7. In Restraint of Tort

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One approach to the task implied by the daunting title of this seminar is to try to prophesy in which areas tort liability will contract or atrophy and in which areas it may develop substantially. Another strategy, and the one which commends itself to me, is to examine some of the analytical processes by which liability issues are now handled with a view to suggesting how they may be improved so that real concerns already imbedded in the law may be made manifest and outcomes may be made less anomalous than at present.

An attempt is also made to tease out some of these concerns although a full exposition of them must be left to another time.

1. Problems With the Position We Are Now In

The collapse twenty years ago of confidence in tort law had little to do with the state of formal doctrine. Rather it concerned the large gap between the apparent promise of tort law and its reality. The promise that a wide range of causes of action is available to all suitably aggrieved citizens was seen to be betrayed by the operation of non-legal barriers to claiming which prevented all but a very few claims by those technically entitled to sue. These claims were almost wholly confined to one tort—that of negligence—and to the two types of defendants who happened to be subject to compulsory insurance (employers and motorists). The presence of insurance behind virtually all defendants was seen as undermining the deterrence claims of the new economic theorists and the corrective justice claims of moral defenders of tort, while resolution of the suits of plaintiffs was often found to hinge in practice so much on the vagaries of evidence that they became a "forensic lottery".

These structural challenges to the respectability of tort still exist but excite less interest nowadays, no doubt partly due to the recessionary times which force expensive reform programmes of comprehensive compensation for, say, personal injuries a long way down the political agenda. It is on other features of tort law that the current wave of anxiety is focused, namely the reach of liability and the coherence liability rules specifically in the tort of negligence.

It may seem ironic that, having learnt how irrelevant tort law is to most people, lawyers have become even more troubled by its appearance of intellectual incoherence and anomaly. But even if tort law remains in practice erratic in outcome and the preserve only of the very rich or very poor plaintiff, it may still be important in its symbolic role as vindicating certain values for society. And in that role the success of tort law will still depend on its appearance of being fair, sensible and focused. In other words, even those of us who think that any 'compensation for disability' goal should be pursued by no-fault social security mechanisms and who do not see tort as having much more than an important symbolic role in society as the law's most patent experiment in 'applied morality', should share the current concern with the application and direction of some areas of tort doctrine. In particular, it is a useful corrective for those tempted by the idea of 'money for everyone, regardless of everything' to investigate the reasons why tort should refuse a remedy to a plaintiff who has been injured by the defendant.

(a) The working out of established doctrine

A minor thread of current concern with the condition of tort is an uneasiness about the working through of tortious principles (usually negligence) into areas which previously had not produced claims. It is one thing to claim that a manufacturer must take care not to have nails in its ginger beer but it may seem quite another to claim that those involved in making goods and buildings should involve themselves in expensive post-supply surveillance of their safety. Such claims are now being made and with some success but they are not the only examples of the pressures the negligence idea is putting on the perceived ambit of tort law. We are

1 I would like to thank Peter Cane, the participants in the SPTL seminar and members of the Sydney University Law Faculty for comments on the text of this paper.
2 Of which some, including the availability of legal aid, have now become even more of a problem.
6 e.g. Walian v. British Leyland, The Times, 13.7.78; Eckerley & Others v. Binney & Partners (the Abbeywood pumping station disaster), leave to appeal refusal of House of Lords 9.6.88, see Independent, 10.6.88.
now seeing whole new types of claim which were simply not considered by practitioners twenty or thirty years ago. For example, some victims of crime are now suing their assailants in tort. More unusually, a local education authority was recently sued in negligence by children who had been sexually assaulted by a headmaster in one of its schools; earlier this year newspapers reported that people who believed their health was damaged in childhood by passive smoking have begun to take legal advice about suing their parents; and just recently a man won legal aid to sue for ‘personal injury and loss’ a council he claims negligently failed to have him adopted when a child.

Violence and accidents within families and homes are noticeably now giving rise to tort claims. In recent years appellate courts have been faced with claims by, for example, a woman who alleged she had suffered mental illness as a result of childhood sexual abuse by her adoptive father and rape by her adoptive brother; and a claim by a person against her foster mother and local authority for alleged negligence in leaving her as a two-year-old (1966) near a source of scalding hot water while the mother fetched a towel.

Particularly noteworthy is the rise in the past twenty years in claims alleging negligent failure by one party to control another. Usually it is alleged that a third party should have been controlled: local authorities allegedly failing to control builders; occupiers failing to control hooligans and vandals; police failing to control criminals. But in one extraordinary case the plaintiff was the party who, it was alleged, ought to have been controlled. It must be quite a sight to the ordinary citizen to see a man securing a £45,000 out-of-court settlement from the Trafford Health Authority on the basis that one of the causes of his killing his mother was the Health Authority’s negligent discharge of him from hospital.

The incidence of extraordinary applications of the negligence principle seem to be increasing. They not only surprise some observers but they must bewilder those to whom the protection of tort law is refused, especially when the refusal is based on grounds which are patently unconvincing. The parent who comes across her child’s bloodied corpse just a little too late for the current rules on recovery for nervous shock to apply to her might wonder why the law rules her child’s blood too dry to found an action while allowing the matricide to sue.

The dilemma these cases throw up is that there is a lot of conduct in modern life which can be implicated in the occasioning of injury and much of this can plausibly be described as negligent. The penetration into non-traditional areas of claims for recovery in tort was an inevitable consequence of the formulation of negligence liability in terms of fairly general principle, at least so long as restraining principles were regarded as peripheral subsidiary considerations. The challenge this phenomenon clearly now presents is that we may not be willing to accept a tort system which seeks to provide compensation (and deterrence) in this vast array of situations. If not, we need to eschew that old confusing cliché that tort law is about compensation and loss—spreading, and to focus in a detailed way on those concerns which provide reasons for denying recovery to those who have admittedly been injured by the negligent conduct of the defendant. Only in that way will we be able to restrict the overall ambit of tort law to broadly familiar bounds without resort to artificial devices which appear so manifestly unjust to the non-lawyer.

The nature of the concern with these cases is in striking contrast to the nature of the dominant con-
corn of lawyers in the area of tort. On the one hand these unusual claims and the anomalies they may present can be seen as the worrying result of the development and application of broad principles of negligence—for example, liability for failure to control another party. Yet for lawyers the principal current concern with the condition of tort law, again centering on the law of negligence, relates to the retreat by appellate courts from broad principle to timid pragmatism. McGhee is overtaken by Wilsher, McLaughlin by Alcock, Hedley Byrne by Caparo, and most famously Anns by Murphy.\(^{(19)}\) Dealing with this complaint requires, however, the same agenda for future action as does the concern with the potentially vast new liabilities generated by broad principles: an explicit focus on those policy concerns which militate against the protection by tort of everyone who has been injured by the carelessness of the defendant.

(b) The retreat to incrementalism

The debate concerning the retreat to incrementalism has been focused on the duty of care in negligence. This is not the place to rehearse the origin of this retreat but it is fairly clear that it was motivated principally by concern that recovery in negligence for economic loss was threatening to get out of hand. In the decade since Junior Books\(^{(20)}\) appellate judges have succeeded in substantially tightening up liability in this area. Had this strategy been accompanied by careful and open explanation, no doubt much later criticism would have been avoided. But the intellectual tactics used were unconvincing. In attacking the earlier broad approach to the duty question as enunciated in Dorset Yacht\(^{(21)}\) and Anns,\(^{(22)}\) the House of Lords focused on the open-ended and vague terms in which it was couched. The complaint seemed to be that if the analysis of duty was generalised in this way into some sort of simple principle or ‘test’ it was doomed to generate far too much liability in the hands of lower courts who needed more restraining guidelines. Better to eschew this ‘modern’ approach and return to an incremental approach.

The first difficulty which emerged with the new incremental approach was that the terms in which it was itself originally couched proved to be virtually empty concepts which gave litigants and lower courts no better guidance than the rejected approach as to the direction, if any, in which the law could legitimately develop. Not surprisingly most lower courts began to ‘play safe’, refusing the economically damaged plaintiff’s claim for the protection of a tort obligation in novel circumstances but only being able to justify this result in obscure and virtually meaningless terms. It took most of the late 1980s and early 1990s before terms such as ‘special relationship’, ‘just and reasonable’, ‘voluntary assumption of responsibility’, ‘reasonable reliance’ and ‘proximity’ were finally revealed as little more than labels in which a court wrapped up the conclusion it had already reached on other (often unannounced) grounds.

Next, the House of Lords’ attempt\(^{(23)}\) to state in more detail analytical steps for the new incremental approach in a way which would prevent the generation of too much new liability by any single new case, revealed further problems. The lower court faced with a novel claim for the protection of a tort obligation was, in effect, told first to blinker its eyes so that it only considered the relevant ‘pocket’ of caselaw dealing with the relevant features of the case at hand. Sometimes this would be a pocket of liability, sometimes a pocket of no liability. Yet for this to produce stability and coherent outcomes two fairly obvious conditions must be satisfied. First, it must be clear what it is about the new case which characterises it and which indicates the relevant earlier caselaw ‘pocket’ within which it needs to be judged. But how are we to know this? Why is it that what is important about the facts of Smith v. Bush is the form of the defendant’s carelessness (negligent professional advice) so that it can be associated with earlier caselaw allowing a duty of care (Hedley Byrne)\(^{(24)}\) Why was not the relevant fact that the plaintiff suffered the economic loss through the acquisition of defective property so that the case would be placed in the D & F Estates/Murphy ‘pocket’ of caselaw with the result that a duty of care would be denied?\(^{(25)}\)


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The second and associated condition which needs to be satisfied if the incremental approach is to produce stability and coherence using a pocket of caselaw as its starting point is that the boundaries of existing pockets, must make sense. One reason why the current state of the law relating to economic loss is so unsatisfactory and unstable is that at present cases are not grouped into pockets in a way which makes sense. The pockets overlap. As we have just seen, a particular fact situation could plausibly fit into both of two pockets enunciated by the courts, even though one is associated with recognition of a duty of care and the other with its denial. To some extent this has been because, in defining pockets, courts have often been beguiled by the superficial similarity of facts rather than being concerned to focus on what, if any, policy concern cases had in common. Even if the approach of starting within a pocket of caselaw was otherwise workable, then, these boundaries would have to be rethought and yet this would require the very sort of broad consideration of principles from which the incrementalists are trying to distance the analysis.

In any case, the fundamental flaw in the 'prejudged pockets' approach which makes it unsatisfactory is that any case may have more than one factor which is juridically significant. The case may involve a local authority defendant, a problematic kind of loss, conduct consisting of an omission, an under-age plaintiff and so on. By focusing without explanation on only one of them—so that, for example, the case is designated at the outset as one 'about negligent misstatements'—courts de-emphasize and run the risk of ignoring other factors to which in other contexts they do give considerable attention. Analytical method needs to be richer than this. It needs to consider each factor in turn—some factors weighing in favour of liability, and some countervailing factors tilting the balance the other way. This needs to happen without any prejudging of what the eventual point of balance might be by the characterization of the case, at the outset, as belonging to a particular set of past cases. Of course, across many fact situations this balancing process will produce pockets of like outcomes— for example there would be a pocket of liability for much physical damage caused by the direct act of a negligent defendant and a pocket of no-liability for the negligent omission to rescue a stranger—so principles would emerge on which practitioners could often confidently advise clients. But hard cases will always arise which do not fit smoothly into settled areas of principle.

Indeed these are the ones most likely to be litigated. The flaw in the Caparo approach is that it suggests a court will be able to determine at the outset of its analysis in these hard cases which of the existing clusters of cases the hard case in hand is best associated with.

(c) What might be done

What any court needs to consider in the duty analysis are all the reasons for helping the plaintiff and all those against doing so: a difficult and complex balancing of the arguments 'for' and 'against'. On its face the Wilberforce test in Anns was simply one attempt to reflect this truism. There were, however, problems with that particular statement of the balancing process. For a start, the first limb skirts over the major problem for any general statement of a negligence principle, namely that there are large areas in which careless conduct causing injury to innocent parties is not actionable.26 Even if there is one strong general principle to be found at this stage—and I doubt it—its application across different types of plaintiff, of loss, of defendant and of form of casual connection27 is extremely variable and complex. Judicial manipulation of the 'foreseeability' concept did not convincingly provide an understanding of this complexity, while the 'proximity' notion scarcely hinted at it. As more unconventional, 'not obvious'28 plaintiffs bring their unusual claims to court the inadequate fleshing out of this first limb, of the 'why should the law help this plaintiff' arguments, begins to prove more problematic. This half of the equation needs attention and may prove just as useful in controlling the widening and dilution of tort principles as the more obvious role of arguments directly against liability in the case.

Here, in this paper, however, I want to concentrate on the latter arguments. It seems widely believed that under the modern Wilberforce test of duty of care insufficient weight was given to those concerns which militate against extending the protection of tort to the plaintiff and that now in order to restore coherent and symbolically convincing boundaries to tort the balance needs to be reset by a firmer emphasis on these countervailing factors. To do this courts should abandon the strategy of searching at the outset for the 'relevant' pocket of caselaw and replace it with one focused, inter alia, on these factors. Courts should identify reasons why negligently caused loss should not be compensated (the 'countervailing agenda'), identify in any particular case, which of those reasons apply and which do not, and decide,
on balance with the pro-liability argument(s), whether the weight of countervailing concerns should lead to a denial of liability.

Sometimes the plaintiff's claim might cause concern on a number of fronts, sometimes just one, sometimes it would be found to clear all the existing countervailing objections to the protection of tort. If the threshold search for a relevant pocket of caselaw was replaced by this analysis it would release lower courts from the problem of identifying with which earlier cases to associate the current complex case. As the court considered each in turn the earlier caselaw relevant to that particular objection to the recognition of the duty of care would be come relevant. Moreover the conservatism of the current House of Lords can be accommodated: the degree to which the court needs to be satisfied that the plaintiff's case did overcome these concerns might be set very high. Indeed, this approach might be a more successful vehicle for the conservatism of the House of Lords, because although it might involve more detailed analysis in some cases it would produce results which openly tailed with rational policy concerns and were therefore more convincing than the somewhat mysterious threshold selection of 'relevant caselaw' based on a received but not explained wisdom.

Clearly the first step on an approach which seeks to re-emphasize the law's countervailing concerns about the imposition of tort liability must be a stronger identification of what these factors are. Ironically, incrementalism has recently worked to hinder just such a development. One result has been that appellate courts have delivered some confusing and awkward dicta on what the concerns of tort law should be. Thus in the two very similar cases mentioned above (Smith v. Bush and D & F Estates) the House of Lords not only reached opposite results but called upon the concept of 'consumer protection' to support respectively the recognition of a duty of care and its denial. Another result is that courts have failed to draw out of earlier cases and develop a policy of not assisting with the protection of a tort obligation those plaintiffs who had an appropriate avenue of alternative protection (on which see below) has made tort law appear (apparently, at least) more protective of business interests than arguably it should be, especially given that the severe and increasing problem of access to justice faced by private plaintiffs has become more widely appreciated. A third inadequacy of the current incremental approach is that it has failed to provide a doctrinal basis for understanding cases such as Ross v. Counters where recovery was, until recently at least, widely agreed as justified but the facts of which fell into no recognised pocket of cases let alone one which sanctioned recovery for economic loss.

Finally the current incremental approach provides no satisfying answer to the question of the relationship of one cause of action to another. It is obvious that, once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular cause of action, incrementalism cannot provide the answer: it will not, for example, be able to rectify the ludicrous position the rules governing recovery for nervous shock have now reached (see below). But it also does not begin to answer the more common problems which arise where, for example, the behaviour of a particular defendant may support allegations of more than one tort. In such cases the claim of the plaintiff may call for the resolution of the question of how the torts interact—specifically the question of whether the fact that the defendant can claim a defence to one tort should influence that defendant's exposure to liability under the other. This problem, recently exposed in two cases before the Court of Appeal (see below), can only be satisfactorily resolved on the basis of broad principles, and, like the problem of the duty of care in negligence, what is needed here are not crude aphorisms: defamation trumps negligence; natural rights trump nuisance; negligent professional advice trumps acquisition of defective property. What is needed and what is still compatible with the general conservative approach preferred by the House of Lords is sharp identification of those underlying concerns/policies/principles on which the law's caution in recognising the plaintiff's cause of action under each tort is based. This could provide lower courts with substantive arguments (as well as conservative arguments if desired) for analyzing new cases and could provide disappointed plaintiffs with explanations for their fate which are more convincing than the simple assertion that it was not just and reasonable to help them.

2. Some Misconceived Countervailing Concerns

Most physical loss cases in the tort of negligence raise sufficiently few concerns that a duty of care is


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either ‘self-evident’ or militated against only by a couple of concerns. At its simplest such cases merely require a balance to be struck between the two countervailing freedoms, one person’s freedom of action and another’s freedom from injury, although this can involve profound questions about legitimate expectations and the trade-off between autonomy and prevention.\(^{33}\) Even so, in some cases special concern can arise with regard to issues as diverse as the impact of liability on industrial relations or on social benevolence.\(^{34}\)

The area in which replacement of ‘pockets’ with an emphasis on countervailing concerns against liability would have most impact is the field of economic loss.\(^{35}\) Although it was anxiety about such claims which produced the current retreat to incrementalism in general and tightening of economic loss recovery in particular there are three misunderstandings underlying that anxiety which will need to be resolved before a coherent agenda of countervailing factors can be defined for that and other areas of law.

Originally the problem with allowing liability for economic loss had been thought to be the unfairness on defendants of indeterminate liability the so-called ‘opening of the floodgates’ problem. So it seemed odd that the context in which the House of Lords’ hostility to recovery in tort for economic loss first arose was not those cases in which the ripple effect of negligent conduct raised the floodgates problem most acutely (for example, bad investment advice) but in the area of claims for economic loss where it was patently absent: claims by owners for the economic loss suffered in acquiring property of defective quality. Factors other than floodgates were clearly fuelling judicial disquiet. Three different concerns can be identified.

(a) Socio-economic impact of the common law; separation of powers

A system which allows law to be made or ‘developed’ by common law judges and by a supreme legislature has at its heart a dilemma which the separation of powers doctrine is inadequate to resolve. On the one hand, looking back in time it is those judgments which cut through the minutiae of legal precedents to draw from them and establish a bold new principle which are regarded as the finest pillars of the common law and which back its claim to be a vital and responsive source of law. Often such cases can be seen with hindsight to have produced, sometimes gradually (Donoghue v. Stevenson) sometimes rapidly (Hedley Byrne), a large rearrangement of socio-economic relationships. In confident times this is seen as an acceptable even desirable consequence of the flexibility and power of the common law. Donoghue v. Stevenson is a notable example from tort law,\(^ {36}\) but one of the best illustrations comes from contract: the paternalistic implication of warranties into commercial dealings in goods in the 19th century which, although having substantial impact on those sellers who had hitherto relied on the caveat emptor principle is now regarded as the ‘very heart’ of the modern law of sale.\(^ {37}\)

Periodically, however, it is to be expected that the judiciary will be daunted by the power at its disposal to disrupt expectations and generate powerful new economic forces.\(^ {38}\) Nor is it unexpected that even when there is a wave of restraint affecting a much broader field, it will be felt most strongly in the relatively unstructured field of tort law, especially negligence law. The most powerful catalyst of the recent swing back to fettering the discretion of judges to develop the law of tort was the controversial and almost immediately apparent impact on local government finances of the decision in Anns. Of course there is a real problem for the law when a deep pocket defendant (such as a local authority) is held jointly and severally liable with a class of defendants (for example builders) who often turn out to be judgment-proof. De facto a disproportionate burden of the liability will fall on the former, a particularly problematic result if it has public duties to perform. But it is not a convincing argument simply to deride

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\(^{32}\) See e.g., the comment of Lord Brandon in Mobil Oil Hong Kong Ltd. and Dow Chemical (Hong Kong) Ltd. v. Hong Kong United Dockyards Ltd., The 'Hua Lien' (1991) 1 Lloyds L.R. 309, 320 (P.C.).

\(^{33}\) For example, by staying awake and keeping a lookout a car passenger may have been able to help avoid the accident which injures her but respect for her autonomy is here held to outweigh the concern with deterrence so she is not held contributorily negligent. Contrast the question of what obligation if any a pregnant woman owes her unborn child, see Re S [1992] 3 W.L.R. 806, casenote at [1993] C.L.J. 21.

\(^{34}\) See respectively Morris v. Ford Motor Co. Ltd. [1973] Q.B. 702 and the rescue cases.

\(^{35}\) J. Stapleton, op. cit.

\(^{36}\) A decision praised by Mr Justice Evatt in a letter to Lord Atkin on the grounds that ‘the common law is again shown to be capable of striking through the forms of legal separateness to reality’: G. Lewis, Lord Atkin (London, Butterworths, 1983) 67.


\(^{38}\) There is, for example, recent evidence of a widespread judicial concern on this point in the US leading to a significant retraction of tort liability: J. Henderson and T. Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change (1990) 37 U.C.L.A. 479. Note also the dramatic shift in emphasis of Lord Bridge who as recently as 1982 had been opposed to an ‘unwarranted abdication of the courts function of developing and adapting principles of the common law to changing conditions’: McLoughlin v. O'Brien (1982) 2 All E.R. 298, 310.
Anns as the sort of 'judicial legislation' which offends the separation of powers doctrine, as this could be said of those other admired landmarks in the law which had comparable effects. There may be special problems with the Anns decision but the fact that it produced a significant socio-economic impact does not distinguish it from other settled cases.

Nor was it convincing to attack Anns on the basis that before that case Parliament had in some way attempted to 'cover the field' by enacting the Defective Premises Act 1972. Ironically the history of that piece of legislation shows rather that it was the culmination of Parliamentary frustration at the timidity of judges unwilling to extend the broad principle of Donoghue v. Stevenson to builder/vendors. If anything, that Act shows how important Parliament is as a corrective when the complex activities of the common law go badly wrong. If matters in the economic loss field continue to lunch along in the way they have done, perhaps the future will again see Parliament intervening to correct the anomalies the current blinkered incremental approach is producing.

But the concern with socio-economic impact and the separation of powers is not a specious one. Even if the role of tort law is principally a symbolic one, it must take care not to appear to usurp the regulatory role of Parliament across large fields—a criticism to which the considerably more activist US judiciary is exposed. Perhaps the non-lawyer is better at seeing the intuitive difference between a court declaring the design of a chimney or car negligent, and a court holding that giving its health risks the marketing of tobacco is negligent: the former holding has relatively isolated impact, the latter threatens to destroy an industry, put thousands out of work and have significant tax revenue implications. The implied 'separation of powers' argument in the rhetoric of judges recognises the fact that those adversely affected by the wide ranging redistributive effects of such cases may legitimately prefer to see these grave matters in the hands of elected representatives. The problem for the law is that so far no legitimate doctrinal technique has been found to distinguish claims by individuals injured by the negligent design or marketing of dangerous products according to the size of the market for the particular product.

There are techniques by which litigants and courts can mask the problem. Negligent design cases for example can be couched as failure to warn claims; but sometimes this is not feasible. Applying joint and several liability to deep pocketed authorities for their failure to control the conduct of third parties in a major area of their activity is one such case. Where the third party is often not good for judgment the impact on taxpayers is large, obvious and direct. But as New Zealand law shows, courts do still have a choice when faced with cases with large socio-economic implications, such as building inspection cases. Courts can choose to make a bold application of general principle to the relevant activity thereby indirectly applying pressure on Parliament to regulate the activity. The alternative is to make a reasoned case for exempting local authorities from liability for their carelessness. Underlying this choice is a tradeoff between different goals. The advantage of the New Zealand approach is that it ensures the individual plaintiff has someone worthwhile to sue. Its disadvantage, as in all cases of liability for the conduct of third parties, is that it deflects attention from the party directly responsible for the damage, and this undermines the deterrent and moral symbolism of liability (a point I will return to later). The strength of the approach of the current House of Lords is that it avoids this deflection of attention. Unhappily, however, it has also thrown up a protective wall around negligent subcontractors who are responsible for much of the creation of defective property and with respect to whom the imposition of liability would not create a disturbing socio-economic impact.

To sum up: in D & F Estates/Murphy the references to Parliament were ill-thought out. Except in rare cases (such as the Occupiers' Liability Act 1957) there is no evidence that Parliament has or wants impliedly to cover a field of civil obligation. Moreover, unless the common law is to become moribund, bold decisions which result in major rearrangement of socio-economic relationships are inevitable. Such rearrangements per se are not a reason for concern: cases such as Walton (the manufacturer's duty to recall certain dangerous products) and Smith v. Bush had substantial effects but are not regarded as results of improper 'judicial legislation'. That is not to say that we cannot extract from Murphy a sound countervailing factor to include on any agenda of concerns mitigating against tort liability.

40 Stapleton, op. cit., 268-9 (see also 278), See Law Commission Report No 40 (1970) para 73 and the speech of Mr Ivo Richard, Parl Debates, Vol. [1830] cols. 1821 (11.2.72), a relevant 'promotor' of the legislation for the purposes of Pepper (Inspector of Taxes) v. Hart [1993] 1 All E.R. 42 (H.L.). The Occupiers Liability Act 1957 was similarly a response by a legislature frustrated by the failure of judges to extend the simple Donoghue v. Stevenson principle to the occupiers' liability field. See also n. 111 below.
41 As has been the fate of the intra-uterine device industry and most of the asbestos industry.
but it has nothing to do with Parliament or large socio-economic impact *per se*. The concern is and should be defined more specifically, namely that the relevant liability had a particular socio-economic effect—a substantially damaging impact on local government finances—which attracted concern. In failing to separate out this specific concern, the House of Lords has confused the reasons for shielding local authorities from liability with the quite separate reasons for shielding private contractors.

(b) Insurance

Recently I have heard appellate judges informally describe the current incremental approach to tort claims as a reaction to the insurance background of such claims. One impression given is that in certain cases, denying a duty of care is justified because it will not leave future victims uncompensated because they have or could have insured the particular loss. But this argument is as flawed as the earlier reliance by some advocates of *expansion* of liability on the argument that future defendants will not be crippled by the relevant liability because they are or could be insured against that loss. If tort law is to retain an appearance of coherence as a private law mechanism for the vindication of an individual plaintiff’s rights against an individual defendant it must be that, as Justice Stephen of the Australian High Court implied, insurance may follow liability but liability need not follow insurance.42

Any intended moral or economic incentives of liability are already weakened where insurance exists but predating the existence of liability on the existence or availability of insurance cuts away any grounds for such incentives. The concept of negligence liability is postulated on the defendant's conduct being wrong, a ‘wrong’, and it is morally incoherent for such a judgement to hinge on the availability of first party insurance to his victim. Just as if liability is treated simply as a gateway to an insurance pool, it fails to provide a reason why anyone ever should lose a tort claim. If liability is denied because the plaintiff could get first party insurance it penalises the cautious and would severely limit the scope of tort recovery since such insurance is available against many forms of actionable loss. The liability of one particular individual to another must be based on reasons other than insurance.

The presence or absence of insurance certainly affects who sues and is sued, but it should not determine who is liable to whom, any more than the wealth or poverty of the parties does.43 It is certainly not a legitimate factor for inclusion in any agenda of countervailing concerns militating against tort liability.

(c) The ‘correct’ spheres of tort and contract: linear liability

Underlying the reining in of liability in negligence seems to be a concern that it had begun to encroach on the legitimate sphere of contract. Thus to grant protection to the plaintiff in *Junior Books* was seen as tantamount to providing it with a warranty of quality for which it had not paid the defendant.47 The most obvious objection to this is that the very nature of tort protection is that it is awarded even where the plaintiff had not paid the defendant for it. Mrs Donoghue was in effect given the protection of a warranty of safety without paying for it. Moreover, in the context of *Junior Books* to say that warranties of quality are the province of contract is mere assertion. A better reason for opposition to that decision needs to be found.

In fact there is, underlying the ‘warranty’ argument against *Junior Books*, a much stronger and far more general dichotomy, one which does not correspond with the line of privity but is often confused with it, and which provides a more convincing basis for criticism of that and other expansionary cases. This is the choice the law of obligations has when faced with a sequence of dealings or potential dealings. On the one hand, the law might prefer to simplify the


45 E.g. for example, house insurance was the motivation for the girl and wife’s claims in *n. 12*.

46 Contrast T. Weir describing s. 2 of the Defective Premises Act 1972 as a ‘striking and admirable instance of theuster of tort law where the plaintiff has adequate insurance cover over the risk in question’; *Casebook on Tort*, 6th ed. (London, Sweet & Maxwell, 1996) 66. The preferable interpretation is that while the D.P.A. creates a cause of action for owners of the defective premises, it excludes from such protection those owners who have been able to secure from an appropriate party alternative (warranty) protection in their bargain (and price). More generally: even if a plaintiff can get first-party insurance for the risk, the question is, should the plaintiff have to pay for such cover or should he/she be entitled in law to that protection. (The question is important because the wealth distribution consequences are quite different in the two cases.) If a plaintiff is held to be entitled to the protection in law and he can bargain with the obliged party he may freely choose to sell it (by accepting an exclusion clause in return for a monetary advantage). One piece of evidence that he did so freely would be that he had the back-up of freely available first party insurance for that type of risk, but here insurance is relevant only to the genuineness of the bargaining around the legal entitlement not to its initial allocation.

47 See discussion of the warranty point in Stapleton op. cit. (1991) 268 et seq.
relevant obligations of the parties by imposing them in a linear form. The first party would owe an obligation only to the party next in sequence and that party’s obligations in turn would only be owed to the next and so on. In other words, the eventual victim, the plaintiff, would be prevented from leapfrogging a party with whom it had had dealings or could have had dealings in order to sue a distant party. This form of liability is most well known in contract where it is secured by the doctrine of privity. However it is a major and widespread misconception to see this form of liability arrangement as synonymous with a contractual vision of law. It is a form of arrangement also available in tort law: a tort plaintiff may be refused a claim against a distant party even though the plaintiff does not have (nor reasonably could have had) a contract with another intermediate party so that any protection the plaintiff could fall back on when faced with this refusal is at most a tort obligation owed by, say, that intermediate party. Although not yet explicitly recognised in UK law, the ‘learned intermediary’ doctrine in the US is a good example of this. This doctrine states that so long as the drug manufacturer adequately warns the GP of the product’s risks, it has discharged its duty to warn and is not liable to a patient injured by the product, who is therefore forced to concentrate his claim, be it in tort or contract, against the GP. The deployment by tort law of this linear form of liability rests on the wholly tenable assumption that patients are far more likely to have been influenced by GP advice than by package inserts from manufacturers. In other product contexts where this assumption about the intermediary’s role fails, the law may then revert to the alternative strategy of imposing obligations on manufacturers to distant victims regardless of whether, for example, the manufacturer had adequately warned the intermediary.

Intermediary not a co-tortfeasor

The preferable basis of the criticism of *Junior Books*, then, is that sometimes a linear arrangement of liability may be justified and that, on the facts of that case, this was the situation there. Such a linear arrangement may be justified even where the intermediary is not negligent. In *Junior Books* the argument would be that given the circumstances it was not unfair to require the commercial plaintiff to seek protection from the party with which it had directly dealt, that is, the main contractor. Instead of relying on bald and unconvincing assertions that warranties of quality are the province of contract not tort, appellate court would be better advised to defend their criticism of *Junior Books* by explaining why, in certain circumstances, it is preferable to channel liability through the sequence of dealings of the parties than to allow the victim to leapfrog the party it had or could have dealt with and sue the negligent creator of the defective property directly. Care would have to be taken here. The ‘explanation’ cannot simply be the assertion that it is unfair for the defendant subcontractor to have to face obligations other than those owed to parties in privity with him, for this is the privity fallacy.

But reasons can be found here, just as they could in the learned intermediary context. The most convincing reason in the circumstances of *Junior Books* is that the plaintiff had had an appropriate opportunity to protect itself, either in its dealings with the main contractor or by dealing directly with the subcontractor. Instead, then, of deriving from the opposition to *Junior Books* a denial of all claims against the creator of defective acquired property with respect to its quality, the more convincing deduction is a countervailing factor to liability which refers to the adequacy of the appropriate alternative means of protection available to the plaintiff. Not all avenues of protection are ‘appropriate’ in this sense. First party insurance, for example, is not. In *Junior Books* the alternative means of protection of bargaining with the contractors were ‘appropriate’ because this (unlike insurance) would have been likely to generate adequate deterrence incentives on sub-contractors.

Distinct advantages would follow if appellate courts abandoned their reliance on assertions that certain types of obligation are the province of contract and determined whether a plaintiff should be granted the protection of a tort obligation from a distant defendant on the basis of whether the plaintiff had had an appropriate opportunity to protect itself in its dealings, or potential dealings, with another suitable party. First, some case law would be more

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48 For example, if for some reason local authorities were held not to owe pedestrians a duty of care with respect to the maintenance of roads, the injured pedestrian would have to look to the vehicle driver for protection.
49 A fact clearly related to the remarkable paucity of judgments relating to pharmaceuticals in the UK.
50 Stapleton, *Product Liability*, op. cit., 10.07 (11). The vendor’s immunity from suit, which is another example of a form of linear arrangement of obligations, rests on more controversial assumptions.
51 Which is antithetical to the existence of independent tort obligations, see Stapleton (1991), op. at 251-2.
52 Among other reasons for channelling obligations is easing proof problems of plaintiffs—the probable form of liability in the Consumer Protection Act 1987.
53 A later article will give a more detailed explanation of these deterrence-based ideas.
Intelligible: for example the decision in Smith v. Bush would be compatible with opposition to the decision in Junior Books. Secondly, there would be no risk of the reasoning collapsing into some version of the privy fallacy. Thirdly, adequacy of appropriate alternative means of protection is part of a much bigger picture. It is relevant in all situations not just in cases where there is a sequence of parties; and it is an important and effective constraint on the growth of tort law. In particular it would help us to find the demarcation line between plaintiffs to whom the law grants protection not bargained for, and plaintiffs to whom no such help is to be given. It is now appreciated that in many areas this line does not correspond with the no privy/privy line. Plaintiffs technically linked by privy with the defendant may still be given protection while plaintiffs who are strangers to the defendant may yet be refused tort protection. Privy is not the appropriate organising principle here.

Appropriate Alternative Means of Protection

Elsewhere I have noted that imbedded in past caselaw on economic loss there is a concern not to assist plaintiffs who had certain alternative means of protection and some recent dicta and caselaw have confirmed the importance of this particular hurdle in both tripartite and bilateral cases. Thus in the recent Canadian case of Norsk the powerful dissent of La Forest et al. used this argument to find against the plaintiff in a situation analogous to that of the Mineral Transporter case: the plaintiff, who relied on the integrity of the property of a party with whom it had a contractual relationship, suffered economic loss as the result of physical damage caused to that property by the negligence of the defendant. The plaintiff is regarded as having in its contractual relationship with the property owner, real (not just nominal) and adequate means of protecting itself from the relevant risk, while appropriately feeding back into a relevant chain of dealings adequate deterrence incentives. Its claim, if any, should therefore be against that party who in turn has a claim against the negligent injurer of the property.

Closers to home, the availability of certain alternative means of protection has been used in judicial reasoning across a wide range of issues. In recent personal injury cases involving the discretion under section 33 of the Limitation Act, for example, the Court of Appeal has held that a factor relevant to the exercise of that discretion is whether the plaintiff has an alternative means of protection in the form of a claim against his or her solicitor for negligence. In another important Court of Appeal case the alternative means of protection argument was used to support a decision that a local authority could not sue for libel in respect of its governing or administrative reputation when no actual financial loss was alleged. Similarly the argument is becoming more explicit in advice cases. For example the more powerful reason used to defeat the plaintiff's claim in tort in Gran Geltas was that the plaintiff's claim directly against the landlord was sufficient protection, and a duplicate claim in tort against the landlord's solicitor was not necessary. Similarly the reasonableness of reliance is now being seen to hinge, inter alia, on the advisee's ability to obtain independent advice. In James McNaughton (in the context of a friendly takeover) it was stressed that a relevant factor in denying an advisee-bidder a claim against the advisor (the auditor of the target company) was that the advisee should have sought independent advice, and it was noted that in business transactions conducted on arms length it would be difficult to rebut the view that advisees should take independent advice even where the advisor-defendant had dealt directly with them. Of course, in this light the recognition of a duty of care in Hedley Byrne itself is open to serious question (and rightly so) because the plaintiff in that case could either have obtained independent advice or paid for the...

56 See e.g. Wentworth v. Wiltshire County Council (1993) 2 All E.R. 256 (C.A.) and Wood v. The Law Society, The Times, 30.7.93 (Q.B.D.). Some of the reasoning in these cases, especially in the advice cases, is problematic because it does not address the issue of when the alternative means of protection may be 'inappropriate' because, for example, their use encourages wasteful duplication of effort and actual dilution of deterrence incentives. Nevertheless, there is clearly an important restraining principle to be developed here.
59 Gran Gelato Ltd. v. Richchiuff (Group) Ltd. [1992] 1 All E.R. 885 (Ch.). For criticisms of the other reasons (and outcome) see P. Cane, 'Negligent Solicitor Escapes Liability' (1992) 5 1 L.Q.R. 539; A. Totton, 'Enquiries before Contract—The Wrong Answer' (1992) Camb. J. 415. Also, what about the potential claim by the plaintiff against his or her own solicitors?
information, thus securing contractual protection. But it is a good explanation for Smith v. Bush and provides a clear justification for shifting the protection of tort towards private plaintiffs and away from commercial plaintiffs.

Multiple Causes

The more courts are willing to adopt a linear arrangement of obligations in tort—refusing to allow plaintiffs to leapfrog a party the plaintiff had or could have dealt with in order to sue a distant tortfeasor—the more manageable becomes the problem of multiple causation. In the modern world, as it has become more feasible to implicate the 'carelessness' of many parties in a deleterious outcome plaintiffs often appear to be in a position to choose randomly between defendants. Short of abandoning joint and several liability—itself an interesting option—the control of this problem and the associated de facto channelling of liability burdens to deep pocket defendants is best helped by the use of linear obligations to shield the more peripheral parties.

One objection to linear liability here is that it may force the plaintiff to sue a party other than the one whose careless conduct directly created the dangerous situation. In most cases it will force the plaintiff to rely on suing an intermediate party usually in contract, and to rely on a chain of litigation to ensure the loss is ultimately distributed to the correct parties. This may not only appear odd but unjust if the intermediate party is not good for judgment: and these are both factors against which the original reason for channelling must be weighed.

Where the intermediary is a co-tortfeasor

Ironically though, unless we are solely committed to making life easier for plaintiffs, the phenomenon of a party not being good for judgment can cut the other way and in favour of linear liability where the intermediate party is a co-tortfeasor. We have already seen in the context of the liability of local authorities for negligent inspection of buildings that the likelihood of the intermediary in such cases (a builder) not being good for judgment proved a positive reason for channelling liability and preventing the plaintiff leapfrogging the builder to sue the local authority (because otherwise a disproportionate amount of overall liability with respect to defective buildings would end up on the shoulders of local taxpayers rather than on careless builders).

But there are other fields in which reasons exist for preventing plaintiffs leapfrogging another party who is most directly responsible for their injury. Take, for example, the area of liability for the criminal acts of third parties. Violent criminals are very often not themselves good for judgment. Was it really such a self-evidently good idea to make the Home Office liable for the property damage caused by escaping Borstal boys? Why is it right that a football club should be held liable when hooligans break off concrete parts of the premises and hurl them at other entrants? Isn't it stretching the reach of a respectable tort law too much for a rape victim to be able to sue the local authority employer of her attacker? From the area of products liability; when and why should the law of tort require manufacturers to render their products resistant to criminal tampering; and should a lock or burglar alarm manufacturer be liable for personal injury damages when its defective product fails and someone is attacked by a burglar?

Given that the criminal is usually judgment proof, is it a sensible outcome for the full load of liability to end on the shoulders of a party whose negligence is really peripheral? Of course, if we believe tort is or should become a conduit for substantial compensation we might be tempted to say yes, because allowing plaintiffs to sue many different parties increases the chances of recovering from at least one. But if we believe this is not the case, and that the role of tort law is really a symbolic one of maintaining balance and justice then we might regard it as unfortunate that such defendants end up with all the liability burden and accompanying stigma. Moreover, already in the Criminal Injuries Compensation Scheme society seems to have acknowledged that such injuries are a group risk with group responsibility. In what the impetus for the expansion of tort law in the field of obligations to control third parties is generated by a hope that substantial numbers of plaintiffs will use tort as a gateway to compensation, it is a false basis for expansion. To the extent that tort is really about the symbolism of moral and deterrence values, we should be taking a much harder look at such cases.

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62 Although see cases noted earlier where the criminal is sued directly.
64 Cunningham v. Reading Football Club (Q.B.D.) Indepen-
such liability and deploying linear arrangements of obligations where possible without necessarily denying plaintiffs any claim at all. 66

3. Teasing out some countervailing concerns from existing caselaw

(a) Is the plaintiff using tort to circumvent an understanding of where the loss should fall?

There needs to be a more tightly developed tortious notion which denies protection to plaintiffs who are seeking to use tort to evade a prior understanding (to which the plaintiff was party) of how obligations are arranged. This is another and again a better reason on which to attack Junior Books67 than that given by judicial critics. It is also a further reason in support of the dissidents’ denial of a duty of care in Norsk where the plaintiff had chosen not to extract contractual protection with the property owner (the licence agreement explicitly provided the plaintiff could not claim damages from the latter in the event of closure of the bridge in an emergency68) and had presumably gained a financial advantage in doing so.

In bipartite situations where a defendant injured a plaintiff directly by positive conduct the issue is handled moderately well by a variable standard of care and very occasionally by the defence of volenti. But if we hope to restrain tort by an increased emphasis on linear liability (and we recognise that this does not necessarily mean that the protection to which plaintiffs will have to resort need be in contract) the position is more complex: the courts must be sensitive to arguments by distant tortfeasors that the understanding between the parties was that the plaintiff would seek protection/redress against another party (perhaps an intermediary) rather than directly against the distant party himself. In accepting this argument courts must feel confident that they know what it is that the plaintiff had accepted. In contract, express terms are a useful starting point for the same restraining pre-condition on protection. 69 But outside that, courts are not yet sufficiently scrupulous in policing this pre-condition to protection. In contract this does not matter so much given the need for plaintiffs positively to establish an implied term for protection—and the unduly restrictive attitude English courts take to terms implied by law. But in tort there is as yet insufficient development of the idea and its associated problems, for example of how a distant but known exclusion clause affects a plaintiff’s claim in tort.

(b) Dignity of the law

Another partly-submerged consideration relevant to the protection by the law of a plaintiff by, say, the recognition of a new duty of care is whether such a move would bring the law into disrepute or maintain it in that state. Defining this countervailing factor can be tricky. Even though it is well known for example that the occasions on which courts are moved to deploy the defences of volenti and especially illegality are best explained on this concern rather than other grounds,70 the formulation of a predictive test of these occasions has proved elusive. Even so the concern is a real one. It implicitly bolsters for example the protection from suit afforded to much police action.71 But it is a factor that can cut both ways. The pro-plaintiff decision in Baker v. Willoughby72 (where the plaintiff succeeded even though he could not establish the but-for connection between the defendant’s fault and the damage complained about) was clearly influenced by the embarrassment it would be to the law that the victim of one tort would have been better off than the victim of two torts.

The dignity of the law is a concern which deserves re-emphasis in the future not least because doctrinal developments have now produced areas of intolerable embarrassment with which incrementalism—in particular, incrementalism of the ‘pre-judged pockets’ form—is inadequate to deal. F. R. Glazebrook has already eloquently attacked the ‘affront to public decency’ represented by awards of damages for the

66 Compare caveat emptor and J. Gordley’s argument that it was used to protect innocent middle-parties in a chain of sales: Philosophical Origins of Modern Contract Doctrine (Oxford, Clarendon Press, 1991) 159.
67 See Stapleton (1991) op. cit. 287.
69 For if they are freely agreed to by the plaintiff, he or she is denied any claim for an inconsistent implied term: Johnstone v. Bloomsbury Health Authority [1991] 2 W.L.R. 1362 (here the term contended for was held to be not inconsistent with the express term). The problem also arises in chains of contracts, see e.g. P. Atiyah, op. cit., 148-9.
71 Hill v. Chief Constable of West Yorkshire [1988] 2 All E.R. 238 [H.L.]; Ancell v. McDermott N.I., 12.3.93 (C.A.); Osman’s case Independent, 8.10.92 (C.A.), although see Kirkham v. Anderton, Independent, 16.190 (C.A.) (damages against police with respect to a suicide would not afford the public conscience or shock the ordinary citizen so the defence of ex turpi causa failed), and the (surely borderline) case of Welsh v. Chief Constable of the Merseyside Police [1993] 1 All E.R. 692, concerning the Crown Prosecution Service.
upkeep of ‘unwanted’ children.75 But a class of claims which even more obviously offends this principle is that concerning nervous shock. It is no small irony that the area of nervous shock is both the best historical example of incremental development and yet also the area where the silliest rules now exist and where criticism is almost universal. Even Lord Oliver does not think the law here is ‘logically defensible’.76 A popular but obvious criticism of the relational, spatial and sensory requirements for the existence of a duty of care with respect to nervous shock is that they do not represent sine-qua-non factors to the causation of the actionable damage. Nervous shock, pathological grief, psychiatric illness or however this damage is best described does not only occur to those with tight ties of affection to the victim who see with unaided sense the injured victim at the time of injury or near enough thereafter.77 Nervous shock can afflict other sorts of people in other circumstances and can do so foreseeably. Drawing a line between the cases of pathological grief now recoverable and pathological grief caused by, say, the sudden shock of being told of a brother’s grisly death and then dwelling upon it, has nothing to do with foreseeability. A brother may foreseeably suffer such a fate even though he has no special or indeed any particular tie of affection to his deceased brother. What is going on in these rules is simply a line-drawing exercise.

The first question is why is it thought that a line must be drawn more tightly than the class of foreseeable victims? In the past there was a fear that approximating nervous shock to other forms of physical loss so that the duty was ‘self evident’ if the loss was foreseeable would generate far too many claims. This is now unpopular as a modern rationale of nervous shock limitations.76 This is because, inter alia, it is thought that medical data on the condition suggests it is not common.77 But the real root of concern may be that appellate courts suspect, and with reason it seems to me, that once a general duty to avoid nervous shock was recognised, many more individuals would be recognised as presenting the relevant symptoms to their GPs. Recovery from grief is a complex and mysterious process. May it not be a major concern of judges that while the prospect of compensation for, say, a broken leg may inhibit recuperation to a minor degree, the prospect of compensation for grief would have a much more powerful disincentive to rehabilitation and one which medical evidence would find extremely difficult to unravel from the original condition?79 If a central factor in grief and depression is anger, might not the adversarial nature of legal process be especially counter-productive? Associated with this concern is the very real one of characterising the relevant actionable damage. We are told that pathological grief is compensatable (so long as it satisfies the above artificial relational etc. requirements) but not normal grief. Leaving aside the perplexing question of why this is so, we are still confronted by the possibility that with hindsight and in the context of a civil claim, medical opinion may define ‘pathological grief’ much more loosely than the law would find tolerable. After all, the boundary between normal and pathological grief is of virtually no significance for medical treatment.

So the corners about recovery for nervous shock are real, but the available techniques for controlling it are not only artificial but bring the law into disrepute. That at present claims can turn on the requirement of ‘close ties of love and affection’ is guaranteed to produce outrage. Is it not a disreputable sight to see brothers of Hillsborough victims turned away because they had no more than brotherly love towards the victim? In future cases will it not be a grotesque sight to see relatives scrambling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument? Moreover, most other feasible control devices which might be used instead of ‘ties of love’ would still turn on the status of the plaintiff and so produce the same unseemly arguments over meaningless boundaries.

Some US jurisdictions who had once recognised a tort relating to privacy have now abolished it because it was felt that no reasonable boundaries for the cause of action could be found, and this was an embarrassment to the law.78 Should not our courts

77 Teff, op. cit.
79 Teff, op. cit.
80 Note that (1) this argument is not the same as a fear of fraudulent claims, and (2) that Lord Bridge noted that the logical deduction from this concern was to wipe out liability for pure nervous shock—the reform argued for here.
wipe out recovery for pure nervous shock on the same basis?80

4. A Few Ideas for Future Movement of Doctrine

(a) When should anticipatory claims be allowed?
The plaintiff suing in defamation does not have to prove any actual damage to reputation: the plaintiff need not find a friend who will testify that he now thinks less of the plaintiff. One way of looking at this fact is that the law is seeking to avoid just the sort of humiliating forensic spectacle it is at present enduring in nervous shock cases. But another way of seeing the absence of a damage-to-reputation requirement in defamation is that the law regards the interest threatened by the defendant’s conduct as so precious that it penalises even mere threats to its integrity for the sake of deterrence. Yet another reason the law might choose to allow claims before any conventional type of damage has been suffered is in order to allow the plaintiff to mitigate his loss. This was the quite rational driving force behind the liability on builders for property which presented ‘an imminent threat to health and safety’.81 It also would support claims in the future by, for example, those exposed to excessive radiation in hospitals. The categories of actionable damage are not closed.82 Just as we may choose in future to wipe out recovery for nervous shock, courts may choose to recognise certain categories of exposure to risk as actionable per se (i.e. recognition that the ‘loss of the chance’ of avoiding the threatened outcome was actionable ‘damage’). Of course an unbridled recognition of such a form of ‘damage’ as actionable has overwhelming arguments against it. Some sort of qualification is needed otherwise everyone living near Sellafield could sue for their increased risk of leukemia, bringing the whole system of civil obligations into public ridicule.83 But in some cases the mitigation argument is very strong. In the US, those negligently exposed to X-rays can sometimes recover damages under the label of ‘damages for the cost of medical surveillance’ where the surveillance will pick up cancers early enough to limit their impact. Moreover in the current dramatic situation involving defective Bjork-Shiley heart valves (a quarter of which are defective and will fail catastrophically without warning),84 the law might be brought into considerable disrepute were it to insist that the recipients ‘wait and see’ before they (or rather their estates) could sue. In other words there may be some class of anticipatory claims which, although speculative (not all recipients of such damages would eventually suffer the deleterious outcome), may be justified, and to this extent the future may see a re-embrace of the broad concern underlying the decision in Anns.

(b) Ranking types of loss; private profit

A vigorous common law might also in the future draw out distinctions within certain categories of actionable damage. In the twentieth century, Parliament has been sensitive to the greater social concern generated by personal injuries relative to property damage,85 and within property damage to the greater concern where a person’s dwelling is affected.86 Might not these sorts of considerations be given more prominence and definition in future common law doctrine?

Similarly there is in both parliamentary enactments and certain areas of the common law a distinction drawn between defendants who act in the course of a business and others.87 A common law which seeks to be responsive to social concerns and distinctions may choose to develop this idea more explicitly. In the future, therefore, we might want to see such a factor enter into the determination of whether a particular plaintiff should be able to sue a particular defendant and on what basis. This is not simply the issue of protecting certain public activities such as those of the police and local authorities

80 If in a case where statute barred room for manoeuvre Lord Reid was moved to complain that ‘the common law ought never to produce a wholly unreasonable result . . .’, Cartledge v. E. Jopling & Sons Ltd. [1963] A.C. 756, 772), how much more forceful is that complaint here where no statute obstructs rational reform.
82 Hoskin v. East Berkshire Area Health Authority [1987] 1 All E.R. 210, 217 (per Sir John Donaldson M.R.): ‘I can see no reason why the categories of loss should be closed either’.
83 As well as having dramatic side-effects in limitation law—potentially barring claims later brought when a person did actually contract leukemia. This has a parallel in the recognition that ‘acquisition of defective property’ claims are really ones concerning economic loss—the defendant can use this characterization of what is the actionable ‘damage’ to argue that the claim is statute barred. See J. Stapleton, ‘The Gist of

Naglo, Part 1’ (1988) 104 L.Q.R. 213, 236 and Nitrogen Eerambo Tocancus v. Inco Alloys Ltd. [1992] 1 W.L.R. 496. The same construction is probably true of a claim that a defective herbicide was ineffective so that the crop is more vulnerable to weeds.
84 By 1992 there had been 470 recorded failures of this heart valve (43 in the UK) with fatal results in two-thirds of cases (33 in the UK): Prob. Liab. Internat. [March 1992] 38. See also The Guardian, 3.12.92.
85 e.g. Limitation Act 1980, s. 33; Occupiers’ Liability Act 1958 s. (6); Unfair Contract Terms Act 1977 s. 2 (1).
86 e.g. Defective Premises Act 1972.
(see above), but of developing a distinction between, say, one who advises, feeds or carries another in pursuit of financial gain and one who does so without that motivation. It might be, for example, that sometime in the future the vicarious liability of employers for the acts of employees in the course of employment will evolve into a personal but strict liability of employers for injuries caused in this way. Certainly UK courts are hostile to employers relying on their former common law entitlement to seek an indemnity from the tortfeasor-employee, and such reliance is now rare. Indeed, so settled in some countries is the consensus that this is a just arrangement that there is a growing momentum to remove formally the personal liability of the employee in line with this practice. One relevant application of this idea might resolve the problematic basis of Richcliff's liability in *Gran Gelato* because Richcliff's 'vicarious liability' would be replaced by a personal strict liability imposed on defendants for acts done by their employees and agents acting in pursuit of the defendant's profit.

5. Interaction of torts inter se and with other causes of action; recourse actions

In the recognition of a tort obligation it can be relevant to consider issues of the maintenance of the integrity of another area of the law and the availability in another area of law of a preferable technique of protection. Both these issues are present for example in the recent cases involving negligent solicitors and wills. The rule that a testator's clear changed wishes cannot override an existing valid will means that the newly favoured parties will lose out unless a new will is executed (and even then they will only have an expectation not an entitlement). When the execution is delayed by the negligence of the testator's solicitor and the testator dies, there is a problem for the law. The victim of the negligence is clearly the favoured party, but he or she is a stranger to the relevant dealings and may be completely oblivious of them. Fashioning protection for the victim in tort while also allowing the solicitor and client to be free to fashion their own relationship is therefore tricky. A less tricky alternative is relaxing the privacy requirement for suing on the solicitor/client contract on the ground that it was clearly for the benefit of the third party favoured beneficiary. For example, the solicitor and client might agree that the solicitor would assign the work to an inexperienced articled clerk who would take considerably longer to process the work than would be reasonable for an ordinary solicitor. The client may have secured a considerable reduction in fee as a result. It is clear that when faced with a claim by the newly favoured party after the testator dies the law would not want to ignore this fact. Yet how can this best be done? If the claim is brought in tort how could the concern about the client/solicitor agreement be taken into account given that the plaintiff may be stranger to it? Already we have seen that the agenda of countervailing factors against tort protection should include hostility to a plaintiff who is trying to use tort to evade an arrangement he or she had agreed to, but that factor would not be an adequate control here because the plaintiff may have been stranger to the client/solicitor arrangement. Similarly trying to fashion the control in terms of what the defendant had expected his obligations to the testator to be smacks of the privity fallacy. It is hard to see how a suitable countervailing factor could be constructed in tort to handle this situation, short of an awkward special exception. A much more satisfactory technique would be to fashion the relevant protection of the newly favoured party out of the client's contractual entitlement which would not only enable the reason for protection of an apparently unconnected plaintiff to be evident but would also bring with it the required limitations of that protection, including the common sense decision by Judge Moseley Q.C. to deny a duty of care to a disappointed beneficiary under a negligently drafted inter vivos transaction (where the settlor had subsequently changed his mind). In short, these wills cases suggest a further countervailing factor against tort liability: would a non-tort avenue of protection be more suitable.

Next, the current keenness of appellate courts to confine negligence liability has had the disturbing side-effect of subordinating and hence distorting its principles in relation to other causes of action. Thus the Court of Appeal has asserted that a referee has

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89 Cane, op. cit. On the other hand, on reading this draft paper Cane asks could the 'learned intermediary' analysis be applied to the solicitor?
90 A rationale which would not then apply to the conduct of the independent contractor (the surveyor) in *Smith v. Bush*, L.Q.R. 344 (case note by J.G. Fleming); HL appeal heard 7.3.94-14.3.94. See also *Ross v. Counters* (1980) Ch. 267.
93 The position is different if the plaintiff had had dealings with a relevant party (see above discussion of linear liability in tort).
95 *Spring v. Guardian Assurance plc* [1993] 2 All E.R. 273 (C.A.); HL appeal heard 29.11.93-30.11.93. See also *Petch v. Comyns of Customs and Excise (C.A.), The Times, 4.3.93* and compare Lonrho plc v. Fayed (No. 5), The Times, 27.7.93 (C.A).
In Restraint of Tort

no duty in negligence to the subject of the reference because defamation (and specifically the defence of qualified privilege) covers the field. That is, a negligence claim is denied on the ground that otherwise a defence available in another tort would be 'bypassed'. Yet at almost the same time the Court of Appeal in the Cambridge Water case held that another claim (for physical loss) could succeed even though the defendant had acted with reasonable care and so had a complete answer to a claim in the tort of negligence.

Spring imperils many of the professional misstatement precedents and is almost certainly wrongly decided. The idea of a defence covering the field is bizarre if we see different civil obligations as responding to different and perhaps overlapping interests of the plaintiff. Moreover, in Spring there was no attempt to argue that the defendant in a defamation suit should be able to resist it by claiming he had acted carefully (and so would have an answer to a negligence claim which answer would be bypassed by the imposition of strict liability in defamation). To judge a plaintiff's claim against the defendant by whether the defendant has an answer to a different claim is to fall into the same trap as those who championed the privity fallacy: that we must not in determining causes of action disturb the expectations of security a defendant may have acquired from his being safe from a claim under a different cause of action. As we have seen, there may be legitimate reasons why we might choose to channel civil obligations, but protecting defendant's expectations is not one of them.

The Court of Appeal decision in Spring was an ill-thought out attempt to rein in one tort, that is negligence, and subordinate it to another, that is defamation. It may well be desirable that negligence (or tort as a whole or perhaps like equity) be kept in reserve—and the recognition of the requirement that plaintiffs have no other feasible appropriate means of protection as a precondition of tort's assistance is a reflection of this. But that does not imply that its form should be distorted by the outlines of alternative claims for protection which have been unsuccessful because the defendant had an answer to them.

Cambridge Water involved a claim about contaminated ground water. Whether the plaintiff's claim was seen as one of nuisance or Rylands v. Fletcher, the Court of Appeal decision seemed clearly wrong. This was not because the defendant had a defence in a different tort (negligence), but because the parallel defence (of due care) should have been accorded to the defendant in those causes of action on which the plaintiff was relying. But this is not the limit of the interest in the case. If we do not intend to irradicate strict liability completely from the law of obligations (and the strict nature of many contractual obligations makes this unlikely) cases such as Cambridge Water raise a much more fundamental question. Let us suppose that a plaintiff in a particular cause of action is unequivocally entitled to the protection of a strict obligation. Because the interconnectedness of much human activity has become apparent and the duty of care in negligence has come to be applied to many more types of conduct than previously, it is now much more likely that there is some other party whose conduct may be implicated in the causation of the relevant injury and whose conduct may be regarded as careless. This means it is now more likely that the strictly obliged defendant will have some 'careless' party against whom to seek recourse.

A plaintiff is usually interested in pursuing compensation in the easiest and most secure way, and not interested in ensuring that the liability costs eventually land on the party or parties which the law may regard as most appropriate. One feature of a system of joint and several liability, itself designed to ease the plaintiff's pursuit of compensation, is that the preferred target of the plaintiff's claim is often the wrongdoer with the deepest pocket. But the fact that the law holds some parties to strict obligations and some only to obligations of care suggests that there are different moral and/or economic norms at work. This would seem to necessitate in any system of joint and several liability that a defendant should, prima facie, have access to a recourse action against other wrongdoers. In other words the very phenomenon of strict and fault based liabilities which are joint and several suggests that the law has more than an interest in compensating plaintiffs in certain circumstances— it seems also to be interested in

98 Cambridge Water Co. v. Eastern Counties Leather plc. (C.A.), [1984] 1 All E.R. 53 but see 63 (reversal by I.L.)
99 Starting with the recognition of a duty of care in the context of a financial reference in Hedley Byrne (which may be wrong on other grounds—see earlier text).
100 Chandler v. Kerley [1978] 2 All E.R. 942, 945: 'the role of equity is supplementary and supportive', per Lord Scarman. See also Simon General Contracting Co. v. Pilkington Glass Ltd. (No. 2) [1988] 1 All E.R. 791, 804: 'just as equity remedied the inadequacies of the common law, so has the law of torts filled the gaps left by other cases of action where the interests of justice so required' per Bingham, L.J.
101 Rylands v. Fletcher (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330 (H.L.)
103 The origin of the strictness of contractual obligations is to some extent, obscure—see Stapleton, Product, op. cit., 2.02.
ranking the behaviour of defendants. To allow the whole liability load to rest on one party by virtue of a factor (the whim of the plaintiff’s choice, the deep pocket of certain defendants) which is not built into the basis of liability seems inconsistent with such a ranking. The law seems to have an interest, not only in compensating suitable plaintiffs but also, once this is accomplished, in enabling the liability costs to be allocated between all those liable to the plaintiff in a way which reflects some moral or economic pecking order of liabilities inter se.

The theoretical and notorious problem here is what should the rules governing recourse look like? In every likelihood the concerns of the law will be different in respect of the claim by the plaintiffs in its concerns in relation to recourse claims between liable parties. For example, any pragmatic argument of easing plaintiff’s proof problems disappears at the recourse stage. The Civil Liability (Contribution) Act 1978 contemplates contribution/indemnity between parties whose liability with respect to the damage is based on breaches of different duties (see s. 6(1)), for example, negligence, breach of contract and breach of statutory duties. But how should apportionment proceed in such cases—causation, blameworthiness, a combination of both these and/or other factors?

Does the negligence principle, for example, swamp whatever basis and goals lie beneath the other liability rules under which non-negligent parties have been held liable, so that the latter are justified in claiming a full indemnity from the former? While this accords with the formal attitude to the vicariously liable employer (who is technically entitled to a full indemnity from the negligent tortfeasor-employee), there is no general clear authority for the proposition that the negligent party should indemnify the strictly liable party. Indeed, many commentators argue that there is caselaw running the other way showing that blameworthiness in not the sole criterion under the 1978 Act. Of course, the courts’ decree of apportionment (not indemnity) in such caselaw might be rationalized by an implicit finding of some sort of fault or carelessness on the part of the ‘strictly liable’ party; but it may not be.

The courts may be attempting to give weight to the bases of the relevant strict liability, including the relative causative potency of those liable. In other words, the task of apportionment here inevitably requires the court to elaborate on the notion of ‘responsibility’ in the apportionment legislation and, in so doing, to speculate about and rank the policy objectives thought to underlie the different legal rules.

It may be, of course, that in recourse actions most courts would simply always give sole weight to the negligence principle allowing full indemnity against the negligent party. But if so, this would have profound implications for the theoretical basis of civil obligations. It would mean that whatever mix of elegant moral, economic or pragmatic ideas was used to justify the initial strict liability of parties to victims, they would be eclipsed at the recourse stage by the negligence paradigm. Thus, whatever the given rationale of a strict liability may be, it would amount to no more in practice than a facade for the real basis of the strict liability—the pragmatic one of facilitating the plaintiff’s suit—because this defendant would eventually be entitled to shift all responsibility on to the negligent party. The phenomenon of strict liability would support no more than this pragmatic rationale save in those very rare cases where no human negligence could, by any device, be said to have been involved in the relevant injury. Modern theories of civil obligation have yet to tackle this fundamental problem, which has implications for the hierarchy of norms reflected in different cases of action not only in the area of multiple wrongdoers but also in cases such as Spring and Cambridge Water.

The problem for theory is exacerbated by two factors in practice. First, as we have seen, the more the interconnectedness of conduct is perceived and the wider the reach of negligence law becomes (especially its expansion in the area of failure to control third parties), the more parties become potential targets for claims and thereby involved in recourse determinations. Secondly, lawyers acting for plaintiffs seem to be becoming (perhaps due to the increased fear of malpractice claims) more assiduous


105 Hervey (1979) op. cit., 510; M. Brazier, Street on Torts, 8th ed. (London, Butterworths, 1988) 532, citing cases which appear to hold that the negligence of a co-tortfeasor does not necessarily relieve a strictly liable defendant completely. Compare Tennant Radiant Heat Ltd. v. Warrington Devel Corp. [1988] 1 E.G.L.R. 41 (C.A.), see below.

106 e.g. Morris v. Ford Motor Co. [1973] Q.B. 792.

107 Certainly, as between a strictly liable landlord and careless tenant, the Court of Appeal recently preferred to deal with the claim and counterclaim (not a recourse claim) as ‘a problem of causation’ alone: Tennant Radiant Heat Ltd. v. Warrington Devel Corp. [1986] 1 E.G.L.R. 41 (C.A.), 44 (Dillon, L.J.).
In pleading an exhaustive list of possible alternative causes of action; so the list of causes of action per defendant which need to be considered at the recourse stage can be considerable. Of course we could mask the problem which arises at the recourse stage if we abolish joint and several liability, as some jurisdictions in the United States have partially done in order to protect ‘deep pocket’ defendants, in particular public authorities. But this would have clear disadvantages for plaintiffs. Alternatively even more favour could be shown to plaintiffs than joint and several liability affords them, for example, as in the Netherlands where in a recent case the Supreme Court held that a plaintiff injured by a generic product (diethylstilbestrol) can sue any or all manufacturers of such a product jointly and severally, and only at the recourse stage can the individual manufacturer argue the market share doctrine to reduce liability to its proportion of the market in that generic product.

In practice however, the whole field of contribution and indemnity is conveniently shrouded in mystery because of the tendency for out-of-court settlements on the issue to be subject to secrecy clauses—as in the Hillsborough football disaster; by the failure of past courts to attempt to address these issues; their omission to set out clear reasons for their decisions; and the virtual absence of appellate litigation on the issues. Ideally, law should illuminate not only who the plaintiff can sue under a rule and why, but who should ultimately bear the relevant loss and why. That the basis of civil liabilities and their relative ranking in importance can be buried in recourse actions so successfully without comment by most observers supports the allegation that it is law’s facade which is important, not its final allocation of loss.

5. Conclusion

Current criticism of the state of tort law can be resolved into two forms: that which takes a political line and boils down simply to a complaint about the House of Lords’ conservative vision for the overall reach of tort protection; and that which concerns the processes by which decisions are taken. I have concentrated here on the latter. Just as, in Lord Goff’s words ‘piecemeal legislation may exercise a distorting effect on the law’ so too can the ad hocery implicit in the Caparo ‘pre-judged pocket’ approach to new cases. Very recently we have seen courts struggling to rationalise quite sensible outcomes within the constraints of this type of thinking. Now a clearer approach is needed.

We might at first be tempted to rely on the fashionable new theories of tort liability developed (nearly all in the US) to combat the collectivist arguments of the late 1960s. But these new theories do not help. Nearly all only focus on two of the complex constituents of any cause of action: the standard of the defendant’s behaviour (fault or strict liability); and causation. No analysis here of why the law does or should have a different attitude to economic loss; how to rank different bases of liability; or whether legislative emphasis in certain areas (personal injuries, dwellings, conduct in the course of a business etc.) should legitimately be reflected in the direction to be taken in the common law. Moreover, there is a substantial amount of terminological confusion in this theoretical debate. Key language is used in quite different ways—particularly the idea of ‘strict liability’. The effects of a law (for example, compensation, self-insurance) are often elided with its goals. An ideological bias is also not uncommon: this is exemplified by the assertion of ‘back to contract’ theorists, that virtually all important transactions are consensual (or potentially consensual).

Next we might be persuaded to rely heavily on a study of comparative law. Recently there has been much criticism of the alleged ‘parochialism’ of the current British judicial scene. In recent commentaries on both Murphy and Norsk sharp criticism has been made of the Law Lords’ failure to analyse the comparative precedents from other jurisdictions. At its most diplomatic: this criticism takes the form of bemoaning the limitations on the House of Lords working in ‘physically cramped conditions with minimal library facilities and non-existent research assistance’.

I have no doubt appellate judges are overworked and need more time to read and reflect

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108 E.g. where liability is admitted as in A.B. and Others v. South West Water Services Ltd. [1993] 1 All E.R. 609. (A case which shows the naïveté of the argument that the E.C. Directive on Products Liability would make life simpler for plaintiffs.)

109 H.R. 9.10.92, Rwd. W. 219 (compare Sindell v. Abbott Laboratories [1980] 607 F. 2d. 924). On the argument that a defendant should be allowed recourse against another party if they had been acting in the course of a business, see Stapleton, Product Liability, op. cit., Chapter 11.

110 The Independent, 9.10.90.


115 See e.g., Flemming (1993) op. cit. 74.

on the complex matters which come before them. But the strength of judicial reasoning comes not from the citation and analysis, thesis-like, of a range of responses from other jurisdictions to the issue at hand. The most powerful and convincing judgments are those which spell out basic principles and explain their application to the specific case in a clear manner.

The way forward lies in thinking clearly about the reasons both for and against helping the plaintiff. Here I concentrated on the latter, the separate consideration of the countervailing factors which militate against the imposition of tort liability. This may require, at the most abstract level, a rethinking of our basic ideas of what tort law is for and some of these will certainly be found wanting. Take for example the common cliché that the tort of negligence is about compensation. Quite apart from the fact that only a tiny fraction of those many people injured by negligence sue and recover in tort, this description is simply inadequate to convey what is the ‘meat’ of negligence law, which is the analysis of the boundaries of the tort which explain why only some victims of negligence are allowed to recover compensation. In this sense, a re-emphasis on the countervailing factors which weigh against the protection of tort is at least as appropriate and useful as the Anns strategy which in effect, was interpreted as asking ‘why not’ as a peripheral afterthought to the duty analysis.

In rethinking what tort law should be for in this broad sense we may choose in future to shift emphasis in a major way, for example by putting greater weight on prevention and on preventative remedies. In the future perhaps tort law should develop greater use of injunctive relief. We have already seen this recently in the novel case of Khorsandjian v. Bush117 which may and should herald, not the fatal unravelling of the property requirement in private nuisance, but the long overdue (albeit covert) birth of new tort of harassment. But we might also want to see injunctive relief developed in other areas, for example, to give those threatened with personal injuries by the continuing conduct of defendants (for example, their employer) some effective remedy. There may, of course, be some areas in which tort will only rarely be able to operate successfully, even symbolically. One such field is that of toxic torts: the embarrassing sight of the Sellafield litigants squabbling over the meaning of ‘soft’ statistics is the best current example of how tort law is inadequate here, even as a symbol of justice. Nevertheless in many other areas the potential role of tort for signalling important social values remains substantial.

This paper’s main suggestions as to how tort law might be restrained within coherent boundaries may be summarised as follows:

1. The strategy of searching for a relevant ‘pocket’ of caselaw at the outset of the duty analysis should be replaced with an analysis based on arguments for liability and on an agenda of countervailing factors to the imposition of tort liability which have been explicitly constructed from policy concerns.

2. More attention needs to be paid to understanding the complexity of and limitations to the pro-liability side of the duty equation.

3. With regard to the no-liability side of the equation, the following are not convincing countervailing arguments to the imposition of tort liability:
   (a) that the imposition of tort liability might have a large socio-economic and redistributive impact;
   (b) that the plaintiff or defendant has or could have obtained insurance;
   (c) that ‘warranties of quality’ are necessarily the province of contract;
   (d) that the defendant has a defence to a different cause of action;
   (e) that to impose tort liability would disturb the defendant’s expectations.

4. The agenda of countervailing concerns should include:
   (a) that the imposition of liability might produce a specific unattractive socio-economic impact (such as severely depleting local government finances118);
   (b) that a linear arrangement of obligations is preferable in the area in order, for example, to shield peripheral deep-pocketed parties and/or to control the problem of multiple causation;
   (c) that the plaintiff had adequate and appropriate alternative means of protection;
   (d) that the plaintiff may be seeking to use tort as a means to evade an understanding as to where the risk would fall;
   (e) that to assist the plaintiff would bring the law into disrepute and injure its dignity;

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(f) that a more convincing and doctrinally convenient form in which to deliver protection to the plaintiff exists in another field of law.

4. The following issues may play a role in the future direction of tort and so deserve more consideration:

(a) the accommodation within the tort analysis of the phenomenon of a plaintiff's prior acceptance of where the risk would lie;

(b) the degree to which tort law in future should provide incentives to prevent or mitigate harm;

(c) the degree to which tort law should distinguish types of physical harm

(d) the degree to which tort law should distinguish conduct in pursuit of financial profit and other forms of conduct.

(e) the interaction of torts inter se and of tort with other causes of action, both in claims by plaintiffs and in recourse claims.