Duty of Care Factors: a Selection from the Judicial Menus

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One of the many great qualities of John Fleming’s masterpiece, The Law of Torts, is its ability to unmask the apparently formulaic reasoning of judges and reveal the real concerns motivating judgment in this notoriously open-textured field, once aptly described as law’s most patent experiment in ‘applied morality’. Following his inspiring lead, I will try in this essay to unmask and draw together some of the recent achievements of British (and some Commonwealth) appellate judges in coming to terms with the complex moral and policy concerns underlying their resolution of novel claims for a duty of care in the tort of negligence. Through this continuing project to unmask the variety of the concerns which such claims throw up to courts it will be made clear why no ‘test’ for the recognition of a duty of care is possible and how courts in future might best proceed.

Donoghue v Stevenson: Four Advances but no ‘Test’ for Duty

There is a core dilemma for judges seeking to rationalize their determination of disputes in the tort of negligence. It is that a much wider range of conduct, and conduct includes omissions, (a) might be implicated in the occasioning of (actionable classes of) injury and (b) might plausibly be described as ‘careless’, than any judge, however radical, would accept.

as properly giving rise to liability. Early on it was appreciated, even if only indirectly, that quite apart from the flexibility provided by the analytical devices represented by the requirements of a breach of standard of care, causation and damage not being too 'remote', more general 'systemic' control of this tort's ambit was necessary. Such control emerged under the label of duty of care: only those to whom a duty of care was owed by the defendant would be able to sue for the injury which the carelessness of the defendant had caused to them. So far so good. But merely providing an analytical label for systemic control was widely regarded as insufficient: a search developed among both judges and academic commentators for a core 'test' to be used to determine whether a duty of care would be owed. Much of the confusion in the field of negligence law has been generated by this misguided enterprise and the false belief that such a 'test' was feasible.

There is no 'test' for the duty of care. There can be no 'duty test' given what it is that judges do under the cloak of this analytical label. Indeed, the underlying nature of judicial reasoning here is distorted when any case is seen as laying down a 'test' for duty. This distortion occurred most famously with the later academic and judicial treatment of the judgment of Lord Atkin in *Donoghue v Stevenson.* Contrary to the shorthand commonly used to describe the importance of the case, *Donoghue's* case did not lay down any 'test' of duty. In the context of the duty of care analysis the real importance of *Donoghue's* case lay elsewhere, namely in four clear and sound principles:

1. The idea that a plaintiff had to bring himself within or incrementally close to a pre-existing 'pocket' of recognized factual situations giving rise to a duty was denounced as wrong and rightly abandoned.
2. The argument that a plaintiff could not base his claim in negligence on conduct of the defendant where that conduct was related to the performance of the defendant's contractual obligations to a third person, was exploded as false. This argument has become known as the 'privity fallacy'.
3. It was made clear that foreseeability of some description was a necessary requirement before a duty of care would be recognized.
4. By the use of the restricted notion of 'neighbour', Lord Atkin

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4 On the utility of the duty concept to signal systemic concerns of the law see Stapleton, 'Peripheral Parties' n. 3 above at 303–5.
6 [1932] AC 562.
7 As opposed to the specific issue of manufacturer's liability.
8 In other words, after *Donoghue's* case no defendant could argue that his contractual obligations to a third party were necessarily exhaustive of his civil obligations.
seemed to emphasize that while foreseeability was a necessary factor for a duty to be recognized, it may not always be a sufficient factor.

The first two principles operate to open up the field of negligence liability by removing two irrational barriers to its coherent development. At first it was these two principles and their intellectually liberating effect on how that tort was seen and deployed by courts which captured the attention of commentators and judges alike. They served well the mid-century moods for rejecting unintelligible historical relics and for increasing social obligation. In contrast, the last two principles emphasized that even with these two barriers removed still other barriers should and must remain. The first barrier, the requirement of foreseeability is straightforward enough: one cannot even be careless with regard to a risk which one could not foresee; a fortiori there can be no duty to avoid it.

But what of the fourth ‘principle’, the neighbour concept? It is here that the confusion has centred. Many commentators and judges in the past have appeared to believe that the term ‘neighbour’, and its modern cousin, ‘the relationship of proximity’, can do more than merely warn of the fact that besides foreseeability there are complex concerns that judges may legitimately weigh in the duty analysis. Thus, for example, there are many judgments\(^9\) which suggest that the ‘relationship of proximity’ is an element common to duty situations; the basis, general conceptual explanation and determinant, unifying theme, rationale, and integral constituent of the duty concept which allows an understanding and identification of duty situations. But these are all dangerously misleading statements because they might suggest that merely by invoking this phrase over a particular fact situation a coherent working criterion for the determination of the duty question is provided for the particular case. It clearly is not. The bald phrase ‘relationship of proximity’ has no content.

Its banal role can be usefully compared to that of the phrase ‘breach of the standard of care’. A ‘relationship of proximity’ is only a determinant of duty and therefore of liability in the same banal sense that the phrase ‘breach of the standard of care’ is a determinant of negligence-in-fact

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\(^9\) Particularly from the High Ct of Australia when Deane J was on that court. All the descriptions of the ‘relationship of proximity’ cited in the text are from such cases (though parallel descriptions are also found in British, Canadian, and New Zealand cases): *Gala v Preston* (1990–1) 172 CLR 243 at 252–3; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52; *Burnie Port Authority v General Jones Pty Ltd* (1992–4) 179 CLR 520 at 543–4; *Sutherland Shire Council v Hegman* (1985) 157 CLR 424 at 497; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 341 at 355.
and therefore of liability. Both phrases merely flag the existence of a particular gate through which the plaintiff must pass. Neither bald phrase reveals what precise substantive issues will, in the relevant circumstances of a particular case, be regarded as relevant to whether the plaintiff is, respectively, owed a duty or can establish negligence-in-fact.

Moreover, as we will see, sometimes a duty factor, such as the concern not to encourage abortion, weighs in favour of a duty, sometimes it weighs against a duty, and sometimes it is simply not raised by the facts of the case at all. So, just as the diversity of fact situations means that in the determination of breach a particular feature may be judged relevant in one circumstance but of little or no weight in another, so among the concerns weighing with judges in duty cases there is no one concern which is always relevant on the facts. In other words, the phrase ‘relationship of proximity’ cannot even be interpreted as code for some constant common denominator in all duty situations. Even a minimal prior relationship between the parties, as misleadingly suggested by the phrase itself, is not always judged necessary for a duty: for example, I owe a duty not carelessly to knock down a total stranger. In short, the bald phrase a ‘relationship of proximity’ can no more deliver ‘underlying unity or consistency’ to the duty field than can the bald phrase ‘breach of the standard of care’ to that of negligence-in-fact.

What is needed is the unmasking of whatever specific factors in each individual case weighed with judges in their determination of duty. It is not acceptable merely for a judge baldly to assert that the plaintiff was proximate; or that a duty was justified because the parties were in a ‘special relationship’, or because the plaintiff had ‘reasonably relied’ on the defendant, or merely because it was ‘fair, just and reasonable’. Without more, these are just labels. Judgment should focus explicitly on why this plaintiff is proximate, why the relationship was special, why reliance was reasonable, and so on.

Over the past twenty years many British and Commonwealth appellate judges have adopted a franker style of analysis, packaged less in the formulaic labels common in earlier case law but more in clearly enunciated considerations for and against recognition of a duty. Of course, there are still many instances where judges mask their reasoning behind empty labels of no content such as ‘a relationship of proximity’ but these instances should not overshadow the achievement of other judges in openly analysing factors which have weighed in their determination. The judgments in Stovin v Wise, X (minors) v Bedfordshire County

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10 Barrie Port Authority v General Jones Pty Ltd (1992–4) 179 CLR 520 at 543.
11 [1996] 3 All ER 801.
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Council,\textsuperscript{12} Elguzouli-Def \textit{v} Commissioner of Police\textsuperscript{13} and Winnipeg Child and Family Services \textit{v} G (DF)\textsuperscript{14} are all admirable examples of the latter phenomenon. On investigation some of these unmasked factors are less than convincing, but many are convincing. In any case, the trend towards greater transparency in judgments allows direct evaluation of the soundness of factors which concerned individual judges and represents a healthy and necessary stage in the maturing of this, the most potentially explosive of all torts.

The chapter ends with a summary of the factors discussed: full-size numerals in the text refer to these lists. A final caveat: the following discussion has had to be highly selective. There are many more duty factors surfacing in the case law than space allows me to deal with here. But I have tried to give some flavour of how diverse the judicially cited factors are and how they range from simple, easily spotted notions such as the concern not to discourage rescue to much more complex but commercially important factors such as the concern not to encourage parties to be dependent and 'free-ride' on tort where they could have helped themselves.\textsuperscript{15}

\textbf{Unconvincing Factors}

\textbf{IN FAVOUR OF RECOGNITION OF DUTY}

Some factors which appear in appellate judgments concerning novel duties of care are unconvincing. It is as important to tease out some of these and to explain in what way they are incoherent as it is to identify convincing factors.

A common weakness in the reasoning of judges in this field is the temptation to elevate the effect of a determination into a reason for it. Thus, while it is true that a finding of a duty of care is owed will promote compensation (of the plaintiff) (1), perhaps deterrence (of the defendant) (2) and loss-spreading (given that virtually all defendants against whom cases are actually taken are insured) (3), none of these factors can be a convincing reason for the determination. They are simply corollaries of it.\textsuperscript{16}

\textsuperscript{12} [1995] 3 All ER 353, where it is particularly refreshing to see a judge concede that the specific duty issue at hand was 'a difficult question on which my views have changed from time to time' (per Lord Browne-Wilkinson at 391).

\textsuperscript{13} [1995] 1 All ER 833.


\textsuperscript{15} In an appropriate manner, namely protect themselves from the risk occurring or obtain contractual protection in relation to the threatened loss in a way which directly or indirectly deters the careless party: see below.

\textsuperscript{16} There is a more general point here. It is as banal and misleading to say that the
The reason these factors are unconvincing in cases recognizing duties is that they are present and would also weigh in favour of a duty in all cases, including the plethora of recent cases in which a duty has been denied. The real issue is why the compensation/deterrence/loss-spreading results are to be allowed in the former class of case but not the latter. Judicial observations that these results will flow in the former cases and are not 'justified' in the latter do not explain, let alone justify, the distinctions courts draw between the two groups.

Of course, sometimes in cases such as these judges may not intend their references to the compensation of the plaintiff, deterrence of the defendant, and so on, to be taken as part of the reasons for the finding of a duty. But unless this is made clear, such comments are very dangerous: for they can appear to support the misleading claims of some commentators that compensation and deterrence (even loss-spreading) are acceptable and potent reasons for recognizing a duty of care.

A parallel trap for judges who have determined that a novel duty of care should be owed in a particular case is to refer to the financial impact such a finding may have on the defendant. Thus, comments that a defendant or a class of defendants is likely to be insured\(^\text{17}\) (4) and/or have a deep pocket\(^\text{18}\) (5) are again liable to mislead some observers into the mistaken belief that the resources of a defendant class is a generally valid factor in the resolution of duty issues. As a general proposition this is demonstrably false as a matter of description\(^\text{19}\) (even though in a specific context, such as the defendant being a public authority or landowner, resources may form part of a rationale specific to that defendant class\(^\text{20}\)) and is bewildering from a normative point of view given that the basis of the normative framework of tort law is personal responsibility.

Also unconvincing are the currently fashionable attempts in some cases to refer to 'voluntary assumption of responsibility' (6) as a factor which justifies the finding of a duty of care. So far none of these attempts has been convincing because, just as with other 'labels' such as 'proximity', this phrase has not been given precise content. Of course if a person, X, not only undertakes a particular task but explicitly undertakes the legal risk of liability for any injury thereby caused, this would be a convincing factor in favour of a duty on that person being recognized.

'function' of tort is compensation as it is to say that the 'function' of a petrol station is to dispense petrol: the question of interest is who is entitled to have the benefit dispensed and why.

\(^{17}\) See cases cited in J. Stapleton, 'Tort, Insurance and Ideology', n. 3 above at 823ff.

\(^{18}\) The defendant's 'shoulders are broad enough to bear the loss': Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 at 398 (per Lord Denning MR).

\(^{19}\) See J. Stapleton, 'Tort, Insurance and Ideology' n. 3 above at 823ff.

\(^{20}\) See, e.g., the later discussion of the concern not to distort public budgets and/or activities.
But as is the case with the defence of ‘voluntary assumption of risk’, the mere undertaking of a task does not justify a conclusion of an undertaking of legal risk and responsibility. Moreover, in practice the facts of a case rarely provide evidence of such an undertaking. A mere judicial assertion that this was the case is not convincing. The law is thrown back on the normative question: should the defendant be under a duty, should he be taken in law to have undertaken the legal responsibility? A mere judicial assertion that this should be the case is also not convincing.

**Countervailing to the Recognition of Duty**

More varied are the unconvincing reasons sometimes given by judges for the denial of a duty of care. Again there are judicial observations based on insurance (1) and wealth (2) which are the mirror-images of those in cases recognizing novel duties. In cases denying a duty, observations that the plaintiff is or could be insured or that the plaintiff has a deep pocket are both unconvincing and demonstrably not applied as a general principle (as they would need to be if they were to be convincing): in the vast majority of cases where a duty is recognized the plaintiff could have insured. As with all the above factors, these observations mask whatever real factors are influencing courts to cite these factors selectively.

But there is also a range of other unconvincing factors, typically found in case law of the time when the confidence of the Annotations period was giving way to the wariness of cases such as *D&T Estates* and *Murphy*. Here the determination of the Law Lords to confine liability (particularly for economic loss) led them to enunciate a series of factors which at best were dangerously misleading observations and at worst bad ‘reasons’ for denial of duties of care.

Concern that, in a particular context, imposition of a duty of care might expose defendants to a large volume of claims (3) (as opposed to an indeterminate number of claims—see below) are unconvincing given that the law is content elsewhere to impose liability where the

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21 For an example see the mere assertion of Lord Goff in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 at 534–5 that such assumption was present in that case but not in *Simian General Contracting Co. v Pilkington Glass Ltd* [1988] 1 All ER 791.
22 See, e.g., the mere assertion of Lord Goff in *White v Jones* [1995] 1 All ER 691 at 710 that the defendant in that case ‘should be held in law’ to have assumed responsibility to the plaintiff.
23 See J. Stapleton, ‘Tort, Insurance and Ideology’ n. 3 above at 823ff and cases cited therein.
25 *D&T Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992.
26 *Murphy v Brentwood District Council* [1990] 3 WLR 414.
potential plaintiff class is large.\textsuperscript{27} Indeed, it would be very odd if a defendant could argue in his own favour that he should not owe a duty because he had many victims!

Clearly observations\textsuperscript{28} that the law had never recognized a duty here before (4) are analytically unhelpful in explaining why a duty should be rejected now that it is being argued for.\textsuperscript{29} What is more, some of the greatest landmarks of the common law, including\textit{Donoghue v Stevenson}, are cases in which it is recognized that what had never been done before should now be done.

Similarly, in some cases judges refer to the fact that in a particular context the recognition of a duty would have a substantial socio-economic and/or redistributional effect (5), or would create a large new area of liability (6).\textsuperscript{30} Now, while there may be sound reasons for extra care in analysis in such cases,\textsuperscript{31} this is not the same thing as providing a specific justification for rejecting a duty. Again, as\textit{Donoghue v Stevenson} and\textit{Hedley Byrne & Co. Ltd v Heller & Partners}\textsuperscript{32} demonstrate, some cases which have had all these dramatic effects are some of the most widely approved ‘landmark’ cases of the common law.

The\textit{ bald} assertion, often made, that restraint must be exercised because the claim is for a duty in relation to pure economic loss (7) is also unconvincing. With hindsight it was ironic that the first recognition of a duty of care in negligence in relation to pure economic loss (save for two obscure earlier cases\textsuperscript{33}),\textit{Hedley Byrne}, concerned negligent words in a context where indeterminate liability threatened. As we will see, it is a sound and well-settled reason against a duty that it would expose defendants to indeterminate liability (the ‘floodgates’ concern). For many years after\textit{Hedley Byrne} there seemed to be a widespread assumption in judgments and commentaries that any claim in relation to a duty

\textsuperscript{27} E.g., an individual’s single moment of carelessness gave rise to liability in negligence (\textit{inter alia}) towards 182 plaintiffs in\textit{Ab v South West Water Services} [1993] 1 All ER 609.

\textsuperscript{28} E.g., see\textit{Murphy v Brentwood District Council} [1990] 3 WLR 414 at 432 (per Lord Keith), 448 (per Lord Oliver);\textit{Leigh & Stillman Ltd v Aliakmon Shipping Co. Ltd (The Aliakmon)} [1986] AC 785 at 815 (per Lord Brandon);\textit{Junior Books Ltd v Vetichi Co. Ltd} [1983] 1 AC 520 at 551–2 (per Lord Brandon);\textit{DGF Estates Ltd v Church Commissioners for England} [1989] 1 AC 177 at 211 (per Lord Oliver). See Stapleton, ‘\textit{Agenda}’ n. 3 above at 253.

\textsuperscript{29} A point well made by the majority of the Australian High Ct in\textit{Northern Territory of Australia v Mangel} (1996) 185 CLR 307 at 339.

\textsuperscript{30} See e.g.\textit{Murphy v Brentwood District Council} [1990] 3 WLR 414 at 419 (per Lord McKay), 430, 432 (per Lord Keith), 451 (per Lord Oliver), 457 (per Lord Jauncey). See Stapleton, ‘\textit{Agenda}’, n. 3 above at 253 and 268.

\textsuperscript{31} See, e.g.\textit{Winnipeg Child and Family Services v G (DF)} (n. 14 above) where the majority gave specific reasons why in this particular case the legislation was the proper forum for resolution of ‘the serious policy concerns’ (para 45) raised by the claim.

\textsuperscript{32} [1964] AC 465.

\textsuperscript{33}\textit{Morrison Steamship Co. Ltd v Greystoke Castle (Cargo Owners)} [1947] AC 265;\textit{Wilkinson v Coventale} (1793) 1 Esp. 75, 170 ER 284.
to avoid pure economic loss would involve this indeterminacy problem and that therefore (a) all economic loss claims formed a class and (b) that they must be treated with especial caution: that is, the mere fact that a claim concerned pure economic loss was seen to provoke the concern of indeterminacy which weighed heavily against recognition of a duty.

As we will see, there may be a deeply rooted moral view of the common law that physical security is an interest worthy of more protection than economic. If accepted and made explicit this might constitute a sound restraining factor in all claims for pure economic loss, but the oft-cited fear of indeterminacy does not justify restraint across the entire class of such claims. As demonstrated by later cases such as the acquisition of property cases,\(^\text{34}\) White v Jones\(^\text{35}\) and so on, this indeterminacy problem is not endemic to all economic loss cases. It is not even endemic to all cases where negligent words cause economic loss. There is a whole range of economic loss situations where both the class of plaintiffs and the quantum of loss is foreseeable and determinate. But echoes of and references back to earlier case law sometimes still allows this crude reasoning to infect judgments.

Conversely, the fact that Hedley Byrne involved words led some judges, concerned with restraining liability, to attempt to confine economic loss liability on the artificial basis of the form of defendant conduct involved. The consequent unconvincing assertion was that the precedent of Hedley Byrne was confined to negligent words causing the economic loss. The idea conveyed was that words are, in some significant but often unstated way, different from acts; and that while the law might recognize a duty in a specific case involving words, the mere fact that in the present parallel case the conduct was an act took it outside the ‘pocket’ of liability recognized by Hedley Byrne (8).\(^\text{36}\) Where an attempt is made to state what this crucial difference is the explanation is, at bottom, merely the concern with floodgates: an observation that sometimes, perhaps even often, the context in which economic loss is caused by careless words triggers this concern. This is not a convincing reason why all cases of negligent words causing economic loss form a coherent class because not every case of negligent words triggers the indeterminacy concern. The concern should be declared for what it is, indeterminacy, and the fallacious distinction between acts and words per se should be abandoned.

\(^{34}\) I.e., cases where the plaintiff suffers economic loss because he has acquired property of a certain quality as in Bryan v Maloney (1994-5) 182 CLR 609 and Smith v Bush (Eric S.) [1989] 2 All ER 514.

\(^{35}\) [1995] 1 All ER 691.

\(^{36}\) For a detailed criticism of the lack of policy justification for a ‘pocket’ of liability devoted to negligent words see Stapleton, ‘Agenda’, n. 3 above at 259ff.
The most dramatic illustration of this fallacy is the still unresolved problem of claims for economic loss suffered by the acquisition of defective property.\textsuperscript{37} Here, despite the absence of any floodgate threat,\textsuperscript{38} the House of Lords has rejected the claim that a negligent builder owes a duty of care to the acquiring owner while nevertheless recognizing that a duty is owed to the owner by a professional adviser when the owner acquired the property in reliance on the latter’s negligent advice. Thus, if X carelessly surveyed land and carelessly advised that it required foundations of no more than three feet deep, X may well owe a duty of care to an owner of the subsequent building when its foundations are discovered to be inadequate; or if X carelessly advised a prospective purchaser that a property has adequate foundations when it did not, X may well owe a duty of care to that purchaser; but if X is actually a careless builder who creates a building with inadequate foundations he owes no duty in the tort of negligence to the subsequent owner!

There have been cases in which the denial of a duty was accompanied by the assertion that a particular piece of legislation impliedly ‘covers the field’ (9).\textsuperscript{39} But in Donoghue v Stevenson the House of Lords clearly did not consider that the warranties of quality recognized by sale of goods legislation impliedly covered the field of the safety of commercially supplied ginger beer. The mere assertion that legislation covers the field begs the underlying substantive question of when, if ever, and why a piece of legislation which is itself silent on the matter\textsuperscript{40} should be taken to have pre-empted the common law developing obligations in the area.\textsuperscript{41}

A close but equally weak argument against a duty is the bald unqualified assertion that an area is more appropriately to be seen as the province of Parliament (10) and that to recognize a duty here would be to engage in illegitimate ‘judicial legislation’.\textsuperscript{42} Thus in the D&E

\textsuperscript{37} On which see ibid at 277–83. For a bizarre illustration see Lancashire and Cheshire Association of Baptist Churches Inc. v Howard & Seddon Partnership [1993] 3 All ER 467. For a way forward in acquisition cases which does not distinguish between words and acts see Stapleton, ‘Peripheral Parties’, n. 3 above at 335–7.

\textsuperscript{38} Because the plaintiff class is determinate (indeed it is usually only 1 or 2 people who acquire ownership) and the relevant quantum of loss is also determinate.


\textsuperscript{40} Contrast the Occupiers’ Liability Acts (1957 & 1984) enacting rules ‘in place of the rules of the common law’, s 1(1) in both Acts.

\textsuperscript{41} Contrast X (minors) v Bedfordshire County Council [1995] 3 All ER 353, ‘I can see no legal or commonsense principle which requires one to deny a common law duty of care which would otherwise exist just because there is a statutory scheme which addresses the same problem’ (per Lord Browne-Wilkinson at 395).

\textsuperscript{42} See Stapleton, ‘Agenda’, n. 3 above at 268–9.
Estate case and Murphy's case we are told that consumer protection in the field of economic loss resulting from the acquisition of property is more properly the province of Parliament, and specifically that the recognition of a duty of care in Anns' case was 'judicial legislation'. Again such assertions beg the question of why the particular field is regarded as more properly the province of the legislature when so many other fields are accepted as areas in which the common law can recognize obligations. The poverty of these particular bald assertions is exposed most dramatically when note is taken that, between the two above cases, the Lords decided the case of Smith v Bush (Eric S.) citing as a reason for the recognition of a duty the need to protect consumers such as Mrs Smith who had suffered economic loss through the acquisition of property.

Yet another bald assertion which has surfaced in appellate case law is that an area was more properly seen as the province of contract (11). This idea was deployed in the early days of judicial concern with recovery for pure economic loss. Its incoherence again lies in the failure to give a substantive explanation of why it should operate in the particular context in which it was used, namely claims for economic loss against manufacturers or builders of property by acquirers of that property, who were therefore relegated to such protection as might be available by private ordering through contract. This is particularly troublesome when in other contexts the point is ignored and plaintiffs given tort protection, even including some instances of economic loss occurring through acquisition of defective property.

Though, as we will see later, courts may now be teasing out more fine-tuned and coherent factors for and against recognizing a duty in cases of economic loss occurring by acquisition of defective property, in the early days of such claims appellate courts enunciated a number of other unconvincing factors allegedly countervailing to liability. Of all these perhaps the most superficially alluring was that set out by Lord Brandon in his influential dissent in Junior Books Ltd v Veitchi Co. Ltd. that to

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43 D&E Estates Ltd v Church Commissioners for England [1989] 1 AC 177 at 208 (per Lord Bridge).
44 Murphy v Brentwood District Council [1990] 3 WLR 414 at 433 (per Lord Keith), 451 (per Lord Oliver) & 457 (per Lord Jauncey).
45 Contrast the explicit analysis on this point in Winnipeg Child and Family Services v G (DF) (n. 14 above).
46 [1989] 2 All ER 514.
47 See J. Stapleton, 'Agenda', n. 3 above at 253.
48 e.g., as in Smith v Bush (Eric S.) [1989] 2 All ER 514.
49 [1983] 1 AC 520 at 551-552. See also, Murphy v Brentwood District Council [1990] 3 WLR 414 at 433 (per Lord Keith), 441 (per Lord Bridge), 451 (per Lord Oliver) & 457 (per Lord Jauncey); D&E Estates Ltd v Church Commissioners for England [1989] 1 AC 177 at 207-8 (per Lord Bridge); White v Jones [1995] 1 All ER 691 at 694 (per Lord Keith) and the
recognize a duty here would be tantamount to giving the plaintiff the benefit of a contract to which he or she was not a party (12). This idea I call the 'evasion of privity fallacy'. There are two ways of seeing why this factor must be rejected. First, if we focus on the defendant: since Donoghue's case, it is no bar to recognition of an entitlement in the tort of negligence and the parallel obligation on the defendant that the defendant owed a similar or identical obligation to a third party with whom he was in contractual privity. Thus Mrs Donoghue was protected by a duty even though the defendant was in contract with a third party who thereby had the benefit of contractual obligations resting on the defendant with regard to the quality and safety of the ginger beer. Secondly, if we focus on the plaintiff: by definition, whenever any tort entitlement is recognized it benefits the plaintiff regardless of whether he or she bargained and paid for it in a contract; indeed this is a corollary of a tort entitlement as currently understood: it is available despite not having been paid for. Mrs Donoghue was given the protection of a duty even though she did not buy the ginger beer and in that way pay for protection. Inasmuch as Lord Brandon's objection is to the plaintiff's failure to have a contractual entitlement against the defendant, most if not all tort entitlements would thereby be rendered objectionable.

This last criticism can also be made of the argument sometimes made that recognition of a duty would in effect make the defendant the insurer of the plaintiff (13). The very term 'insurer' here is confused because defendants, unlike insurers, only have to pay when and because they have breached an obligation. Moreover, even if we decide to use the term 'insurer' for this situation, it is still true that wherever any tort entitlement is recognized this in effect makes defendants insurers in that sense. Were this type of 'insurance' objectionable, it would render all tort obligations objectionable.

As Lord Brandon's failed attempt to draw a line excluding certain cases concerning the acquisition of property from the reach of negligence liability illustrates, the relation of tort to contract has been seen as particularly troublesome in the period since Hedley Byrne recognized that pure economic loss was an actionable form of loss (that is, it could form the 'gist damage' in a claim in negligence). Judicial concern in this area occasionally manifested itself in observations, cruder than, but similar to, Lord Brandon's reasoning, about the defendant's expectations.50

50 E.g., see Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (the Mineral Transporter) [1986] 1 AC 1 at 15 (PC); The Aliakmon [1986] AC 785 at 816-17 (per Lord Brandon).
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Where these reflect a concern not to upset such expectations (14) and this concern is elevated into a reason for denying a duty of care we are presented with no more than the privity fallacy which was so comprehensively demolished in Donoghue’s case.\(^{51}\) If a defendant’s expectations are not to be unsettled, no expansion of common-law obligations would be acceptable; it is only by unsettling expectations that novel obligations can be recognized.

To show the variety of unconvincing countervailing arguments which recent case law have thrown up, let me give one final example. In \textit{Spring}\(^{52}\) the Court of Appeal denied the victim of a careless reference the protection of a duty of care on the basis that he already had another cause of action against the defendant arising from the same facts, namely defamation, in relation to which the law recognized that the defendant had a defence (qualified privilege) (15). Given that separate torts protect separate interests, it is likely that any set of facts may, \textit{prima facie}, trigger claims in more than one tort. To reject the possibility of concurrent liability here\(^{53}\) is to disturb this rich pattern of common law response and would set us the impossible task of ranking all causes of action and justifying the ranking. Thus, in \textit{Spring’s} case the court would need to explain why it implicitly ranked the policy concern reflected in the defence of qualified privilege in the tort of defamation above the probability concerns operating in the tort of negligence. Why not vice versa: if a reference was careful (thereby providing an answer to the claim in negligence), why would that not be sufficient to deny an entitlement in defamation? It is true that qualified privilege reflects an important concern of the law which reason demands should not be overlooked when a different cause of action is argued for. But mechanically and across the board to reject a duty of care (or any other cause of action) \textit{merely} on the basis that it would undermine or outflank this policy concern pre-empts the real possibility that on the facts a court might judge this factor to be outweighed by strong factors in favour of liability where a careless untrue statement causes physical or economic loss to the plaintiff.

\(^{51}\) That someone else has a ‘suitable’ claim against the defendant is also a version of this fallacy: Stapleton, ‘Peripheral Parties’, n. 3 above at 324. Sometimes there are ways of reading a judgment to avoid such an embarrassing construction: J. Stapleton, ‘Tort, Insurance and ‘Ideology’ n. 3 above at 827, n. 21.


\(^{53}\) As elsewhere: see \textit{Northern Territory of Australia v Mengel} (1996) 185 CLR 307 at 368 where Deane J resorted to the same unconvincing argument to assert that the Beaudesert proposition ‘impermissibly’ intruded on the domain of the tort of negligence and other torts. See also 359 (per Brennan CJ).
Convincing Factors

In Favour of Recognition of Duty

Judgments are remarkably thin on explicit convincing pro-liability factors. The most powerful of all such factors is one which can, in effect, merely be deduced from a remarkably consistent pattern of outcomes in the relevant sphere: namely, a defendant who, by his own positive act, has carelessly caused physical damage to the plaintiff or his property is always held to owe a duty of care to the victim. This is so even if the plaintiff and defendant are complete strangers; plaintiff and defendant are physically distant; the plaintiff is rich and insured; the defendant is a public authority; and so on. In other words, apart from Crown privilege no factor countervailing to the recognition of a duty has yet been identified which has the force to outweigh this pro-liability factor. Thus, if I carelessly trip a stranger into a swimming-pool where he drowns it will be held that he is my ‘neighbour’, that we are ‘proximate’ and that it would be fair, just, and reasonable to impose a duty on me.

But although this ‘trump’ factor should clearly be placed on the top of our menu of convincing pro-liability factors, its formulation can be little more than a recital of the relevant fact pattern: proper vindication of the law’s concern with the physical security of persons and property is currently regarded as justifying a duty being imposed on a party by whose own careless act the plaintiff’s person or property has been physically damaged (1). Of course, this does not mean that whenever I cause you physical damage by my act I will always be liable. Courts still have a range of analytical devices which they can use to exculpate me: my act was not a breach of duty; the damage was too remote; you had voluntarily assumed the risk or were acting in a way which the court is willing to recognize justifies raising the defence of illegality against you; and so on. But the fact that a duty is always recognized in such cases confirms that judges want to give a very forceful ‘systemic’ message about the importance the common law places

54 Trump factors such as this and the trump countervailing factor discussed later might be described as ‘principles’ constituting assertions of rights which stand to be justified, if at all, in moral terms. Other factors might be described as ‘policies’ which, because they are generated and justified by consequentialist (though not only economic) concerns, may be subject to being outweighed in any particular case by countervailing policies.

55 Statutes commonly go further to reflect the detail of social values and to elevate particular sorts of physical security: thus personal injuries are treated preferentially in many statutory regimes of liability (see e.g. the Occupiers’ Liability Act 1984, s 1(8), (9)) as is damage to buildings which are dwelling houses (e.g. Defective Premises Act 1972, s 1). Is it possible that the common law might develop such fine tuning in relation to physical loss?
on physical security from careless acts. Moreover, so well-recognized and accepted is this concern that courts rarely attempt to justify or explain its eminence within the common law. Their silence on such a key factor is, of course, understandable given that the task of justification here would require the handling of delicate issues of moral philosophy.

More specific concerns which weigh convincingly in favour of liability have been raised explicitly by appellate judges. For example, courts routinely justify holding that those who create situations of peril owe a duty to those who intervene in order to rescue others on the basis that to deny a duty would tend to discourage rescue (2). Since the common law should not discourage that which the community consensus wants encouraged, a duty is convincingly justified.

The unwanted baby cases throw up another specific sound pro-liability concern. When the first such case came before the courts it was brought by the child. Analytically the only damage of which the child could complain, the only formulation of damage which could be said to form the gist of the action, was life itself. As we will see, courts are generally concerned with the symbolic messages the law sends out. Here this led to the court denying the claim of a duty of care owed to the child: for, given the limits of the law’s conceptual apparatus, recognition of a duty would require the law to acknowledge that healthy life could be ‘damage’ to the individual baby, a proposition wholly at odds with community morality. Cleverly the next unwanted baby case was presented in a way which avoided this sound countervailing concern: here it was the parents who sued for their own loss, the economic loss in bringing up the child. Here not only was the previous countervailing concern absent but a separate pro-liability argument was convincingly cited by the court in justifying its recognition that the careless medical defendant owed the parents a duty of care: a denial of duty would tend to encourage abortion (3), again a result which would have flown in the face of a community consensus that this is a phenomenon which should not be positively encouraged.

**Countervailing to the Recognition of Duty**

Just as at the top of the list of convincing pro-liability factors there is a factor which can be defined so precisely that it trumps all others when present on the facts, so too we can spell out from case law a sound countervailing factor so powerful in a narrow formulation that it trumps all others. The common law recognizes the core libertarian impulse that I

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56 McKay v Essex Health Authority [1982] QB 1166.
57 Emeh v Kensington Area Health Authority [1985] QB 1012 at 1021.
am not my brother's keeper where he is a stranger! The concern here is to maximize a person's freedom of choice of action and at present the very heavy weight given to this concern has produced a clear bright-line of outcomes: no duty of affirmative action is recognized towards a stranger. In other words, the concern with freedom of action is currently given such weight that it is seen to justify denial of all duties of affirmative action towards strangers (1). Thus the law accepts that were I to walk past a baby stranger drowning in a paddling-pool I would be under no legal duty to assist. In the eyes of the law at present, he or she is not my 'neighbour', we are not 'proximate', and it would not be 'fair, just and reasonable' to impose on me a duty to roll the baby out of the pool, so powerful is this concern with freedom of action.

Of course, the fact situations which trigger the pro-liability trump factor (that the plaintiff was physically injured by the affirmative act of the defendant) and the fact situations which trigger the trump countervailing factor (that the defendant failed to act in relation to a stranger) are mutually exclusive. But the law also allocates weight (albeit rebuttably) to weaker versions of both. Thus, in cases of physical injury courts seem keener to protect plaintiffs by recognition of a duty of care than in cases of pure economic loss, even where the act causing physical injury was committed not by the defendant but by someone over whom the defendant merely had some form of control. On the other hand, in cases where the complaint is of an omission by the defendant, courts are more reluctant to recognize a duty than in cases where the complaint is about a positive act of the defendant even where the case is between non-strangers: because it is possible for the court to regard the passive defendant, relative to the active source of injury, as a merely peripheral party (2). 58

Clearly some fact situations can raise both of these weaker versions of our two trump factors. This is seen most clearly in cases where the omission of the defendant to control the behaviour of a third party has resulted in physical injury to the plaintiff: cases such as Topp 59 and Smith

58 A view often bolstered by the fact that the party of central causal importance is being sued or has already been successfully sued by the plaintiff: In Jones v Islington National Properties Ltd v South Bedfordshire District Council [1986] 1 QB 1094; Curran v Northern Ireland Co-ownerships Housing Association [1987] AC 718; Richardson v West Lindsey District Council [1990] 1 WLR 522; Ancell v McDermott [1993] 4 All ER 355; Clough v Bussan (West Yorkshire Police Authority) [1990] 1 All ER 431; Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd [1985] 1 AC 210; Wood v Law Society (1993) 143 NL 1475 (QBD); Stanin v Wise [1996] 3 All ER 801 (for the point see [1994] 3 All ER 467 at 469); Banque Financière de la Cité SA v Westgate Insurance Co. Ltd [1991] AC 349. See Stapleton, 'Peripheral Parties', p. 3 above at 316. Contrast the recognition of a duty in Pyrenees Shire Council v Day [1998] HCA 3 (23 Jan. 1998), para 8 where the principle wrongdoer had been successfully sued.

Duty of Care Factors

v Littlewoods. Such cases pose some of the most difficult cases for judges to handle since the two concerns in tension with one another reflect powerful but ultimately incommensurate moral impulses. In such cases, even where judges agree on the relevant factors to be weighed, it is inevitable that sometimes different judges will give the competing factors different weight, yet each will be unable to explain his particular determination in a way which convincingly justifies it in preference to the different determination of his fellow judges.

Sometimes in these ‘failure to control third party cases’ additional sound countervailing factors can be discerned in judgments denying a duty of care. Thus not only are there a large number of cases in which there are judicial references to the fact that the defendant is of peripheral causal importance and another party the principal actor, but there are many cases where it is emphasized that the victim himself had adequate means of avoiding the risk eventuating and causing loss (3).

Of course, even in the set of cases of failure to control a third party where the plaintiff did not have adequate means of avoiding the risk eventuating, a duty may be denied on the basis of the perceived strength of the libertarian concern and the associated view that, relative to the


61 Discussed in Stapleton, ‘Peripheral Parties’, n. 3 above at 314–17. Such cases are even more troublesome when overlaid with the concerns which may be triggered when the defendant is a public authority; see e.g. Stowin v Wise [1996] 3 All ER 801; Home Office v Dorset Yacht Co. Ltd [1970] AC 1004; Pyrenees Shire Council v Day [1998] HCA 3 (23 Jan. 1998); J. Stapleton, ‘Peripheral Parties’, n. 3 above at 313–14.

62 See e.g. Yuen Kun-Yeu v Attorney-General of Hong Kong [1988] AC 175 at 195; Richardson v West Lindsey District Council [1990] 1 WLR 522 at 546; Ancell v McDermott [1993] 4 All ER 353 at 363; Clough v Bussan (West Yorkshire Police Authority) [1990] 1 All ER 431 at 434; Murphy v Brentwood District Council [1991] AC 398 at 487. On the general point see Stapleton, ‘Peripheral Parties’, n. 3 above at 310–17. That the primary wrongdoing is that of the third party seems an important theme in the judgment on the abuse claims in X (minor) v Bexefordshire County Council [1995] 3 All ER 353: ‘the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others’ (per Lord Browne-Wilkinson at 382).

63 See e.g. Barrett v Ministry of Defence [1995] 3 All ER 87 at 95; Banque Financière de la Cité SA v Westgate Insurance Co. Ltd [1991] AC 249 at 271; James McNaughton Paper Group Ltd v Hicks Anderson & Co. [1991] 2 QB 113 at 128; Pacific Associates Inc. v Baxter [1980] 1 QB 993 at 1031; Minorities Finance Ltd v Arthur Young [1989] 2 All ER 105 at 110; Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council [1986] 1 QB 1034 at 1062; Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co. Ltd [1985] 1 AC 210 at 241; Yuen Kun-Yeu v Attorney-General of Hong Kong [1988] AC 175 at 195; Richardson v West Lindsey District Council [1990] 1 WLR 522, 539; Van Oppen v Trustees of the Bedford Charity [1990] 1 WLR 235. These cases are discussed on the general point in Stapleton, ‘Peripheral Parties’, n. 3 above at 305–10. For an Australian example, see San Sebastian Pty Ltd v The Minister (1986) 162 CLR 341 at 360 (that the plaintiff could have used private advisers). It applies even in cases where the defendant’s conduct was a careless act and the loss was physical, e.g. Philcox v Civil Aviation Authority, The Times, 8 June 1995 (no duty on supervisory public authority re negligent airworthiness certificate).
active injurer, the defendant was a mere peripheral party. This is what
happened in both Topp and Smith v Littlewoods, particularly noteworthy
examples as they both involved denial of duty in relation to physical loss
and in both the principal wrongdoer was not good for judgment. But in a
subset of these cases, namely the subset where the defendant is a public
authority, we find the denial of a duty being explicitly bolstered by other
sound countervailing factors relevant to the conduct of such bodies.64
One of these is that the imposition of a duty might produce a specified
unattractive socio-economic impact, namely the disproportionate
distortion of the budgets of public bodies and/or the diversion of their efforts
to the detriment of a specified public interest (4).65 Interestingly, this
factor has been recognized in cases involving physical loss as well as cases
involving pure economic loss.66
Among other sound countervailing factors are some we have already
touched on, for example the indeterminacy concern (5). Even though
different commentators elaborate the concept of the rule of law differen-
tly, it seems agreed that at least one requirement of that touchstone of
legal legitimacy is that a person should be able to know what the law
demands of him. The confluence of this constitutional idea and a specific
notion of fairness produces the common-law restraining requirement
that liability rules allow defendants to know the extent of their obliga-
tions in advance. Efficiency concerns also demand this: for how else can
a person decide whether it is worth engaging in an activity if he cannot
know what its costs will be. This means that a powerful countervailing
factor is present wherever a duty would expose the defendant to the risk
of liability for an indeterminate time or to an indeterminate class or for
an indeterminate67 extent of loss. This is known loosely as the ‘flood-
gates’ concern.

Another well-known factor is generated by another constitutional
principle, namely the separation of powers. This is the so-called policy/opera-
tional distinction (6) which arises in disputes concerning the
liability of public bodies. Though this distinction is, at the margins,
much easier to state than to apply,68 it is a restraining factor which has

64 Whether acts or omissions.
65 See e.g. Elguzouli-Daf v Commissioner of Police [1995] 1 All ER 833 at 842; Welton v North
Cornwall District Council [1997] 1 WLR 570 at 581, 585; and cases discussed and cited in
66 See Stovin v Wise [1996] 3 All ER 801 at 813, 832; the abuse claims in X (minors) v
Bedfordshire County Council [1995] 3 All ER 353 at 381. See also the police cases such as Hill v
Chief Constable of West Yorkshire [1988] 2 All ER 238 and W v Commissioner of Police of the
67 Not merely extensive, see above. On the general point see Ultramarex Corp. v Touche
(1931) 174 NE 441; Stapleton, ‘Agenda’, n. 3 above at 253ff.
68 On the current position in the UK see X (minors) v Bedfordshire County Council [1995]
wide support in principle and operates powerfully over a wide range to suppress duties in negligence.

The earlier discussion of the unwanted baby cases also touched on another sound countervailing factor: that to assist this plaintiff would bring the law into disrepute or otherwise injure its dignity (7), in that case by signalling the socially unacceptable view that healthy life could constitute actionable damage in the eyes of the law. This concern with the dignity of the law, not only underlies other cases where a duty is in effect denied, but also underlies many other controls of the common law of obligations such as the rules of assessment of damages, the defence of illegality, sometimes the defence of volenti, and sometimes even causation.

In passing let me also note that the concern with the dignity of the law should also be an important factor courts consider when faced with the problem of the civil law being used to evade the demands of criminal law procedure or in effect challenge the outcome of the criminal process. The most notorious recent example of the sort of challenge that

3 All ER 353 at 368–71, 360: if the decision complained of falls within the ambit of a statutory discretion it cannot be actionable at common law; if the decision is so unreasonable that it falls outside that ambit it may give rise to common-law liability; but if the factors relevant to the exercise of the discretion include matters of policy (here meaning matters judged unjustifiable such as the ‘allocation of resources or the determination of general policy’, 380) the court cannot reach the conclusion that the decision was outside that ambit.

69 Sometimes the law falls between two stools: e.g., in an attempt to avoid the floodgates potential of liability for nervous shock courts formulated artificial duty requirements (spatial, temporal, and relational) widely regarded as themselves bringing the law into disrepute, see Stapleton, ‘In Restraint’, n. 3 above at 84, 94–5.

70 Such as the recent decision of the CA that a Health Authority owed no duty to a schizophrenic to provide after-release care (and thereby prevent his killing a stranger): 

Churis v Camden & Islington Health Authority, The Times, 10 Dec. 1997. For ex turpi causam ideas operating at the duty stage see also Cory J (221–222) in 


71 See, e.g., Burns v Edman [1970] 2 QB 541 (dependency claim related to proceeds of crime).

72 Albeit in an impressionistic manner which ‘cannot be expressed in a way that is self-executing’: 

Galan v Preston (1990–1) 172 CLR 243 at 273 (per Brennan CJ). None the less, the better view is that the law recognizes illegality as a defence if a factor countervailing to the recognition of a duty of care in cases where ‘for the law to lend its support to the recovery of damages by a plaintiff who suffers injury while participating with the defendant in the commission of a serious criminal act’ (Toohey J, at 292) would be repugnant to prevailing community standards and therefore would bring the law into disrepute.

73 E.g., the better view of 

Baker v Willoughby [1970] AC 467 where the plaintiff was the victim of 2 sufficient tortious causes, was that the law is justified in abandoning the but-for threshold test for factual causation where to apply it would leave the victim of 2 torts worse off than the victim of one. (Note here dignity of the law acts as a pro-liability factor.) The same is true in cases of multiple possible sufficient causes such as 


74 On which see Stapleton, ‘Peripheral Parties’, n. 3 above at 326–7, and cases cited therein. Compare the comment of Brennan CJ (in a different context) that the law should
can be thrown out to the common law of obligations in this way is the trial and subsequent civil case brought against O. J. Simpson in the United States. A variety of such challenges are feasible (and some are also surfacing in the United Kingdom and elsewhere) not merely in the intentional torts such as assault, but also sometimes in the context of the duty of care: where a person acquitted of murder seeks to establish that his legal team owed him a duty of care to advise him about the potential for a claim for false imprisonment; or a victim or a victim’s family sue their legal representatives for failing to advise carefully on the potential of a civil claim against an acquitted person.

An associated countervailing factor is that recognition of a duty of care here might threaten to involve substantial and systemic evidentiary difficulties (which may even bring the law into disrepute) (8). Perhaps the haphazard reluctance of the courts to recognize duties of care in relation to pure loss of a chance is motivated by this concern. Certainly a thread in the judicial concern in nervous shock cases seems to be related to the evidential difficulties, if not impossibility, of drawing a convincing distinction between this syndrome of symptoms and that associated with non-actionable ‘mere grief’.

Similar to these last factors is a concern with the judicial system in general. Where a duty might threaten the orderly pursuit and administration of justice (9) courts recognize a powerful countervailing factor. 76

Clearly that imposition of a duty might threaten the control of public order, the conduct of military operations or national security (10) would also constitute a sound countervailing factor to the recognition of that duty. 77

We saw earlier that the fact that the plaintiff had means to avoid the risk eventuating and causing loss has often been cited as a factor bolstering a finding that the defendant was a mere peripheral party who should not be burdened with a duty of care. But even where the defendant’s carelessness is regarded as causally important and where, therefore, one might expect the law, \textit{prima facie}, to be interested in deterring such conduct, there may be in particular cases more powerful reasons against

\footnote{\textit{limit the admission of a civil duty of care in order not to trespass upon the operation of the criminal law}: \textit{Gala v Preston} (1990–1) 172 CLR 243 at 272.}

\footnote{The curious dichotomy by which loss of a chance arguments are treated differently according to whether the loss is economic or physical began to emerge more than a decade ago: J. Stapleton, ‘The Gist of Negligence: Part I’, (1988) 104 LQR 213 at 235.}


\footnote{See, e.g. \textit{Hughes v National Union of Mineworkers} [1993] 4 All ER 278 at 288 and \textit{Mulcahy v Ministry of Defence} [1996] 2 All ER 758 at 772.
the imposition of a duty consistent with an interest in deterring such potent carelessness. For example, in a solid series of cases such as Simaan British appellate courts have refused the protection of a duty of care to plaintiffs who, despite not being in contractual privity with the defendant, were linked by a chain of contracts through a middle party to the defendant (these are the so-called ‘contractual matrix’ cases).78 A similar phenomenon exists in cases such as The Esso Bernicia, where though the plaintiff may have had no dealings with the defendant, the plaintiff had had dealings with the owner of property the injury to which by the careless defendant had caused economic loss to the plaintiff (the damage to property of third party cases).79 It is noteworthy that all these cases involved pure economic loss and all involved commercial plaintiffs.

In each case the commercial plaintiff was seeking to use tort to provide it with an entitlement against a distant defendant. In each case this was an entitlement which the plaintiff could have obtained in contract against the middle-party in contractual matrix situations or the property owner in the damage to property of third-party cases. Had such protection been secured it would thereby have introduced, in the contractual matrix cases, an incentive on that middle party to extract similar protection from the defendant (and thereby effect deterrence of the defendant without the intervention of tort). In the damage to property of third-party cases the securing of such contractual protection from the owner would have given the plaintiff a claim against the owner who could then have recovered the relevant amount as part of his loss in his negligence claim against the defendant for injury to his own property, again a situation which allows deterrence of the defendant without the intervention of tort.

In these circumstances recognition of a duty would in the future positively encourage advertent parties in the position of the plaintiff to be dependent, to refrain from available self-help conduct (namely, contractual protection from the middle party or owner) which would have secured protection from economic loss for them (while also achieving deterrence of the defendant). Courts seem almost uniformly unwilling

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79 See, e.g., from the House of Lords Esso Petroleum Co v Hall Russell & Co (The Esso Bernicia) [1989] AC 643 at 663, 665, 676; The Alliemen [1986] AC 785 at 819. See also the dissent of La Forest in Norsk Pacific Steamship Co. Ltd v Canadian National Railway Co. (1992) 91 DLR (4th) 289 at 349: ‘it is hard to imagine a more sophisticated group of plaintiffs than the users of railway bridges. These parties have access to the full range of protective option . . . (including) contracts with the bridge owner.’ For a detailed discussion of both types of case see Stapleton, ‘Peripheral Parties’, n. 3 above at 32FF.
positively to encourage such dependency and ‘free-riding’ on the tort of negligence, at least in relation to economic loss, whether it be in a contractual matrix case (which we might call ‘the Simaan principle’) or a case concerning damage to property of a third party (which we might call ‘the Esso Bernicia principle’) (11).

The force of this countervailing concern not to assist those who have adequate means of deterring the defendant and protecting themselves is underscored by the fact that the only major case out of line with this approach in the U.K. is the contractual matrix case of Junior Books (where the plaintiff not only had adequate alternative protection in place, via its contract with the middle party, to protect itself and deterring the defendant but had that contractual entitlement and had exploited it to recover damages from the middle party). Significantly, although Junior Books was a decision of the House of Lords, it has not been applied by an appellate court in England and even judges elsewhere known for their sensitivity to pro-liability factors have strongly hinted that the case is one which should not be followed.

That the plaintiff in contractual matrix cases had an adequate opportunity to use his contract with the middle party to protect himself and achieve (albeit indirectly) the deterrence of the defendant is not only a sound rationale for the denial of a duty in such cases, but it also provides a convincing distinction to be drawn between these cases (some of which, like Simaan, involved economic loss resulting from the acquisition of property from the middle party) and Smith v Bush Eric S. In the latter case a duty to avoid economic loss was recognized in the context of the acquisition of property in favour of a non-commercial plaintiff who, despite being in a contractual chain that led to the defendant, was prevented by standard terms within that chain (and their presence in all alternative transactions in that market sector) from obtaining contractual protection from the middle party for the risk involved. In an exceptionally important analogue, the High Court of Australia similarly allowed a subsequent non-commercial owner of a dwelling to sue a contractually distant builder in circumstances where the relevant market conditions (caveat emptor in the sale of used dwelling houses) prevented

80 The subtle implication of this factual feature is discussed below.
83 See later discussion of Cooke P’s comments in Invercargill City Council v Hamlin.
the plaintiff from obtaining the relevant protection from the middle party with whom she was in privity.\footnote{85} Note that courts are not necessarily adopting some unexplained differential between commercial and non-commercial plaintiffs here. The concern not positively to encourage dependency and free-riding is only triggered where the plaintiff has sufficient muscle in the relevant contractual context to be able to negotiate for protection with the middle party were a duty to be denied. This simply tends to be more likely in cases involving commercial plaintiffs and less likely where the plaintiff is a consumer.

Further subtlety in the courts' approach here is revealed when we consider contractual matrix cases where the plaintiff already has protection from economic loss by his contract with the middle party.\footnote{86} Importantly, even here we see that powerful commercial plaintiffs such as Simaan are denied the protection of a tort duty. In contrast, those plaintiffs perceived as prone consumers, such as the indirect Names were perceived to be in Henderson,\footnote{87} are allowed such protection. The countervailing concern about dependency and free-riding provides a sound rationale for this otherwise baffling distinction: that whereas the recognition of a duty to protect the former type of plaintiffs might positively encourage them to use their negotiating power to ‘cash in’ on their tort entitlement in their dealings with the middle party, protection of the prone consumer will not result in such exploitation.\footnote{88}

Now that judgments have begun to reveal judicial sensitivity to the possibility that plaintiffs could secure both protection from and deterrence (albeit indirect) of the defendant using contract, the reason for certain stress points in the law becomes clearer. We have already seen how this broad concern about not encouraging dependency on and exploitation of tort explains the widespread rejection of the decision in Junior Books. But the concern also allows us to formulate the anxiety...

\footnote{85} Though it must be conceded that the principle under discussion was not directly expounded: Bryan v Maloney (1994–5) 182 CLR 609. Note Toohey J’s sensible concern that ‘confining liability to the first purchaser might encourage sham first sales as a means of insulating builders from liability’ (at 663).

\footnote{86} Significantly, this was also the case in a number of other cases from which the principle under discussion is drawn: e.g. Simaan General Contracting Co. v Pilkington Glass Ltd [1988] QB 758; Maithed v Industrial Tank Specialities Ltd [1986] QB 507; Pacific Associates Inc. v Baxter [1990] 1 QB 993; Banque Financière de la Cité SA v Westgate Insurance Co. Ltd [1991] AC 249; Marc Rich & Co. AG v Bishop Rock Marine Co. Ltd [1994] 1 Lloyd’s Rep. 492.

\footnote{87} Henderson v Merret Syndicates Ltd [1994] 3 WLR 761.

\footnote{88} This suggests however that consumers and buyers of goods should be able to sue distant manufacturers for pure economic loss (e.g. where the item, say a TV, simply does not work): a matter which has yet to receive authoritative determination by an appellate court in the UK (presumably because the warranty remedy for consumers against retailers is so effective).
which surrounds apparently more established precedents. Take two examples. First, *D&F Estates*: in this case might it not be argued that the *Simaan* countervailing concern was absent on the ground that the plaintiffs could not realistically have obtained contractual protection from the middle party against the defendant's negligence, nor were they part of a class likely positively to become dependent or to exploit any tort entitlement granted them? Secondly, *Hedley Byrne*: if the plaintiffs in *Simaan* and so on are required to seek protection (and thereby secure indirectly the deterrence of the defendant) via contractual arrangements with the middle party, why is not a commercial plaintiff who had *direct* dealings with the defendant, whether amounting to a contract or not, told that it had an adequate avenue of self-protection (and route to deter the defendant), namely by contract with that party for that protection; and that, just because it had failed to help itself, tort was not willing to step in and bail such a party out of its economically unwise gamble in relying on the defendant's advice without contractual or other protection?89

The law is concerned to prevent itself being the instrument by which parties may exploit others in breach of (even minimal) good faith principles. Thus it has been held, for example, that a duty would be denied where its imposition would allow the plaintiff to circumvent a positive arrangement or understanding (to which both the plaintiff and defendant were clearly parties) as to where the relevant risk would fall and/or the avenues of legal complaint the plaintiff would use (12).90

Another feasible countervailing factor is that, for some *specified* and sound reason, the area is one more appropriate for Parliamentary action (13).91 Of course, the force of such reasoning rests on how convincing those reasons are.

A final example of a convincing countervailing factor can be deduced from the reasoning of the House of Lords in *Spring v Guardian Assurance plc*.92 In that case the view was taken that there would be no liability in

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90 *Pacific Associates Inc v Baxter* [1990] 1 QB 993 at 1032, 1010-11, 1020-3; *Norwich City Council v Harvey* [1989] 1 WLR 828 at 837 (a physical loss case); *The Pioneer Container* [1994] 3 WLR 1 at 10. But caution is required here to avoid the privity fallacy: see Stapleton, 'Peripheral Parties', n. 3 above at 328-31 and cf. *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd*, The Times, 28 Jan. 1997. Cf. also *Morris v Ford Motor Company Ltd* [1973] QB 792 (a case on subrogation not duty) where there was a judicial concern not to allow the party claiming subrogation to disturb such a joint understanding (which was crucial to harmonious industrial relations).

91 See, e.g. *Winnipeg Child and Family Services v G (DF)*, n. 14 above, discussed below.

92 [1994] 3 All ER 129.
the tort of negligence where carelessly made true statements cause injury. Although the Law Lords did not spell out which analytical label was most appropriate to carry this message, the 'no-duty' packaging is clearly the most convenient. What needs to be signalled is the generality of the concern here: that liability would be inconsistent with free (true) speech (14). That would not be conveyed as forcefully if, for example, the no-liability result was packaged as a case of there being a duty of care even with regard to the truth but liability ultimately never attaching because the damage is always caused by the underlying truth and not by the carelessness of the statement.93

A Few Examples from New Zealand, Australia and Canada

Just as many appellate judges in the United Kingdom have become more open about the substantive factors they have considered in resolving claims for novel duties of care, so too have many judges in New Zealand, Australia, and Canada. Space here precludes the rigorous discussion which these many factors deserve. But for three reasons it is worth mentioning a few examples. First, there will always be factors in the jurisprudence of other countries which, by mere happenstance, have not yet been thrown up by the fact situations litigated in one's own system but which could well weigh with local appellate judges if a suitable case came before them: indeed, in my view this is the most fruitful harvest of comparative legal study. Secondly, a few Commonwealth examples help confirm the variety of factors to which the common law is sensitive and help bolster the associated argument I have been making that this phenomenon prevents any formulation of a common denominator 'test' of duty in the same way no common denominator 'test' of 'breach of a standard of care' can be formulated. Thirdly, this variety ranges from factors, such as the indeterminacy concern, whose weight is uniformly recognized, to factors such as a concern with preserving local customs of rural hospitality (see below) whose recognition and weighting obviously varies across jurisdictions: the source of that divergence in the common law world is to be welcomed not feared.

Judgments of the New Zealand Court of Appeal contain some of the clearest statements of the earlier important principle that the law should not positively encourage dependency and free-riding on tort, where the

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93 See also the explicit rejection of a duty 'not to injure the plaintiff's reputation by true statements' in Bell-Booth Group Ltd v Attorney-General [1989] 3 NZLR 148 at 156 (per Cooke P). Cf. Lowther plc v Fayed (No. 5) [1994] 1 All ER 188 at 195 (CA) where a similar refusal to allow the telling of the truth to be actionable is made by the CA in the context of the tort of conspiracy to injure by lawful means.
plaintiff could have protected himself in contract either directly with the defendant or with a middle party. So, for example, in *Invercargill City Council v Hamlin* President Cooke strongly hinted that were a case parallel to *Junior Books* to come before that court, a duty would be denied on the basis that 'the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded'. Indeed in *South Pacific Manufacturing Co. Ltd v NZ Security Consultants and Investigations Ltd* Richardson explicitly recognised that this countervailing concern could arise between commercial parties who had had direct dealings, stating, 'I cannot see any justification for allowing [the plaintiffs] a greater recovery through tort than they were prepared to pay for in contract'.

That courts are able to draw clear and convincing restraining force from a specific statute is well-illustrated by the judgments of the New Zealand Court of Appeal in *Kavanagh v Continental Shelf Company (No. 46)*. Here the judges rejected the claim that the agent of a council owed a duty in the circumstances on the basis that to recognize such a duty would undermine the clear policy of a statute (sound countervailing factor 15). The relevant statute was designed to protect public bodies from liability in contract for unauthorized contracts purportedly made on their behalf. Were the 'carelessness' of the agent in making such an unauthorized contract to lead to his liability in the tort of negligence, the council might well have been vulnerable, via the doctrine of vicarious liability, to the very sort of liability from which the statute sought to protect it.

Another potent countervailing factor was cited by the High Court of Australia in the *San Sebastian* case. Here the claim that a public body owed a duty of care to a property developer was rejected on the grounds, *inter alia*, that recognition of a duty to an individual might clash with, inhibit, or frustrate a specifiable 'public interest' with which the defendant has been charged (sound countervailing factor 16). In other words, even where a court may characterize the defendant's conduct as 'operational', a duty might be denied to an individual on the basis of such a clash of interests. Of course, such a factor, also often deployed by British appellate judges, can only have weight if the

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97 [1993] 2 NZLR 648. A parallel concern seems to underlie the rejection of a duty on the individual social workers and the psychiatrist in *X (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 384.
98 *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 341 at 374.
99 See, e.g. *X (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 371 (per Lord Browne-Wilkinson), a common-law duty should be denied if it would be 'inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties'; *Davis v Radcliffe* [1990] 1 WLR 821 at 827 (per Lord Goff), typically 'the
specific clash of private and public interests can be convincingly established. That this is feasible is shown by some of the police cases. That it is even feasible in the case of regulatory bodies with only one field of operation is shown by cases where a public body is authorized solely to monitor the soundness of companies or banks. Such a body might decide not to warn individual investors and depositors of evidence of maladministration of the company or bank, or not to warn them of its financial plight in the hope that the company or bank can put its house in order or trade out of its difficulties rather than risk damage to public confidence in the company or banking system.

The Sen Sebastian judgments contain another explicit sound countervailing factor (17): that 'to impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and expertise for a person contemplating a course of conduct'. This is yet another concern which might be thought to throw doubt on the correctness of the decision in Hedley Byrne.

The Australian High Court has also recently concerned itself with a factor, known as the doctrine of 'general reliance', from whose problematic form it is possible to tease out a sound pro-liability factor. It was noted earlier that where the complaint against a defendant is merely that it did not control the principal author of the plaintiff's injury there is, for statable reasons, a greater reluctance to impose a duty than in cases of the defendant's overt act causing harm. Since many complaints against public bodies relate to their regulatory functions this countervailing factor often arises in cases involving public authority defendants. (It was in an attempt to define cases where, nonetheless, public bodies would owe duties that it was thought that a concept of the public's general 'reliance or dependence' might assist.)

very nature of the task, with its emphasis on the broader public interest' militates against a duty to an individual; W v Home Office, The Times, 14 Mar. 1997 (CA); Welton v North Cornwall District Council [1997] 1 WLR 570 at 581, 585 'the interests of the individual may have to be sacrificed for the greater common good' (per Ward LJ). On the general point see Stapleton, 'Peripheral Parties', n. 3 above at 313-14 and case law-cited therein. This factor is closely associated with that couched in terms of the distortion of public budgets and/or activities (see above).

100 Sen Sebastian Pty Ltd v The Minister (1986) 162 CLR 341 at 372.
102 Mason was happy to formulate the idea in both terms: ibid at 470. Unhappily it came to be known by its weaker limb: general reliance. Mason appreciated that simply because the public is vulnerable to a risk and subliminally 'relies' on a government agency would not be sufficient (after all, citizens 'rely' on police to catch criminals but no duty is owed here) but attempts to define the idea more narrowly were couched in terms of general reliance and were perceived as unconvincing: see Pyrenees Shire Council v Day [1998] HCA 5 (23
In rare cases, however, the regulatory activity of a public body does not consist of the surveillance of risky behaviour of third parties: rather, the public body has alone been allocated the role of the organization of behaviour of others and is the sole creator of the risk. Air traffic control is a good example, where the public body charged to allocate air space carelessly orders two aircraft on to a collision course and they obey and collide. In such cases, the public body is clearly the principal causal player and the public is not only completely prone to the relevant risk but is dependant solely on the public body discharging its role carefully. The dependence is not only complete but it is a dependence which is exclusively focused on the public body by the nature of how the risk came about. This can be contrasted with similar public regulatory roles such as checking on the safety of aircraft where the aircraft’s operator and manufacturer might be regarded as being the principal parties in relation to how the risk came about and the regulator occupying a merely peripheral role.\textsuperscript{103} Were the doctrine to be couched only in terms of ‘general dependence’ or better still, ‘exclusive dependence’, and narrowly defined to catch only cases where it is the public body alone which has control over the relevant risk, it would undoubtedly constitute a sound if rarely triggered pro-liability factor (sound pro-liability factor 4).

On the other hand, the fact that the plaintiff was exclusively dependent on the conduct of the defendant may, nevertheless, be outweighed by the strength of countervailing concerns. This is well-illustrated by the recent judgment of the majority of the Canadian Supreme Court in the extraordinary case of\textit{Winnipeg Child and Family Services v G. (D.G.)}\textsuperscript{104} where,\textit{inter alia}, the question arose whether a pregnant woman owed a duty of care to her unborn child in relation to ‘lifestyle choices’. Such a child is, of course, exclusively dependant on its mother in relation to risks arising from such choices. Among the range of countervailing factors cited by McLachlin J writing for the majority were the following: a duty here might encourage-abortion (sound countervailing factor 18);\textsuperscript{105} recognition of a

\textsuperscript{103} The role may even be judged peripheral relative to that of another party where the damage suffered was physical and the regulator’s conduct was: an act, for example see\textit{Philcox v Civil Aviation Authority}, The Times, 8 June 1995 (CA) (contrast the recognition of a duty in\textit{Perrett v Collins}, The Times, 23 June 1998 (CA); or a failure to continue to act, for example see\textit{Stovin v Wise} [1996] 3 All ER 801 on which contrast\textit{Pyrenees Shire Council v Day} [1998] HCA 3 (23 Jan. 1998).

\textsuperscript{104} See n. 14 above.

\textsuperscript{105} Ibid, para 44.
Duty of Care Factors

A duty might overall have deleterious effects on those in the position of the plaintiff (19), recognition of a duty here would render actionable defendant conduct (such as drug abuse) which was not a free choice and so would not be effective in deterring it (20); the content of the duty could not be defined adequately narrowly with bright lines (21), avoidance of breach of such a duty would be particularly onerous on disadvantaged groups (22); the duty would effect a major departure from traditional legal categorization of a fundamental relationship and such change is best left to the legislature (23); and since a duty here would constitute a potentially extensive invasion of a ‘fundamental’ aspect of liberty, women’s autonomy over their own bodies, this justified ‘great caution’ and supported the view that it was an area best left to the legislature (24).

Concluding Remarks

Let me make a few remarks before I summarize the above selections from the ‘judicial menu’ of duty factors. A first and obvious point is that these lists are by no means complete or closed. The changing nature and diversity of social circumstances will continue to reveal factors which might convincingly weigh with courts in determining the appropriate limits of the obligation in negligence. Moreover, just as the lists will change over time, so too may the judicial weight given each factor. In both these phenomena lies the richness and flexibility of the common-law method.

Secondly, concerns which have sound weight in this field must, by modern common-sense juridical logic, run throughout the law: the law should not speak with a forked tongue. The parallel point also holds: factors which sensibly concern judges elsewhere in the law might well have a valid resonance here. An example which also illustrates the cultural-specificity which relevant factors may have can be drawn from Australian jurisprudence dealing with the issue of landowners’ liability for the escape of fire. Since 1914 the Australian High Court

106 Ibid, paras 42–4. Because, e.g., an addicted mother might choose not to seek pre-natal health care for fear of legal action against her.
107 Ibid, para 41.
108 Ibid, para 39. The legislature was in a better position to craft a ‘solution that is principled and minimally intrusive to pregnant women’ (para 56).
109 Ibid, para 40.
110 Ibid, para 29. ‘The pregnant woman and her unborn child are one’ (para 55).
111 Ibid, paras 34, 37, 45, 50, & 55.
112 We have seen, e.g., that the concern not to bring the law into disrepute underlies other analytical compartments of this tort itself such as the defence of illegality and even causation. Similarly many sound concerns of the law have earlier surfaced under the ‘packaging’ of remoteness of damage and these might also be considered relevant to the duty question.
has rejected the special *ignis suus* rule (which makes the landowner vicariously liable for such escapes caused by the negligence of mere licensees) on the explicit basis that ‘contemporary conditions in this country have no real similarity to urban conditions in medieval England’\(^{113}\) and that such a liability rule would have been an intolerable restriction on ‘the tradition of hospitality in the bush and would have been a disincentive to pastoralists to allow Aboriginal communities to camp on their holdings’\(^{114}\). Presumably equivalent concerns not to discourage socially beneficial forms of hospitality (sound countervailing factor 25) would have weight in duty-of-care cases where the facts raise the issue. Similarly, given the law is keen elsewhere to frustrate dishonesty, bad faith, duress, and so on, we might confidently predict that such factors would not be ignored in the duty analysis where the facts raise the issue.

Thirdly, while the listing of these judicial menus of sound factors relevant to the duty issue help unmask the substantive determinations being made by judges in this field, they cannot operate as some sort of mechanical guide as to how a novel case will be decided in the future. This is because, at the end of the day, even if judges agree on the relevant factors to be weighed in the individual case, different judges may well place different weight on competing factors and do so quite reasonably. As we have seen, this is often the case. It is, after all, the source of the embarrassment for the law in claims asserting that the defendant should be under a duty of affirmative action.

Fourthly, there are areas in which, even were judges to agree on the relevant duty factors and their weight, the common law does not possess the tools necessary to draw coherent non-arbitrary lines around an obligation. A classic example of this sort of conceptual helplessness is liability for nervous shock. To the evident and understandable frustration of appellate judges, this is an area where it seems that all that can be done with common-law techniques to restrain the tort within acceptable limits is to adopt the sort of artificial and incoherent boundary rules which currently exist, and which are a sore humiliation to the law.

Fifthly, drawing together these judicial policy menus allows us to pinpoint areas of inconsistency and tension in the current law. Thus it allows us to see why, in the area of economic loss resulting from the acquisition of property, claims against a local authority should, contrary to past judicial treatment in the United Kingdom, be treated separately.

\(^{113}\) ‘Where the escape of domestic fire rivalled plague and war as a cause of general catastrophe’: *Burnie Port Authority v General Jones Pty Ltd* (1992–4) 179 CLR 520 at 534 (per the majority).

\(^{114}\) Ibid at 566 (per Brennan CJ). See also *Whitfield v Lands Purchase and Management Board* (1914) 18 CLR 606 at 616 (per Griffiths CJ).
from claims against builders. This is because in the former cases a powerful countervailing factor is present which is absent in the latter cases: namely, that imposition of a duty on such a public body might produce a particular unattractive socio-economic impact, namely the disproportionate distortion of public budgets and activity.

Sixthly, it is noteworthy that among factors explicitly cited by judges recently in the analysis of duty, there seem to be significantly more factors countervailing to recognition of a duty than factors weighing in favour. This phenomenon, probably caused by the unwise adoption of sequential two- and three-step duty ‘tests’ which separate the ‘proximity’ determination from, and therefore tend to emphasize, countervailing factors, might superficially mislead observers into thinking that the project of recording such judicial menus of recognized duty factors is somehow motivated by a crude concern to rein in liability. This would be misguided as well as short-sighted because only by carefully pinpointing and determining the limits of countervailing factors can we guard against the emphasis on restraint being misapplied. Thus, for example, even this short study allows us to see that though there may be powerful reasons for the denial of duty in Murphy's case, the denial in D&F Estates is much less convincing.

Seventhly, in constructing these menus I have simply examined appellate judgments and evaluated the coherence of the reasons actually stated by the judges. There is a separate project to be pursued which looks at which factors should be considered relevant to duty even though they do not yet surface in judgments.

Eighthly, these judicial menus underscore why there can be no ‘test’ for duty. The fact situations are so various and raise such a variety of different factors for courts to weigh in their determination that no directive formula is feasible. Cases such as White v Jones and Henderson, for example, are characterized by the dissimilarity of relevant factors not their similarity.

Finally, we might ask what will the most powerful judgments in the field of novel duties of care look like?

1. They will be judgments which explicitly eschew any purported reliance on a directive ‘test for the duty of care’, explicitly eschew the incantation of formulaic labels as devices for determining the specific duty issue at hand and which instead spell out in detail from the facts the substantive factors weighing with the judge, both those for and those weighing against recognition of a duty. Under

115 Conversely it might be the result of a period of concern with the rapid growth of liability in the field.
this approach where all factors for and against are balanced together and not evaluated separately and in sequence, the analysis does not contain the sort of potential for pro-plaintiff (or pro-defendant) bias which bedevilled the sequential application of the well-known two- and three-stage ‘tests’ for duty.\textsuperscript{116}

2. Earlier case law would not be pre-classified into ‘pockets’\textsuperscript{117} based on crude factual similarity but examined to see where such substantive factors had arisen before and how courts had dealt with them. Thus a case involving, say negligent words, would not be pre-assigned to a pocket of precedent relating to ‘liability for negligent statements’ which is an association of cases with no coherent policy basis. Instead it would be considered in the light of any case law there might be\textsuperscript{118} relating to whatever individual substantive factors the fact situation threw up, even where the overall factual contexts of such precedents look quite different to the case in hand: for example, the facts of the case in hand may throw up the indeterminacy concern; or a concern to safeguard public budgets from disproportionate distortion; or a concern not to encourage dependency and free-riding on tort; or all of these factors.

3. The caution of incrementalism would be transformed into a caution in relation to departing too radically from past judicial weightings of substantive policy factors. Thus if, in the past, the libertarian concern has consistently prevented a duty of affirmative action being owed to strangers, caution in overturning this strong position would be both understandable and acceptable in the light of the law’s interest in certainty.

4. If it is thought helpful, this entire process could be couched in terms which, though previously troublesome because of their vague and/

\textsuperscript{116} Even the otherwise admirable judgment of Kirby J in Day’s case [1998] HCA 3 (23 Jan. 1998) finally falls into this sort of trap by separating out the establishment of ‘proximity’ from a ‘third question’ where issues of legal policy might justify rejection of a duty even to a party who had established proximity. The separation of stage 2 ‘proximity factors’ from stage 3 ‘legal policy factors’ is productive of confusing and unnecessary line-drawing; is the sort of concern underlying the denial of a duty in Simaan one of the former or the latter? Why should lower courts be sent on the fruitless errand of allocating relevant factors between stage 2 and stage 3? Might it threaten an unintended bias against claims, given that a whole step (i.e. step 3) is devoted entirely to countervailing concerns? Conversely, might this rigidly sequential analysis of factors generate a pro-plaintiff dynamic in much the way the Amos approach allegedly did?

\textsuperscript{117} For a detailed criticism of ‘pockets’ and ‘incrementalism’ when defined in relation to analogous fact situations rather than in terms of substantive policy factors, see Stapleton, ‘In Restraint’, n. 3 above.

\textsuperscript{118} Of course some cases will present concerns which have not yet been presented to appellate courts. As Donoghue’s case established, this lack of a relevant ‘pocket’ of analogous cases should not be fatal to the claim.
or shifting meaning, could now be used with sharpened and therefore more effective definition:

- First, the judge would state that the plaintiff must establish that the relevant risk was *foresseeable*.
- Secondly, the judge would state that the plaintiff must establish why the law should conclude he was owed a *duty* by the defendant and the judge would state that to do this the plaintiff must show that, taken together and on balance, the pro-liability concerns raised by the facts outweigh factors countervailing to liability.
- Next, the judge would identify with sufficient precision to give later guidance to practitioners and judges alike which pro-liability and countervailing concerns are raised by the particular fact situation.
- The judge would consider previous case law, if any, in which these concerns were raised and the weight given them by previous courts (being cautious about departing more than *incrementally* from such earlier weightings).
- The judge would determine what weight, *in this judge's own view*, it would be *fair, just and reasonable* to give to the relevant factors and therefore, on balancing them together, whether a duty of care should be recognized.
- After such an open analysis, but only then, it would be acceptable for the judge to deliver his conclusion in the form of the familiar 'packaging' of: the defendant owed a *duty* of care; the plaintiff was *proximate* to the defendant; and the plaintiff was a *neighbour* of the defendant whom the latter ought reasonably have taken care not to injure.
Summary of Selected Duty Factors

Unconvincing Factors

IN FAVOUR OF RECOGNITION OF DUTY

(1) Recognition of a duty will promote compensation (of the plaintiff).
(2) Recognition of a duty will promote deterrence (of the defendant).
(3) Recognition of a duty will promote loss-spreading (e.g. via the insurance of the defendant).
(4) The defendant is (and the defendant class is likely to be) insured.
(5) The defendant has (and the defendant class is likely to have) a deep pocket.
(6) A mere assertion that the defendant voluntarily assumed responsibility or a mere assertion that in law the defendant should be taken to have voluntarily assumed responsibility.

COUNTERVAILING TO THE RECOGNITION OF DUTY

(1) The plaintiff is (and the plaintiff class is likely to be) insured.
(2) The plaintiff has (and the plaintiff class is likely to have) a deep pocket.
(3) A duty would expose the defendant to a large volume of claims.
(4) The law has never recognized a duty here before.
(5) Imposition of liability would have a substantial socio-economic and/or re-distributive effect.
(6) Imposition of liability would create a large new area of liability.
(7) The bald assertion that the loss here was pure economic loss (on the erroneous assumption that all such claims threatened indeterminate liability).
(8) A bald unqualified assertion that words are different to acts and that while the law may recognize a duty in a parallel case involving words, the mere fact that in the present case the conduct was an act takes it outside that ‘pocket’ of liability.
(9) A bald unqualified assertion that a particular piece of legislation impliedly ‘covers the field’.
(10) A bald unqualified assertion that this is an area more properly to be seen as the province of Parliament.
(11) A bald unqualified assertion that this is an area more properly to be seen as the province of contract.
(12) To recognize a duty here would be tantamount to giving the
Duty of Care Factors

plaintiff the benefit of a contract to which he or she was not a party (I call this 'the evasion of privity fallacy').
(13) That the duty would in practice make the defendant the insurer of the plaintiff.
(14) That recognition of a duty would upset the defendant’s expectations (and other forms of the ‘privity fallacy’).
(15) The plaintiff had another cause of action against this defendant and/or that the defendant had a defence to a different cause of action which the plaintiff had against him.

Convincing Factors

**In Favour of Recognition of Duty**

(1) That the proper vindication of the law’s concern with the physical security of persons and property justifies a duty being imposed on a party by whose careless act the plaintiff’s person or property has been physically damaged.
(2) Denial of a duty would tend to discourage rescue.
(3) Denial of a duty would tend to encourage abortion.
(4) That the relevant risk was in the exclusive control of the defendant on whom the plaintiff was, therefore, ‘exclusively dependent’.

**Countervailing to the Recognition of Duty**

(1) That the proper vindication of the law’s concern with the liberty of the individual justifies a refusal to recognise any duty of affirmative action towards a stranger.
(2) The defendant is causally only a peripheral party.
(3) The plaintiff himself had adequate means of avoiding the risk eventuating and causing loss.
(4) The imposition of a duty might produce a specified unattractive socio-economic impact such as the disproportionate distortion of the budgets and/or activities of public bodies to the detriment of a specified public interest.
(5) A duty here would expose the defendant to the risk of liability for an indeterminate time or to an indeterminate class or for an indeterminate (not merely extensive) extent of damage (the ‘floodgates’ or ‘indeterminacy’ concern).
(6) The concern to separate executive and judicial powers requires
the denial of a duty in relation to the broad policy decisions of public bodies as opposed to operational conduct.

(7) Recognition of a duty here might bring the law into disrepute or otherwise injure its dignity.

(8) Imposition of a duty here might threaten to involve substantial and systemic evidentiary difficulties which may even bring the law into disrepute.

(9) Imposition of a duty here might threaten the orderly administration of justice.

(10) Imposition of a duty might threaten the control of public order, the conduct of military operations or national security.

(11) Recognition of a duty would in the future positively encourage adversarial parties in the position of the plaintiff to be dependent on tort, to refrain from available self-help avenues, namely contract with the middle-party (in contractual matrix cases), the third party owner (in the damage to property of a third party cases) or directly with the defendant, which self-help would have secured protection from economic loss while also achieving deterrence of the defendant. This is the concern about encouraging ‘dependency’ or ‘free-riding’ on tort.

(12) Recognition of a duty might encourage exploitation of others in breach of good faith principles, for example recognition of a duty here would allow the plaintiff to circumvent a positive arrangement/understanding (to which both the plaintiff and defendant were parties) as to where the relevant risk would fall and/or the avenue(s) of complaint the plaintiff would ‘use’.

(13) For some explicit and sound reason(s) the area is one more appropriate to Parliamentary action.

(14) Imposition of a duty would be inconsistent with free (true) speech.

(15) Imposition of a duty here would undermine the clear policy of a piece of legislation.

(16) Recognition of a duty to this individual, even in relation to what is judged ‘operational’ conduct of the defendant, might clash with, inhibit or frustrate this public authority defendant’s pursuit of the public interest with which it has been charged.

(17) To impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and expertise for a person contemplating a course of conduct.

(18) Recognition of a duty would tend to encourage abortion.
(19) Recognition of a duty might overall have deleterious effects on those in the position of the plaintiff.

(20) Recognition of a duty would render actionable defendant conduct which was not a free choice and so would not be effective in deterring it.

(21) The content of the duty could not be defined adequately narrowly with bright lines.

(22) Avoidance of breach of such a duty would be particularly onerous on disadvantaged groups.

(23) The duty would effect a major departure from traditional legal categorisation of a fundamental relationship and such change is best left to the legislature.

(24) The duty would constitute a major invasion of a ‘fundamental’ aspect of liberty (such as autonomy over one’s own body) and such change is best left to the legislature.

(25) Recognition of a duty would discourage socially beneficial forms of hospitality.