

# Economic Loss: The Floodgates

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*The Mineral Transporter*,<sup>1</sup> *Muirhead v. Industrial Tank Specialities Ltd.*<sup>2</sup> and *The Aliakmon*<sup>3</sup> have again raised the hoary conundrum concerning the limits of liability for economic loss. It merits an airing.

Let us start with some well-known facts. Cattle contracted to construct a tunnel for Knight. This tunnel was to be under an embankment. Due to the negligence of the defendant water authority, water leaked from their pipe and the embankment and the land around were flooded. This made it more difficult than it would otherwise have been for Cattle to make the tunnel and he thus lost profit on his contract to the tune of £26. Cattle claimed this loss from the defendants.<sup>4</sup> At the trial at the Leeds Assizes before Amphlett B. judgment was given for the plaintiff. On appeal this decision was reversed. Blackburn J. in his judgment transformed a mouse into an elephant. After tentatively making the revealing suggestion that had Knight sued in his own name he could have recovered the £26 as trustee for the plaintiff, he decided against Cattle. This he did in a significant way. He started with the proposition that “in the present case *the objection is technical and against the merits*, and we should be glad to avoid giving it effect . . .” Then why not avoid this?

The answer to that question has set the cat among the legal pigeons ever since.

It is necessary – though the reader will be familiar with it – to cite what Blackburn J. then went on to say:

“ . . . But if we did so we should establish an authority for saying that in such a case as that of *Rylands v. Fletcher* the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and

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1. *Candlewood Navigation Corp. Ltd. v. Mitsui O.S.K. Lines Ltd. : The Mineral Transporter, The Ibaraki Maru* [1986] A.C. 1 (P.C.).

2. [1985] 3 All E.R.705 (C.A.).

3. *Leigh & Silavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] 2 All E.R.145 (H.L.).

4. *Cattle v. Stockton Waterworks Co.* (1875) L.R.10 Q.B.453.

5. Italics mine.

person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. Many similar cases to which this would apply might be suggested. It may be said that it is just that all such persons should have compensation for such a loss, and that if the law does not give them redress it is imperfect. Perhaps it may be so. But, as has been pointed out by Coleridge J. in *Lumley v. Gye*, courts of justice should not 'allow themselves, in pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness of its limited powers, has imposed on itself, of redressing only the *proximate and direct* consequences of wrongful acts'."

So these are the reasons why in a case in which had Knight sued as trustee Cattle would have recovered. If, as he did, he proceeded at common law he could not. A difference of procedure hardly affects the equities; and equities, in the broad sense of the word, Blackburn J. unblushingly admitted that there were. His decision appears to proceed upon two grounds. First, that it would open "floodgates" to allow recovery in a case like *Rylands v. Fletcher*<sup>6</sup> if the workmen could recover for more than the loss of their tools and their clothes;<sup>7</sup> second, that recovery must be limited to the "*proximate and direct consequences of wrongful acts*".<sup>8</sup>

It is apprehended that the second ground of decision was the relevant statement of principle<sup>9</sup> though, almost in fear and trembling, perhaps, one may be permitted the opinion that Blackburn J. applied it wrongly to the facts of the case. But it is the first ground, the "floodgates" ground, that demands immediate attention. Before, however, considering the "policy" (or lack of it) that underlies the "floodgates" argument one must pass to the House of Lords decision in *Simpson & Co. v. Thomson*<sup>10</sup> which gives to it a concrete form which has since been slavishly adhered to. Briefly, in *Simpson's Case* a Mr. Burrell owned two ships, A and B; B negligently collided with and sank A. The plaintiff underwriters paid Mr. Burrell for the loss of A and then sought to recoup themselves against him as the owner of B. Had some third party owned B there would have been no doubt their claim could have been satisfied by resort to subrogation,<sup>11</sup> but the House of Lords denied the claim by resort to the specious argument that since, technically, there could be no

6. (1868) L.R.3 H.L.330.

7. Note that there is no actual mention of the distinction between economic and physical loss. Had that distinction been drawn between the loss of wages on the one hand and of tools on the other a "flood" might still arise if the tools were unique and irreplaceable and their loss entailed permanent loss of work.

8. It must be remembered that Coleridge J.'s rhetoric about the "floodgates" was uttered in *Lumley v. Gye* (1853) 2 E.B.216 where, as the sole *dissenter*, he stood alone in guarding them. They were opened and, of course, no disasters followed.

9. One respectfully agrees with Edmund-Davies L.J. in *Spartan Steel and Alloys Ltd. v. Martin (Contractors) Ltd.* [1973] Q.B. 27 that "proximity" was the nub of the decision.

10. (1877) 3 App. Cas. 279.

11. Once more, as in *Cattle's Case*, equity will succour where common law will not.

subrogation because Mr. Burrell could not sue himself<sup>12</sup> ergo there could be no claim by the plaintiffs because (unassisted by subrogation) they could have no direct right of action. Why not?

At the risk of boring the reader it is now necessary to repeat the well-known passage in Lord Penzance's speech in *Simpson's Case*. He said:

"This proposition<sup>13</sup> virtually affirms a principle which your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidence of a contract of insurance. The principle involved<sup>14</sup> seems to me to be this – that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have *no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation*.<sup>15</sup> This, I say is the principle involved in the Respondents' contention."<sup>16</sup>

Lord Penzance then proceeded to conjure up all sorts of horrid possibilities if the "principle" were not adhered to. Take the case of the wrongdoer who destroys property which the owner has contracted to supply to a third party. It would, it seems, be awful if the latter could recover.<sup>17</sup> Or the case of the man who injures someone whose doctor, for a yearly fee, has agreed to treat him. The doctor should have no claim for his extra expense. Or the case of the actor who is disabled so that his manager suffers loss. Could the manager recover?<sup>18</sup> "Such instances", Lord Penzance continued, "might be indefinitely multiplied giving rise to rights of action . . . which might be both numerous and novel."

This is the "floodgates" argument of which Lord Edmund-Davies has said:

12. The argument was that since Mr. Burrell could not sue himself there were no "shoes" to stand in. Logical, but hardly sensible. Equity, through subrogation, recognizes that underwriters have a right: to deny that right because the *machinery* (subrogation) cannot logically be operated is to mistake the adjectival for the substantive, the shadow for the substance: see "The Fallacies of *Simpson v. Thomson*", (1971) 34 *M.L.R.* 149.

13. Namely, the suggestion that the underwriters could have a direct right of action at common law.

14. But *was* it? Why cast the net so wide?

15. Of course this is cast in the negative, but the time-worn shibboleth has now become "only those who own or possess the damaged property can sue for consequent economic loss." Why Lord Penzance let in the lienor is unclear: the latter's possessory interest is nothing but a piece of machinery for protecting his contractual right – e.g. the repairer's right to his pay.

16. Italics mine.

17. It would seem to be only just. The owner suffers no loss, he has his money, assuming risk and property have passed.

18. In terms of proximity probably he should not; unless, at least, the wrongdoer was aware of the relationship. Likewise the doctor. Such a position may be distinguished from *Cattle's Case* where the water authority should have been aware of the tunnelling.

“My Lords, the experiences of a long life in the law have made me very familiar with the “flood-gates” argument. I do not of course suggest that it can invariably be dismissed as lacking cogency; on the contrary it has to be weighed carefully, but I have often seen it disproved by later events. It was urged when the abolition of common employment was being canvassed, and it raised its head again when the abolition of contributory negligence as a total bar to a claim in negligence was being urged. And, even before my time,<sup>19</sup> on the basis of conjecture later shown to be ill-founded, it provided a fatal stumbling block to the plaintiff’s claim in the “shock” case of *Victoria Railways Commissioners v. Coultas* (1883) 13 App. Cas. 222, where Sir Richard Couch sounded the “floodgates” alarm in stirring words . . .”<sup>20</sup>

With respect, it is thought that this comment is justified. When the “floodgates” have been opened<sup>21</sup> it does not appear that the apprehended disasters ever have occurred; rather, under careful judicial control,<sup>22</sup> new remedies have been afforded where they were needed. But what requires to be noted is that there are two different aspects of the “floodgates” argument: the one lacking merit, the other to some extent respectable. The first of these aspects appears in Lord Penzance’s speech: it is that the opening of the “gates” will give rise to a deluge of new kinds of claims,<sup>23</sup> both “numerous and novel”; a fear which has been so often expressed. That is one side of the coin; but it has always been the philosophy of the far-sighted judge that “if men will multiply injuries actions must be multiplied too; for every man that is injured ought to have recompense.”<sup>24</sup> Had the judges not accepted new fields of liability and ploughed up old ones<sup>25</sup> the law of torts, from

19. His Lordship could, and should, have added the most significant refutation of the “numerous and novel” (“floodgates”) “alarm”. In *Winterbottom v. Wright* (1842) 10 M. & W. 109 Lord Abinger feared to venture upon new fields: he denied the claim upon the ground that “we ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions.” Alderson B. was of opinion that “The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that . . .” all sorts of terrible things could happen. The point of the case was, of course, that where a contractual right was broken an injured party who was not the contractor could not sue. Since *Donoghue v. Stevenson* [1932] A.C.552 these cautionary cries are one with Nineveh and Tyre; and few, except, perhaps typically, Scrutton L.J. in *Farr v. Butters* [1932] 2 K.B.606 have seen reason to complain about the opening of these “floodgates”.

20. *McLoughlin v. O’Brian* [1983] A.C.410.

21. As in *Donoghue v. Stevenson*.

22. Instance the cautious development of the rule in *Lumley v. Gye*.

23. Lord Penzance’s fear of preposterous claims was really a *non sequitur*: no more was needed than to decide *Simpson’s Case* on the merits – and such a decision need not necessarily have led to his frightening conclusions.

24. *Ashby v. White* (1703) 2 Ld.Raym. 938, 955; *per* Lord Holt. Where would the law be without its creative judges? Its Mansfields, its Atkins, its Dennings, its Marshalls and its Holmes’s?

25. Some judges set their faces against this impious practice. But where should we have been if Coke had done so? An example of the attitude is to be found in Lord Brandon’s speech in *The Aliakmon*, *supra* n.3, at p.154: his Lordship reads Lord Wilberforce’s celebrated statement in *Ann’s v. Merton London Borough Council* [1978] A.C. 728, 751-2 as suggesting (“*stare decisis*”) that policy, once settled, cannot be changed. With respect, Lord Wilberforce seems to say no such thing. If he had he would have been flying in the face of *Donoghue v. Stevenson*, to mention only the most famous case by which the fields have been reploughed.

the invention of trespass onwards, would never have developed.

The second aspect of the "floodgates" argument, which is equally familiar, lies in the fear of extension of liability beyond the limits which a defendant may be expected to bear; "liability to an indeterminate amount for an indeterminate time to an indeterminate class".<sup>26</sup> There is undoubtedly some force in this argument; it is probably what Blackburn J. had in mind when, in *Cattle's Case*, he referred to the workmen and their wages. Some control mechanism is undoubtedly needed to prevent such a result.

The courts are now casting about to find an effective mechanism.<sup>27</sup> Three candidates for the task hold the field. First, a rather unpopular candidate, proximity or "reasonable foresight";<sup>28</sup> second, Lord Penzance's rule of thumb (much to the fore); third, what one may call the "loss/reliance" mechanism. Use of analogy might suggest a fourth possibility: but we will come to that later.

Bearing in mind that we are concerned with "economic" loss, let us now consider these mechanisms.

First: "reasonable foresight". The danger about this is that, at least on the face of it, and in a special sense, ultimately, it may impose too much liability. One can reasonably foresee all kinds of things. For instance if one lets loose a virus likely to affect cattle the owner of an auctioneer's business miles from the point of release may suffer loss by reason of markets being closed.<sup>29</sup> Again, if, as an accountant, one makes a careless mis-statement in an account the document may fly far and wide and get into the hands of all sorts of people who may incur loss in reliance upon it. Or, again, if one negligently cuts off electric power supply factories in an entire neighbourhood may have to stop work and thereby lose profit.<sup>30</sup> And so on. Thus, on the face of it "foresight" cannot promote a policy which seeks to *limit* liability: rather the reverse. On the other hand, at the risk of being accused of teaching one's grandmother to suck eggs, one must remind the reader that, as Lord Atkin formulated it, it is of its kind a *restrictive* principle. True, Lord Atkin starts "you must take reasonable care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your neighbour" but he continues with the vital gloss . . . "who, then, is my neighbour? The answer seems to be persons *so closely and directly*"<sup>31</sup> affected by my act that I ought reasonably to have them in contemplation . . ." We come back to Coleridge J. and the "proximate and direct."<sup>33</sup>

26. *Ultramares Corp'n. v. Touche* 174 N.E. 441; 255 N.Y. 170 (1931); per Cardozo C.J.

27. See, above all, *Caltex Oil (Australia) Pty. Ltd. v. Dredge Willemstad* (1976) C.L.R.529.

28. Let it not be forgotten, however, that this was the mechanism employed by Blackburn J. in *Cattle's Case*.

29. *Weller & Co. v. Foot & Mouth Disease Research Institute* [1966] 1 Q.B. 569.

30. *S.C.M. (UK) Ltd. v. W.J. Whittall & Son Ltd.* [1971] 1 Q.B.337; *Spartan Steel & Alloys Ltd. v. Martin (Contractors) Ltd.* [1973] Q.B.27.

31. Numerous recent *dicta* have suggested that the test of "directness" is outmoded. In face of Lord Atkin's universally accepted criterion of "directness" it is hard to see how this can be.

32. *Donoghue (or McAlister) v. Stevenson* [1932] A.C.562, 580.

33. *Supra* n.8.

To the same effect is Lord Wilberforce in *Anns v. Merton London Borough*: "... one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of *proximity* . . ." <sup>34</sup>

So that in fact here we have a control mechanism, but the question is how effectively it can be operated. One can only embark upon attempting an answer to this question by bearing in mind that there can never be any such thing as an absolutely "correct" application of principle to a particular fact situation: that is what the diversity and wealth of opinion in the *Digest* was all about. What is "restrictive" to one person may to another be the reverse. But if we take the cases of the auctioneer, the accountant and the negligent power-cutter already put, it may be agreed that the remoter consequences were not proximate; and this form of control mechanism may, in such situations, be made to work. That is the negative side of the picture. But what about the positive one? If "proximity" ceases at a given point what (and this is the normal way the Atkin formula is looked at) should it include? It is thought that, even in the case of economic loss, it ought to include all really close situations and that it would envisage the case of the time charterer who loses hire and profit when another ship negligently damages his ship. It is thought that the relationship between the errant ship and the time charterer is sufficiently close and direct. And yet, as will appear, by reference to the Penzance rule and *stare decisis*, in *The Mineral Transporter* <sup>35</sup> the Judicial Committee decided the reverse. And again, one would emphatically have thought that the buyer of a cargo to whom the risk but not the property has passed ought to have a claim against a negligent shipowner who damages the cargo. Every shipowner knows that there may be people in the buyer's position. But again, relying upon Lord Penzance and *stare decisis* the House of Lords in *The Aliakmon* <sup>36</sup> have finally denied such a claim. Reliance in these decisions is placed upon Lord Wilberforce's caution that "foresight" must give way to "policy"; <sup>37</sup> how far the "floodgates" doctrine (at its worst) and *stare decisis* are matters of "policy" is questionable. Both deny the need for a readiness to consider change which is inherent in a healthy legal system.

So what of the "foresight" principle as a control mechanism? Generally speaking, it is believed that it would of itself, if sensibly applied, be sufficient to control the incidence of economic loss: it would to a large extent narrow it, but to some extent, too, it would widen it. There is, however, one important reservation: the principle provides no safeguard in Blackburn J.'s case of the workmen in the drowned mine: although Blackburn J. clearly did not, it would be legitimate to

34. [1978] A.C.728, 751-752.

35. *Supra* n.1. It remains remarkable, however, that an enlightened House of Lords in *Morrison S.S. Co. Ltd. v. Greystoke Castle* [1947] A.C. 265 allowed general average contributors a direct claim against a negligent ship. It is not overlooked that those who dislike it have made attempts to explain this decision away.

36. *Supra* n.3.

37. In *Anns*, at pp.751-752.

regard them as “proximate” to the defendant, and yet as a matter of policy the incidence of liability might be too great for the defendant to bear. Blackburn J. clearly did think that. We will seek to answer this problem at a later stage.

We will now pass to the second form of control mechanism, the Penzance doctrine itself. As we have seen, this amounts to the proposition that liability is to be controlled by the principle that economic loss can only be recoverable if it follows upon physical injury to person or to property: step outside this and give a claim to a person who has, for example, a merely contractual interest in the person or property involved and the “floodgates” will open. It has, however, already been remarked that (*pace* Lord Penzance) this “flood” is not a *necessary* consequence: indeed, other control mechanisms are available – in particular the proximity doctrine which is restrictive and is capable<sup>38</sup> of being very restrictively applied.

So let us now consider the credentials of the Penzance doctrine. To start with, inasmuch as it does, if it does,<sup>39</sup> originate in *Cattle's Case*<sup>40</sup> it boasts an unpromising pedigree: “in the present case the objection is technical and against the merits.”<sup>41</sup> Moreover, its history is beset with doubts: in espousing it in *Elliott Steam Tug Co. Ltd. v. The Shipping Controller*<sup>42</sup> Scrutton L.J. said “. . . the common law rightly or *wrongly* does not recognize a right to sue for injury to a merely contractual right.” Further, the stark distinction between physical loss on the one hand and economic loss on the other is far from clear-cut. If my car is negligently damaged I am complaining about the *cost* of repair: an economic loss. If, as the result of a carelessly performed sterilization operation a woman has a child, the major loss of which she complains is economic – the cost of bringing up the child.<sup>43</sup> And, indeed, as has often been remarked, all legal injury is economic in that it is remediable by damages.<sup>44</sup>

Further, as the cases show, the distinction between physical and economic loss brings us to the ridiculous point that if the same plaintiff suffers economic loss arising out of a physical injury and also similar economic loss (but not arising from

38. For instance it has been argued that the cargo owner puts himself outside the bounds of proximity to the shipowner by taking upon himself the contractual risk *vis-à-vis* the seller. Of course the proximity rule, like any other, may be applied capriciously. It should be added that we are not concerning ourselves here with problems arising from exclusion clauses and the operation of the Hague Rules.

39. As was suggested above, a careful reading of *Cattle's Case* reveals that the decision did not rest upon Lord Penzance's proposition but upon proximity.

40. (1875) L.R.10 Q.B.453.

41. Blackburn J.'s exordium in *Cattle's Case*.

42. [1922] 1 K.B. 127, 140. And in *La Société Anonyme de Remorquage à Hélice v. Bennetts* [1911] 1 K.B.243, 249 Hamilton J. had his doubts . . . “I *can* understand that the law might regard any interference by the defendant with the plaintiffs' contractual chances with a third party as a ground of action in their favour.” Certainly. What about *Lumley v. Gye*?

43. *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* [1985] Q.B.1012.

44. There is absolutely no clear line of distinction. In *Junior Books v. Veitchi Co* [1983] A.C.520 Lord Roskill treated the loss as “economic”; in *Tate & Lyle Ltd. v. Greater London Council* [1983] 2 A.C.509 Lord Templeman treated the Veitchi loss as physical. Which of their Lordships was “right”? So too, the subsidence cases like *Dutton v. Bognor Regis United Building Co. Ltd.* [1972] 1 Q.B. 373 have been treated as falling within either category. Nobody is to blame: the distinction is unsound.

physical injury) in consequence of the same wrongful act he can recover under the one head but not under the other.<sup>45</sup> Here inconsequent resort is had to the "floodgates". It is argued that to allow the latter claim might give rise to a flood of actions; as, for instance, in a case like *Spartan Steel & Alloys Ltd. v. Martin (Contractors) Ltd.*<sup>46</sup> where a negligently severed electric cable might, by stoppage of power, cause loss of profits to all the factories in the neighbourhood. This argument is, however, only relevant if, once again, one assumes that the Penzance doctrine is the only form of control mechanism: whereas in fact the proximity principle could supply an answer. Further, just the same argument could apply to physical, rather than economic, damage. Where explosions are concerned it can be far flung.<sup>47</sup> Indeed, this fact glaringly underlies the statutory limitations imposed upon the amount of liability in maritime and aviation law, to which we will return.

Apart from these considerations, however, how far does the Penzance rule achieve sensible and just results? It has been suggested above that in the case of the time charterer<sup>48</sup> and the case of the buyer to whom the risk, but not the property, has passed<sup>49</sup> it flies in the face of the proximity principle only to be defended by the cry of *stare decisis*.<sup>50</sup> But what about the case where a negligent ship runs down a ship in tow<sup>51</sup> and the Penzance rule denies the tug owner his lost towage? If there ever was proximity it is here and it is thought that the layman would say that the tug owner ought to recover: moreover, a decision in his favour would not open any "floodgates". What about the case of a passenger who loses profits as the result of delay in a voyage caused by a collision? Penzance denies him recovery,<sup>52</sup> but it is thought that he would feel that his lawful expectations had

45. *Spartan Steel and Alloys Ltd. v. Martin (Contractors) Ltd.* [1973] Q.B. 27 (C.A.) – where, of course, the defendant having negligently severed a power cable a "melt" in the plaintiff's furnace was damaged through lack of power and they lost profit on other "melts" which, through lack of power, they were unable to process. The decision was that the plaintiffs could recover in respect of the damaged melt both for the damage and for loss of profit – but the purely "economic" loss of profit on the other "melts" was irrecoverable. To the same effect is *Muirhead v. Industrial Tank Specialities Ltd* [1985] 3 All E.R. 705 (C.A.), where a fish farmer suffered loss due to a defect in an electric pump. He was allowed to recover from the manufacturer in respect of the physical loss of some lobsters and the loss of profit thereon; but not for costs and loss of profit generally. The distinction between physical injury and economic loss in such circumstances is "technical and against the merits". A blemish, one would have thought, in our law of a kind which we would have thought archaic and risibile had we met it in the Law of the Twelve Tables. Lord Roskill in *Veitchi's Case*, *supra* n.44, indicates that *Spartan Steel* may require reconsideration by the House of Lords: it certainly needs to be reconsidered.

46. *Ibid.*

47. See, e.g., *The Grandcamp* [1961] Lloyd's Rep. 504.

48. *Candlewood Navigation Corp. Ltd. v. Mitsui O.S.K. Lines: The Mineral Transporter* [1986] A.C.1.

49. *Leigh & Silavan Ltd. v. Aliakmon Shipping Co Ltd: The Aliakmon* [1986] 2 All E.R. 145 (H.L.). Disapproving a dictum of Sheen J. in *The Nea Tyhi* [1982] 1 Lloyd's Rep. at p.612 and overruling the decision of Lloyd J. in *Shiffahrt und Kohlen GmbH v. Chelsea Maritime Ltd: The Irene's Success* [1982] 1 All E.R. 218. But see the powerful dissent of Goff L.J. and the doubts of Oliver L.J. in the Court of Appeal: *The Aliakmon* [1985] 2 All E.R. 44.

50. A cry particularly dear to commercial lawyers; yet there is no reason why commercial law, above all, should be static.

51. *La Société Anonyme de Remorquage à Hélice v. Bennetts* [1911] K.B. 243.

52. See *The Mineral Transporter*, *supra* n.48, at p.19: *per* Lord Fraser.



been denied by some mysterious technicality. And so one might continue. It is submitted that as a control mechanism the Penzance doctrine is not only suspiciously technical but also too restrictive.

Now let us turn to another control mechanism which is gaining ground. This has a respectable pedigree. It is the very mechanism that founded the law of contract through the medium of *assumpsit*. It is the notion of loss by the plaintiff caused by *reliance* upon the defendant. It is now becoming clear that purely economic loss will be remedied where it arises from such reliance upon the defendant's words<sup>53</sup> or deeds,<sup>54</sup> provided, at least, that there is a relationship between the parties "equivalent to contract".<sup>55</sup> Where misrepresentation is concerned there is nothing new in such a notion; there could never be recovery for fraud unless the plaintiff had relied upon the fraudulent statement. But where deeds, other than misrepresentations, are involved a difficulty which is, perhaps, more than semantic arises. What is meant by "reliance"? One gets no guidance from the speeches of Lords Fraser and Roskill in *Veitchi's Case*,<sup>56</sup> but on a broad reading it seems to mean that the plaintiff must "look to" the defendant to safeguard his interests. Lord Roskill instances the case of the buyer who looks to the seller's, rather than the manufacturer's, skill and judgment under s.14(3) of the Sale of Goods Act; in which case "reliance" appears to mean little more than the second proposition, that the situation must be "equivalent to contract". Yet, as Robert Goff L.J. has suggested, "reliance" can mean something else; for, as he points out "every motorist relies on every other motorist in the vicinity to drive carefully",<sup>57</sup> and in this sense the reliance concept becomes subsumed within the concept of negligence itself – and if this were so the way would be open for much wider liability than either *Hedley Byrne* or *Veitchi's Case* envisage.

As far as the law now goes, however, it would seem that the purely economic loss is recoverable under this control mechanism where there is a situation "equivalent to contract" and reliance in the first of the senses just mentioned. Why this restriction should be placed upon economic, as opposed to physical, loss is not explained. It may arise from the fortuitous fact that in *Hedley Byrne* and *Veitchi* a contractual framework was involved. But awkward questions call for answers. If a manufacturer puts water into a ginger beer bottle<sup>58</sup> which reaches me as the ultimate consumer why should I have no remedy against him while, by contrast, I would have a claim if he let a snail into the bottle and I were to contract a minor attack of gastritis?<sup>59</sup> The answer seems to be that in the case of defective goods the

53. *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465.

54. *Junior Books v. Veitchi & Co.* [1983] A.C. 520.

55. *Hedley Byrne* at p.529, *per* Lord Devlin.

56. *Supra* n.54.

57. *Muirhead v. Industrial Tank Specialities* [1985] 3 All E.R. 705, 714.

58. The interesting suggestion raised by Stamp L.J. in *Dutton v. Bognor Regis United Building Co.* [1972] 1 Q.B. 373, 414-415.

59. In *Donoghue v. Stevenson* the injury almost fell into the *de minimis* category.

situation between plaintiff and manufacturer is not “equivalent to contract”; but nor is it in the case of the snail.<sup>60</sup> Or is the truth that there is an inarticulate premise that there is something more worth a remedy where physical loss is concerned than where economic loss is?<sup>61</sup> Unless this inarticulate distinction can be justified and made articulate in the form of a principle (which, it is submitted, it cannot) there seems little reason why the “neighbour” principle should not apply to economic as much as to physical loss. Which suggests the need for an advance in the former field beyond the “equivalent to contract” situation.

In this context it is important to note that in *Hedley Byrne* Lord Devlin himself said “I regard this proposition<sup>62</sup> as an application of the *general conception of proximity*. Cases may arise in future in which a *new and wider proposition quite independent of any notion of contract will be needed*.”<sup>63</sup> This points to the desirability of easing the “floodgates” beyond the reliance/contract bar towards some wider concept of proximity. That, it is thought, is something that needs to be done. But the question is “What wider concept?” An answer was boldly supplied by an eminent Chancery judge<sup>64</sup> in *Ross v. Caunters*<sup>65</sup> (where a legatee lost her legacy on account of a solicitor’s negligence): proximity should be defined in the context by reference to the Atkin test itself – and recovery by the legatee thus permitted despite the absence of physical damage or any question of contract or reliance, in the sense of “looking to” the solicitor. And in *Ministry of Housing and Local Government v. Sharp*<sup>66</sup> the Court of Appeal took a similar bold step.

Is that the correct conclusion? If, as has been remarked above, the Atkin principle is regarded as restrictive rather than permissive in that it is confined to *directly* foreseeable consequences it seems, on the face of it, to provide as good an answer to the “floodgates” as any. No perfect mechanism can ever be devised and what is “proximate”<sup>67</sup> in the Atkinian sense in relation to a given fact situation is always an open question: that is what the administration of justice is about. But it is suggested that it is desirable to raise the “floodgates” above the level of the Penzance or *Veitchi* tests and that these “policy” mechanisms are not

60. Though one might perhaps interpose that there is just as much of a contractual framework between consumer and manufacturer as there was between plaintiff and sub-contractor in *Veitchi's Case*.

61. It is worth refuting the ridiculous suggestion often made that economic loss should be irrecoverable because recovery is inhibited by the philosophy of the “market place”. Of course it is where business competition is concerned – and that goes back to the *Gloucester Grammar School Case* (1410) Y.B. 11 Hen.4, fo.47, pl.21 – but not all economic loss arises in the course of competition.

62. Namely, the “equivalent to contract” proposition.

63. [1964] A.C., at pp.530-531.

64. Megarry V.-C.

65. [1980] Ch.297.

66. [1970] 2 Q.B. 223.

67. In *Caltex Oil (Australia) Pty. Ltd. v. Dredge Willemstad* (1976) 136 C.L.R. 529 the High Court of Australia, while apparently refusing to adopt the Atkin test *simpliciter*, allowed recovery for economic loss caused as the result of damage to a third party’s pipeline upon the basis of what they regarded as a restricted definition of “proximity” or “propinquity”. But it is thought that the facts fitted the Atkin formula.

“considerations which ought to negative, or to reduce or limit the scope of the duty.”<sup>68</sup>

So far, so good. But there is one kind of “flood” that “proximity” cannot control. The case, already referred to, of the lost wages of Blackburn J.’s miners. In such a case there is close proximity between the “drowner” of the mine and the workers: their presence and the loss of their wages could be readily foreseen and the loss of the wages was a direct result of the “drowning”. Yet Blackburn J. clearly had it in mind that such losses were *greater than any one defendant could be expected to bear*. Some mechanism other than proximity is therefore needed to meet such a case. There is one possible, pragmatic, “floodgate” to hand. The problem of overwhelming loss is no stranger to the law: it is met by a number of statutes. In particular both in maritime and in aviation law statute and international convention limit the *amount* of liability. This is plain, and essential “policy”. Is it beyond the powers of a legal system which grapples with the problem of comparative fault in contributory negligence and solves the difficulties of bankruptcy and liquidation to devise a method of limiting the *amount* of liability by limiting the *amount* of claims where the loss is too great for one defendant to bear?

68. *Anns v. Merton London Borough Council* [1978] A.C. 728, 751-752: *per* Lord Wilberforce.