Proximity as principles: Directness, community norms and the tort of negligence

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This article argues that the recent trend towards explaining duty of care cases by way of policy reasoning is unwelcome and largely unnecessary. An account of the legal requirement of proximity is proposed, this account treating the requirement as a set of legal norms of responsibility that are derived from social norms of responsibility. The proximity inquiry looks to normatively significant factors that relate to the relationship between the parties and the way that the harm was caused: "directness", for want of a better term. General normatively significant factors give rise to categories (the pockets of liability approach) such as manufacture or misstatement, but special normatively significant factors (the so-called "assumption of responsibility" or "special relationship") can alter the outcome that would be suggested by examining the general factors alone. Most cases can be explained by a directness view of proximity, focusing, as it often does, on whether the claimant's behaviour exculpated the defendant's behaviour, and under this account policy factors play a secondary role in determining liability for careless action or inaction. All jurisdictions utilising the proximity and duty of care concepts are discussed.

Given the importance of the tort of negligence, it is perhaps surprising that there is still no agreement as to the basis upon which to carry out the gate-keeping to the tort – in other words, as to how a court should decide whether or not to hold a careless defendant liable for harm. Since *Caparo Industries plc v Dickman* [1990] 2 AC 605, in England and Wales that gate-keeping has been performed by the tripartite test that addresses foreseeability, pro ximity and fairness, justice and reasonableness (at 617-618 per Lord Bridge). This test is itself a replacement for the two-stage test of *Anns v Merton London Borough Council* [1978] AC

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728, and has been the subject of sustained attack since its inception. Such attacks have been successful in Australia, as can be seen from the High Court of Australia's decisions in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 73 ALJR 1190 and *Sullivan v Moody* (2001) 207 CLR 562; 75 ALJR 1570; and in Canada.[1] Whichever test is adopted, however, it is little more than a wrapper in which the real tools of gate-keeping are kept; the more important issue is the scope of the tort itself, rather than the packaging in which it is presented.

At its heart, the debate about the gate-keeping of the tort of negligence is about whether such gate-keeping is to be governed by principles or by policy, the former approach (see, for example, Kirby J's views in *Perre v Apand Pty Ltd* (1999) 198 CLR 180) often corresponding to the use of rules and the latter (see, for example, McHugh J's views in *Perre v Apand Pty Ltd*) to the use of discretion.[2] Scepticism as to the discovery of principles has led to a lack of confidence in the efficacy of the concept of proximity, and a concomitant move towards policy-based factors (floodgates, a reluctance to allow recovery for so-called pure economic loss, a consideration of who is best positioned to insure against loss). This article adds to the morass of material on this issue, coming out in support of the view that the widespread abandonment of principles is too hasty. It will be argued that principles (community norms) can explain most of the law on the existence of a duty of care (although it should be understood that there is no single "quick-fix" principle or grand theory), and that over-reliance upon policy grounds for an explanation of the gate-keeping of the tort of negligence naturally results in bafflement and a recommendation for widespread reform.[3]

Stapleton is one of the chief proponents of the view that extrinsic factors are of central importance in the gate-keeping of the duty of care,[4] although she concedes that the two most important factors in deciding whether or not to recognise a duty of care, which she calls "trump factors", are both principles (based upon community standards) rather than policies (instrumentalist).[5] Stapleton does not provide an account justifying or explaining these factors, other than to say that they are "deduced from a remarkably consistent pattern of outcomes in the relevant sphere",[6] merely stating them and then turning to policy facts for her explanation of the law. She turns to policy too early, however. Community standards, to which even Stapleton concedes the status of "trumps", can be understood as a set of principles that provides a coherent account of the law that is superior to a policy-based account both in its ability to account for the case law and its ability to justify that law.[7] Specifically, this article seeks to

[1] See *Cooper v Hobart* [2001] 3 SCR 537; (2002) 206 DLR (4th) 193.
[2] See Katter N, *Duty of Care in Australia* (LBC Information Services, Sydney, 1999), pp 16-17.
[3] See, eg, Stapleton J, "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249.
[4] Stapleton, n 3; Stapleton J, "Duty of Care Factors: A Selection from the Judicial Menus" in Cane P and Stapleton J (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, Oxford, 1998), pp 527-528.
[5] Stapleton, n 4 (1998), pp 72, 73-74, and esp n 54.
[6] Stapleton, n 4 (1998), p 72.
[7] Indeed, Stapleton, n 4 (1998), concedes that one of these trump factors ascribes responsibility to defendants who "carelessly cause physical damage" by their own positive act. Yet the inclusion of the term "cause" in this trump factor is an inclusion of the whole causation inquiry, an inquiry into responsibility that cannot be decided without reference to non-policy factors with an emphasis on individual responsibility, by Stapleton's own admission: see Stapleton J, "Perspectives on Causation"

reclaim the proximity concept as a meaningful definitional element of the scope of the tort of negligence, opposing the prevalent view that proximity (or whatever the tort of negligence's gate-keeper is called) is an amorphous collection of extrinsic factors that must be weighed up, which weighing can only be described as problematic.[8]

The requirement of proximity should be seen as little more than a conduit for the application of community standards, the inquiry into which contains a strong factual element (guided heavily by the results of previous inquiries that can be found in judicial precedents[9]). It will be further argued that standards of community morality are, in fact, largely concerned with what might be called the "directness" of the causation of the harm, in other words the relative roles of the claimant and defendant in the chain of events with which the action is concerned, and the question as to whether the claimant's actions are sufficiently culpable to exculpate the careless defendant's acts or omissions. The "pockets" approach to liability (categorising manufacture separately from misstatement, for example) is explicable as the identification and application of normatively significant general features of a particular case, an essential part of coming to understand community standards. The special relationship/assumption of responsibility concept should be understood as the identification and application of normatively significant special features of a particular case. The "exclusionary rule" against economic loss can be understood as the rare application of a policy rule against recovery for economic loss, coupled with the widespread application of principles of responsibility that are actually concerned with directness rather than the type of harm caused.

Of course, proximity (so defined) does not tell the whole gate-keeping story, but it does account for most of it. Yes, in many cases extrinsic factors are important, particularly cases of liability for public authorities and perhaps in economic loss cases too, and yes, not all moral responsibility should translate to legal liability.[10] However, such policy factors are exceptional in operation (although not rare in application) in that they detract from the basic community standard-determined position, and they will be barely discussed in this article. In the absence of such factors, the application of community standards should decide whether legal liability – a duty of care – is posited.

in Horder J (ed), *Oxford Essays on Jurisprudence: 4th Series* (Oxford University Press, Oxford, 2000). Thus Stapleton concedes that much of the responsibility question falls to be determined by non-policy factors prior to considerations of policy.

[8] Stapleton, n 4 (1998), p 87ff admits to problems in weighing up the extrinsic factors she has carefully outlined.

[9] When judicial precedents are seen as binding determinations as to community standards, and the categories (discussed below) are seen as the identification of general factors that are significant according to those standards, we can reject as unfounded the fears of McHugh J in *Perre v Apand* (1999) 198 CLR 180, and Brennan J in several High Court of Australia decisions, that a principled approach to proximity will eliminate the certainty and importance of the established categories.

[10] The terms "responsibility" and "liability" are used primarily in these senses: the former designating culpability according social norms, the latter designating an obligation to compensate arising from the application of legal norms.

THE GENERAL THESIS THAT PROXIMITY IS AN APPLICATION OF SOCIETY'S NORMS AND EXPECTATIONS

At the heart of the thesis proposed herein is the argument that, where possible, the legal rules governing the tort of negligence should be justified by reasons internal to the practice of tort law, rather than by extrinsic reasons (which we might call policy reasons). I agree with Weinrib that a justificatory principle, to do its job of justifying, must be applied in full – in other words, it must "expand to fill into the space it naturally fills" rather than being cut short by extrinsic factors (policies).[11] For me, the best account of tort law is as a system of law that compensates for wrongdoing, where wrongdoing is defined by social norms. Thus, for me, the key task of an account of the tort of negligence is the explication of those social norms of responsibility that are given legal effect by the tort. Discussion of the so-called corrective justice model of tort law is deliberately avoided, although it is recognised that the proposed thesis is better explained by such a model than by functionalist justificatory models;[12] I see the minimum premise upon which this article is built as being only that the tort of negligence involves the ascription of liability for behaviour and harm that is wrongful, according to normal conceptions of wrongfulness prevalent in society.

Interpreting the tort of negligence

Even when the fault requirement of a tort is met, the tort will only regulate behaviour when that behaviour falls within that sphere that it is the tort's purpose to regulate. Most torts protect a particular interest, govern a particular conduct or situation, or have a limited function. The scope of application of such torts is limited accordingly, as was shown by the decision in *Hunter v Canary Wharf Ltd* [1997] AC 655, in which the House of Lords interpreted the tort of nuisance as being about the protection of proprietary rights in land and their holders' enjoyment of them, and thus concluding that personal discomfort or material damage to property were actionable harms but personal injury was probably not.[13]

The tort of negligence is wider than other torts as it does not protect a particular interest, govern a particular type of conduct or situation, or have a specific limited function.[14] Consequently, the tort applies to a wide range of types of

[11] Weinrib E, *The Idea of Private Law* (Harvard University Press, Cambridge, Mass, 1995), p 39. Of course, the law is a social institution and the administration of legal justice is paid for out of the public purse, and as such must take account of policies. The place for policy arguments, however, is to supplement or abrogate the scope of a tortious obligation that has been otherwise allowed to fill its natural space and to operate coherently, and such policy arguments should be openly admitted and discussed, rather than cited as unquestionable mantras.

[12] See further Coleman J, "Moral Theories of Torts: Their Scope and Limits" (1982) 1 *Law and Philosophy* 371 and (1983) 2 *Law and Philosophy* 5; Weinrib, n 11; Burrows A, "In Defence of Tort" in *Understanding the Law of Obligations* (Hart, Oxford, 1998); Honoré T, *Responsibility and Fault* (Hart, Oxford, 1999), p 73ff.

[13] Cf the process by which courts determine whether loss of amenity or mental distress are within the scope of contractual obligations, eg, in *Jarvis v Swans Tours Ltd* [1973] QB 233; *Watts v Morrow* [1991] 1 WLR 1421; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344; *Farley v Skinner (No 2)* [2001] 3 WLR 899.

[14] See McHugh MC, "Neighbourhood, Proximity and Reliance" in Finn PD (ed), *Essays on Tort* (The Law Book Co, 1989), p 7.

harm;[15] indeed, the tort of negligence is, unusually, defined by and named after its fault requirement – a failure to take the level of care that could reasonably be expected.[16] Interpreting the tort in the light of its purpose and values of the society it serves,[17] which fill in the detail of the general governing concept of corrective justice (or whatever conception of justice is preferred), is necessarily a more complicated task for the tort of negligence than for other torts.[18] This is so because the purpose or ambit of the tort of negligence is not easily defined, and the values of society are harder to pin down on the general level at which the tort operates than at the more specific level provided by the specific situations within which other torts operate.

Nevertheless, the tort still regulates society and, consequently, it is to society that one must look when determining the scope of the tort. Lord Atkin stated in *Donoghue v Stevenson* [1932] AC 562 that "[t]he liability for negligence, whether you style it as such or treat it as in other systems as a species of 'culpa', is no doubt based on a general public sentiment of moral wrongdoing for which the offender must pay" (at 580). But to be careless, or even to carelessly cause harm, is not of itself considered wrong enough to attract blame in our society. A complex network of societal expectations and values ascribe moral responsibility to individuals in some situations of causing harm, not ascribing moral responsibility in others despite individuals having been a cause of the harm. Tort law must reflect the allocation of moral responsibility prevalent in the society it regulates.[19] This function is fulfilled, for the tort of negligence, by the operation of the requirement of proximity,[20] which determines whether a defendant will be liable for carelessly causing foreseeable harm.[21] As Stephen J has said of the "general public sentiment of moral wrongdoing" to which Lord Atkin referred:

[15] The types of harm recoverable may stretch even further than the traditional categories would suggest: Witting C, "Physical Damage in Negligence" (2002) 61 CLJ 189.

[16] Burrows A, "Dividing the Law of Obligations" in Burrows, n 12. It might be argued that the thesis proposed falls down here as negligence is not fault and is not wrongful. In response, it is contended that failing to live up to the standards of society in the way described by the legal requirement of negligence (a part-objective and part-subjective test) is *in fact* considered to be blameworthy behaviour by our society, such that it can be treated as giving rise to responsibility for undesirable consequences. For discussion see Simester AP, "Can Negligence be Culpable?" in Horder, n 7. Note also the above quotation from Lord Atkin.

[17] We can say that such values make up the "matrix of facts" within which the tort was created and operates, to use terminology derived from Lord Hoffmann's commonsense principles for interpreting contractual documents: see *Investors Compensation Scheme v West Bromwich* [1998] 1 WLR 896. (The phrase "matrix of facts" is Lord Wilberforce's: see *Prenn v Simmonds* [1971] 1 WLR 1381.)

[18] See Honoré AM, "Causation and Remoteness of Damage" in Tunc A (ed), *International Encyclopedia of Comparative Law, Volume XI: Torts* (Martinus Nijhoff Publishers, The Hague, 1983). Honoré argues, at s 98, that to attempt to set the limits of recovery by inquiring into the scope of the tort of negligence (as opposed to, say, the tort of defamation) is merely to "invite the judge to fix them for himself" and to therefore "fulfil a legislative function in settling the types of damage for which compensation is payable". I disagree, as the following discussion shows.

[19] See, eg, *Smith New Court Securities v Citibank* [1997] AC 254 at 280 per Lord Steyn. See also Cane P, *The Anatomy of Tort Law* (Hart, Oxford, 1997), pp 21-22; Vines P, "Fault, Responsibility and Negligence in the High Court of Australia" (2000) 8 Tort L Rev 130.

[20] And the requirement of causation, discussed below.

[21] Kwei D, "Duty of Care, Aristotle and the British Raj: A Re-assessment" (1997) 21 MULR 65, usefully reminds us of the fallacy of arguments purporting to deriving an "ought" from an "is". Most torts (such as defamation) merely describe a legal norm which applies moral norms. The tort of negligence seems to be different by deriving a legal norm in a particular case, the duty of care, from

> [such] a sentiment will only be present when there exists a degree of proximity between the injury such that the community will recognise the tortfeasor as being in justice obliged to make good his moral wrongdoing by compensating the victims of his negligence.[22]

It is not difficult to see, then, that "proximity" describes little more than the flavour of the inquiry into community norms being conducted, and "sufficient proximity" merely describes the conclusion of the inquiry. Deane J, the champion of proximity as a useful concept for deciding duty of care questions, readily agreed that proximity is a "unifying rationale" rather than an "automatic or rigid formula for determining liability".[23] The critics of proximity who worry that proximity is not a simple formula are attacking a straw man. Proximity is a label for the inquiry into societal norms, not a rule or formula that encapsulates or replaces that inquiry.[24]

The task of determining the expectations and values of a society, with a view to applying them to the question of the scope of the duty of the tort of negligence, is partly a question of fact, since such values actually exist. Such an inquiry is problematic because community standards are unclear and about them reasonable people may differ – the facts in question are a slippery type of fact known as community norms.[25] That this is so need not undermine the task of the interpreter of society; hard cases will always be hard, but it is the aspiration of judges that is important.[26] The account proposed is not merely prescriptive but is also interpretive and descriptive – it seeks to explain the existing law of past judicial decisions rather than merely proposing a way for decisions to be taken in future. In this account, therefore, judicial precedents in proximity cases make up a body of authoritative (for our purposes) pronouncements upon the community standards in question, and so our (and our judges') task is made less daunting than it might otherwise be. We need not design the legal rules anew; rather we must seek to discover the social values that lie behind the body of law that already exists. By explaining the legal rules of proximity as applications of the social norms of responsibility, such social norms are incorporated into the law and can thus be turned to when legal precedent does not give a full answer to an instant case.

It makes sense, in the light of this, to use intuition and induction to elucidate and formulate the community standards that are known and used by all of us without being explicitly formulated (except on rare occasions). As Hart and Honoré explain when discussing the elucidation of commonsense principles of causation,

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a merely factual inquiry, through the concept of proximity. The argument in this article is that the proximity concept enables the relevant facts of a case to be plugged into the norms of society – it requires an inquiry into the scope of those norms.

[22] *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 575.

[23] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497. See also the comments of Lord Roskill in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 628.

[24] See the comments of the High Court of Australia in *Hill (t/a RF Hill & Associates) v Van Erp* (1997) 188 CLR 159.

[25] See further Katter, n 2, p 14ff, and the commentators cited there.

[26] Cf Dworkin's account of judicial decision-making as based upon the aspiration of forming the best account of the law and to decide an instant case accordingly. Only Dworkin's ideal judge, Hercules, could completely succeed in such a task every time he undertakes it.

"As with every other empirical notion we can hope only to find a core of relatively well-settled common usage amid much that is fluctuation, optional, idiosyncratic, and vague: but the study of this core, as in other cases, may be enough to shed light on at least the darkest corners."[27]

We apply, and occasionally delineate, such common standards all the time, for example when we use words in our communication or morals to guide our action. This is also a commonplace judicial task that is undertaken whenever a judge inquires as to whether a particular defendant has breached a duty of care. This is so because determining whether someone was negligent or not requires comparison with the reasonable person, but the reasonable person is nothing more than an anthropomorphic embodiment of the values of the society in which he or she lives. It is not easy to ask whether somebody was or was not careless enough for tortious liability to be imposed, because the question being asked is really whether societal norms would blame the defendant for her or his (precise) conduct. This is parallel to the question that proximity must ask: assuming that the defendant's behaviour was below the standard expected of one in the defendant's position (the breach question), would he or she be treated as responsible for the harm that was caused (the proximity question)? As Trinidade and Cane have observed, "both 'reasonable foreseeability' and 'proximity' are terms that express value judgments by courts as to when it is appropriate to impose liability for negligent conduct".[28] In many ways, the proximity question as to the scope of the tort is the easier to answer, since it asks only *whether* a particular person would be treated as being responsible for a particular chain of events, rather than *exactly what behaviour* would be expected of that particular person in guarding against the chain of events.

So what is the content of the governing social norms?

Even accepting the argument made so far, it is still necessary to identify the relevant social norms of responsibility. Such norms do not need to be justified individually (unlike policy reasons) because they fall under the general justification behind looking to social norms to flesh out the rules of justice that lie at the heart of tort law; we ought to follow such norms not because of their individual content but because we ought to follow social norms in general.[29] Nevertheless, such norms still do need to be identified. In the following section, a particular account of the social norms in question will be proposed, using the existing legal precedents as a body of evidence from which to infer the norms. This account holds as central the idea that determinations of moral responsibility (given that a defendant was careless) centre on the social expectations placed upon the defendant and the normative significance of the claimant's role in the

[27] Hart HLA and Honoré T, *Causation in the Law* (2nd ed, Clarendon Press, Oxford, 1985), pp 26-27, 92.
[28] Trinidade F and Cane P, *The Law of Torts in Australia* (3rd ed, Oxford University Press, Oxford, 1999), p 346.
[29] This is only true within the bounds of the law's general selection as to which sorts of norms are to be legally enforceable, evidenced by the existence of specific torts; the judge does not have carte blanche to merely posit legal liability on the basis of a finding as to social responsibility unless the social responsibility falls within, or incrementally without, an existing tort. Our discussion, then, is limited to enforcing social norms of responsibility for careless behaviour, since that is the (admittedly wide) scope of the particular tort already recognised by the law.

causing of harm. In other words, social norms of responsibility look to directness.

THE SPECIFIC THESIS THAT PROXIMITY IS BASED UPON DIRECTNESS

It is submitted that the flavour of our society's norms of responsibility can be captured by the term "directness". Moral responsibility is determined by investigating the roles of the defendant and the claimant in the chain of events leading up to the harm, and looking at normatively significant features of the defendant's and claimant's behaviour. These depend upon the way society views the transaction in question and the roles of the parties, but ultimately in many cases it will be shown that society's judgment of a claimant would be that the harm caused to the claimant was her or his own fault (or that her or his role was sufficiently culpable to prevent the claimant complaining about the defendant's harm, the claimant's behaviour breaking the chain of moral responsibility). This judgment is particularly likely when, for example, loss is caused by the claimant relying upon something being the case or occurring. In such cases the defendant's responsibility will depend upon whether the claimant's reliance is normatively significant: was the claimant morally entitled to rely or not?

The account proposed thus argues that cases in which the court finds that there is insufficient proximity are cases in which the court's conclusion of its inquiry into norms of responsibility goes against the claimant – the harm is deemed too indirect for the defendant to be held responsible by the claimant, and so the law does not impose legal liability upon the defendant. "Directness" is a useful label for the account of proximity proposed herein, not only because it has been popular with judges (ever since Lord Atkin defined the neighbour principle in *Donoghue v Stevenson* [1932] AC 562 by a claimant being "closely and directly" affected by a defendant),[30] but also because it captures some of the flavour of the account, with its emphasis upon the chain of events leading up to the loss. It should be borne in mind, though, that directness, like proximity, is intended to designate a process of inquiry into social norms of responsibility, rather than a scientific inquiry or a particular substantial rule. "Direct", like "sufficient proximity", denotes merely the positive conclusion of the inquiry into whether the loss falls within the norms of responsibility.

The reader can test the assertions of the previous two paragraphs by reference to her or his own understanding of our society's norms, but the assertions will also be tested in this article by examining their fit to the law: do such norms explain the decisions made in past cases?

Categorising cases: General normatively significant factors

Even though the scope of the tort of negligence, and so the application of the requirement of proximity, depends upon social values and expectations, one need not conclude that every decision as to moral responsibility or legal proximity is of value only as applied to its own facts. Generalisations can be made about social norms providing that the limits within which the

[30] Lord Atkin defined the "neighbour", to whom a duty of care is owed, as one "*so closely and directly affected* by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (at 580) (emphasis added).

generalisation is true are identified, and hence the same can be said for the legal norms that reflect them. [31]

This is why the law currently distinguishes between various categories of chains of events or relationship, such as basic physical action, manufacture, statement-giving, service provision and omission. As the Supreme Court of Canada recently explained, '"proximity' is generally used in the authorities to characterize the type of relationship in which a duty of care may arise … sufficiently proximate relationships are identified through the use of categories".[32] In society we expect certain things from a manufacturer and from a consumer, and treat a manufacturer as responsible for harm caused through certain chains of events. We expect different things from the giver and recipient of a statement, and treat the statement-giver as responsible for harm caused through other chains of events to those relating to manufacture. As one commentator puts it, "the concept [of proximity's] role is limited to providing a broad canvas beneath which the more specific, 'pragmatic' principles giving rise to duty in discrete categories of case can be discussed. The concept is a label, not a working principle of liability capable of bringing precise definition to the adjudication of a particular case."[33] Categorising previous applications of society's norms, previous court decisions, allows the identification of general features of those norms and greatly simplifies the proximity inquiry. Only in cases to which none of the identified general norms apply will the full proximity inquiry, looking directly to society's norms, need to be conducted. Still, it is preferable to see the general norms as part of a broad inquiry into society's standards, rather than seeing the categorisation as the identification of specific rules for specific cases.[34] This is so both because it makes the overlap of categories/general norms less problematic (see the discussion of problems of characterisation below), and because it shows the tort in a more coherent light.

It should be noted that the normative significance of the general features of the relationship of the parties, the determination as to proximity that results from characterisation as falling within a particular category, is not conclusive of the proximity inquiry. In a particular case there may be other, less easily generalised, normatively significant factors (concerning the conduct of the particular statement-giver, for example) that point in the other direction. These special factors will be discussed shortly. Nevertheless, characterisation of a particular case as falling within a particular category allows a prima facie, and so rebuttable, assessment to be made as to whether the nexus between the defendant

[31] Indeed, without identifying situationally specific general norms, any norms we identify will be hopelessly general and too vague to be of use in determining individual cases. This appears to be the weakness with the otherwise promising approach proposed by Smillie JA, "The Foundation of the Duty of Care in Negligence" (1989) 15 Mon LR 302.

[32] *Cooper v Hobart* [2002] 3 SCR 537 at 551; (2002) 206 DLR (4th) 193 at 203-204 per McLachlin CJ and Major J.

[33] Barker K, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461 at 461. See also the comments of McLachlin J in *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021 at 1151; 91 DLR (4th) 289 at 368: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors."

[34] The latter is the approach espoused by Brennan J, eg, in *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340.

and the harm is sufficiently direct for social responsibility, and so legal liability (subject to policy considerations), to be imposed.

The category of product manufacture

The relationship/causal category of manufacture and construction will now be discussed by way of example, an account of the social norms of responsibility governing this category being proposed so as to explain the decisions of the cases falling within it. This is an example of a category for which prima facie there is sufficient proximity between a defendant and the harm caused in those situations falling within it.

It is a rule of our society, reflected in the tort of negligence, that if one puts something into the world that is not as it seems, and so does not fulfil the purposes that it can be expected to perform, then one is responsible for the interference that this (the disparity between appearance and reality) causes on other individuals (either end-users or bystanders). Such disparity we call "dangerousness".[35] Although later individuals who encounter the dangerous object may have the ability to neutralise the danger, the rules of our society nevertheless (usually) treat the creator of the danger as responsible for it. This is the case even though the end-user may have made a choice to use the object. Essentially, our social norms of moral responsibility say that the consumer is entitled to rely upon objects being what they seem – that the consumer is entitled to make the assumption that they are not dangerous – and so such a reliance/assumption is not treated as breaking the chain of moral responsibility. This cannot be deduced from any first principles; rather, it is in fact the allocation of responsibility that our social norms make.

The scope of the tortious obligation of negligence reflects these norms of responsibility. Thus, the manufacturer of a bottle of ginger beer is a sufficiently direct cause of gastroenteritis resulting from somebody drinking the beer.[36] If, however, stomach upset is caused by drinking too much ginger beer, then that is not the responsibility of the manufacturer. Even though the manufacturer made the product in such cases, the harm is not caused by danger and accompanying reliance upon safety; rather it results from a patent feature of the ginger beer, and so the chain of events leading to the harm is held to be outside the scope of the obligation.[37] We should say that in such cases there is no proximity. Similarly, a manufacturer is liable for harm done by a kitchen-knife breaking during ordinary use, but not for anything that is done with a knife that is as it seems (for

[35] See Seavey WA, "Reliance on Gratuitous Promises" (1951) 64 Harv L Rev 913 at 915-916: "It is reasonably clear that the tortious conduct lies not in careless manufacture but in putting the machine into the stream of commerce where it will be likely to harm others… The automobile with a defective mechanism, a bottle of poison, stove blacking which cannot be safely used upon a hot stove – none of these are 'intrinsically' dangerous. They are normally harmful only because of the mislabelling." Putting of something dangerous into the world thus does not merely mean manufacture, but also includes, eg, gaining control of a dangerous product and not removing it from the world, or rendering dangerous a safe product manufactured by another by alteration or peeling off a warning label.

[36] *Donoghue v Stevenson* [1932] AC 562.

[37] Thus there can be no liability even though the manufacturer fails to take reasonable steps to prevent the user from drinking too much ginger beer (providing that the beer is not dangerous by appearing to be safer in large quantities than it is). In other words, there is no question of breach because the tort does not impose an obligation upon the manufacturer to take reasonable steps to prevent users from drinking more ginger beer than appears safe.

example, if I slip and cut myself, or it falls on somebody, or I stab somebody with the knife).

The proximity is dependant upon the danger and the reliance. If I know that a knife is likely to break then it is not dangerous (to me), and there can be no proximity to harm caused by it breaking. Thus a manufacturer can prevent there being proximity by neutralising a danger through a warning. In *Kubach v Hollands* [1937] 3 All ER 907, the manufacturer of a chemical labelled the chemical as needing to be tested, and so the chemical's properties were no longer not what they seem.[38] The issue in *Kubach v Hollands* is, thus, not that the manufacturer took reasonable care and so did not breach an applicable tortious obligation not to cause harm in a particular way, but that he was not a direct cause of any harm because he had not put anything dangerous into the world and so there was no harm for which he could be liable under the tortious obligation. In addition, reliance upon an item's safety is a necessary part of a danger being able to cause a loss. If a faulty knife breaks when used by somebody who is completely indifferent as to whether or not it was safe (perhaps because he believes himself to be invincible), then arguably the manufacturer should not be liable as it is not the danger that caused the loss (even though the item was dangerous), and so the loss is outside the scope of the manufacturer's duty.

The general social rules that users are morally entitled to assume the safety of objects, and that manufacturers are morally responsible for loss caused by such an assumption being wrong, are not without limits. The argument is often made that liability for defective products does not extend to economic loss; however, such cases can be explained by reference to the meaning of "danger" and the scope of the duty without resorting to external (policy) reasons. For something to not be as it seems, one has to define the term "seems". Clearly, for an object to "seem" to have certain characteristics it must reasonably appear to have those characteristics; in other words, the consumer must have made whatever examination is reasonable in the circumstances and drawn the reasonable conclusions. In this way, social norms of behaviour are again incorporated – a consumer is entitled to hold a manufacturer responsible only insofar as the consumer could not be expected to have discovered something about the object. The difficulty arises when one recognises that the level of inspection that a user of an object is socially expected to take depends not only on the type of the object but also on the use to which it is put. If a use is abnormal then, insofar as that was the cause of the loss, the manufacturer cannot be held responsible, as the everyday norms of society do not extend to what society deems to be special activities, for which the user should take special measures. If I rely on an apparently stainless steel knife being made of stainless steel and conduct a chemistry experiment upon it which causes me injury, because the knife is actually made of aluminium and so reacts with my chemicals, then the manufacturer should not be held liable.

Arguably, profitable uses (or treating items as economic assets) are deemed by society to similarly be abnormal, that is, at the user's own risk. This may be because, commercial enterprises being what they are, commercial parties are

[38] *Cf Hurley v Dyke* [1979] RTR 265. See also the discussion in *Griffiths v Arch Engineering Co Ltd* [1968] 3 All ER 217. Provided that a notice is not invalid under the *Unfair Contract Terms Act 1977* (UK), it should serve to pass responsibility to the party that later encounters the goods.

expected to factor the risk of latent defect into their enterprise and to pay for checks/valuations/insurance. If they do not, then their assumption/reliance upon the object being as it seems is their own responsibility (that is, is not reasonable) and so breaks the chain of responsibility. If this is correct, then it should be noted that such a factor is relevant because it is the moral judgment that society makes and so is relevant to the scope of the tort, rather than because it is an external rule of policy concerning the possibility of insurance and the like. Our law of tort follows these rules, and accordingly, commercial value or lost profits are prima facie not recoverable from manufacturers of defective products (or others responsible for putting the product into the world).[39] However, being a general rule of social responsibility applicable to manufacture as a category, it should be observed that the rule is presumptive and can be rebutted, demonstrating sufficient proximity, when the special factor of a special relationship is present in an individual case.[40]

Some variations of the above facts need to be discussed. The first is where financial costs are incurred through legal liability to third parties resulting from a dangerous product. The second is where financial costs are incurred through repairing or withdrawing a dangerous product. Since these types of cost, although economic, are not caused by a drop in economic value or a loss of profits, but rather through non-profitable use (or merely possession) of the product, they should be within the manufacturer's proximity and so within the manufacturer's responsibility for the dangerous product. It is likely that such costs are recoverable under our tort law.[41] However, when the normative position in such cases is described simplistically as being based upon preserving safety, problems of application arise.[42]

[39] *Muirhead v Industrial Tank Specialties* [1986] QB 507; *Simaan v Pilkington Glass Ltd (No 2)* [1988] QB 758; *Murphy v Brentwood District Council* [1991] 1 AC 398. Where possible, pieces of property should be delimited according to normatively significant factors. When society treats objects, for these purposes, as part of the same thing provided by the same source the court should do the same, rejecting complex structure analysis and treating the property as simply having broken down and ceased to be as valuable as it was. Where society treats objects as distinct in normatively significant ways then complex structure theory should be employed. It is accepted that this is not an easy question to answer, and relies on our intuition of societal norms, in other words, common sense.

[40] *Muirhead v Industrial Tank Specialties* [1986] QB 507; *Hamble Fisheries Ltd v L Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep 1. This is the basis upon which the decision in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 is best explained: see *Muirhead v Industrial Tank Specialties* [1986] QB 507; *Murphy v Brentwood District Council* [1991] 1 AC 398 per Lord Keith. See also *City of Kamloops v Nielsen* [1984] 2 SCR 2; *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

[41] *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85; (1995) 121 DLR (4th) 193; *Lambert v Lewis* [1982] AC 225 at 278 per Lord Diplock; *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep 352 at 356; *Murphy v Brentwood District Council* [1991] 1 AC 398 at 475 per Lord Bridge; *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep 395 at 403. See also Fleming JG, *The Law of Torts* (9th ed, LBC Information Services, 1998); Fleming JG, "Preventive Damages" in Mullany NJ (ed), *Torts in the Nineties* (LBC Information Services, Sydney, 1997); and the forceful argument of Laskin J, dissenting in *Rivtow Marine Ltd v Washington Iron Works and Walkem Machinery & Equipment Ltd* [1974] SCR 1189; (1974) 40 DLR (3d) 530 (which was adopted in *Winnipeg Condominium*).

[42] See *Hughes v Sunbeam Corp (Canada) Ltd* (2002) 219 DLR (4th) 467, in which a class action was brought by purchasers of a smoke detector that allegedly did not detect small fires, the purchasers seeking to recover (in effect) the cost of replacement. Although refusing to strike out the claim as disclosing no reasonable cause of action (see (2002) 219 DLR (4th) 467 reversing the decision of the

The category of statement-making

Having discussed the relationship/causal category of manufacture, in which there is prima facie sufficient proximity to found liability (except for profitable use losses), it is instructive to examine an analogous causal category, but one in which there is prima facie insufficient proximity between the defendant and the harm. The statements category is also interesting for two other reasons. First, it bears strong similarities to the category of manufacture. Second, it is the category in response to which the law of the assumption of responsibility was developed, by which specific factors counteract the presumptive effect of the general (category-determined) factors and give rise to sufficient proximity where prima facie there was none.

An analysis of liability in this area must begin with a point made by Lord Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 635:

> The damage which may be occasioned by the spoken or written word is not inherent. It lies always in the reliance by somebody on the accuracy of that which the word communicates and the loss or damage consequential on that person having adopted a course of action on the faith of it.[43]

The similarity with manufacture is clear: that category also concerning the putting into the world of something that may cause harm by people's reliance upon the assumption that the something is as it appears. In the terms used previously, we can say that statements cause harm by being dangerous (not as true or correct as they appear) and by the user relying upon the assumption that they are as they seem. This feature is even clearer in the case of the statement than in the case of a product, since, unlike a product, a statement can *only* cause harm through use, as Lord Oliver observes. A statement will never blow up when unattended; it only has life through reliance upon its veracity or correctness.

Our society's norms of responsibility do not automatically ascribe to the stating party the responsibility for the consequences of reliance upon a misstatement. A user is entitled to assume (at least for non-commercial purposes) that a product is as it seems but not that a statement is as it seems, since the making of a decision is (treated as) the responsibility of the autonomous party in question. Thus relying upon the correctness of a statement breaks the chain of moral responsibility as the relying party is treated as responsible for weighing up the value of information, even information given by other parties.[44] All losses caused by reliance upon the correctness of statements are thus prima facie too

motions judge, unreported, 5 December 2002, Cumming J), Laskin JA stated that the claim "would likely fail" (at 476). On the normative principles outlined above Laskin JA is correct: there should be no duty of care as the financial costs are incurred through the purchaser's choice to get a working smoke detector, rather than through the need to remove a danger (since, unlike a building that is liable to collapse, the detector is no longer dangerous once the defect has been discovered). Leave to appeal to the Supreme Court of Canada has been refused (22 May 2003) and the full hearing is pending.

[43] See earlier comments to the same effect in *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 354.

[44] Although society does not treat statements per se as wrongful, and reliance upon them is thus the responsibility of the relying party, deceitful statements are the exception. Under the tort of deceit, reliance upon deceitful statements is the responsibility of the stator (and the stator cannot use contributory negligence of the relying party to reduce damages). This tort is based upon the same moral principle that holds that intended consequences are never too remote.

indirect, and thus prima facie there is insufficient proximity to found liability for negligent misstatements.[45]

One main difference between statements and products, that may explain the difference in our society's approach to the users of statements on the one hand and the users of products on the other, is that statements are easier to inspect (verify). As the respondents argued in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 474*:* "The spoken or written word is not packaged, so that it cannot be examined like the ginger-beer bottle in *Donoghue v Stevenson*, which allowed no chance of intermediate examination and so created a proximity." Often inspection of a manufactured product will be impractical both because of a lack of expertise on the part of the user, and because such inspection would render the product unusable. Of course, a user of either a product or statement still has the option not to take the risk of reliance and use, but in the case of statements (which the user is more likely to be able to "manufacture" himself by forming his own opinion) it is more reasonable to suggest that a user take this option. In our society it is accepted that people have to use objects without the availability of a contractually responsible party, in order to live their lives. This is what Witting calls the "comparative moral contest as between the doer and sufferer of harm".[46]

It should be noted that, as in manufacture cases, a maker of a statement can take steps to defuse the danger of the statement by warning that it may be inaccurate or otherwise disclaiming responsibility.[47] The former is effective to render the statement safe, the latter to prevent an assumption of responsibility.

Other categories

So far, only the categories of manufacture and misstatement have been discussed, along with the prima facie allocation of moral responsibility and legal liability that corresponds to each category. It is submitted, however, that the other categories of the law of negligence can also be largely explained in a similar way (accepting that such categories overlap and that characterisation problems may arise[48]).

Negligent action without intervention (what we might call "infliction") is an obvious example of a category in which sufficient proximity is present as the loss is caused directly by the action – society treats the actor as responsible for the consequences of the careless action.[49] This is liability for making something worse.[50] If one suffers an infliction of damage to one's property, then one can recover not just for the property but for the profits lost through the damage to the property (providing that they are not too remote). Such losses are economic, but unlike in the case of losses caused by putting dangerous products into the world,

[45] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
[46] C Witting, "Justifying Liability to Third Parties for Negligent Misstatements" (2000) 20 OJLS 615. See also Fleming JG, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can Bar Rev 471 at 486.
[47] For example, as in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* itself. See the discussion of manufacture cases above at 80.
[48] See the discussion below at 89.
[49] See *Mobil Oil Hong Kong Ltd v Hong Kong United Dockyards Ltd ("The Hua Lien")* [1991] 1 Lloyds Rep 309 at 328ff.
[50] *Capital & Counties plc v Hampshire County Council* [1997] QB 1004.

even commercial losses are considered direct when they result from damage to one's own property without any third party intervention.[51]

Omissions cases provide an obvious example of a situational category in which loss is only caused by reliance by another party on action, since nonfeasance can only be said to have caused loss if it was assumed that the nonfeasant party would act.[52] Both social and legal norms do not, generally, treat individuals as liable for not doing what another assumed that they would do – the assumption and not the nonfeasance is the focus of responsibility for any loss.[53] If there is a special relationship, or other set of specific factors that render the expectation of action reasonable in the eyes of social norms of responsibility, then the presumption of a lack of sufficient proximity in omissions cases is rebutted. The creation of a danger,[54] control over dangerous property[55] or a dangerous situation,[56] or control over one not able to control themselves in a dangerous situation,[57] may give rise to a duty to obviate the danger. Where someone is interfering in a rescue, then he or she may be liable to take reasonable steps to rescue because he or she has potentially taken the place of somebody else who could have done so.[58] In fact, even without any action committing the neighbour to the claimant, it may be that a doctor, a lifeguard or a lighthouse authority should be liable to act to help others merely because of their position in society.[59] It could be that the will cases such as *White v Jones* [1995] 2 AC 207 can be explained in this way – as a general social expectation that falls upon solicitors.[60]

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[51] Such losses are usually not classified as "pure economic loss", although it is submitted that such a classification begs the question, and that really the unexpressed basis for the distinction between pure and non-pure economic losses is that, on the whole, the former are direct and the latter indirect. For discussion of economic losses resulting from damage to another's property, so-called "relational losses", see the discussion below at 96.

[52] Hart and Honoré, n 27; Honoré, n 12, p 46ff.

[53] *Stovin v Wise* [1996] 1 AC 923.

[54] See Lord Hoffmann's explanation of *Home Office v Dorset Yacht Co* [1970] AC 1004 in *Stovin v Wise* [1996] 1 AC 923 at 948.

[55] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

[56] In *Watson v British Boxing Board of Control* [2001] QB 1134, the BBBC became responsible, and so liable, for Michael Watson's boxing injuries by reason of their control over the boxing match and their power to determine whether or not resuscitation facilities were provided at the ringside. More directly, teachers have a duty to prevent pupils from hurting each other: *Richards v Victoria* [1969] VR 136. See also *Nagle v Rottnest Island Authority* (1993) 177 CLR 423.

[57] Thus foster parents, because of their de facto control over their foster child, have been held liable for not preventing the two-year-old from burning herself: *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559. *Cf Hahn v Conley* (1971) 126 CLR 276.

[58] But see *Capital & Counties plc v Hampshire County Council* [1997] QB 1004.

[59] Williams K, "Medical Samaritans: Is There a Duty to Treat?" (2001) 21 OJLS 393. The idea of general reliance was first presented by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464, and has been applied in *Parramatta City Council v Lutz* (1988) 12 NSWLR 293. The lighthouse example was given by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 486.

[60] In the similar case of *Ross v Caunters* [1980] 1 Ch 297 at 313ff, Megarry V-C thought that it was important that in such cases the loss is "directly caused" as in such cases it is not possible to identify any action by the beneficiary of the will in reliance upon the competence of the solicitor. Megarry V-C thought that the loss was consequently not dependent upon reliance, and rejected (at 321) the argument that there was no loss but rather a failure to receive a gain. It is respectfully submitted that the losses in the will are caused by omissions, meaning that it is only if there can be

A subcategory of omissions liability is that of liability for the negligent non-performance of services (in other words, that part of the performance of a service that does not involve making things worse, making things worse being infliction and so direct, as discussed above). A service gives rise to an expectation that a certain goal will be achieved, and action taken in reliance upon that expectation can give rise to losses or harms. The failure to achieve a goal, essentially a case of omissions liability, is prima facie indirect. However, once the service has been embarked upon, the special circumstances that rebut this presumption and give rise to sufficient proximity will sometimes be present – if it is reasonable in our society to rely upon the service-provider achieving the goal.[61] In such cases the service-provider must take reasonable care to achieve the goal, or pay for the losses incurred as a result of the failure to do so.[62]

Another subcategory of omissions is the category of liability for the actions of third parties.[63] Cases in this category are doubly indirect, since not only are they omissions cases (and so the claimant's reliance on the omitting party's restraint of the third party intervenes in the chain of moral responsibility), but they are omissions in situations whereby the harm is caused by a third party (and so the third party's action also intervenes in the chain of moral responsibility).[64] Consequently, in such cases there is, again, prima facie insufficient proximity to found a duty of care.[65] Sometimes special circumstances leading to proximity, and so liability, will stem from the control over a third party (for example, parents not restraining children, referees not restraining rugby players); in other cases they will stem from control over an activity or location in which third parties interact (for example, local authorities not maintaining traffic lights at a road junction).

Finally, part of the (currently confused) law of promissory estoppel may be explained on the basis that one party, by making a promise (with all the invitation to reliance that this entails), has become responsible for any expense incurred in reliance on the assumption that the promised activity will be

said to be a social expectation or social reliance upon solicitors' drafting of wills that the nonfeasance could be culpable. The unarticulated premise in Megarry V-C's judgment was the social expectation that entitles beneficiaries to expect solicitors to do their job, although it is correct that specific beneficiaries do not rely upon solicitors in any specific sense involving actual knowledge; their reliance is a social reliance upon the entire class of solicitors.

[61] The seminal service case is *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145. See also discussion below at n 62.

[62] See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, particularly the speech of Lord Browne-Wilkinson. Burrows A, "Solving the Problem of Concurrent Liability" in Burrows, n 12, p 29). correctly observes that negligent service claims are about the failure to confer benefits. However, Burrows is wrong to say that the foundation of liability in such cases is agreement or the social force given to the practice of promising; rather, it is reliance (upon a benefit being conferred) induced by the *fact* of promising. Once one has induced that reliance, and in the presence of the special circumstances making such reliance proximate, the service-provider is under an obligation to take care that the relying party does not suffer loss as a result of the reliance.

[63] Vicarious liability is the only type of liability that is truly liability for the actions of third parties – really the cases being discussed here are cases of liability for failure to restrain third parties where the failure results in the third party causing damage.

[64] Failure to put the handbrake on, causing one's car to roll away and injure someone, is an omission without third party involvement; carelessly loading real bullets into a gun on a film set causes harm without omission but through third party involvement.

[65] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

performed.[66] Promissory estoppel would then be part of the tort of negligence.[67] In support of this contention, a strong argument can be made that promissory estoppel is all about wrongful interference and harm, rather than enforcing promises per se.[68] The promise is important not as part of a social convention by which the promisee is given a right to the promisor's performance, but rather as behaviour that in fact causes reliance and that can be proximate where the special circumstances (an assumption of responsibility) make it so.[69] Of course, the fit between promissory estoppel and negligence is currently imperfect because there is at present no requirement that a failure to take care be proven before liability in promissory estoppel can be established, so promissory estoppel as a sword may end up as a separate tort altogether.[70]

Specific normatively significant factors: The assumption of responsibility/special relationship

As explained above, fitting a case into a causational category only recognises the general normatively significant features of the relationship between the claimant and defendant, and so provides only a presumptive determination as to whether or not the defendant's actions were a sufficiently direct cause of the harm in question for the defendant to be liable for the harm that ensued. It is not only general relational characteristics that are normatively significant. Special[71] factors related to the relationship or roles of the parties, or to their dealings, are also relevant to moral culpability for consequences.[72] Where the general normatively significant factor (category) gives rise to a presumption that the

[66] Cf McBride N, "A Fifth Common Law Obligation" (1994) 14 LS 35 at 45ff; Swanton J, "The Convergence of Tort and Contract" [1989] 12 Syd LR 40 at 53. It is not suggested that this duty covers all of what is currently called the law of promissory estoppel: in addition, there is the part of promissory estoppel that deals with equitable forbearance (to ameliorate the requirement of consideration, the strictness of which is unnecessary in variation of contract cases), and the part that allows the informal granting of property interests or entering of contracts where there is uncertainty as to whether the one or other has been successfully performed. Indeed, the duty described in the text goes further than the law of England and Wales, which is still governed by the rule from *Combe v Combe* [1951] 2 KB 215 that promissory estoppel can only be invoked in response to promises to waive an existing right (except in proprietary cases). No such limitation applies in Australia: *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. In fact, in *Walton Stores* Deane J even suggested that an action in negligence may have been available on the facts (at 454), although the case was not pleaded or argued on this basis.

[67] See Seavey, n 35, at 926.

[68] This approach was put forward forcefully by Brennan J in the High Court of Australia in *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, although the measure of damages awarded in that case did not reflect this approach. See *Hoffman v Red Owl Stores* 133 NW (2d) 267 (1965) for United States support of this view; and Spence M, "Australian Estoppel and the Protection of Reliance" (1997) 11 JCL 203.

[69] See also the discussion of failures to confer a benefit through a service, above n 62.

[70] See Seavey, n 35, at 927. The absence of this requirement in the current law of promissory estoppel is the best support for McBride's argument, n 66, at 49, that the duty to prevent detrimental reliance on a promise is not tortious but is sui generis. But note this problem of fit with the carelessness aspect of the tort of negligence is not unique to promissory estoppel. In *Welton v North Cornwall District Council* [1997] 1 WLR 570 the court forced the facts of threatening orders (taking care not really being relevant) into the characterisation of careless advice in order to apply the tort of negligence to the case at hand.

[71] Meaning non-general, rather than unusual.

[72] This is not unlike Deane J's concept of "circumstantial closeness" in *Jaensch v Coffey* (1984) 155 CLR 549 at 584.

defendant does not have sufficient proximity to the loss to be held under a duty of care, special normatively significant facts may rebut the presumption and give rise to sufficient proximity. Thus, special factors may make a manufacturer liable for losses of profit caused by a dangerous product,[73] or make a giver of a statement liable for a misstatement,[74] or make a nonfeasant liable for not acting.[75]

That special normatively significant factors can have this effect on responsibility first came to prominence in the misstatement case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and the group of special characteristics were labelled an "assumption of responsibility" (at 529). In situations in which such facts arise, the stating party is held responsible for the consequences of reliance upon the statement's veracity or correctness – the making of a statement and its subsequent reliance are brought within the scope of the negligence obligation. Unsurprisingly, it is difficult to identify exactly what features are sufficient to attract responsibility, and so liability, to an otherwise blameless maker of a statement. Circular phrases are used to label the group of features, such as "reasonable reliance" and the abovementioned "assumption of responsibility". The latter is welcome because it emphasises the importance of socially normative *responsibility* to legal liability, although the word "assumption", with its suggestion of voluntary, intentional taking of responsibility, can be an accurate description of only some of the cases in which specific special circumstances are present. McBride and Hughes[76] argue that a stator is liable where he or she has "let others down" after accepting "power" (meant loosely) over the recipient of the statement, which is probably closer to the mark, if only because it is more imprecise. Anyway, the types of specific features required for liability are well-known and will not be investigated here,[77] frequently involving a tacit invitation of reliance, a special skill or knowledge inspiring trust, or a high degree of relational power or dependency, but above all it is clear that mere reasonable foresight of loss is not enough and that in such cases, without these normatively significant special features, the defendant would not be liable for the harm caused.

One important consequence of viewing the assumption of responsibility concept as the recognition of specific factors drawing a defendant that would otherwise be outside the scope of the tort within it, is that we can see that the foundation of liability in these cases is still the imposed tortious obligation to take care not to carelessly cause harm – the same tort is at work here as in *Donoghue v Stevenson*. The assumption of responsibility is just a set of normatively

[73] See the discussion by Goff LJ in *Muirhead v Industrial Tank Specialties Ltd* [1986] QB 507. See also the speeches of Lords Keith and Oliver in *Murphy v Brentwood District Council* [1991] 1 AC 398; and *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, discussed above at 81.
[74] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
[75] *Watson v British Boxing Board of Control* [2001] QB 1134.
[76] McBride N and Hughes A, "Hedley Byrne and the House of Lords: An Interpretation" (1995) 15 LS 376 passim. See also McBride NJ and Bagshaw R, *Tort Law* (Longman, London, 2001), p 101ff.
[77] See further Barker, n 33; Ryan KW, "Negligence and the Giving of Advice and Information" in Finn, n 14. Cf the discussion by Honoré, n 12, p 54ff, of factors that give rise to a responsibility to act where such responsibility would not otherwise exist: harmful and risk-creating acts, office or position of responsibility, dependency: being well placed to meet a need, benefit received, and undertaking.

significant circumstances that will bring a chain of events (such as the release of a dangerous statement) within the scope of the tort of negligence.[78]

It should be noted that even when special factors are present, they do not give rise to unfettered responsibility and so liability – rather they are limited according to the circumstances in which they render the defendant responsible. In the case of statements, special circumstances will only give rise to sufficient proximity between the defendant and harm caused to certain people relying upon the statement for certain purposes. The apparent purpose for which the statement was given is important as it defines the ambit of the consequences over which society and the recipient treat the stator as morally responsible and the relier as not morally responsible (which conclusions we often label "an assumption of responsibility" and a "reasonable reliance" respectively). If a statement appears to be made for particular purposes then any reliance on the statement's veracity for a further purpose is at the relier's own risk (we say that such reliance is unreasonable) and outside the scope of the stator's negligence obligation.[79]

It was suggested above that the commercial or non-commercial nature of a use of a product may be normatively significant, explaining why economic losses caused by products are rarely recoverable in negligence. A similar factor may be at work in cases of misstatement; it may be that the special relationship needed to rebut the presumption of insufficient proximity in misstatement cases is less likely to be found where the relier upon a statement is relying for commercial reasons than where the relier is relying for non-commercial reasons. Reliance in the former situation would be more usually treated as breaking the chain of responsibility than reliance in the latter situation, since commercial parties are expected to pay for their reliance;[80] a carelessly made statement that a bridge is safe would more usually justify liability for injury than justify liability for losses caused to the owner by his reliance upon the statement for valuation purposes.

Problems of characterisation

It is important to note that categorisation on the basis of normatively significant characteristics of a case will not always be easy, because the social norms

[78] McBride argues that the duty of care discovered in *Donoghue v Stevenson* and the duty of care discovered in *Hedley Byrne v Heller* are not two specific instances of a more general obligation, but rather that they have different foundations and reflect different obligations: see McBride NJ, "Classification and Legal Education" in Birks P (ed), *The Classification of Obligations* (Clarendon Press, Oxford, 1997).

[79] See, eg, *Caparo Industries plc v Dickman* [1990] 2 AC 605 (statutory audit to enable shareholders to exercise class rights in general meeting but not to inform them for the purposes of making investment decisions) and *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (valuation of security property for lenders not intended to amount to advice as to whether or not to advance money). Where a statement or piece of advice is given pursuant to a statutory duty, the purpose of the duty will inform the scope of the tortious duty that can arise from the giving of the statement or advice. In some situations this gives rise to policy issues (the "fair, just and reasonable" question), but often it is also a question of the scope of the assumption of responsibility, given that the recipient of the statement or advice should have known the purposes for which it was given.

[80] Of course, most non-commercial situations are purely social, and in such cases the reliance will be unreasonable and so break the chain of responsibility: see *Chaudhry v Prabhakar* [1989] 1 WLR 29 at 34 per Stuart-Smith LJ. Where the relationship is not commercial but not purely social, tort liability will be likely and contract liability will be unlikely (due to the difficulty of showing an intention to create legal relations). See further MacGrath M, "The Recovery of Pure Economic Loss in Negligence – An Emerging Dichotomy" (1985) 5 OJLS 350.

identify relevant factors that are not themselves mutually exclusive. Consequently, apparent problems of characterisation can occur.[81] As Lord Devlin observed in *Hedley Byrne v Heller* (at 516-517):

> A defendant who is given a car to overhaul and repair if necessary is liable to the injured driver (a) if he overhauls it and repairs it negligently and tells the driver it is safe when it is not; (b) if he overhauls it and negligently finds it not to be in need of repair and tells the driver it is safe when it is not; and (c) if he negligently omits to overhaul it at all and tells the driver that it is safe when it is not. It would be absurd in any of these cases to argue that the proximate cause of the driver's injury was not what the defendant did or failed to do but his negligent statement on the faith of which the driver drove the car and for which he could not recover.

Despite what Lord Devlin seems to suggest, there is no need to characterise a case as belonging to only one category. Several different norms of responsibility can apply concurrently to a particular person for a particular course of events, and the claimant should be able to plead any of them. It is submitted that in all three examples there is an omission by the defendant – a failure to achieve the goal of a safe car – with injury resulting from the driver's reliance upon the goal being achieved (this is the first general normatively significant characteristic). In all three examples there is also an untrue statement that the car is safe, injury resulting from the driver's reliance upon the statement being true (the second general normatively significant characteristic). Both categories (general characteristics) raise a presumption that the defendant is not responsible, but in all three examples the same special circumstances are present (the defendant's expertise and the voluntary undertaking of the task that is only for the driver's benefit) that rebut the presumption. Thus both categories lead to the same conclusion – responsibility for the defendant – and so characterisation is not overly important.

In addition, the first of Lord Devlin's fact-patterns could (also) be a case of actually making the car worse (less safe) which is direct even without any special circumstances, so in that case sufficient proximity is present merely as a result of the general normatively significant factors. Finally, if the defendant has sufficient control over or responsibility for the vehicle, then letting the driver take the unsafe vehicle onto the road could, in all three examples, also be a case of putting a dangerous thing into the world. If this is correct, then the defendant would be liable (to third parties) in the same way that the manufacturer or distributor is liable for goods: liable for having control of the car and not curing its danger (it appearing safe but not being so).

It should be remembered that one has proximity with regard to certain consequences rather than across the board, so it may be necessary to demonstrate overlapping duties if the claimant is to show proximity with regard to all the types of harm suffered (including failure to make a profit etc). It will be seen shortly in the discussion of misstatements causing non-economic loss that

[81] See Witting C, "Negligent Inspectors and Flying Machines" (2000) 59 CLJ 544 at 551ff and the discussions below in this article.

characterisation issues frequently arise, but such issues are not problems once one accepts that there can be overlapping norms and so overlapping reasons for proximity.

Judicial recognition of the importance of directness

The above discussion shows how focusing upon directness allows the identification of social norms that explain the categorisation of negligence cases and the special relationship concept. At the very least, it is clear that the way that loss was caused, and not just the type of loss caused, is important, since (for example) omissions cases always prima facie result in insufficient proximity whatever the type of loss caused, and so a special relationship is always required if there is to be liability.

If one looks back over the decisions of the last decade, one can see that judges are coming to use the terms "direct" and "indirect", in order to group together the categories discussed above and to generalise across the pockets of case law.[82] This is not to suggest that the same rules apply in each pocket, but rather that the same process is being conducted for each pocket – the terms "direct" and "indirect" are variables whose content depends upon the pocket being discussed. Lord Oliver in *Murphy v Brentwood District Council* [1990] 3 WLR 414 at 446-447 could not be clearer:

> A series of decisions in this House and in the Privy Council since *Anns*, however, have now made it clear beyond argument that in cases other than cases of *direct* physical injury the reasonable foreseeability of damage is not of itself sufficient and that there has to be sought in addition in the relationship between the parties that elusive element comprehended in the expression "proximity".[83]

One test of the account proposed is to look at cases of negligent misstatements causing non-economic loss. Unlike categories of omissions and liability for third parties, misstatement cases are often explained as being determined more by the economic nature of the damage suffered rather than the way the loss was caused. Stapleton's view of *Hedley Byrne v Heller* is typical: "To secure recovery, then, the plaintiff had, at the least, to overcome any barriers to recovery for negligent words, and any barriers to recovery of economic loss. With hindsight it is surprising how far the attention of the House of Lords was absorbed by the first question."[84] Weir agrees: "Doubtless because of the arguments of counsel, their Lordships concentrated less on the nature of the harm caused than on the means

[82] It will be remembered that one element of Deane J's tripartite description of proximity famously outlined in *Jaensch v Coffey* (1984) 155 CLR 549 was "causal proximity", which he defined as "the closeness or directness of the relationship between the particular act or cause of action and the injury sustained" (at 585). This echoes the idea of proximate cause, discussed below at 100.

[83] Emphasis added. Ward J in *Ravenscroft v Rederiaktiebølaget Transatlantic* [1991] 3 All ER 73 quoted these passages in full and after the word "direct" he inserted in square brackets "and I emphasise 'direct'". See also Lord Oliver's equally unequivocal statements in *Caparo v Dickman* [1990] 2 AC 605 at 635. Indeed, in *Murphy v Brentwood District Council* [1990] 3 WLR 414 the council's counsel conceded that a duty was owed in respect of personal injury resulting from failure to secure compliance with the bylaws. The court, however, was reluctant to accept that a duty would exist even with regard to personal injury: see at 457 per Lord MackKay; at 463 per Lord Keith; at 492 per Lord Jauncey. See also, eg, Deane J in *Jaensch v Coffey* (1984) 155 CLR 549; Sir Michael Fox in *Preston v Torfaen BC* (1993) 36 Con LR 48.

[84] Stapleton, n 3, at 260.

by which it was caused – the defendant's conduct rather than the victim's harm – though manifestly both were crucial."[85]

It is submitted that it is not surprising that the means by which harm was caused was emphasised in *Hedley Byrne v Heller* because discussion of the means, looking to social norms of responsibility, is sufficient to decide the case solely by reference to the purposes of the tort, and without recourse to policy reasoning based upon the type of loss.[86]

Quite apart from it making more sense to talk about the way loss was caused, since that is what we do in omissions and other categories of case, the "type of harm" explanation for *Hedley Byrne* is inadequate. This inadequacy is only unobvious because most cases of negligent misstatements are also economic loss cases. Once we come to cases in which negligent misstatements cause non-economic loss, it is possible to observe judges realising that it must be the way that harm is caused that is the salient feature of negligent misstatement cases, and in such cases judges focus on that feature to determine that there is prima facie insufficient proximity. Indeed, in such cases the judges have even taken to using the term "directness" to explain what proximity is all about. The following cases on this issue, which arises too infrequently (in England and Wales at least) for a fully convincing body of evidence to have arisen either in support or in refutation of this argument, show that, as Witting observes, there is "cause to believe that current distinctions between cases of negligent misstatements causing physical damage and negligent misstatements causing pure economic loss are false. In each category, the courts should be primarily concerned with the particular interactions through which damage has been caused."[87]

The first case directly on point is *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] 1 AC 211. In that case a classification society, because of its surveyor's carelessness, did not withdraw the class (which indicates seaworthiness and is needed to get insurance and other contracts) from the damaged ship in question, recommending only temporary repairs. The ship sank along with its cargo, and the cargo-owners sued the classification society for its carelessness (seeking to recover the balance of US$5.7 million that they could not recover from the shipowners). Lord Steyn, giving the speech for the majority of the House of Lords, affirmed the "qualitative difference between cases of direct physical damage and indirect economic loss" (at 235), notably conflating the concepts of directness and type of harm. More clearly, he went on to state that "[t]he law more readily attaches the consequences of actionable negligence to directly inflicted physical loss than to indirectly inflicted physical loss" (at 237), and gave as a paradigm of directly inflicted physical loss the example of dropping a lighted cigarette into a cargo hold known to contain a combustible cargo.

Lord Steyn held that the classification society's carelessness in *The Nicholas H* did not amount to a direct infliction of physical damage to the cargo. He also identified policy reasons why the classification society should not be liable, with which we need not concern ourselves here. It is respectfully submitted that Lord Steyn was correct to hold that there was insufficient proximity in this case,

[85] Weir T, *Tort Law* (Oxford University Press, Oxford, 2002), pp 45-46.
[86] Hence Lord Hodson in *Hedley Byrne v Heller* at 509: "It is difficult to see why liability as such should depend on the nature of the damage." See also at 517 per Lord Devlin.
[87] Witting, n 81 at 554.

since, although the loss was physical in type, it was caused by what was in substance a misstatement that the ship was seaworthy, alongside the non-fulfilment of a service that sought to only award or maintain a ship's class if the ship was seaworthy. The harm was, therefore, prima facie too indirect for there to be a duty of care. Had the classification society taken a greater part in the putting of the ship to sea then it could be responsible as a manufacturer (a "putter-into-the-world"), and so would be sufficiently proximate without any special circumstances. Lord Steyn (at 237) was in no doubt that the case should not be characterised in this way, since the classification society had only a "subsidiary" role in putting the vessel to sea, and so the loss was indirect.[88] Consequently, the case is governed by the norms relating to misstatements and failure to achieve a goal, and so does not give rise to liability without special normatively significant circumstances.

Lord Steyn also held that, on the facts, the special circumstances that would be significant in this respect were not present and so there had been no assumption of responsibility by the classification society, since "[g]iven that the cargo owners were not even aware of NKK [the classification society]'s examination of the ship, and that the cargo owners simply relied on the undertakings of the shipowners, it is in my view impossible to force the present set of facts into even the most expansive view of the doctrine of voluntary assumption of responsibility" (at 242). Most important for present purposes, though, is the general holding that even physical loss requires an assumption of responsibility for there to be sufficient proximity if that physical loss was caused by a statement.

Two cases with similar facts provide little assistance on this matter. The first is *Philcox v Civil Aviation Authority (The Times*, 8 June 1995), in which, pursuant to the Civil Aviation Authority's statutory authority, a certificate of airworthiness was given to a light aircraft that was not airworthy. The aircraft crashed and the plane's owners claimed for the financial loss suffered as a result of the physical harm to the plane.[89] The second case is *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648. This time the statutory body, the Department of Transport, carelessly issued a certificate of seaworthiness to a vessel that was not seaworthy. The plaintiffs were induced by the certificate to buy the fishing vessel, and when the mistake was discovered at the next pre-certification assessment, the ship was rendered nearly worthless by its inability to secure a certificate. In *Reeman*, therefore, the claim was for "pure economic loss".

In neither case did the English Court of Appeal find a duty of care owed by the certification body. In both cases, the deciding factor appears to be that the certification process was conducted for the limited purpose of the protection of

[88] Contrasting the instant case with *Clay v AJ Crump & Sons* [1964] 1 QB 533, in which case an architect was "primarily responsible" for leaving a unsafe wall standing, and so the architect was sufficiently directly responsible for the wall falling on a workman for there to be proximity to found a duty of care. See also *Perrett v Collins* [1998] 2 Lloyd's Rep 255, a *Clay v Crump*-type of case rather than a *Nicholas H*-type of case, discussed below at 94.

[89] Both Staughton LJ and Millet LJ recognised that the loss was not "pure economic loss"; rather, it was consequent upon physical harm.

third parties. Some judges saw this as a question of proximity,[90] others as a question of whether it would be fair, just and reasonable to impose a duty.[91] In terms of the directness theory, Millet LJ explained that the physical damage in *Philcox* was not direct,[92] and that the relationship between the parties, arising as it did from a statutory duty not designed to protect the plaintiffs, did not change this. In the same case, Staughton LJ mentioned the argument, arising out of *The Nicholas H*, that one should not just consider the type of harm caused but also whether the loss was "directly caused", but was reluctant to express a concluded view on the matter (and instead went on to discuss the fair, just and reasonable requirement).

Reeman was a case of economic loss; however, Phillips LJ (who gave the longest judgment, with which Gibson LJ expressly agreed in his concurring speech) stated, obiter, that the *Donoghue v Stevenson* test that does not require any proximity beyond foreseeability has only survived "in the context of physical harm *directly caused*" (at 676) (emphasis added). Phillips LJ then said (again obiter) of the decisions in *Murphy v Brentwood District Council* [1991] 1 AC 398 and *The Nicholas H* [1996] 1 AC 211 that "[t]hese decisions at least raise a serious question as to whether the department owed any duty to Mr Reeman, or even to his crew, in respect of the risk of death or injury flowing from the unseaworthiness of the vessel" (at 679).[93]

The final significant case is that of *Perrett v Collins* [1998] 2 Lloyd's Rep 255, the facts of which are similar to those in *Philcox*, although in this case reliance on a statement led to personal injury. The first defendant, Mr Collins, made a light aircraft from a kit and then made his own modifications to the aircraft. In order to fly the aircraft, Mr Collins was required under the statutory regime regulating such affairs to have a permit. He obtained such a permit from the third defendant, the Popular Flying Association (of which he was a member), through the second defendant inspector employed by the Association, after inspections at several stages of construction by the second defendant. On his second flight of the aircraft, Mr Collins lost control of the plane, and his passenger, the plaintiff Mr Perrett, was injured upon landing. It turned out that the propeller was not compatible with the gearbox that Mr Collins had used and, furthermore, a reasonably competent inspector in the second defendant's position would have noticed this and, hence, not granted a permit to fly. The first instance judge held

[90] Millet LJ in *Philcox*, and all three of the Court of Appeal in *Reeman*. However, Ward LJ in *Philcox* expressly stated that there *was* sufficient proximity in that case.

[91] Staughton LJ and Ward LJ in *Philcox*, and all three of the Court of Appeal in *Reeman* (although their judgments concentrated more on the proximity issue). Millet LJ in *Philcox* agreed that it would not be fair, just and reasonable to impose a duty but preferred to rest his decision upon a lack of proximity.

[92] Millet LJ in *Philcox* saw the certification as causing loss through an omission rather than through a misstatement, unlike the Court of Appeal in *Reeman*, but that does not affect the directness discussion.

[93] See also at 679 where Phillips LJ states that it is not axiomatic that widows would have claims against the department under the Fatal Accidents Acts if Mr Reeman and his crew had put to sea and drowned because of the unseaworthiness. *Murphy v Brentwood District Council* [1991] 1 AC 398 is similarly a case of a claim for economic loss, but in that case both Lord Mackay (at 457) and Lord Keith (at 463) expressly reserved opinion on the question of whether the local authority carelessly failing to supervise compliance with bylaws would be liable for *personal injury* caused by defective premises, even though the existence of such a duty was conceded by counsel for the council.

that all three defendants owed the plaintiff a duty of care that had been breached, and the second and third defendants appealed this decision.

Buxton LJ, after mentioning the distinction between physical damage and economic loss, gave the leading judicial statement on directness as it relates to proximity (at 273):

> The distinction is not, however a simple one between physical damage and economic loss, because the cases of foreseeable physical damage that are likely to attract liability without more consideration, following the approach referred to by Lord Oliver in *Murphy*, are cases of "direct" physical damage. The notion is difficult to define, and is not defined in the cases that employ it; but at least one consideration seems to be that damage may be held not [sic][94] to be "direct" if it is inflicted by an act of the tortfeasor that produces the damage without other human intervention. It will of course be noted that this is a different issue from that of causation, since it is perfectly possible for a person to cause damage otherwise than by his own direct act. The existence of this sub-category of physical damage does however meant [sic] that where the physical damage is deemed to be indirect, the questions of proximity, justice, fairness and reasonableness remain wholly in issue, and to be established by the plaintiff …
>
> … At first glance the issue of directness may seem a matter of terminology rather than substance. In truth it is a material factor. The law more readily attaches the consequences of actionable negligence to directly inflicted physical loss than to indirectly inflicted physical loss [repeating Lord Steyn's comments from *The Nicholas H*].

Buxton LJ realised that although the concept of "directness" was not a useful analytical tool but rather a label that could be applied once it had been decided whether our society attributes responsibility to a particular cause, it identified a key factor in determining the existence of a duty of care.

His Lordship held (at 274) that the personal injury in this case was sufficiently directly caused by the second defendant, since

> it was wrong to speak of the first defendant as primarily responsible, with the second defendant's role being subsidiary. The second defendant was not simply an inspector from outside, whose approval was in practice obligatory on the owner because of insurance pressures. Rather, as the judge found, the second defendant was involved with the inspection of the aircraft throughout.

He therefore distinguished *The Nicholas H*, in effect saying that this was not merely a misstatement case, but was in substance also a manufacturing-type case, and so a case in which there was sufficient proximity between the defendant and the harm caused even without any special circumstances.

Hobhouse LJ believed there to be a basic distinction between personal injury and physical damage to property ("which universally requires to be justified") and economic loss (which does not). For that reason, he was of the opinion that no assumption of responsibility can ever be necessary to found liability for personal injury or property damage: "[w]here on general principle in the context of foreseeable risk of personal injury, a duty of care exists, lack of directness,

[94] This is a singularly inconvenient place for a reporting or transcription mistake, but it seems clear that the word "not" was not intended. The view that an error has been made is lent further credibility by the evident slip of the pen later in the same paragraph, where "meant" is written where "mean" should have been.

unless it destroys the causative link, provides the defendant with no answer" (at 264). This statement is premised upon the view that directness and causation are solely external, perhaps scientifically-based, tort standards, and so are not relevant to showing the existence of the duty of care, a premise that this article attempts to refute. Finally, Hobhouse LJ stated that "*Marc Rich* should not be regarded as an authority which has a relevance to cases of personal injury or as adding any requirement that an injured plaintiff do more than bring his case within established principles" (at 264). On this basis, he had no problem finding the second defendant to be liable. Nevertheless, it is significant that Hobhouse LJ also saw the case not primarily as a misstatement case but rather as a case of responsibility for putting a dangerous item into the world, hence: "Once the defendant has become involved in the activity which gives rise to the risk, he comes under the duty to act reasonably in all respects relevant to that risk" (at 262). If this is true, then his view that there is no need for proof of directness in personal injury or physical damage cases is obiter, since he viewed the case at hand as being one that essentially fell into a category (manufacture-type cases) in which sufficient directness is prima facie present anyway.[95]

Lord Swinton-Thomas conflated the policy issues (the question as to whether the duty was fair, just and reasonable) with the question of proximity. It appears that his views lie in between those of the other two judges, finding the most significant factor to be that the purpose of the inspection by the second defendant, and the subsequent certification, was to protect the safety of the public. He probably felt that the certification was like a misstatement, but that there had been an assumption of responsibility.[96]

In addition to the above-mentioned cases, there is the hypothetical example given by Lord Hoffmann in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 at 213. He suggested that if a doctor negligently pronounced a mountaineer's knee fit, and consequently the mountaineer went ahead with his expedition and suffered a mountaineering injury unrelated to his knee, the doctor should not be liable despite being a sine qua non cause of the injury because the scope of the duty of care does not extend to the whole expedition. This must be correct, and shows that the doctor's assumption of responsibility only creates sufficient proximity for consequences of reliance on his statement for the purposes of the mountaineer using his knee, rather than reliance on his statement with a view to advising the mountaineer as to whether to undertake the climb at all. In other words, the doctor is responsible if the knee gives out but not if the expedition goes wrong. This can only be correct if the doctor is not automatically liable for all personal injury or physical damage (since the damage results from a statement), but rather requires special factors for such liability, which special factors may well limit the ambit of the liability.

Of course, these few cases do not prove much. We can be pretty sure that negligent misstatements causing non-economic loss do not automatically give rise to a duty of care, and the directness view of proximity explains the cases in a way that the type of harm view cannot. In addition, judicial recognition of the

[95] See Hobhouse LJ's comments at 262: "Once this proximity exists [by way of involvement in an activity], it ceases to be material what form the unreasonable conduct takes. The distinction between negligent misstatement and other forms of conduct ceases to be legally relevant, although it may have a factual relevance to foresight or causation."

[96] This is suggested by his comments at 272.

importance of directness is encouraging. Still, the reasons given by the judges in these cases do not provide unequivocal support for the explanation proposed herein. We can probably say that it is generally accepted that directness is important, but maybe not any more than that. Witting goes much further, however. He argues that "possible points of intervention between any failure to take care and subsequent damage … [retain] the utmost importance to our understanding of the role of proximity in negligence"[97] and that "a notion of causal proximity lies at the heart of the proximity concept used in both *Donoghue v Stevenson* and *Hedley Byrne* case categories"[98] since the concept of directness "helps to establish the fact that the loss really is the product of the defendant's conduct and that it should be identified with him rather than with someone else."[99] It is respectfully submitted that this is right, and this is the view that I have sought to present and develop herein.

A final mention should be made of the other side of the coin: cases that result in economic loss but are not caused by an obviously indirect means (in that there are no obvious normatively significant points of intervention between the defendant and the claimant's economic loss). On the directness account of proximity, compensation should be recoverable in such cases without proof of special proximity/directness factors, that is, without an assumption of responsibility. We have already seen that economic loss resulting from damage inflicted upon one's own property is recoverable without showing specific proximity factors.[100] We have also seen that compensation is recoverable for economic losses without proof of specific proximity factors where such losses arise from defective manufacture or construction and result from legal liability to third parties or the costs of repairing the product or building.[101] Another interesting group of cases is that of (one type of) relational loss – economic loss caused by costs or a loss of profits resulting from physical damage to property belonging to a third party. Cases such as *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd* [1986] 1 AC 1 make it clear that such losses are almost certainly not recoverable.[102] Nevertheless, this is not necessarily inconsistent with the directness thesis. On the one hand, it may be that, at least in commercial cases, such losses are normatively indirect since our society expects commercial parties to factor in the risks whenever they rely upon other people's property in their ventures (unless the venture is a joint venture perhaps). On the other hand, it may be that this rule is explicable on policy grounds through genuine fears of indeterminate claims for an indeterminate amount.[103] Dicta in two recent cases, both concerning claims for oil spill compensation under the Merchant Shipping Acts, suggest, obiter, that local fishermen might be able to recover for losses of profits against a polluter of public waters containing public fish without proving

[97] Witting C, "The Three-Stage Test Abandoned in Australia – Or Not?" (2002) 118 LQR 214 at 215.
[98] Witting, n 81 at 555.
[99] Witting, n 81 at 560.
[100] See above at 82.
[101] See above at 80.
[102] See also *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27; *The Aliakmon* [1986] AC 785; *Londonwaste Ltd v Amec Civil Engineering Ltd* (1997) 53 Con LR 66; but see *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.
[103] See *Simpson & Co v Thomson* (1878) LR 3 App Cas 279 at 290 per Lord Penzance.

any assumption of responsibility.[104] Such comments were made explicitly on grounds of the directness of such loss;[105] perhaps this case would be distinguishable fom the unrecoverable relational loss claims by the public nature of the "damaged" property – our society allows even commercial parties to rely upon public waters without taking out insurance.[106] Policy concerns might be set aside in such cases for similar reasons.[107]

Furthermore, the High Court of Australia recently found a duty of care in a case of economic loss that was arguably direct in *Perre v Apand Pty Ltd* (1999) 198 CLR 180; 73 ALJR 1190. Some South Australian potato-growers suffered economic loss when they were prevented from exporting their potatoes to Western Australia by reason of Western Australian quarantine restrictions. The restrictions were imposed as a result of the proximity (within 20 km) of the plaintiff's potatoes to a neighbouring farmer's potatoes that were diseased, the disease having been introduced with the potato seeds sold to the farmer by the defendants. The High Court found a duty of care, and this is explicable on the grounds that the loss caused was direct – the plaintiffs were completely vulnerable and there was nothing blameworthy in what they did or did not do. Essentially, they had no morally significant role in the chain of events leading to their loss.

Why a directness explanation of the requirement of proximity is preferable to alternative explanations of proximity

There are several reasons, of varying importance, as to why the directness (social values) explanation of proximity is preferable to a type of harm explanation of proximity. The following are some of them:

1. It justifies and explains the present system of categorising cases according to the way that the harm was caused (the "pockets of liability approach").
2. It provides a framework in which the concept of the special relationship/ assumption of responsibility can be justified and explained, showing that, far from being a separate foundation for liability to the *Donoghue v Stevenson* principle, it has the same basis – social norms and morally significant factors such as directness and human intervention.[108]

[104] *Landcatch Ltd v International Oil Pollution Compensation Fund* [1998] 2 Lloyd's Rep 552 (Lord Gill), aff'd [1999] 2 Lloyd's Rep 316, concerning a claim under the *Merchant Shipping Act 1974* (UK); *Algrete Shipping Co Inc v International Oil Pollution Compensation Fund, "The Sea Empress"* [2003] 1 Lloyd's Rep 123, aff'm [2003] 1 Lloyd's Rep 327, concerning a claim under the *Merchant Shipping Act 1995* (UK). The loss on actual facts of the cases was much less direct than that in the fishermen examples, the claims being rejected by the fund and the courts upholding these decisions. Whilst dicta of the Inner House in *Landcatch* (at 324, 332, 334, 336) and David Steel J in *The Sea Empress* (at 128) support the view that local fishermen could recover at common law, the Court of Appeal in *The Sea Empress* (at 336, 339) seems to suggest that, whilst local fishermen could recover under the Fund, they could not recover at common law. Lord Gill in *Landcatch* did not discuss the issue.

[105] See the citations to the judgments of the Inner House and David Steel J in n 105. Per David Steele J (at 128): "There is no longer any distinction between direct physical damage and direct economic loss."

[106] In *The Sea Empress* (see [2003] 1 Lloyd's Rep 123 at 128) David Steel J and Mance LJ (see [2003] 1 Lloyd's Rep 327 at 336) noted that there is a public right to take fish, protected through the tort of public nuisance.

[107] See *Landcatch* [1999] 2 Lloyd's Rep 316 at 334 per Lord McCluskey.

[108] See above n 78.

3. It explains why physical harm and personal injury are not always recoverable, even when there are no policy reasons for non-recovery and the loss is foreseeable and carelessly caused (such as in misstatement cases).
4. It explains why economic loss is sometimes recoverable and usually not (because it is usually indirect). In other words, it removes the need for any exclusionary rule against economic loss.
5. It is more coherent with the general approach of tort law, which arguably focuses more on corrective justice and the values and norms of the society it is regulating, and less on policies and distributive justice. Thus the directness approach looks to reasons internal to the tort to limit its scope, rather than reasons external to the tort. This is preferable as it makes more sense of the law, and also because principles are more certain and thus make the law more predictable by members of the society to whom it applies.
6. It explains Lord Atkin's emphasis on the "closeness and directness of the parties", the use of the term "proximity", and various other judicial references to the relationship of the parties.

What role is left for policy reasoning?

It has been argued that much of the decision-making in duty of care cases can be explained through the application of normative principles. In certain, narrowly-defined, types of case, policy reasons may well be important, such as that of liability of public authorities or liability for psychiatric harm. It is questionable, however, whether there is any need to have recourse to a general rule against economic loss because of its giving rise to "liability for an indeterminate amount for an indeterminate time to an indeterminate class".[109] The limitations on recovery for misstatements on normatively significant grounds (that is, the requirement of a special relationship in misstatement cases) render such wide liability almost impossible in misstatement cases.[110] More generally, the normative (that is, principled) account of the law proposed herein leaves little need for policy reasoning as decisions can be explained without them. In this account so far, the only area which may require policy explanations is that of the usual non-recoverability of relational losses (discussed earlier), although even that area can also be explained on normative grounds: it may be that our society considers the use *for commercial reasons* of one's own property, other people's property, and statements, as being at one's own risk and so under one's own responsibility. Thus there must be a special relationship for proximity in cases of profitable use of one's own property (defective but not dangerous products) or of another's property (relational losses), and in cases of profitable use of statements, which already require special circumstances for liability, the special circumstances will less usually be present. Such an approach comes close to asking whether reasonably adequate protection from the risk of the loss was available elsewhere.[111] However, it is preferable to ground such reasoning on norms of responsibility (profit-making parties are thinking about money and it is their own fault if they don't protect themselves) than on protectionist or

[109] The much-cited phrase is Cardozo CJ's from his judgment in *Ultramares Corp v Touche* (1931) 255 NY 170 at 179.
[110] Craig P, "Negligent Misstatements, Negligent Acts and Economic Loss" (1976) 92 LQR 213 at 218.
[111] See Stapleton, n 3, at 285.

distributive policy goals, not only because principle is preferable to policy, but also because the content and application of such a principle is easier to discern and apply if it refers to a norm rather than a political concern.

On the role of policy, a brief mention of the Supreme Court of Canada's recent decision in *Cooper v Hobart* [2001] 3 SCR 537; (2002) 206 DLR (4th) 193[112] is required. In that case the majority of the Supreme Court developed the *Anns v Merton*[113] two-stage test, bringing it more into line with the *Caparo v Dickman* [1990] 2 AC 605[114] three-stage test. Essentially, the court took an approach broadly in line with that proposed herein, seeing the first stage as turning on a quest for foreseeability and proximity (the latter defined largely along the lines proposed herein[115]). This stage of the test was central to the scope of the tort, and if the first stage was passed then prima facie a duty was present, subject only to policy reasons under the second stage preventing a duty from being recognised. So far, all is largely as proposed herein. The main difference between the views of McLachlin CJ and Major J, on the one hand, and that proposed in this article on the other is that McLachlin CJ and Major J stated that policy, "in the broad sense of that word" (at 203), is relevant at both stages of the inquiry, although "different types of policy considerations are involved at the two stages" (at 202). They preferred to discuss those policy factors relating to the "*relationship* between the plaintiff and the defendant" (at 203) under the first, proximity, stage of the test, leaving "residual policy considerations" (at 206) concerned with "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (at 206) (such as the inappropriateness of imposing liability for the consequences of policy decisions, fear of indeterminate liability, and other "reasons of broad policy" and immunities (at 206) to be considered at the second stage.

The court refused to find sufficient proximity between a registrar with a statutory duty to investigate and suspend the licences of mortgage brokers, and the plaintiff who invested funds with a mortgage broker, holding that "the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public" and such a duty would "come at the expense of other important interests, of efficiency, and finally at the expense of public confidence in the system as a whole" (at 208 and 210 respectively). Even had there been sufficient proximity, a duty would have been refused under the second stage because of the executive and quasi-judicial nature of the Registrar's functions, and because the requirements of the decision-making are inconsistent with a duty of care to investors (at 211).[116]

It is respectfully submitted that, in "broadly" conceiving of the concept of policy, the Supreme Court of Canada has unnecessarily diluted the concept of

[112] Noted by Neyers J, "Distilling Duty: The Supreme Court of Canada Amends Anns" (2002) 118 LQR 221; Pitel SGA, "A Reformulated Anns Test for Canada" (2002) 10 Tort L Rev 10.
[113] See above at 1.
[114] Although *Caparo v Dickman* was not referred to in *Cooper*.
[115] See text to n 32 above.
[116] A duty was refused on the different facts of *Edwards v Law Society of Upper Canada* (2002) 206 DLR (4th) 211 for substantially the same reasons, the duty again failing both stages of the two-stage test.

proximity. The scope of the statute creates the power and social expectation that could amount to special circumstances giving rise to proximity in the case of an omission, so this consideration is a consideration of social norms and is properly considered under the first stage. The other factors, however, including the legislature's apparent intention that no private law duty exist, the risk of inefficiency, the risk of losing of public confidence, and the inappropriateness of investigating policy decisions, should all be considered under the second stage as policy considerations. That major proviso aside, the new two-stage test in Canada fits better with the account proposed than the current English and Welsh three-stage test, with its confused idea of what proximity is and why we have it.

PROXIMITY AND PROXIMATE CAUSE

It is entirely possible to leave the discussion at the point reached, but if the central thesis is accepted, then an important further question arises that should at least be noted. This further question concerns the relationship between proximity and the concepts of causation and remoteness, which seem also to be concerned with directness and human intervention, and this in turn raises a further question as to the relationship between the duty of care and the other elements of the tort of negligence. We should have sympathy with Lord Denning, who said in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 at 35: "[t]he more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say 'There was no duty'. In others I say: 'The damage was too remote'."[117] There is no space to answer this question fully, but an outline of the issues it raises may prove to be instructive to those who wish to embark upon further investigation.

An obligation-centred theory of remoteness and causation

Even less well settled than the rules of remoteness and causation themselves are the reasons and justifications for the imposition of such rules. Again, the question is raised as to whether such rules are, on the one hand, external-type reasons for limiting compensation, such as policy rules limiting liability to make it manageable or "commonsense" limitations on recovery,[118] or, on the other hand, internal-type reasons for limiting compensation, by which certain losses are excluded from recovery because they are not within the scope of the tort that has been breached. At the very least, it is important to recognise that the proximate cause question, unlike the scientist's interest in causation, is not merely a search for a description but rather is an attribution of liability.[119]

The argument that causation rules are internal-type reasons for limiting compensation would suggest that it is impossible to find out whether a particular act was a proximate cause of a particular harm simpliciter; rather one must ask

[117] See also the comments of Denning LJ (as he then was) in *Roe v Minister of Health* [1954] 2 QB 66 at 85ff. For fuller discussion see Morris C, "Duty, Negligence and Causation" (1952) 101 Univ of Penn L Rev 189.

[118] See Beale JH, "The Proximate Consequences of an Act" (1920) 33 Harv L Rev 633; McLaughlin JA, "Proximate Cause" (1925) 39 Harv L Rev 149; Goodhart AL, "The Third Man or Novus Actus Interveniens" (1951) CLP 177; James Jr F and Perry RF, "Legal Cause" (1951) 60 Yale LJ 761.

[119] Green N St J, "Proximate and Remote Cause" (1870) 4 Am L Rev 201, reprinted at (1954) 9 Rutgers L Rev 452; Bingham JW, "Some Suggestions Concerning 'Legal Cause' at Common Law" (1909) 9 Col L Rev 16 at 25; Hart and Honoré, n 27, p 24; Cane P, *Responsibility in Law and Morality* (Hart Publishing, Oxford, 2002), p 128ff.

whether a particular act was a proximate cause of a particular harm *with regard to a particular obligation*. If the way that the harm was caused is within the scope of the duty then the act is proximate, and so its author should be held liable if fault requirements are met (and no policy reasons militate against positing legal liability). If this is accepted, then it is nonsensical to talk about a breach of an obligation that resulted in a remote harm; rather, we should say that the remote harm is outside the scope of the obligation and so there was no breach of the obligation.[120]

The obligation-centred view of proximate cause was put forward by Bingham in 1909[121] and, largely independently, by Green in 1927.[122] Bingham argued that "a defendant [is] responsible for any concrete sequence if the prevention of that sequence was within the purposes of his duty" but that "a wrong is not the 'legally blamable' cause of a concrete sequence if the prevention of that sequence did not fall within the purposes of the infringed duty".[123] Green agreed, and emphasised that it is thus impossible to successfully find uniformity or a formula that will determine proximate cause questions:

> The process which leaves the problem a wide open one in every case, requiring the consideration of economic and social interests on the broadest scales, offers a variable rule where only variableness obtains.[124]

Bingham was less of a realist and less of an atomist, allowing that "generalizing in the field of 'legal cause' should be confined to a few useful, broad but not definitive considerations and a multitude of specific rules and principles of narrow compass. The nature of the problem is the further delimitation of concrete duties. Therefore the most useful results will be obtained by scientifically grouping duties into narrow classes and developing accurate and helpful rules for each class."[125]

Hart and Honoré accept that the scope of the duty has a large part to play in attributing moral or legal responsibility to actors (in addition to questions of legal policy).[126] However, they argue, against what they call the "causal minimalist" position, that norms of causation are accessible through common sense and independent of the scope of a particular obligation, and have a significant (usually necessary, often sufficient) role to play. The norms of causation should be kept separate from the question of the scope of the duty.[127] The thesis that this author would propose would not be favoured by Hart and Honoré, who argue that the rules of causation are independent of non-causal notions as to the scope of the duty, probability and considerations of equity.

[120] This is not as strange as it sounds, because the tort of negligence is not actionable per se like breach of contract and trespass; rather, there must be actual loss for there to be a breach of the tortious obligation against negligence. To use Weinrib's terminology, n 11, p 115 ff, for the tort of negligence, unlike for torts actionable per se, there can be no normative loss without factual loss.

[121] In his modestly titled article, "Some Suggestions Concerning 'Legal Cause' at Common Law": see above n 120.

[122] Green L, *Rationale of Proximate Cause* (Vernon's Law Book Co, Kansas City, 1927). Green claims (pp 130-131) not to have been consciously influenced by Bingham.

[123] See Bingham, n 119 at 35.

[124] See n 122, pp 70-71.

[125] See n 120, at 154.

[126] See n 27, pp xlv ii-l. See also their discussion of omissions at 140ff and 194ff as breach of a duty to prevent a particular result. See also Honoré, n 18, s 97ff.

[127] See n 28, pp li-liii.

Nevertheless, this point of dispute, whilst theoretically important, appears to be of less concern to Hart and Honoré than the argument that no useful general rules of causation can be justified. This is a position that Hart and Honoré seem to view as a necessary consequence of causal minimalism, probably as a result of their over-concentration on the views of the staunch realist and atomist Green as their target.[128]

It is submitted that Hart and Honoré's theory that "common-sense principle may be of use" to "emphasize certain features, constantly recurring in particular cases, which are in a sense policy neutral"[129] is not inconsistent with a "scope of duty" approach. Commonsense principles of causation are only important to the extent to which they form a part of a particular tort's scope of responsibility. However, Hart and Honoré are correct that their causational principles are generally accepted community standards of responsibility, and consequently they do form a part of most torts' scopes of responsibility (which also derive from community standards, also known as the community's "common sense"), and there is no harm in generalising about such norms where they are generally applicable. Providing the norms of responsibility relating to causation are not applied to torts that govern behaviour to which they appear not to be applied by society, it is helpful to think of them as a largely unchanging group of norms and to delineate them where possible (as Hart and Honoré do in their book). Certainly this view does not support the indiscriminate use of discretion weighing up pure policy factors, the "modern" approach to which Hart and Honoré were reacting;[130] rather, it supports the use of causational rules as community standards discovered through a question of fact. Indeed, the approach proposed herein takes that position even further, since it allows that it is a question of fact (and common sense) whether the commonsense norms of causation are considered relevant to responsibility in a particular (type of) case.

This is substantially the view that has been taken up by Lord Hoffmann in lectures given to the Chancery Bar Association in 1999 and Northumbria Law School in 2002,[131] and in opinions given in House of Lords decisions in *Kuwait Airways Corp v Iraq Airways Co* [2002] 2 AC 883 and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32. Lord Hoffmann has said: "One cannot separate questions of liability from questions of causation. They are inseparably connected. One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability"[132] and so "I

[128] See n 28 passim, and esp p 95ff. Hart and Honoré do not anywhere cite Bingham.
[129] See n 28, p 296.
[130] See n 28, p 88ff.
[131] "Common Sense and Causing Loss", Lecture to the Chancery Bar Association, 15 June 1999; "The Problem of Causation", 2002 Eldon Lecture to the University of Northumbria at Newcastle, 7 June 2002. See also Kelley PJ, "Proximate Cause in Negligence Law: History, Theory and the Present Darkness" (1991) 69 Wash Univ LQ 49. Kelley provides a useful discussion of the area and comes out in support of a refined version of Bingham's theory. Stapleton, n 7, seems also to support this approach, advocating the reallocation of most questions of causation and remoteness, dealing as they do with individual responsibility, to the analytic categories of duty of care and proximity. She seems to want to determine these questions of individual responsibility by commonsense community standards, although elsewhere she has argued for a much greater role for systemic policy concerns: see n 4 (1998).
[132] *Kuwait Airways Corp v Iraq Airways Co* [2002] 2 AC 883 at 1106.

think that in dealing with problems of causation, courts have been too prone to resort to generalities rather than specifics. The generalities simply conceal the real reasons for the decision."[133] He goes on to recognise that, whilst the sine qua non test, along with its qualifications and refinements, is not necessarily a part of every tort duty – it is not a universal principle – it is a part of the scope of almost every tort duty simply because it is a general principle of our society.[134] To this extent, these rules can be generalised and applied without much consideration of the tort in question; within the tort of negligence at least, it can be assumed that they apply to every situation. That does not, however, mean that they are not explicable in terms of the scope of the duty; rather, that most duties that regulate our society will include these rules because, on the whole, they follow societal norms about responsibility. Put simply, we don't blame people for things that would have happened anyway.[135]

If the obligation-centred theory of remoteness and causation (or at least of a large part of what we now call remoteness and causation) is correct, then the question of proximity is really a question of proximate cause (as re-evaluated as a question as to the scope of the tort of negligence). If this is true, then the question of proximity is largely redundant. For example, the maker of a statement is prima facie not the proximate (socially responsible) cause of any consequences of reliance upon the correctness of that statement, even if careless, although where a special relationship or assumption of responsibility exists the losses are in fact proximately caused by the statement. Without such a special relationship, the reliance upon the statement by the claimant is a novus actus interveniens, and there should be no legal duty of care.

Do we need the duty of care concept?

Of course, this sort of thinking leads us to ask whether the duty of care concept itself is redundant.[136] Arguably it should be viewed as merely the conclusion of an inquiry into whether the general norms governing liability under the tort of negligence encompass the specific facts of the instant case. Those general norms would then need to be investigated and construed, as they are for other torts, and a suggested starting point would be that one owes a tortious duty to take reasonable care not to directly (or proximately) inflict harm upon others. The concept of directness or proximity could be used to decide whether norms allocate responsibility to the defendant or to the claimant on the general and specific facts of the case. The concept of foreseeability could be subsumed within the question of breach. Discussions of this point, however, go well beyond the scope of this article.

[133] See n 133, p 21.
[134] Cf Cane's explanation of the sine qua non test as being a part of moral norms of responsibility, n 120 at 138ff.
[135] Bingham calls this a "primary requisite of responsibility", n 121, at 25. See also Hoffmann, "The Problem of Causation", n 131. Lord Hoffmann discusses this further in *Fairchild v Glenhaven Funderal Services Ltd* [2003] 1 AC 32 at 73.
[136] WW Buckland famously argued that the duty of care was the "fifth wheel on the coach" in "The Duty to Take Care" (1935) 51 LQR 637 at 639, and later WW Buckland, *Some Reflections on Jurisprudence* (Cambridge University Press, Cambridge, 1945), p 110ff. See also Fleming, n 46; Howarth D, "Negligence after Murphy: Time to Re-Think" (1991) 50 CLJ 58; Hepple B, "Negligence: The Search for Coherence" (1997) 50 CLP 69.

