vietchi. That decision turned upon a finding of "the requisite degree of proximity" (at 546 per Lord Roskill) and that "the proximity between the parties is extremely close, falling only just short of a direct contractual relationship" (at 533 per Lord Fraser). It affords significance to the presence or absence or reliance, a matter central to the decisions in Hedley Byrne -v- Heller 1964 AC 465 and Sutherland Shire Council -v- Heyman (1985) 59 AL JR 564. Further, it accomodates the decision in Caltex where a close degree of proximity existed - the defendant knew of the existence of the pipelines and of their inherent nature as productive equipment and had the knowledge or means of knowledge that the pipelines extended to the plaintiff's refinery, "leading to the quite obvious inference that their use was to convey refined products from refinery to terminal" (at 576). The dredge was engaged in the vicinity of the pipelines in an organised dredging operation likely to take a considerable period of time and the damages claimed reflected the loss of use of the pipelines "representing not some loss of profit arising because collateral commercial arrangements were adversely affected but the quite direct consequence of the detriment suffered, namely the expense directly incurred in employing alternative modes of transport" (at 577).

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It should be noted that the requirement of proximity postulated above is not precisely that enunciated by Stephen J. in Caltex, although substantially the same factors adverted to by Stephen J. would have been relevant to the postulated requirement. Stephen J.'s requirement was directed to the relationship between the tortious act and the damage. Stated in this manner, the principle suffers from the defect, referred to above, of echoing outmoded principles concerned with remoteness of damage, rather than directing itself to the existence of a duty of care.

The postulated requirement of proximity allows a greater degree of flexibility than is permitted by the application of the test stated by Gibbs J. and Mason J., which it is is suggested, with respect, may lead to entirely arbitrary results. It permits a greater range of recovery than would be permitted by the principle adopted by Jacobs J. which involved little, if any, extension beyond the rule in Cattle -v- Stockton Waterworks.

None of the decisions of Deane J. referred to above were given in cases in which the rule in Cattle -v- Stockton Waterworks arose for specific consideration although Sutherland Shire Council -v- Heyman was (at least in the view of some of the members of the court, including Deane J.) a case concerned with the recovery of pure economic loss. However, Deane J. made it clear that he saw the requirement of proximity as a fundamental

one applicable throughout the tort of negligence, although he acknowledged that the degree to which it needed to be considered in particular cases varied depending upon whether the subject case fell within an established category.

It may be said that the postulated requirement is too generalised and provides little, if any, assistance in identifying the cases in which recovery should henceforth be allowed. However, it has the merit of recognising that there are cases outside the Cattle -v- Stockton Waterworks principle in which recovery should be allowed and provides a framework within which more detailed principles may be developed. After all, this is the manner in which the common law has traditionally developed - by a process of enunciation of broad principles facilitating the development of more detailed ones by way of analogy from one case to another. This can be seen, for example, in relation to the principles concerning breach of duty - the concept of negligence has been developed, and is still developing, by the process of analogy from one case to another. As Stephen J. said in Caltex in relation to his concept of "proximity":

> "As the body of precedent accumulates some general area of demarcation between what is and what is not a sufficient degree of proximity in any particular class of case of economic loss will no doubt emerge; but its emergence neither can be, nor should it be, other than

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> as a reflection of the piecemeal conclusions arrived at in precedent cases. The present case contained a number of salient features which will no doubt ultimately be recognised as characteristic of one particular class of case among the generality of cases involved in economic loss. This will be typical of the development of the common law in which, in the words of Barwick C.J. in M.L.C. Assurance Co. Limited -v- Evatt, the elements of the relationships out of which a duty of care is imposed by law 'will be elucidated in the course of time as particular facts are submitted for consideration in cases coming forward for decision'" (at 576).

This approach does involve the application of what Glass J.A. referred to as a "unifying principle" and does not lead to the consequence he foresaw if liability for economic loss were simply left to be determined by unstated considerations of policy, namely, "the production of a wilderness of single ad hoc decisions, each relationship in an infinitely variable series being judged individually for its suitability to be a matrix of duty without reference to any criterion except grounds of policy, the policy itself being wholly undetermined" (The Minister for Environmental Planning -v- San Sebastian 1983 2 NSWLR 268 at 301).

7. TORT CLAIMS BY CONSIGNEES OF GOODS

Having considered the nature ofthe general principle to be adopted, it is appropriate to examine now the way in which it may be applied to the class of case which was the subject of the recent decision of the House of Lords in Leigh and Sillivan Limited -v- Aliakmon Shipping Co Limited ("The Aliakmon") (1986) 2 WLR 902, namely the class of case concerned with

consignees who, being for one reason or another unable to sue in contract, claim in tort against the owner of the carrying vessel.

In Margarine Union -v- Cambay Prince Steamship Co Limited ("The Wear Breeze") 1969 1 QB 219 it was held, applying traditional principles, that in the absence of any right of property or possessory title to the goods, the consignees could not sue in tort. A contrary view was later taken in The Irene's Success 1982 QB 481 which received support from Sheen J. in The Nea Tyhi 1982 1 Lloyd's Rep. 601.

In The Aliakmon, the House of Lords approved The Wear Breeze and overruled The Irene's Success. In that case, the risk in relation to the carriage of a quantity of steel coils had passed to the plaintiff buyers at the time of shipment. Due to their inability to resell, they subsequently arranged with the sellers that, as agent for the sellers, they would present the bill of lading and obtain the coils from the vessel. The coils were damaged during the voyage due to bad stowage for which the ship owner was responsible. It was held that the consignees had no action in contract and that property in the coils had not passed. It was however contended for the consignees that there would be no opening of the floodgates if their claim were allowed, as any exception thereby established would be a small one indeed. To this, Lord Brandon, in the principal speech said:

> "I do not think that the law should allow special pleading in a particular case within the general rule to detract from its application. If such detraction were to be permitted in one particular case, it would lead to an attempt to have it permitted in a variety of other cases, and the result would be that the certainty, which the application of the general rule presently provides, would be seriously undermined. Yet certainty of the law is of the utmost importance, expecially, but by no means only, in commercial matters. I therefore think that the general rule, re-affirmed as it has been so recently by the Privy Council in The Mineral Transporter 1986 AC 1, ought to apply to a case like the present one, and that there is nothing in what Lord Wilberforce said in Anns' case 1978 AC 728 which would compel a different conclusion". (at 914-5).

This is, with respect, an unduly restrictive approach. Whilst the need for a reasonable degree of certainty cannot be denied, this approach accords certainty an emphasis which is unrealistic. The "physical damage" test itself, as has been sought to be demonstrated earlier, is far from being a paradigm of certainty. The common law has developed and grown to meet the needs of society by principles which are capable of being moulded to meet changing circumstances. To draw a line which is so rigid as to be incapable of exception or modification would be to stultify the law in this area and to ignore even the caveat of the Privy Council in The Mineral Transporter that "almost any rule will have some exceptions".

Application of the proximity test to the facts of The Aliakmon would suggest a contrary conclusion to that reached by the House of Lords. The description of the relationship between the parties in Junior Books is apt

also to describe the relationship in The Aliakmon - it was "as close as it could be short of actual privity of contract" (at 546). The identity of the buyers would no doubt have been well known to the defendant shipowner, as they would almost certainly have been named in the bill of lading issued by the shipowner as "consignee" or "notify party". The defendant would have appreciated that even if it did not become a party to a contract with the buyers at the time of the issue of the bill (as it would have if the sellers had acted as agent for the buyers in arranging carriage), it would be likely to do so before the vessel discharged- by reason of endorsement and delivery of the bill of lading to the buyers by the sellers. It would have appreciated that even if the property in the goods had not passed to the buyers at the time of shipment, the goods would have been the subject of an agreement for their sale to the buyers and the risk of damage was likely to be with the buyers, with property to pass to the buyers at least shortly thereafter. Furthermore, the nature of the economic loss to the buyers if the goods were damaged was likely, as it did, to mirror the quantum of the loss for which the shipowner could have been called to account by the sellers, namely the cost of repair or replacement of the goods.

The last mentioned factor is one upon which Robert Goff L.J. (nor Lord Goff) fastened in his judgment in the Court of Appeal in The Aliakmon. He was in favour of

allowing recovery under a principle which he described as the principle of"transferred loss" which he described in the following terms:

> "Where A owes a duty of care in tort, not to cause physical damage to B's property and commits a breach of that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B, but (as is reasonably foreseeable by A) such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled, subject to the terms of any contract restricting A's liability to B, to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him, C. To that proposition there must be exceptions. In particular, there must..be an exception in the case of contracts of insurance" (1985 QB 350 at 399).

A difficulty with this approach, as was pointed out in the House of Lords, is that it finds no support in the authorities and is in fact inconsistent with them. Furthermore, as a strict rule, it leaves insufficient flexibility and is a panacea only in a limited class of case. The nature of the damage for which the plaintiff is likely to seek to hold the wrongdoer liable is, it is submitted, better understood simply as one of the factors relevant to satisfaction to the proximity requirement.

One of the difficulties in extending the boundaries of the rules relating to economic loss which is highlighted by The Aliakmon and by Junior Books is the extent to which the wrongdoer is entitled to call in aid the terms of the contract between himself and a person other than the plaintiff. The majority in Junior Books did not

see this difficulty as one incapable of solution (although Lord Brandon, who dissented, saw it as confirming his view that no extension of the existing law should be made). Lord Fraser (with whom Lords Russell and Roskill agreed) pointed to the difficulty of ascertaining the standard by which the defectiveness of an article is to be judged. He accepted what Windeyer J. had said in Voli -v- Inglewood Shire Council (1963) 110 CLR 74, that if an architect undertakes:

> "to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter, negligently permitting a greater weight to be put upon it" (at 85).

Lord Fraser concluded that there was "no reason why the builder should not be free to make with the purchaser whatever contractual arrangements about the quality of the product the purchaser wishes. However jerry - built the product, the purchaser would not be entitled to damages from the builder if it came up to the contractual standard. I do not think a subsequent owner could be in any better position..." (at 533-4). Lord Roskill also tentatively suggested that the duty in tort to the plaintiff would be qualified by reference to the terms of the contract pursuant to which the defendant manufactured or supplied the relevant article. This approach was rejected by the House of Lords in The Aliakmon, one question in that case being whether if the shipowner owed a duty of care to the consignees that duty was to be qualified by reference to the terms of the contract

between the shipowner and the shipper, which incorporated the provisions of the Hague Rules. Lord Brandon, delivering the speech with which the other members of the House concurred, said that he was unable to understand how contractual limitations contained in a contract to which the plaintiff was not a party could by synthesised into a standard of care (at 915-6) and was unable to accept that there was any analogy with the disclaimer clause given effect to in Hedley Byrne -v- Heller, the clause being part of the direct communications between the plaintiff and the defendant in that case. Although the Hedley Byrne disclaimer was for that reason different, the decision did at least show that a duty of care which might otherwise arise, is capable of exclusion or limitation, by action of the negligent party. Goff L.J. in The Aliakmon (although for other reasons declining to find that a duty existed) was firm in his conclusion that any duty of care owed by the shipowner in that case would have to be qualified by any contractual limitations contained in or arising out of the contract with the shipper. He referred to the facts in Ross -v- Caunters (in which a disappointed beneficiary sued solicitors for negligently failing to advise their client that a spouse of a beneficiary should not witness the will) as demonstrating that it would be unjust to the defendant not to have his duty of care in tort controlled or limited by the nature of the responsibility he had assumed to the person with whom he had contracted. Goff L.J. gave a further example of a situation in which a testator asked

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a solicitor to prepare a will while they were on holiday together and the solicitor, "lacking his book of precedents" agreed to do so, as a matter of friendship, but without assuming any legal responsibility.

The difficulty which this question raises is not confined to this area of the law. It arises also in relation to bailments. If the owner of goods sues, as it is now acknowledged that he is entitled to do, a sub-bailee for negligently damaging the goods, is the sub-bailee entitled to rely in defence upon exclusion clauses contained in the contract between himself and the bailee under which he has taken possession? This question remains unresolved. Nevertheless, there seems no reason why in the field of recovery of damages for negligently inflicted economic loss this type of difficulty should be regarded as a bar to development of a wider principle permitting recovery or why the difficulty should not be resolved by limiting the duty to the plaintiff to mirror any limitations on the duty assumed by the defendant in favour of the owner of the property or other person with whom he contracted.

8. CONCLUSION

Reasonable foreseeability has long been regarded by the courts as an inadequate limitation on rights of recovery of negligently inflicted pure economic loss. This view has been based upon a fear of opening the 'floodgates' to a multitude of limitless claims.

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As a result, recovery was originally denied altogether. In some areas, most notably that of misrepresentation, principles have been developed which have led the courts to permit recovery because claims may be confined within defined boundaries. In others, such as interference with contractual rights in respect of damaged property, difficulty in formulating a satisfactory principle to permit limited recovery has led, at least in relation to the English Courts, to complete denial of recovery.

Recent judgments of Deane J. in the High Court have however pointed to a unifying principle of proximity which it has been submitted in this paper should be recognised as the touchstone for recovery. Application of the principle would allow a substantial number of just claims, which under traditional principles would be doomed to failure, to succeed. Furthermore, the principle is not only consistent with precedent, it satisfies the competing considerations of certainty and flexibility.

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