LIABILITY AND RELIABILITY

the reliance interest in
negligence damages

by

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A thesis submitted in conformity with the requirements for the degree of
Master of Laws
Graduate Department of Law
University of Toronto

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0-612-46029-0
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ABSTRACT

This thesis considers the role of reliance in the law of negligence, with particular reference to the "special relationship" of Hedley Byrne & co Ltd v. Heller & partners Ltd, founded on undertaking and reliance. The House of Lords has recently held that reliance is only an indicator of liability, and that undertaking is the touchstone of duty.

I argue in this thesis that reliance is an essential factor in liability, and that even if the decision is correct, the reasoning is wrong. In doing so, I argue that the special relationship is the sole form of liability for reliance, and that detrimental reliance is the sole basis of recovery. Economic loss recoverable under Hedley Byrne is recoverable only because it amounts to detrimental reliance. Once this is understood the recovery of economic loss outside of Hedley Byrne can be properly approached.
ACKNOWLEDGEMENTS

I would like to acknowledge the assistance and support of the following persons in making this thesis possible:

Jodi Libbey, for giving me so much more than I will ever be able to repay;

My supervisor, Professor Peter Benson, for his guidance and assistance in this difficult area;

Professors Brian Langille and Arthur Ripstein, who started me thinking about *Hedley Byrne* in a new way;

Professor Bruce Chapman and Assistant Professor Mayo Moran for review and discussion;

Matthew Conaglen and Malcolm Thorburn for their friendship, not to mention discussion, critique and review;

Julia Hall for her indefatigable and outstanding organisation;

and all my friends in the graduate programme and in the Faculty of Law, and my unfailing friends back in New Zealand.

I would also like to record my deep gratitude to the University of Toronto and to the Spencer Mason Trust for providing me with financial assistance, without which this would not have been possible.

Finally, I would like to thank my mother, my father, and my sister for their good humour, enthusiasm, and support.
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Part I: Introduction

Private law protects certain interests of the individual, such as bodily integrity and physical property, but it is not easy to place all causes of action within this framework. The cause of action set out in Hedley Byrne & co Ltd. v. Heller & partners Ltd. is one such example. The case tends to be understood as an exceptional instance of recovery for economic loss. I suggest, however, that the cause of action does not involve recovery of economic loss, but recovery of reliance loss.

The concept of reliance loss is not new. In 1936, Lon Fuller and William Perdue published “The Reliance Interest in Contract Damages” in the Yale Law Journal. In their article, three different “interests” – different from the protected interests noted above – in contract damages are identified by considering the purposes or interests served by the law of contract damages: the restitution interest, the reliance interest, and the expectation interest. Having identified these three interests, Fuller and Perdue argued that the reliance interest is the primary

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interest, and the other two are subsidiary to and derived from it. The expectation measure, they argued, is a variant of the reliance interest, serving a dual purpose of allowing the promisee to rely on the promise, and punishing the promisor for betraying reliance induced by the promise.

The relevance of their analysis, moreover, is not restricted to the law of contract. When it is used as a starting point to understand the law of negligence, the result is striking. The cause of action under *Hedley Byrne* becomes a clear example of recovery in the reliance interest, and light is shed on the question of recovery of economic loss. Such an analysis of the role of reliance in the law of negligence is the purpose of this thesis, with the goal of identifying its scope, justification, and purpose.

The main issue I seek to address is the role of reliance in negligence under *Hedley Byrne*. Until recently it seemed beyond argument that undertaking and reliance were the two key pins forming the "special relationship" which is the foundation of liability in that case. But the House of Lords has more recently held, in *White v. Jones*, that reliance is nothing more than an indication of

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liability, albeit a strong one, and that it is the *undertaking* which is the touchstone of duty. As I will later suggest, reliance is an essential factor in liability, and that even if the decision is correct, the reasoning is faulty.

The related problem which will also be addressed is the relationship between reliance and economic loss. The discussion of reliance in this thesis has some bearing on the proper treatment of economic loss and the limits on its recovery.

*Structure*

I begin by looking at the manner in which liability in negligence arises, through an examination of the duty of care in negligence. I look at the role of reliance in the imposition of duties of care, and in particular in the creation of special duties in *Hedley Byrne*. I then look in more details at the role of reliance in determining the imposition of the duty of care under *Hedley Byrne* and in determining damages for breach of that duty. This is followed by a review and summary of the role reliance plays in negligence. I consider the question of reliance loss liability. Finally, I look at the implications of this discussion for the question of recovery of economic loss and the decision in *White v. Jones*.

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Although I discuss the implications of this discussion for the recovery of economic loss, the focus of this thesis is limited to reliance, and does not seek to address the broader issue of recovery of economic loss.
Part II: The different interests in tort damages

II.1 Identifying the interests

In their article, Fuller and Perdue's approach was to ask what characterised the different awards of damages in contract, and therefore the interests in those awards. Again, the three interests identified are:4

(i) the restitution interest, or the return of value conferred upon the defendant as a result of (or in reliance on) the promise;

(ii) the reliance interest, or the compensation awarded to the plaintiff for detriments suffered in reliance on the promise; and

(iii) the expectation interest, or the value of the expectancy created by the promise.

In the following discussion, I will attempt to demonstrate how these interests are served in the law of tort damages, or more particularly in negligence damages.5

4 Fuller & Perdue, supra note 2 at 53-54.
II.1.1 The compensation interest

The compensatory principle in tort is the compensation of the plaintiff for the value of the harm suffered as a result of the tort. According to the overarching compensatory principle, *restitutio in integrum*, the plaintiff is to be placed in the position in which she would have been had the tort not been committed. In a simple tort, such as battery, the plaintiff is entitled to be compensated for the injury caused when the defendant strikes her. A fourth interest, the *compensation* interest, can therefore be added to the analysis.

However, the compensation interest cannot be defined solely by reference to the principle of *restitutio in integrum*, for that principle in theory covers all forms of tort damages. The distinction lies in the way the harm arises. The

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5 I am not the first to suggest this as a starting point for analysis based on Fuller and Perdue’s article. Burrows applies their approach in classifying obligations: A.S. Burrows, “Contract, Tort, and Restitution – A Satisfactory Division or Not?” (1983) 99 L.Q.R. 217; A.S. Burrows, *Understanding the Law of Obligations: essays on contract, tort and restitution* (Oxford: Hart Publishing, 1998). Stapleton has also applied the analysis to tort, referring to an interest based on “normal expectancies”, which she substitutes for the expectation interest in contract. The interest she uses suggests that the conferral of a benefit may be enforced in tort where it would be expected that the plaintiff would receive that benefit. In this way she manages to coalesce the interests which, as I have suggested above, ought to be separated into the reliance interest and the compensation interest. Stapleton has based the “normal expectancies” measure on the principle that a duty to take care arises when a task has been embarked upon. J. Stapleton, “A New ‘Seascape’ for Obligations: Reclassification on the Basis of Measure of Damages”, in P. Birks, ed., *The Classification of Obligations* (Oxford: Clarendon Press, 1997) 193.
compensation interest represents the harm, or injury, caused directly to the plaintiff by the defendant. By contrast, the reliance interest is harm which is induced in the plaintiff by the defendant; thus, although the plaintiff factually causes the detriment, the defendant is deemed to have caused the plaintiff's actions.

II.1.2 The restitution interest

The restitution interest represents the return of value which the defendant (or in some instances, another person) has derived from the plaintiff through the infringement of the plaintiff's rights. These are examples of restitution as a remedy.7

In this form of restitution, there are essentially two types of case: in the first, the defendant has taken or received something of value from the plaintiff in breach of the plaintiff's rights; in the second, the defendant has made a profit from an activity involving a breach of the plaintiff's rights. The difference lies in the provenance of the value in the defendant's hands. Examples of the first type

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6 Livingstone v. Rawyards Coal Co (1880), 5 App. Cas. 25 at 35, per Lord Blackburn.

of case are common, particularly in conversion, where the defendant has obtained possession of the property through a misrepresentation or misunderstanding by the owner. This may also occur in negligence. Examples of the second type include where the plaintiff has trespassed on the plaintiff's property and has derived a benefit from doing so.\(^8\)

The latter is in one sense a claim for a compensatory interest; the plaintiff is seeking compensation for the infringement of her rights, assessing the value of that claim by reference to the value of the benefit to the defendant. But for this reason it is more correctly characterised as a restitutionary interest, because the valuation of the plaintiff's claim is by reference not to any loss of value by the plaintiff, but by the value derived by the defendant.

In the tort context the restitution interest is wider than that identified by Fuller and Perdue. Whereas in contract, the claim is for benefits or value transferred consensually from the plaintiff to the defendant in reliance on the promise, in tort, the interest also includes involuntary transfers of value.

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\(^8\) Edwards v. Lee's Administrator 265 Ky. 418, 96 S.W. 2d 1028 (1936). The principle at work in the second type of case is sometimes known by the misleading name of "waiver of tort". The conceptual misunderstanding which lead to this name is that the plaintiff "waives" the tort, or in other words, does not seek compensation for the tort, and instead seeks an account of profits as if the defendant were his agent. See S. Hedley, "The myth of 'waiver of tort'" (1984) 100 L.Q.R. 653; Birks, ibid. It has also been argued that
II.1.3 The reliance interest

In tort, the reliance interest represents the detriment suffered by the plaintiff in reliance on a representation made by the defendant, and is equivalent to the same interest in contract, where the plaintiff relies on the promise made by the defendant. Typically, in negligence, detriment is suffered because the representation was made negligently, or because the defendant negligently fails to act according to the representation.

Technically, reliance is merely functional, establishing the causal link between the claimed detriment and the representation. Factually, the plaintiff's reliance infers that he had an opportunity to avoid the harm resulting from the defendant’s negligence. The plaintiff must therefore show the reasonableness of his reliance. This “functionality” is the distinguishing feature of this type of interest.

The reliance interest must be distinguished from the plaintiff's reliance on the defendant to act in a particular way, or to take care in actions, where that reliance is not part of the causal chain of harm. This form of reliance is related to

Vincent v. Lake Erie 124 N.W. 221 (S.C. Minn. 1910) is an example of this form of restitution.
the vulnerability of the plaintiff to the actions of the defendant, and in a sense, is present in almost all cases of negligence. Because reliance plays no causal role, recovery for harm which results is on the basis of the compensation interest rather than the reliance interest.

Put another way, the distinction between the reliance interest and the compensation interest lies in the way the harm is caused. In the compensation interest, the plaintiff is recompensed for the harm caused directly by the defendant to the plaintiff. In the reliance interest, the plaintiff is recompensed for detriments he has caused himself as a result of relying on the defendant, and which would not have been considered detriments if the defendant had not been negligent. If the criteria for liability are met, the defendant is in law held responsible for causing those detriments.

II.1.4 No expectation damages in tort

In contract, the expectation interest is the principle of compensation: the plaintiff is to be placed in the position in which she would have been had the contract been properly performed.\(^9\) The law takes the view that the plaintiff is

\(^9\) *Robinson v. Harman* (1848), 1 Exch. 850 at 855, per Parke B.
entitled to the benefit of performance from the moment the contract is formed. The plaintiff is considered to be wronged by the loss of that benefit.

There is no equivalent to this measure in tort. The common law imposes no duty to confer a benefit on another. In Hegelian terms, private law imposes only negative duties\(^{10}\) not to interfere with the rights of others. Therefore, if the defendant makes a representation from which the plaintiff expects to benefit, or which would benefit the plaintiff, there is no question of requiring the defendant to fulfil that representation, or to provide the plaintiff with the equivalent value. It is only the special circumstances of a contract which allow the promisee to be considered to be entitled to the expectation interest. In negligence, if the plaintiff may in the circumstances reasonably rely on a representation, and does so, the defendant is liable not for the value of the plaintiff's expectation, but the value of the plaintiff's detriment:

Since a person is not in general liable for failing to confer a benefit, he or she should not be liable for negligently failing to carry through with an undertaking unless the plaintiff's position has as a result been made worse than it would otherwise have been. One way in which a person can be made worse off is by detrimentally relying on an undertaking given by another person. If, however,

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\(^{10}\) E.J. Weinrib, "Right and Advantage in Private Law", in D. Cornell, M. Rosenfeld, and D. Carlson, eds., Hegel and Legal Theory (New York: Routledge, 1991) c. 9.
the person to whom the undertaking was given did not rely on the undertaker, then the latter did not cause the former harm and there should be no liability.\textsuperscript{11}

Where there is a contract, the plaintiff is entitled not just to the value of any detriment suffered, but to the full value of the promise. A gratuitous representation or promise, on the other hand, is not enforceable in contract; and the "expectation loss" occasioned by the gratuitous representation is therefore not recoverable.

It is therefore useful to keep the expectation interest in mind in considering whether a plaintiff's harm may be recoverable. Because some forms of harm which might be thought recoverable are in fact in the expectation interest, they cannot be recovered in tort.

\section*{II.1.5 Punitive interests}

One aspect of damages which falls outside the above framework is punitive interests. These types of damages are awarded to punish the tortfeasor for wrongdoing. It is arguable that they are in fact an anomaly in private law, for the punishment of the wrongdoer is properly a matter for the State, in public law.

\footnote{S.R. Perry, "Protected Interests and Undertakings in the Law of Negligence", (1992) 42 U.T.L.J. 247 at 276-77, citing W. Seavey, "Reliance on Gratuitous Promises or Other Conduct", (1951) 64 Harv. L. Rev. 913.}
Punitive damages also parallel the operation of the criminal law in punishment of the wrongdoer. Because a different burden of proof is applied, civil trials can arrive at a different conclusion. Certainly there is no obvious reason for paying such damages to the plaintiff, except possibly as a reward for carrying out the state’s responsibilities.

The punitive interest has little place in this discussion for two reasons. First, in most jurisdictions exemplary damages are rarely available in negligence. Intention is usually a prerequisite for punishment, and negligence is by definition unintentional conduct. Secondly, and more importantly, punitive interests fall outside the principle of *restitutio in integrum*, which is the central concern in this thesis. The award of exemplary damages is independent of whether compensation has been awarded. Exemplary damages are therefore not considered in this discussion.

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II.2 Summary

There are, in summary, three main interests which can be identified in the law of negligence damages: the compensation interest, the reliance interest, and the restitution interest. The expectation interest, identified in contract damages, represents a compensatory principle which is not applicable in negligence.

I referred at the start of this thesis to the protection private law offers to different interests of the individual. If right is the reflex of remedy, then a consideration of remedial structures can assist in understanding those rights. As I later suggest, consideration of the reliance interest provides an understanding of the law of negligence which differs from that usually proposed, and helps identify and distinguish different strands of liability. The analysis also suggests that the reliance interest in negligence damages is a substantially different form of protected interest.
Part III: Liability in negligence

In outline, the tort of negligence is based on the concept of a duty of care. The duty is owed to a particular person in relation to a particular type of injury. Liability results where a breach of that duty results in harm to the person to whom the duty is owed. The defendant’s liability is to compensate that person for that harm.

What is of interest in this thesis is the role reliance plays in the way the duty of care arises. The starting point for this analysis is the underlying rule that there is no general duty to confer a benefit on others – or, as it is sometimes (perhaps more correctly) expressed, no duty to prevent harm to others.

I begin the discussion by looking at this rule against liability. From there, I look at the bases on which a duty of care does arise – first, the more widely applicable concept of proximity, and second, the less obvious concept of a special relationship.

III.1 Background

III.1.1 No duty to benefit others

The general rule against liability for failure to prevent harm – and its counterpoint, liability for causing harm – is usually expressed in terms of the
distinction between misfeasance and nonfeasance. These terms are used slightly differently by different authors, but the underlying idea in each different use varies only slightly. I employ the terms here according to whether there is a breach (a misfeasance) or is not a breach (nonfeasance) of the plaintiff’s rights. These terms can be differentiated from act and omission (or action and inaction) and from recoverability of loss. Thus, an omission in breach of the plaintiff’s rights will amount to a misfeasance, and may attract liability. If there is no breach, then the omission is mere nonfeasance, and will not attract liability.

What must be emphasised is that acts and omissions do not directly correspond with misfeasance and nonfeasance. For inaction to result in liability, there must be a prior duty requiring the defendant to act, or to take care, however that may have arisen. In this respect there must be some actual action or conduct by the defendant which supports the duty.

This corresponds with the approach taken by Bohlen in his work on the common law:

There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by
any wrongful act of the defendant. .... This distinction is founded on that attitude of extreme individualism so typical of anglo-saxon legal thought.13

Duty of care is a potentially amorphous doctrine, with capacity to swallow up other considerations in negligent conduct, such as foreseeability, causation, remoteness. Misfeasance does not equate with recoverability, but signifies a prerequisite *prima facie* breach of rights. An individual is required to take care where the rights of another individual would be infringed if he does not take such care. In nonfeasance no right is infringed, and no liability results, even though the plaintiff may have suffered harm. The term “disadvantage” has been used to refer to a loss of this type (i.e. a loss which the plaintiff has suffered but which is irrecoverable).14

Further, as Bohlen points out, an important facet of the distinction between misfeasance and nonfeasance is that it provides a public justification for the current state of private law. It provides an explanation for the distinctions

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14 For a discussion of the doctrinal differences between right and advantage, see Weinrib, “Right and Advantage”, supra note 10.
drawn between recoverable and irrecoverable losses, and links with the underlying philosophy of individualism.\textsuperscript{15}

The distinction between misfeasance and nonfeasance is implicit in many parts of the law of tort. It is rarely explicit. One example of the distinction is \textit{H.R. Moch Co. Inc. v. Rensselaer Water Co.}\textsuperscript{16} In that case Cardozo J. considered the liability of a water company for negligently failing to keep sufficient pressure in the water pipes, in breach of its contract with the city. The claim related to the destruction of the plaintiff's property in a fire which had spread from neighbouring properties. There had been insufficient pressure for the fire brigade in the hydrants. According to the claim, had there been sufficient pressure, the fire department would have saved the plaintiff's property.

The Court held that the defendant owed no duty to the plaintiff in tort, and that the plaintiff could not sue as a beneficiary of the contract with the city. The claim was dismissed as being "outside the protection of the law":

\textsuperscript{15} For more on this point, see P. Benson, "The Basis of Corrective Justice and its Relation to Distributive Justice" (1992) 77 Iowa L. Rev. 515 at 550-601.

The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong.  

In other words, no right was infringed; what the plaintiff suffered was a disadvantage, and the claimed wrong was a mere nonfeasance.

The distinction between misfeasance and nonfeasance is also evident in the rule that there is no recovery in tort for expectation losses. As noted above, expectation losses are only recoverable in contract. Consistent with the distinction, a contract is considered to involve the transfer of benefits at the time of formation. From that moment the right to performance is the property of the promisee. A breach of contract is therefore an interference with that property, and compensating that breach involves valuation of the promise. In tort, there is no such transfer of rights on the occasion of a mere representation, and the plaintiff is therefore not entitled to the value of performance. To allow the recovery of expectation losses would be to punish the defendant for failing to confer a benefit on the plaintiff when she had no duty to do so. Liability extends no further than the harm caused by the failure to take care.

Finally, the distinction shows the necessity of a relationship between the plaintiff and defendant, or mutuality, for the duty of care can only arise in relation

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to a particular person or class of persons. The person to whom the duty is owed must be identified. The relationship between the plaintiff and the defendant gives meaning and content to the duty. If there were no relationship, the defendant would be liable to anyone who suffered from his default.\footnote{\textsuperscript{18} For the deduction of the doctrine of misfeasance/nonfeasance from the rule of causation, see E. Weinrib, \textquote{Legal Formalism: On the Immanent Rationality of Law} (1988) 97 Yale L.J. 949 at 979.}
III.1.2 Misfeasance and duties of care

Although there is no general duty to confer a benefit or prevent harm, it can be said that there is a general rule against harming the interests of others. The law of negligence encompasses a range of activities where this duty is manifested. The increased interaction between individuals in society necessitates rules that require persons to take care where their activity is otherwise likely to cause harm to the protected interests of others. Thus, where the activity of the individual is causing an unacceptable risk of harm to the person or property of another when they come within the sphere of that activity, a duty of care will arise. If that risk eventuates harm, the individual will be liable.

Duties of care in tort also arise where the defendant endangers the plaintiff’s interests in the course of relations with the plaintiff (ignoring for the moment questions of concurrent liability where there is a contract). This occurs in circumstances where the defendant induces the plaintiff to rely on him in some way which causes the plaintiff loss. Again, the defendant is, in the circumstances, considered to have created an unacceptable risk of harm to the person or property of the plaintiff. However, where above the circumstances might be said to be the key factor which gives rise to the duty, here the key factor giving rise to the duty is the relationship between the plaintiff and defendant.
The distinction between misfeasance and nonfeasance flows directly into these duties. The background rule, no liability for failure to confer a benefit or to prevent harm, is equivalent to nonfeasance. The edict in interaction with others is to cause no harm; doing so is a misfeasance. In this regard, the law of negligence details the determination of whether the defendant will be held liable for causing the harm suffered by the plaintiff.

One aspect of these duties which should be emphasised at an early stage relates to the way in which the duties arise. A duty of care is imposed on the defendant where his actions create a risk of harm to the plaintiff or the plaintiff’s property. The duty cannot be avoided. By contrast, in cases involving reliance, there is an opportunity for the plaintiff to avoid harm, and the defendant to avoid liability, if the defendant warns her not to rely on him. In this sense the duty can be avoided; if it is not, the defendant is said to have taken or “assumed” responsibility for the plaintiff’s reliance.
III.2 Duties of care

III.2.1 Introduction

At the turn of the century, the law of negligence encompassed numerous individual forms of negligence, each with its own criteria. It was not until 1932, in Donoghue v. Stevenson, that the House of Lords successfully bound them together and facilitated the development of a single tort of negligence. The principle underpinning this comprehensive tort was "proximity", and it provided a broad basis for duties of care.

The tort of negligence was again extended in 1963. In Hedley Byrne v. Heller, the House of Lords held that a defendant could come under a special duty of care through conduct in relation to the plaintiff. The central notion was that of a "special relationship", denoting that the defendant had taken responsibility upon herself in relation to the plaintiff. The House of Lords used the same terms of liability as it had in Donoghue v. Stevenson, taking the view that the concept of a special relationship formed a supplementary type of proximity.

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20 Ibid.
Once the test for a duty of care is established, we can consider what limits there must be on the scope of liability for breach of the duty. The basic concept applied in setting these limits is foreseeability. Not only is the defendant’s liability limited to damage which is a foreseeable result of the breach, the damage must be a foreseeable type, and not be too remote from the breach.

Because negligence is not actionable without damage, the determination of the existence of a duty necessarily includes the determination of the type of damage to which the duty relates. This is correct for two reasons. First, because damage is an integral part of the cause of action in negligence, it is pointless to speak of a duty of care without reference to the damage. More importantly, the alternative requires the court were to determine first, the existence of a duty, and subsequently whether the damage complained of is a type covered by the duty. The court would, in determining whether the duty owed in fact covers the damage complained of, have to refer back to the factors used to determine the duty of care in the first place. In effect it would be repeating its consideration of the duty. Put another way, the consideration of duty would be split into two parts. It is preferable that the duty be considered at the one time and in its entirety, to determine the duty of care by reference to foreseeable types of damage.

In the following sections the nature of liability in negligence is discussed in more detail. I hope to emphasise a difference between the form of liability imposed under Donoghue v. Stevenson and that set out in Hedley Byrne.
III.2.2  *Donoghue v. Stevenson*: the concept of proximity

Lord Atkin's speech in *Donoghue v. Stevenson* is today regarded – rightly or wrongly – as setting out the founding principle in the law of negligence. The relevant passage in his speech is as follows:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. 21

There are three interrelated concepts here: first, the *duty*, that is the duty to take care to avoid injury; second, the "*neighbour*" to whom the duty is owed, the individual whose interests are "closely and directly affected by my act"; and third, *proximity*, the label for the nature and degree of relationship with the neighbour which gives rise to a duty of care.

It appears stunningly simple. However, Lord Atkin did not intend proximity to be equated with the concept of foreseeability. Situations where damage was foreseeable were to be divided between those which were sufficiently proximate to give rise to a duty of care, and those which were not.
Moreover, Lord Atkin considered that there might be instances—often referred to today under the rubric of “policy”—where justifiable reasons are invoked to deny liability. (I take the term “policy” as a label for the justified considerations relating to liability which apply in each case.)

“Proximity” has been repeatedly and heavily criticised for its ambiguity and for its concealment of the “real”—impliedly arbitrary and unjustifiable—rationales for judicial decision making. Nevertheless (or as might be expected by such critics), Lord Atkin’s principle has persisted as the foundation of the duty of care. In Home Office v. Dorset Yacht Co. Ltd., Lord Reid noted:

In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. Donoghue v. Stevenson may be regarded as a milestone, and the well-known passage in Lord Atkin’s speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.

21 Ibid. at 580.
23 Ibid. at 1026-1027.
Lord Reid's view was developed into a fully-fledged test for a duty of care by Lord Wilberforce in *Anns v. London Borough Council of Merton*. Lord Wilberforce proposed a test which separated proximity from foreseeability and joined its undefined elements to "policy factors", leaving foreseeability as the initial basis for the duty of care:

"In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."

This approach to the determination of liability is commonly known as the *Anns*, or "two-stage" test. Its merit (or demerit, depending on viewpoint) lay in freeing the courts from hunting for analogy and precedent, and allowed them to develop the case law much more quickly.

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The *Anns* test was soon followed, and continues to be applied, in both Canada\(^{26}\) and New Zealand.\(^{27}\) In England, however, the authority of *Anns* was subject to heavy criticism, mainly for over-extending the bounds of liability:

Since *Anns* put the floodgates on the jar, a fashionable plaintiff alleges negligence. The pleading assumes that we are all neighbours now, Pharisees and Samaritans alike, that foreseeability is a reflection of hindsight and that for every mischance in an accident-prone world someone must be liable in damages.\(^{28}\)

The main error in Lord Wilberforce’s test seems to have been following Lord Reid’s suggestion that the courts could almost dispense with reference to precedent in determining the existence of a duty of care. Yet the virtue of the *Anns* test lies in its scrupulous reduction of proximity to a mixture of policy and foreseeability. Provided the policy reasons are articulated and justified, there can be no complaint of arbitrariness.


The High Court of Australia, however, declined to follow Anns in the 1985 case of Sutherland Shire Council v. Heyman, arguing instead that “the law should develop novel categories of negligence incrementally and by analogy with established categories”, known as the “incremental” approach. This was the view adopted by the House of Lords when Anns was abandoned.

Other tests and variations of tests for a duty of care have been identified, but the differences are minor. In New Zealand, the Court of Appeal has been stalwart in defending its decision to retain the Anns test. Most recently it has suggested that in the result there is actually little difference between the tests:

> There is a danger here of the method of approach becoming more important than the objective. The objective is to ascertain whether it is appropriate that there be a duty of care in the particular case. So long as that objective is realised, I cannot think that it is of great moment whether it is attained by a two-stage test, an incremental approach, or some combination of the two. What matters is that there is an identification, an analysis and a weighing of all of the competing considerations.

It is clear that there must be some principled basis for dividing cases where the risk of harm is foreseeable into (i) those where harm is recoverable; and (ii) those where it is not. The principle can only make sense by locating it within

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29 (1985), 157 C.L.R. 424 (H.C.A.) at 481, per Brennan J.
the circumstances of a particular case. The aversion created by an overt discretion based on circumstances can be allayed by a combination of reference to precedent and analogous cases, and articulated justifications (i.e. "policy reasons") for excluding liability. In this sense there is in fact little difference between the "tests".

III.2.2.1 Proximity

In *Hedley Byrne*, Lord Devlin noted that the concept of "neighbourhood" or proximity in *Donoghue v. Stevenson* is so broad as to be of little use in direct application to any particular case. This may be true if one thinks of proximity as a single, defining consideration rather than a description of a bundle of circumstances and factors determining the existence of a duty of care. Definition of the concept is certainly a task which the courts have by and large refused to undertake.

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30 *South Pacific*, supra note 27 at 316, per Hardie Boys J.


32 *Hedley Byrne*, supra note 1 at 607, per Lord Devlin.
One exception is the judgment of Deane J., of the High Court of Australia, who provided a descriptive definition in Jaensch v. Coffey:

Lord Atkin did not seek to identify the precise content of the requirement of the relationship of "proximity" which he identified as a limitation upon the test of reasonable foreseeability. It was left as a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid causing reasonably foreseeable injury to another. It is directed to the relationship of the parties insofar as it is relevant to the allegedly negligent act of one person, and the resulting injury sustained by the other. It involves the notion of nearness or closeness, and embraces physical proximity (in the sense of space and time) between the person and the property of the plaintiff and the person or property of the defendant, circumstantial proximity, such as an overriding relationship of employer and employee or of professional man and his client, and causal proximity, in the sense of the closeness or directness of the relationship between the particular act and the injury sustained. The identity and relative importance of the considerations relevant to an issue of proximity will vary in different classes of case, and the question whether the relationship is "so" close "that" the common law should recognise a duty of care in a new area or class of case may involve value judgments in matters of policy and degree.33

Some conclusions about proximity can be drawn from the case law. Proximity is not constituted in spatial propinquity, but rather is related to the potential that the defendant's actions will cause harm to the plaintiff's interests. Put another way, it relates to how close the plaintiff is to the risk created by the defendant's activity. Proximity is also determined by whether it is justifiable to impose liability in a particular circumstance; and whether the harm is caused to a protected interest. In essence, it is a measure of the appropriateness of liability. However, it is difficult to avoid the conclusion that proximity is in the end a collection of justified
reasons for limiting liability. This view is taken by Lord Wilberforce in *Amns*: accepting that proximity is a matter of policy, in the sense that policy denotes a mix of reasonable foreseeability and justified limitations.

In some situations proximity appears to play no role and foreseeability of harm is the only measure of the duty of care. In fact the reverse is true: in these situations the proximity is so clear that it is not necessary to discuss it. Driving a car is an example of such a situation. Where the harm is reasonably foreseeable, and the circumstances provide no reason to refute a duty of care, there can be no dispute about the sufficiency of the proximity.

Whether or not the term “policy” is used, there must be justified reasons for imposing or excluding a duty of care. These reasons fall into groups, some examples of which will be given here.

First, a duty of care may be superfluous given the relations which already exist between the relevant parties. Thus, where a plaintiff insured sued the insurer’s private investigator for negligently concluding that arson was the cause of a fire damaging the insured property, the Court of Appeal of New Zealand held

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33 (1984), 155 C.L.R. 549 (H.C.A.) at 584 [emphasis added].
that the contract with the insurer, together with the law of defamation, provided a sufficient remedy, and therefore a duty of care served no purpose.\textsuperscript{34}

Second, liability may be inconsistent with or excluded by the contractual relations between the parties. The parties may have deliberately structured their contractual relationships in order to avoid direct liability between the head contractor and the sub-contractor. A duty of care would be inconsistent with this structure.\textsuperscript{35} Unlike the previous example, where the available remedy is already sufficient, here the remedy is impliedly excluded.\textsuperscript{36}

Third, liability may be inconsistent with the operation of the court system. A barrister does not owe a duty of care in relation to the conduct of litigation, and a judge cannot owe a duty of care in relation to making decisions.

Fourth, liability may be inconsistent with the operations of government. For example, the government does not owe a duty of care in relation to damage

\textsuperscript{34} \textit{South Pacific, supra} note 27.

\textsuperscript{35} See \textit{White v. Jones, supra} note 3 at 721, per Lord Mustill; see also Fleming, \textit{supra} note 31 at 207.

\textsuperscript{36} This provides, in my view, the only solution to the problems of concurrent liability.
sustained in wartime. Another example lies in claims against government social welfare departments, and other public authorities, relating to the exercise of their powers. A duty of care may be considered superfluous or inconsistent with the existing remedial structures provided for the review of those powers.

Proximity in the above sense derives from the circumstances and the relations between the parties, whether as simple as physical propinquity or governed by a complex contract. In the following discussion, I denote this by reference to proximity or to Donoghue v. Stevenson. I differentiate it from the second basis of liability, where the relationship between the parties involves an assumption of responsibility by the defendant and reliance by the plaintiff. Although the courts and critics do refer to this second type as a form of proximity, I have not done so in order to assist discussion.

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37 This may alternatively be considered an instance of liability so broad as to infringe the rule against general liability, for the government in such a situation would owe a duty of care to every citizen.
III.2.3  **Hedley Byrne v. Heller** – a special relationship

**III.2.3.1 Background to the decision**

The second structure of liability in negligence derives from the 1963 case of *Hedley Byrne v. Heller*. The case involved the question of liability for negligent misrepresentation, and the decision drew on three lines of authority. The first dated to the late nineteenth century decision in *Derry v. Peek*, which denied liability for negligent statements. The second flowed from the early twentieth century case of *Nocton v. Lord Ashburton*, a case involving fiduciary relationships in equity which questioned the interpretation of *Derry v. Peek*. The third line of authority concerned the tort of negligence itself, following *Donoghue v. Stevenson*. A fourth factor which might be suspected as having been influential, although without any clear evidence, is the doctrine of estoppel which had been revitalised in *Central London Property Trust v. High Trees House Ltd*.

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38 Supra note 1.
Derry v. Peek\(^{42}\) was a House of Lords decision largely considered to be authority that there could be no liability for a negligent misstatement. The directors and promoters of a nascent railway company had issued a prospectus which claimed that they had the right to use steam engines on their railroad. In fact, under the governing statute, the company needed the consent of the Board of Trade to do so. That consent was eventually refused. The defendants were sued in deceit by investors, but were held not to be liable because they honestly (though negligently) believed the claim to be true.

The case was interpreted to stand for the proposition that there could be no liability for an honest but negligent misrepresentation – a misunderstanding of the decision, as the action was in deceit and not in negligence. Intent was a requirement of liability in deceit, and an honest but negligent belief denied that intent. This interpretation was set out in the Court of Appeal decision in Le Lievre v. Gould,\(^{43}\) which remained the prevailing authority until Hedley Byrne was decided, even though it was doubted by the House of Lords in Nocton v. Lord Ashburton.\(^{44}\)

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\(^{42}\) Supra note 39.

\(^{43}\) [1893] 1 Q.B. 491 (C.A.).

\(^{44}\) Supra note 40.
Nocton v. Lord Ashburton involved a breach of the fiduciary relationship between solicitor and client. In his leading judgment, Viscount Haldane wrote that a duty to take care, in statements or otherwise, may arise where the circumstances and relations of the parties showed a special relationship. His Lordship went on to say:

I do not find in Derry v. Peek an authority for the suggestion that an action for damages for misrepresentation without an actual intention to deceive may not lie. What was decided there was that from the facts proved in that case no such special duty to be careful in statement could be inferred, and that mere want of care therefore gave rise to no cause of action.

Although the case planted a seed of doubt, it was another fifty years before Le Lievre v. Gould was overturned.

In 1950, in Candler v. Crane Christmas & co, the Court of Appeal held 2-1 that the rule in Le Lievre v. Gould still applied. In that case, the defendant accountants had negligently certified a company’s accounts to the plaintiff. The plaintiff lost money he invested in the company in reliance on the

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45 Ibid. at 955 (H.L.). The discussion and principles in the case are plagued by the form in which it was pleaded; it was not until the case was before the House of Lords that the fiduciary relationship was “discovered”.

46 Ibid.

accounts. The Court held, on the authority of *Le Lievre v. Gould*, that there could be no liability for honest by negligent statements. Lord Justice Denning dissented, arguing that there should be liability where a professional person made statements in the course of business upon which other persons have relied. Although outvoted, his judgment was subsequently vindicated in *Hedley Byrne*, and more recently lauded in *Caparo Industries plc v. Dickman.*

**III.2.3.2 The decision**

In *Hedley Byrne*, the plaintiff advertising company had asked its bank to investigate the creditworthiness of one of its clients. The plaintiff's bank then solicited the opinion of the defendant, another bank, but (crucially) enquired on the understanding that there would be no liability for the truth of the statement. On that basis, the defendants stated that the client was to their knowledge creditworthy. The plaintiffs allowed the client more extensive credit, only to discover that the company was nearly insolvent and the account would never be paid. The plaintiffs then sued the defendant bank on the basis that it had been negligent in its statement.

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*Supra* note 28 at 623, per Lord Bridge. Note however that, applying *Caparo*, the same circumstances, might not longer give rise to liability.
The House of Lords held that in the circumstances a special relationship could arise which would support the plaintiff’s claim. The House applied the concept of a special duty or special relationship which had formed the basis of its decision in Nocton v. Lord Ashburton. However, the plaintiff’s appeal was dismissed on the grounds that the disclaimer was effective to preclude liability. In Viscount Haldane’s words from Nocton, the circumstances did not clearly give rise to a special duty; no special relationship could arise where the parties agreed at the outset that one would not.

The import of the decision lay in the fact that House did appear to find that there would – or at least could – have been liability but for the disclaimer. Certainly, the House ruled that Le Lievre v. Gould was the wrong interpretation of Derry v. Peek, and that it was possible in certain circumstances to be liable for negligent statements. Lord Morris set the rule out as follows:

If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others who could reasonably rely upon his judgment or skill or upon his ability to make careful enquiry, a person takes it upon himself to give information to, or allows his information to be passed on to, another person who, as he knows or should know, would place reliance on it, then a duty of care will arise.⁴⁹

⁴⁹  *Hedley Byrne*, supra note 1 at 611, per Lord Morris (Lord Hodson concurring).
Derry v. Peek was overturned, with the assistance of the concept of a “special relationship” borrowed from equity.

The House of Lords also considered how this form of liability related to the principle in Donoghue v. Stevenson. First, the House rejected the plaintiff’s argument that liability could be founded simply on Donoghue v. Stevenson:

The House in Donoghue v. Stevenson was, in fact, dealing with negligent acts causing physical damage and the opinions cannot be read as if they were dealing with negligence in word causing economic damage. Had it been otherwise some consideration would have been given to problems peculiar to negligence in words. That case, therefore, can give no more help in this sphere than by affording some analogy from the broad outlook which it imposed on the law relating to physical negligence.  

Instead of determining the case solely on the basis of Donoghue v. Stevenson, the House looked for evidence, arising from the circumstances, of a special relationship between the parties which gave rise to a duty of care.

Second, although liability could not be founded directly on Donoghue v. Stevenson, their Lordships took the view that the basis of liability was not radically different from that in Donoghue v. Stevenson. In Lord Pearce’s words above, there was the same “broad outlook”. The House considered itself to be setting down the grounds on which proximity might be found where the plaintiff
was relying on a statement made by the defendant – where a special relationship arose out of the circumstances. Lord Devlin stated:

I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. .... Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.

I regard this proposition as an application of the general conception of proximity.51

III.2.3.3 Discussion

It was suggested above that three lines of authority, referred to by the cases Derry v. Peek, Nocton v. Lord Ashburton, and Donoghue v. Stevenson, converged in Hedley Byrne. It is now possible to disentangle all three. As noted above, Derry v. Peek was the case directly on point and overruled. Donoghue v. Stevenson provided a theoretical framework of proximity-based liability which helped encourage the court to develop the concept of a special relationship. The special relationship derived from Nocton was borrowed from its original equitable context, and fitted into the Donoghue v. Stevenson framework.

50 Hedley Byrne, supra note 1 at 615, per Lord Pearce; see also Lord Reid's comments at 580; Lord Hodson's at 596ff.; and Lord Devlin's at 608.

51 Hedley Byrne, supra note 1 at 611.
Nocton represents perhaps the most troubling aspect of the decision in *Hedley Byrne*, as its application brought about the derivation of a basis of liability in tort from a case determined in equity. This is troubling because the two areas of law have different normative foundations. In the wrongful interaction of parties in the independent pursuit of separate interests, tort law regulates the interaction where those independent pursuits come into conflict. In equity, or more specifically in fiduciary duties, the parties are in a relationship where the fiduciary’s interests are subordinate to those of the beneficiary.

While this clear difference in normative foundation does not preclude the borrowing of concepts from one to the other, the difference must be borne in mind, and care taken, when doing so. In the instance of the special relationship borrowed in *Hedley Byrne* from *Nocton*, the existence in tort law of the doctrine of estoppel supports the development. But each and every reference across the boundary between tort and equity requires careful consideration.52

Finally, estoppel is mentioned above because the ruling in *Hedley Byrne* parallels the formulation of estoppel so closely it is difficult to avoid it. It is even more clearly visible in modern formulations of *Hedley Byrne* liability. The
modern revival of the doctrine of estoppel was in large part the work of Denning J. (as he then was) in High Trees House, a decision only a few years prior to his judgment in Candler v. Crane Christmas.

In High Trees House, Denning J. found that the representation made by the plaintiffs, to the effect that the defendants need only pay a reduced rent, was binding because although gratuitous, it was a promise "which was intended to create legal relations, and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on." The similarity to the formulation of liability under Hedley Byrne is striking; indeed, the outline of liability could easily apply, with the simple substitution of representation for promise. I will return to the relationship between the two and its implications below.

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52 Interestingly, A.S. Burrows suggests that equitable wrongs are in the process of being reinterpreted as tortious wrongs as part of the ongoing confluence of law and equity. Burrows, supra note 5.

53 Supra note 41.

54 Supra note 47.

55 Supra note 41 at 133, per Denning J. It is not clear from the case whether or not Denning J. in setting out the basis of liability, intended to require the plaintiff to have relied to its detriment, rather than merely relied without detriment; but that is the way the doctrine has been interpreted.
III.2.3.4 Two distinct foundations of liability

Liability under both *Donoghue v. Stevenson* and *Hedley Byrne* is usually discussed within the rubric of negligence, but beyond the use of terms such as duty, breach, causation, and harm, there are some fundamental distinctions. I seek here to show that the two are in fact different types of liability and, although linked by some common features, ought to be considered as separate and distinct.

The above analysis suggests that there are two bases of liability in negligence. The first derives from *Donoghue v. Stevenson*, and is applied to negligent acts causing loss where a duty of care arose based on proximity. The second is a supplementary form of liability which stems from *Hedley Byrne*, and is applied to reliance on undertakings where a duty of care arises out of a special relationship.

I differentiate them at two main levels: first, the way in which the duty arises; and second, the interests (in the Fuller and Perdue sense) to which they relate.

Under *Donoghue v. Stevenson*, a duty of care is imposed on the defendant when she is considered to be sufficiently "proximate" to the plaintiff. The duty is imposed because of the actions or the status of the defendant, and is owed to a particular class of plaintiffs. Under *Hedley Byrne*, the duty of care is an
obligation which is imposed on the defendant where she is taken to have encouraged the plaintiff to rely on her. As noted above, it is avoidable provided the defendant indicates to the plaintiff that he ought not to rely.

In the sense that liability under *Hedley Byrne* can be said to be assumed through the actions of the defendant, liability under *Donoghue v. Stevenson* may at first glance appear the same. The defendant in a case under *Donoghue v. Stevenson* can be said to have "assumed responsibility" by acting in a way which creates a risk to the plaintiff or his property. But it is not actually "assumed" in the same way. Liability under *Hedley Byrne* can be escaped through the use of a disclaimer, so that it is possible to undertake the same activity, in otherwise identical circumstances, without liability. To be effective against liability under *Donoghue v. Stevenson*, a disclaimer must usually be contractual.

The difference lies partly also in our expectations in the different circumstances. Under *Hedley Byrne*, the defendant must *assume* responsibility because there is no underlying expectation of responsibility in such circumstances. Ordinarily (and outside of contract), one does not expect others to rely on one's words, or to be able to rely on the statements of others. But where the circumstances are exceptional, the defendant will be responsible unless a
disclaimer is made. A disclaimer under *Hedley Byrne* can prevent the special relationship from arising at all.  

Put another way, under *Hedley Byrne* the defendant may make it clear that no one should rely on her, and this disclaimer would be effective in preventing liability provided it is communicated before the plaintiff's detrimental reliance has become irrevocable. Under *Donoghue v. Stevenson*, liability cannot be so easily escaped. The use of warning signs and barriers to advert others to the chance of injury will not exclude liability, though it seeks to discharge the duty of care and implicate the plaintiff as contributorily negligent. Thus liability under *Donoghue v. Stevenson* can be said to be imposed, where under *Hedley Byrne* it is assumed.

This leads to a second level of distinction: the interests protected by the duty. Under *Donoghue v. Stevenson*, the harm is caused directly by the actions of the defendant, and recovery is in the compensation interest. Under *Hedley Byrne*, the harm is induced in the plaintiff through reliance on the defendant, and liability is therefore in the reliance interest.

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56 This point is clouded by the decision in two recent House of Lords cases heard together, *Smith v. Eric S. Bush; Harris v. Wyre Forest District Council*, [1990] 1 A.C. 831; [1989] 2 W.L.R. 790; [1989] 2 All E.R. 514 (H.L.). In both cases the House found a property valuer liable to the purchaser of a house in spite of the use of a disclaimer. However, in
Liability under *Hedley Byrne* centres around reliance. Reliance plays a role both in the assumption of responsibility by the defendant and in the causation of harm to the plaintiff. Although proximity may take account of reliance in determining whether a duty of care has arisen, reliance plays no part in the determination of harm. Liability under *Donoghue v. Stevenson*, however, takes little account of reliance. It is concerned with direct causation of harm to the plaintiff by the defendant.

If this is correct, there are wide implications for the cause of action in negligence. In particular, the exclusive limitation of *Hedley Byrne* to actions for the recovery of loss suffered in reliance on the plaintiff suggests that it ought not to be related to *Donoghue v. Stevenson* in any other way. Consideration of the interests protected by each of the actions suggests that they ought never to conflict, provided the interest, which each claim falls within, is identified.

The sole and exclusive protection of the reliance interest in negligence is through the cause of action in *Hedley Byrne*. The only exception is that damages for either form of liability may be in the restitution interest. However, any claim in the restitution interest under *Hedley Byrne* is for loss which is also in the

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both cases the House relied on the Unfair Contract Terms Act 1977 (U.K.) to overcome the disclaimer, and for this reason I do not consider that it impacts on the common law.
reliance interest – it represents a benefit conferred on the defendant in reliance on the representation, and is therefore recoverable in the reliance interest. This point will be discussed in more detail below. Damages for breach of a duty based on proximity may also be in the restitution interest, but only where there is no reliance. This is the appropriate analysis of the waiver of tort cases based on negligence, as such claims are not in the reliance interest.

Using this as a starting point, in Part IV the form of liability under *Hedley Byrne* will be examined in greater detail. In addition the role reliance plays in cases falling under *Donoghue v. Stevenson* will also be discussed. Finally, attention will be turned to the question of the relationship between the two heads of liability and the confusion which has arisen through the attempt to read them together.

Throughout this thesis the forms of liability will be referred to by using these leading case names. The terms proximity and special relationship will also be used to refer to their respective bases of liability. As noted, in some cases the special relationship is stated to be a form of proximity. Although this is arguably the correct approach, I have kept the two distinct in order to avoid confusion and because it seems that the special relationship is sufficient on its own to give rise to a duty of care without calling it proximity.
III.3 Foreseeability

Once a duty of care has arisen, the limits on damage are by and large based on one concept—foreseeability. To reiterate, in order for the damage to be recoverable, it must have been a foreseeable result of the breach, and more importantly, it must also be of a type of damage which was foreseeable. This is important for the recovery of economic loss, and has important implications for the duty of care. Finally, the claimed damage must not be causally too remote from the breach.

Exceptions or extensions of liability can also arise in the area of foreseeability for policy reasons. A prime example comes from the rescue cases. In the paradigm case, the defendant’s negligence has caused a hazard from which a third party must be rescued. If the plaintiff is injured in rescuing or attempting to rescue the defendant will be liable for his or her injuries. The “chain” of foreseeability is long and it is not clear that there is in fact any actual foreseeability, but the courts are consistent in requiring the defendant to make good any harm suffered by rescuers in such instances.

III.3.1 Types of damage: The Wagon Mound

The requirement of foreseeability provides that the defendant’s liability for the consequences of breach is limited to foreseeable types of harm. Thus, if
the type of harm suffered was not foreseeable, the defendant will not be liable even though his breach of duty may have caused it. As noted above, the determination of whether the damage is recoverable forms part of the determination of the existence of a duty of care.

This principle was developed in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.* ("The Wagon Mound"). Previous authority had suggested that the defendant was liable for all consequences flowing from the breach. But in *The Wagon Mound*, the Privy Council held that the damage had to be of a type foreseeable to the defendant, and that the type of damage ought to be determined as part of the duty of care:

It is, no doubt, proper when considering tortious liability for negligence analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as (as it has been said) there is no such thing as negligence in the air, so there is no such thing as liability in the air. Suppose an action brought by A for damage caused by the carelessness (a neutral word) of B, for example, a fire caused by the careless spillage of oil. It may, of course, become relevant to know what duty B owed to A, but the only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from its context and to say that B is or is not liable,

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and then to ask for what damage he is liable. For his liability is in respect of that damage and no other.\textsuperscript{59}

While this leaves open the question of what are recognised types of damage, and to what degree they can be distinguished, such questions do not concern us directly at this stage, with the exception of suggesting that reliance is, arguably, a type of damage. In this way the duty of care under \textit{Hedley Byrne} is intended to apply only to that type of damage.

As noted above, different considerations will apply to different types of damage, and different factors will affect the determination of the types of damage for which the defendant will be liable. Thus it has been said that a higher degree of proximity is required for the recovery of economic loss. One suggestion, explored later in this thesis, is that the particular considerations for reliance loss delimit the circumstances in which the loss is recoverable to such an extent that it has become a detailed basis of liability.

Finally, if the harm is of a type for which the defendant is liable, he is liable for unexpected results due to particular susceptibilities of the plaintiff. The defendant cannot complain that the plaintiff was unusually vulnerable and harmed more than could have been foreseen or expected. Provided the damage is of a

\textsuperscript{59} \textit{Supra} note 57 at 425, per Viscount Simonds for the Judicial Committee.
recoverable type, and is not excluded for some other reason, the defendant is liable for the actual harm caused.

III.3.2 Remoteness of damage

The last aspect of foreseeability to be covered here is remoteness. The rule is a reminder that the damage must be causally related to the breach. The chain of cause and effect, where each effect becomes a new cause, may continue for some time until it is exhausted, if it is at all. But the defendant is not liable for all the ongoing consequences of the breach. Assuming that the damage is of a foreseeable type, liability will end at a point where the damage becomes too "remote" from the breach.
III.4 The interpretation of Hedley Byrne

Two important aspects of liability were raised and addressed by *Hedley Byrne*: the question of liability for negligent words and the question of economic loss. One of the difficulties of the case is the lack of clarity of the House's approach to these questions, and for this reason subsequent interpretations of *Hedley Byrne* has stumbled over them. First, is the case restricted to negligent words or does it extend to negligent acts? And second, is the case the only avenue of recovery for pure economic loss? The answers to both these questions which appear in the case law are querulous but affirmative. Both answers are, in my view, wrong.

III.4.1 Negligent words and negligent acts

It is clear that *Hedley Byrne* established liability for negligent misstatement. But it did so through the concept of an undertaking, which is not necessarily limited to negligent words, and it can therefore conceivably apply to negligent acts.

At first glance, a difference between words and acts appears sensible. In *Hedley Byrne*, Lord Pearce commented that:

Negligence in word creates problems different from those of negligence in act. Words are more volatile than deeds. They travel fast and far afield. They are
used without being expended and take effect in combination .... yet they are dangerous and can cause vast financial damage.\textsuperscript{60}

But it is singularly difficult to demarcate a clear distinction between words and actions. Lord Devlin recognised this in his speech, giving the example of the mechanic who is asked to repair the plaintiff’s car:

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 all 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.\textsuperscript{61}

The example is obscured by presence of the inferred contract between the plaintiff and the defendant, but it does suggest that there are circumstances in which words and actions are inextricable. On the analysis offered above, the solution seems to be to accept that there could in theory be liability both under \textit{Hedley Byrne} – for reliance loss caused by breach of a duty of care based on an undertaking – and under \textit{Donoghue v. Stevenson} – for breach of a duty of care based on proximity. The question of which head of liability to apply depends on

\textsuperscript{60} Supra note 1 at 613-14; see also the comments of Lord Reid at 580-581; Lord Morris at 590; and Lord Devlin at 602.

\textsuperscript{61} Hedley Byrne, supra note 1 at 516.
the interest which is sought for recovery: *Donoghue v. Stevenson* applies for the compensation interest and *Hedley Byrne* for the reliance interest. What is interesting to note is that intuitively, regardless of the head of liability, there would be liability in all three cases. The difference lies in the causal link between the breach and the harm. If it is through the reasonable reliance of the plaintiff then the plaintiff will be able to recover reliance loss. This can obviously include physical as well as economic harm to the plaintiff. If it cannot be said to be through the reliance of the plaintiff, the plaintiff seeks to recover physical or economic loss in the compensation interest.

Where does this leave a distinction between words and actions? As a distinction between forms of liability it is, as Lord Devlin stated in *Hedley Byrne*, “unworkable”. The distinction must be between cases involving reliance on representations and cases which do not. In order to recover damages in the reliance interest, the plaintiff must identify a representation, in words or actions, which was relied on to her detriment. If the plaintiff seeks recovery in the compensation interest, the facts may be the same, but the question is whether there is sufficient proximity in the circumstances. No representation need be proven.

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It should be noted that this conclusion suggests that although all actions for negligent misstatement are governed by *Hedley Byrne*, not all actions under *Hedley Byrne* are for negligent misstatements. However, all actions under *Hedley Byrne* are exclusively in the reliance interest, and include negligent misstatements because such actions can only be for recovery in the reliance interest.\(^{63}\)

### III.4.2 Liability for economic loss

The recovery of reliance loss under *Hedley Byrne* is often mis-characterised as recovery of economic loss. In this section I outline the confusion of reliance loss with economic loss. The difference between the two needs to be emphasised.

*Hedley Byrne* was one of the first cases to recognise economic loss as a type of damage. Prior to that, the courts had approached such questions as one of the existence of a duty of care without concern as to type of damage. *Hedley Byrne* has, however, subsequently become understood as the sole avenue of

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\(^{63}\) Intentional misstatements can lead to liability in defamation or injurious falsehood.
recovery for economic loss in English law. Other common law jurisdictions have been more robust.64

Economic loss can be defined as damage to intangible property, including certain types of interference with the plaintiff’s rights to future income. It is distinguished from physical damage (damage to the plaintiff’s person or tangible property). Economic loss is divided into two types: “pure” and “consequential”. Pure economic loss is “financial loss suffered by a plaintiff which does not flow from any damage to his own person or property.”65 Consequential economic loss flows from damage to the plaintiff’s person or property, and is (arguably) simply a part of the measure of the physical damage to the plaintiff.

Reliance loss is, I have suggested, damage suffered by the plaintiff through reliance on a representation made by the defendant. Obviously economic loss may be suffered in reliance on a representation made by the defendant and would in that instance fall into the reliance interest in damages. Because such damage is not always clearly recognised as reliance loss, however, it is often confused with the question of recovery of economic loss.

64 See cases discussed in Parts V and VI below.
Since pure economic loss was first considered a type of damage, it has been argued that it is altogether irrecoverable. The protection which private law provides for economic loss is so limited, and the policy reasons against liability are so strong, that an “exclusionary rule” has been suggested. The various cases which have allowed recovery are regarded as anomalous exceptions to the exclusionary rule, falling within as yet undefined areas where recovery is allowed.

It must be recognised that, in relation to economic interests, the protection of the plaintiff’s rights is nowhere near as great as it is in relation to physical interests. The infliction of economic loss on others is an integral aspect of the modern capitalist system. Businesses are expected to compete, ostensibly in the name of efficiency. Economic loss cannot therefore be recoverable in many circumstances even if deliberate. Moreover, much which falls within the definition of economic losses would never be considered recoverable, even if no distinction were made. A single action can, due to the inter-relatedness of modern society, have a broad and large impact on others, but not every scrap of loss resulting from a defendant’s negligence can be visited on the defendant. There must be a proportionate relationship between fault and liability.

The question of economic loss is a question of recovery in the compensation interest to be determined under the model of liability identified with Donoghue v. Stevenson. Where the economic loss falls into the reliance interest, its recovery is determined under Hedley Byrne. Theories of economic
loss, therefore, do not need to incorporate recovery under *Hedley Byrne* because it is recovery of reliance loss and not economic loss.

The fact that reliance loss can, in most cases, be considered as economic loss is due to an overlap of definition. It does not alter the nature of the cause of action. The fact that two different causes of action can lead to recovery for the same actual loss, by considering it from a different point of view, does not mean that both causes must be subject to the same criteria of liability.

However, *Hedley Byrne* does not explicitly recognise reliance loss, and the case has subsequently been interpreted as the exclusive precedent for the recovery of economic loss. In my view this interpretation is incorrect. Liability for economic loss need not be restricted to a *Hedley Byrne* form of liability. It can be determined under a proximity-based duty of care. Provided the plaintiff can demonstrate a right against the defendant which has been infringed, and the particular policy issues relating to economic loss can be refuted, recovery should be allowed. It seems to me that an exclusionary rule must be used as a starting point for a theory of liability, but the real question must be whether a right has been infringed. The determination of the existence, and infringement, of any such right is the issue in economic loss. Obviously, determining whether the plaintiff’s
rights have been infringed is not always easy. One legitimate way to avoid a determination of the plaintiff's rights is to bring recovery within the *Hedley Byrne* structure of liability. But this ought not to be used as the sole possible solution to recovery of economic loss. The courts ought not to have recourse to fictional undertakings by the defendant and dubious forms of reliance by the plaintiff.

It will be clear that this thesis adopts the view that the exclusivity of *Hedley Byrne* relates not solely to words or to economic loss but to reliance loss, which includes all cases involving words and some cases of economic loss.

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Part IV: Reliance in the law of negligence

Part III of this thesis outlined the basis of liability in negligence. Part IV will consider the meaning of reliance in negligence, focusing mainly on the role of reliance in Hedley Byrne liability. In particular, the structure of liability is examined in detail, particularly the mechanics of the undertaking itself in IV.1, dividing it into the assumption of responsibility, mutuality, and reliance. The role of reliance in causation and proximity is also examined. The role reliance may play in negligence liability under Donoghue v. Stevenson is reviewed. I consider why this head of liability is treated as a form of negligence, and assess the suggestion that Hedley Byrne liability is not properly part of negligence.

IV.1 Criteria for liability

Liability under Hedley Byrne was recently considered by the House of Lords in Caparo Industries plc v. Dickman. The plaintiff investor sought recovery of money lost through a successful take-over bid which was undertaken in reliance on accounts audited by the defendant. The accounts suggested that the company was making a healthy profit (over £1.3m), whereas in fact it was

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67 Supra note 28.
operating at a substantial loss (over £400,000). The House of Lords rejected the claim on the grounds that the statement had not been made with the intention that the plaintiff rely on it. Lord Bridge, giving one of the leading judgments, set out the defining features of liability he discerned from the precedent cases:

\[\text{[T]he defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it.}^{68}\]

Although the reliance was foreseeable, he did not consider that the accountants in that case were liable under this definition:

\[\text{The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied upon by strangers to the making of the statement for any one of a variety of different purposes which the maker of the statement had no reason to anticipate.}^{69}\]

\[\text{Though it might have been foreseeable, it was never in the defendant’s contemplation that the statement would be passed on to the plaintiff for it to rely}\]

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\[68 \quad \text{Ibid. at 620.}\]

\[69 \quad \text{Ibid.}\]
upon. Just as proximity is not solely determined by foreseeability, the special relationship is not solely determined by foreseeable reliance. The defendant would not have expected that investors involved in an aggressive take-over bid would be entitled to rely on its auditing of the accounts; few corporate raiders are so naïve. There was therefore also unlikely to be causation.

Lord Bridge's formulation can be reduced to the requirement that the defendant know that the plaintiff is likely to receive the statement and is likely to rely on it for a particular purpose, and that the plaintiff actually rely on it for that purpose. Lord Jauncey gave a more succinct version:

[W]here a duty of care has been held to exist, the statement in question has, to the knowledge of its maker, been made available to the plaintiff for a particular purpose upon which he has relied.70

There is a slight difference in emphasis to be placed on how the defendant's intentions are to be assessed, which will be discussed further below. But the key factor in these formulations is the reliance by the plaintiff. On the part of the defendant, there must be anticipation of reliance, and an intention (or a realisation) that the plaintiff will feel entitled to rely on the statement. These should be assessed objectively, taking the defendant’s intentions into account by examining the circumstances in which the representation was made. This is the
undertaking by the defendant. On the part of the plaintiff, there must be a parallel understanding that she is entitled to rely, and the plaintiff must actually rely.

IV.1.1 Undertakings by the defendant

Determining what is meant by the concept of an "undertaking" from the cases is not a simple exercise. Lord Devlin's speech in *Hedley Byrne* discusses much of the case law, including *Nocton v. Lord Ashburton*, and refers to Sir Frederick Pollock's comment on an earlier case that "the cause of action is better regarded as arising from default in the performance of a voluntary undertaking independent of contract". He then made the following comments:

> [T]here is ample authority to justify your lordships in saying now that the categories of special relationships, which may give rise to a duty to take care in word as well as in deed, are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which ... are "equivalent to contract" that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from a mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied on and that the informer or

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70 *Ibid.* at 685.

71 *Supra* note 40.

adviser knows that it is. Where there is no consideration it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form.\[^{73}\]

Lord Devlin then reviewed the basis of liability set out by the other judges. He noted that the obligation is a voluntary one, in that it is avoidable, rather than “imposed by law”:

I do not understand any of your lordships to hold that it is a responsibility imposed by law on certain types of persons or in certain situations. It is a responsibility that is voluntarily accepted or undertaken either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.\[^{74}\]

Two conclusions may therefore be drawn about undertakings; first, they may be made by words or conduct; and second, they may be express or, more probably, inferred from the circumstances in which the defendant acts.\[^{75}\] Thus making a statement to a person may, in the circumstances, constitute an undertaking.

\[^{73}\] *Hedley Byrne*, *supra* note 1 at 610, per Lord Devlin.

\[^{74}\] *Ibid.* at 610-11, per Lord Devlin.

\[^{75}\] See Perry, *supra* note 11 at 274.
Lord Devlin noted in *Hedley Byrne* that stripped of legal trappings, an undertaking is no more than a bare promise.\(^76\) It is a statement or representation which implies, in the circumstances of its making, that the defendant has taken care in ascertaining the truth of the statement, or that he will take care to ensure the truth of the statement.

What, then, distinguishes an undertaking from a bare promise, and fixes the defendant with liability for reliance? First, the defendant must be taken to intend to take on responsibility to the plaintiff. As Lord Bridge noted above,\(^77\) there must be more than foreseeability of likely reliance. A railway company may publish its timetable, and know that the locals rely on the timetable, and that they use the railway lines as a path to the next town; but this does not necessarily mean that they have undertaken to use the railway only at the published times and will therefore be liable for injury caused by unscheduled trains.\(^78\) No intention to undertake can be gleaned from the circumstances; although the railway knows

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\(^{76}\) "There is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract." *Hedley Byrne*, *supra* note 1 at 610, per Lord Devlin.

\(^{77}\) *Supra* note 28 at 620.

they do so, the locals are using the timetable and the railway line for a purpose the railway cannot be taken to have intended.

By comparison, the owner of a headland may have undertaken a duty if he operates a lighthouse on it which, to his knowledge, seafarers come to rely on; but he may not if to his knowledge they rely on the night-lights in his chicken coop which also happens to be on the headland.\(^7^9\)

The key is in the inference of an intention to take on responsibility towards another. The undertaking does not flow from the defendant's power over the plaintiff, or the defendant's opportunity to benefit him. In the headland example, the fact that the owner has built a *lighthouse* is itself evidence that he intended others to rely on it as a lighthouse; the fact that they rely on a lit chicken coop does not impose any responsibility on him. In the railway example, the timetable is intended to be used for the purpose of catching trains, not to indicate when the track may be clear for trespassers.\(^8^0\)

An undertaking is not meant to involve a conscious undertaking of legal responsibility, as Lord Browne-Wilkinson emphasised in *White v. Jones*. His

Lordship stated that the phrase “assumption of responsibility” should be understood “as referring to a conscious assumption of responsibility for the task rather than a conscious assumption of legal liability to the plaintiff for its careful performance.”

IV.1.1.1 The interests in damages for undertakings

As discussed earlier, an undertaking amounts in effect to an unenforceable promise – unenforceable because no consideration has been given for the promise. That undertaking gives rise to a duty and, more pointedly, liability in the reliance interest. It is the conclusion that liability is solely in the reliance interest which I wish to test here. According to the list developed in Part II above, there are four possible interests in damages where the defendant has breached that duty: the compensation interest; the restitution interest; the reliance interest; and the expectation interest.

I suggest that the law of negligence precludes the award of damages for breach of an undertaking in anything other than the reliance interest. It is

80 Walking along railway lines was illegal at the time.

81 White v. Jones, supra note 3 at 716, per Lord Browne-Wilkinson.
incompatible with the structure of private law for there to be recovery of anything other than the reliance interest in negligence resulting from an undertaking.

The concept of an undertaking requires that any damage be linked to the undertaking through reliance. Any damage which is not linked to the undertaking through reliance lies in the expectation interest; and the expectation interest is, for reasons outlined above, not available in the law of tort.

Where the defendant has made an undertaking, damage to the plaintiff may occur in one of two ways. Either the plaintiff suffers detriment in reliance on the defendant, or the defendant causes harm to the plaintiff directly. Both are possible in breach of an undertaking. I will deal with the latter first. It must be assumed that there has been no reliance by the plaintiff on the undertaking, and no possibility of formation of a contract.

Where there has been an undertaking, the defendant may cause harm through a negligent misstatement or through negligent action. Where harm is caused through a negligent misstatement, the plaintiff’s loss can only be considered as reliance loss. There can be no injury to the plaintiff without reliance on the representation.

Where the harm is caused by the defendant’s negligent action, however, the analysis is different. The harm is in the compensation interest rather than in the reliance interest. The breached undertaking is, in effect, a promise to take
care; but the plaintiff is not entitled to the benefit of that promise because no contract has been formed. If a contract had been formed in which the defendant promised not to cause harm to the plaintiff, the plaintiff would be entitled to the value of the promise made to her, which in the circumstances would be the value of the damage inflicted on her. As no contract has been formed, however, the plaintiff is not entitled to the value of the promise to take care. It cannot be enforced.

The defendant cannot therefore be liable for breach of that promise, and the undertaking cannot therefore give rise to a duty of care in relation to the plaintiff. It cannot be breached by direct action. Any recovery granted on this basis is in the expectation interest and breach of the rule that its recovery is restricted to contract.

This situation must be distinguished from those where the defendant is said to have undertaken a duty of care in the course of acting to the benefit of the plaintiff. In these situations the defendant is clearly responsible for taking care in carrying out the action. To cite an old example, if the plaintiff is drowning in a river, the defendant is under no duty to throw a rope to him, however easy it might be to do so. However, if the defendant sets out to rescue the plaintiff, by actually taking positive action to do so, she will come under a duty to take reasonable care in doing so. This case does not fall under Hedley Byrne;
moreover, damages are not in the expectation interest but in the compensation interest, for the harm caused to the plaintiff by the defendant's action.

The fact that there can be no recovery in the compensation interest for damage in breach of a duty of care under *Hedley Byrne*, however, does not preclude the possibility of recovery for damage in the same circumstances for breach of a duty of care under *Donoghue v. Stevenson*. This would be the correct approach where there has been damage which has not arisen through the plaintiff's reliance. The rescue example is also an example of a duty of care best understood through proximity rather than grounded in *Hedley Byrne*.

In examples of situations where damage has resulted other than through the plaintiff's reliance almost all involve a prior contract or prior relations between the parties. *Donoghue v. Stevenson* applies to most of these cases. Thus, a mortgagee owes a duty of care to the mortgagor and the guarantor when selling the mortgaged property. This could be regarded as an assumption of responsibility by the mortgagee upon entering into possession, as negligent performance could cause loss to the plaintiff mortgagor. But the courts consistently analyse such situations — properly, I think — in terms of simple

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proximity under Donoghue v. Stevenson. There is no reference to a duty of care. Thus, in Standard Chartered Bank Ltd. v. Walker, a prime example of such a situation, Lord Denning M.R. stated:

[If a mortgagee enters into possession and realises a mortgaged property, it is his duty to use reasonable care to obtain the best possible price. ... This duty is only a particular application of the general duty of care to your neighbour which was stated by Lord Atkin in Donoghue v. Stevenson and applied in many cases since.³³]

Indeed, the only way it appears possible to cause loss through breach of an undertaking and in the compensation interest, is where the defendant has promised, in contract with a third party, to carry out a service which would benefit the plaintiff. Here the plaintiff need not rely on the defendant in order to suffer a “loss”. Yet this loss is more correctly in the expectation interest; the plaintiff is not entitled to the benefit of the promise, for there is no contract between the plaintiff and the defendant. Such a loss is therefore not recognised as recoverable; it is the loss of an advantage rather than an infringement of a right in the plaintiff. Furthermore, a duty of care in these circumstances cannot depend on an undertaking or assumption of responsibility, because there has been no assumption of responsibility towards the plaintiff. It seems artificial to suggest that the defendant has assumed responsibility vis-à-vis the plaintiff when the clear

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³³ Ibid. at 1415.
expression of his responsibilities is encapsulated in the contract. Finally, it is a clear doctrine of our law that no right arises in a third party beneficiary of a contract solely by virtue of the formation of the contract. The doctrine of privity of contract requires that the third party be brought into the contract in some way.

The appropriate analysis is to consider that a duty of care may arise because the contract has brought the plaintiff and defendant into a relationship of proximity under Donoghue v. Stevenson. The circumstances must be assessed to determine whether they might support a determination of proximity. In this way the two forms of liability can overlap although they will diverge in relation to the interest protected in recovery. It seems clear that the compensation interest has no place in relation to the breach of an undertaking.

I pointed out above that the expectation measure could not be applied to an undertaking. Nevertheless, there is a tendency to apply the expectation measure when determining the level of recovery for breach of an undertaking. When the court asks what position would the plaintiff be in if the tort had not been committed, it must be remembered that there is no contract; the plaintiff is not entitled to the benefit of the observance of the undertaking. The loss in a case of an undertaking suffered by the plaintiff is determined according to his reliance on the undertaking, and not on the gain the plaintiff would have made had the undertaking been observed. Obviously in some cases there may be little difference, if any, between the two; but the latter measure is an expectation
measure and not the true loss suffered by the plaintiff. It is essential that recovery be limited to that loss.

With respect to the remaining interests, I argue that insofar as there is a restitution interest in damages for *Hedley Byrne* liability, it forms part of the reliance interest. The plaintiff will be suing for value transferred to the defendant in reliance on the undertaking.\(^4\) Damages are therefore in the reliance interest. Outside of damages, an action for the *return*, rather than the value, of anything transferred would be in the restitution interest but would be an action in conversion, or possibly in unjust enrichment. It would not be covered by *Hedley Byrne*.

In summary, I hope to have shown that the nature of damages in the law of negligence is such that there can only be a reliance interest (in this sense including the restitution interest) in damages for breach of undertakings. Any other approach to undertakings infringes the division between the law of tort and the law of contract. Any situation where recovery is in the compensation interest falls under the duty of care based on proximity. Reliance is the essential focus of this basis of liability.
If this is incorrect, then there are two interests in damages for breach of undertakings: the compensation interest and the reliance interest. This discussion will proceed on the basis that there can only be recovery for reliance on an undertaking. I return below to the possibility of compensation for harm caused through breach of an undertaking, in my discussion of the recent House of Lords decision in *White v. Jones.* However, I argue that because the plaintiff cannot claim the benefit of the undertaking, there is no basis for damages in the compensation interest. The plaintiff must look to liability under *Donoghue v. Stevenson.*

In the context of an undertaking, detrimental reliance by the plaintiff on the undertaking correlates with the normative basis of liability. In a paradigmatic example, the defendant’s promise has been made in seriousness and is subject to contractual sanction by a third party. But there is no justification for liability to the plaintiff in the mere fact that it would benefit her. She has done nothing to guarantee (in a contractual sense) the truth of the defendant’s representation or promise. Nor is there anything in the fact that the promise to benefit the plaintiff

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84 Note, however, that if the plaintiff has given the defendant something in reliance on the undertaking, it ought to be possible to argue that there is in fact a contract, or at least that promissory estoppel applies.

85 See discussion in Part VI below.
was contractually made to a third party. The simple doctrine of privity stands against that proposition, and ought not to be circumvented by tort.

**IV.1.1.2 Definition of an undertaking**

We might therefore opt for the following formulation of an undertaking:

*The defendant has undertaken responsibility to the plaintiff where the defendant acts in a manner so as for it to be reasonable for the plaintiff to conclude that the plaintiff can rely on the defendant with respect to the content of the undertaking. Recovery is limited to the value of the reasonable detriment suffered by the plaintiff in reliance on the undertaking.*

The normative value of the undertaking is clear: to require individuals to take care when others are likely to rely on them. It is an additional duty to take care where an individual's actions are likely to harm others, by protecting them against being negligently mislead. The general edict is not to harm the interests of others. *Donoghue v. Stevenson* clearly protects the individual's property from negligent interference and injury. *Hedley Byrne* adds to that protection, by delimiting the circumstances where loss arising through reliance on another can be brought home to the other. As noted earlier, the fact that harm is caused through the plaintiff's reliance shows that he had an opportunity to avoid the harm resulting from the defendant's negligence. The determination of an undertaking
shows that it was reasonable for the plaintiff to rely on the defendant in those circumstances. The plaintiff must then demonstrate the reasonableness of the extent to which he relied.

I have focussed heavily in this thesis on the interests in damages as defined by Fuller and Perdue, and have not discussed what type of “protected interest” is operative under Hedley Byrne. Benson suggests that the law is protecting the benefit which the plaintiff would have received had he not been invited to rely on the defendant.87 The relinquished situation is the baseline for measuring the loss. At a more abstract level, Perry suggests that it is the plaintiff’s autonomy which is being protected.88 The plaintiff is protected from being misled. These are just two facets of the circumstances of the paradigm case. Both are correct in their own way. The normative value of liability invokes a limited right to rely on others and, at the simplest level, protects the status quo of the plaintiff’s financial position from loss induced through reliance on the negligence of others.

86 See Perry, supra note 11 at 281-82.
87 Benson, supra note 66 at 451.
88 See Perry, supra note 11.
I have emphasised the objective assessment of the undertaking because although the defendant’s subjective intentions are important, the defendant’s objective conduct is in fact the most important factor. Her specific intentions are of no concern if they are not reflected in her conduct, and the plaintiff is only entitled to rely on that conduct. The plaintiff has no other way of understanding the defendant’s intentions. In particular, the defendant must be clear that if he does not actually intend for the plaintiff to rely on him. Assuming that his conduct is such that, objectively, the plaintiff can reasonably rely on him, he will be taken to have intended her to do so. Thus, in Hedley Byrne itself, if there had been no disclaimer, the defendant bank may not actually have intended for the plaintiff to rely on its statement; but unless it had made the disclaimer the plaintiff may have been fully entitled to do so.

This objective assessment of the circumstances requires the defendant to consider the nature of the circumstances and the consequences of her actions. Lord Steyn was clear on this point in Williams v. Natural Life Health Foods:

The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene.89

The objective approach is paralleled in the formation of contracts; for although the defendant may not have intended to create legal relations, his actions may be objectively taken to have done so. The law in both areas requires parties to act as they desire to be understood.

In cases involving more than two parties, the defendant’s responsibility must be assessed by reference to the circumstances in which the statement was made. Thus if the defendant’s statement is made to an intermediary and passed on to the plaintiff, the circumstances in which the defendant made the statement will determine the extent of the undertaking. The court will infer from the circumstances the defendant's knowledge of the use to which the intermediary was to put the statement. For example, a property valuer may assess the value of a house for a bank attempting to determine whether to lend money on the security of the property. If the bank then passes on the valuation to the purchaser, the liability of the valuer will depend on her knowledge of the use to which the bank would put the valuation, and whether the valuer could be said to have the purchaser sufficiently in contemplation to have undertaken responsibility to him. The defendant cannot be liable if the bank puts the statement to an unexpected or unknown use.
In the case law, there have been attempts to further limit or categorise the situations where the special duty will arise. In *Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt* the Privy Council attempted, relying on Lord Denning's judgment in *Candler v. Crane Christmas & co.*, to limit the ambit of these duties to professional persons whose business or particular skill involved the provision of advice. This attempt to further define the typical circumstances in which the duty of care will arise was however not followed, partly because it was unnecessary – such circumstances obviously fall within the definition of liability – and because it is clear that there are situations where liability will attach but which fall outside these definitions of liability. There was no justification for the limitation, for the nature of the circumstances will usually be sufficient to show whether there is in fact an undertaking of responsibility.

There remain two further aspects of the undertaking-reliance liability structure. The first is the relationship between the plaintiff and defendant, which is discussed under the rubric of mutuality; and the second is the nature of the plaintiff's reliance.

\[91\] *Supra* note 47.  
\[92\] *Supra* note 90 at 805, per Lord Diplock for their Lordships.
IV.1.2  Mutuality

English law does not recognise a duty in the air, so to speak; that is, a duty to undertake that no one shall suffer from one's carelessness.¹³

There must be an object of the duty of care, for although a duty may be owed to more than one person at a time, it cannot be owed to the world in general. Mutuality, or the relationship between the plaintiff and defendant, is an essential aspect of liability, and indeed, of all liability in tort. Mutuality provides a limit on the ambit of liability, and in part it also answers in part the problem of indeterminate liability, through limitation of those to whom a duty is owed.

Determining the scope of the class of persons to whom the defendant owes a duty of care involves a close consideration of the circumstances. First, it is important to note that when the relationship is formed (which is when the duty of care arises), the duty need not be owed to a specific and determinate plaintiff. The defendant may assume responsibility to a limited, though open class of persons, and may do so before the plaintiff is a member. For example, where the defendant is an accountant who certifies the correctness of a company's accounts for the purposes of an investment prospectus, a duty (if there is one) might be owed to persons who consider investing in the company in reliance on the
prospectus. Those persons are, at the time the accounts are audited and certified, unidentified and indeed are unidentifiable; but the class into which they fall is identifiable.\textsuperscript{94} Thus it is perfectly feasible that both the undertaking and the breach could have occurred prior to the identification of the specific plaintiff, with liability resting on a relationship between the defendant and a determinate, limited class of potential plaintiffs.

It has been suggested that the class of plaintiffs is or should be limited to those who are specifically and individually known to the defendant; an unknown plaintiff is owed no duty of care.\textsuperscript{95} This suggestion however can only be wrong. If an accountant is certifying statements about a company’s financial status in the knowledge that investors will be relying on it, the class cannot be determined by asking which investors are known to the defendant and which are not. The limitation is determined by the class of persons to whom the accountant knows or should know the company will be supplying the statements. They are the persons to whom an undertaking is given. Again, the class cannot be those who will

\textsuperscript{93} \textit{Bottomley v. Bannister}, [1932] 1 K.B. 458 (C.A.) at 476, per Greer L.J.

\textsuperscript{94} The situation is not unlike the determination of persons who are to be beneficiaries of a trust where there are questions concerning whether the trust is void because there is uncertainty as to the identity of the class of beneficiaries.
foreseeably rely on the statements, but rather those who, in the circumstances, the
defendant must be taken to have intended to rely on the statements. The
inevitable concise requirement is that the class be determined by reference to the
circumstances of the making of the statement.96

IV.1.3 Detrimental reliance by the plaintiff

Once a duty of care has been established the measure of recovery is
determined by reference to the reliance loss suffered by the plaintiff. The
determination of an undertaking shows that reliance on the defendant was
reasonable; now the plaintiff must also show that the extent of her reliance was
also reasonable. In this sense the question relates to quantum of damages rather
than to liability.

Reliance loss is a non-specific term covering any and all detriments
suffered in reliance on the defendant’s undertaking. Technically all that is
required is that the detriment be suffered in reliance on the undertaking. Reliance
is an integral step between the undertaking and the harm, for it provides the causal

 suprah note 11 at 294ff.

96 Perry, ibid. at 300.
link between the two. If the detriment claimed by the plaintiff is shown not to be causally linked to the undertaking then it does not qualify as reliance loss. 97

The detriment and the reliance must be reasonable both in nature (what is claimed) and in scope (the amount claimed). Thus the defendant will not be liable for all detriment suffered in reliance, but only for that which is reasonable, and to a reasonable extent. 98

Reliance may therefore take many forms. It will include positive action undertaken by the plaintiff, such as expenditure or investment, as well as inaction or forbearance, such as the relinquishment of opportunities. Quantification may also be difficult, especially in cases of lost chances.

Moreover, the detriment must be irrevocable. If the defendant subsequently warns the plaintiff that he is not able to keep to the undertaking, or advises the plaintiff to not rely on it, the plaintiff will only be able to recover detrimental reliance insofar as it is irrevocable. The fact that the plaintiff could then have salvaged or recovered the claimed detriment will sever the causal link.


The detriment will not in fact have been caused, or not wholly caused, by reliance on the defendant.

The reliance must be also specific to the undertaking. It cannot relate to a “general” reliance on the defendant; it must relate to a specific detriment suffered as a result of relying on a specific undertaking by the defendant. It must therefore also be subsequent to the undertaking. Note, however, that reliance in other circumstances may assist in giving rise to a duty of care based on proximity (see below at IV.2).

IV.1.4 Conclusion: the role of reliance

Recovery for reliance is sometimes said to alleviate the harshness of the strict rules of contract and tort. Without it, individuals who are misled to their detriment would be left without recourse in situations where they ought to be entitled to rely on others. Through considering reasonable, detrimental reliance, the rule imposes liability on defendants for making representations in situations where it ought to have been clear that others would act on the representations.

The view that the rules of contract and tort are “harsh” stems from consideration of areas on the fringes of contract, where losses would be
irrecoverable without *Hedley Byrne* liability, such as in pre-contractual negotiations. From some angles it can appear that the law of tort is "rescuing" these plaintiffs. However, the normative values of reliance loss recovery do not require this type of support for their justification. This form of liability exists to protect reliance in particular circumstances, and the fact that this dovetails with contract demonstrates a tendency to coherence in the law, rather than an stopgap response to harshness. Moreover, as misrepresentations are actionable in contract and in tort (as deceit) where they are deliberate, it seems only logical that they should be where they are negligently made.

Within the *Hedley Byrne* structure of liability, reliance forms the core of liability. But the most important aspect of its role is not where one might expect it to be located, that is, in the determination of the reliance itself, but rather in defining and determining the undertaking, that is, what is relied upon. The plaintiff's reliance is in the end a matter of remedy rather than liability. The undertaking, which is the essential aspect of liability, depends on more than mere power over the plaintiff, or the opportunity to benefit him. It is defined in terms of reliance. The defendant must conduct herself so as to convey an intention to

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encourage reliance by the plaintiff, thereby forming a relationship between them and giving rise to a duty of care.

In an undertaking, reliance is centred on the defendant’s inferred intention to induce reliance by the plaintiff. This is the foundation and core of liability. The formation of the duty is all-important; the remaining factors are simply mechanisms for determining recoverability and reasonable limits once it is clear that a duty has arisen.
IV.2 The role of reliance in a duty of care based on proximity

In some cases the plaintiff may rely on the defendant to act in a particular way, or to take care, without that reliance contributing to an assumption of responsibility, or forming a link in the causal chain. Recovery is therefore in the compensation interest rather than in the reliance interest. This form of reliance is that which is present in cases falling within Donoghue v. Stevenson. Thus, a plaintiff walking down the street may be said to “rely” implicitly on the defendant to drive carefully; but this is clearly not a situation of undertaking and reliance. In this form, reliance does little more than show that the plaintiff was vulnerable to the defendant. Equally, in Donoghue v. Stevenson itself, the plaintiff can be said to have “relied” on the manufacturer to make the ginger-beer properly, and this “forced” reliance is in part referred to by Lord Atkin in his reference to the lack of opportunity for intermediate inspection in the case.

This “non-causal” reliance is divided into two types: specific and general. Specific reliance relates directly to the particular activity of the defendant which caused the harm – in the example above, driving his car. Recovery is not in the reliance interest. General reliance relates to the overall responsibilities and activity of the defendant. Although case will focus on the specific instance which caused harm, the significance of reliance in the imposition of a duty of care stems from its ongoing and non-specific nature.
Unlike "causal reliance", non-causal reliance (specific or general) may be prior or contemporaneous with the duty of care. Causal reliance must be subsequent to the undertaking, for otherwise there can be no causal link between the undertaking and the harm. More importantly, specific or general reliance cannot be said to provide the causal link between the breach of duty and the harm. It plays no role in determining recovery, only in determining liability.

IV.2.1 Specific reliance

Specific reliance, as opposed to general reliance, is reliance which relates to the defendant’s activity giving rise to the harm. It is similar to causal reliance. The plaintiff relies on the defendant to take care, but the plaintiff’s claim does not depend on an undertaking. For example, all other drivers on the road, and indeed pedestrians and other persons in the vicinity of a defendant driver will in a sense be relying on him to take care in relation to them. Reliance in this situation can be said to be forced upon the plaintiff, a factor which is present in most duties of care under Donoghue v. Stevenson.

Specific, non-causal reliance plays a somewhat undefined and apparently negligible role in the imposition of a duty of care based on proximity. It is not often referred to by the courts. It is implicit in many circumstances as a prerequisite of the plaintiff’s vulnerability to the defendant. Almost any case of negligence can be said to involve a reliance on the defendant to take care, and so in this sense to identify specific reliance is pointless. Moreover, this vulnerability
has long been a hallmark of the imposition of duty in the law; for example, the vulnerability of the plaintiff beneficiary to the defendant is a common thread in fiduciary obligations in equity as well as in tort.

**IV.2.2 General reliance**

General reliance, on the other hand, is less common and a recognised factor in the imposition of liability. It most often arises through the ongoing relationship between the plaintiff and the defendant, and that relationship may be as wide as the relationship between the public and the government. Interestingly, in this respect general reliance comes surprisingly close to forming the basis of a general duty of care.

General reliance refers to situations where those who are affected by the defendant’s activity or exercise of a power, rely and are known to rely on proper performance by the defendant. It may be limited to public bodies, or possibly to those acting in the public interest. In the case law, general reliance is invoked strongly in questions of the duty of care of public authorities in exercise of their powers. The imposition of a duty seems to derive impetus from their position as public bodies with responsibilities for the public good. In this sense general reliance is presently only applied to cases involving public authorities.

Although there are other examples, the most extensive discussion of general reliance is in relation to building cases. The leading case is *Sutherland*
Shire Council v. Heyman, in which the High Court of Australia found that a duty of care could be owed by a local authority to a property owner building a house.¹⁰⁰ In his judgment, Mason J. suggested that general reliance was one justification for imposing liability on public authorities, at least in the context of building negligence cases:

[T]here will be cases in which the plaintiff’s reasonable reliance will arise out of a general dependence on an authority’s performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability... This situation generates on the one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power.¹⁰¹

Justice Mason’s comments have been echoed by the Court of Appeal of New Zealand, which has adopted the view that the public reliance on local authorities to exercise due care over building inspections is so pervasive and notorious that it justifies the imposition of liability.¹⁰² In Canada, the discussion does not appear to be as overt in building negligence cases, although general reliance is discerned in other areas relating to public authorities, notably in one

¹⁰⁰ Supra note 29. No liability was imposed in that case.
¹⁰¹ Ibid. at 464.
case in relation to the exercise of Agriculture Canada’s powers under the Seeds Act.\textsuperscript{103}

More recently, the point was considered by the House of Lords in \textit{Stovin v. Wise}.\textsuperscript{104} The question was the liability of the local authority for failure to implement a decision to improve a dangerous intersection. The plaintiff had suffered an accident at the intersection which planned — but shelved — improvements could have prevented. The House of Lords held 3-2 that no duty of care was owed to the plaintiff. In doing so, the House noted that reliance, although not applicable on the facts, had a role to play in the imposition of liability on the local council. Lord Hoffmann in particular noted that this justification appeared to be specific to public bodies.\textsuperscript{105}

The grant of power to public bodies does not of itself necessarily entail responsibility. General reliance is only one way in which a statutory power will give rise to duty of care. Its justification derives from the public nature of the


\textsuperscript{105} \textit{Ibid.}, at 953-55.
responsibility. What sets the public authority apart is both the devolution of responsibility from the State, and the mandate from the electorate. The public authority is therefore more likely to be responsible where its actions are in and for the public interest. In the example given earlier, the maintenance of a lighthouse on a headland by a private owner may give rise to a duty of care where the reliance of the populace becomes notorious. But the duty of care would be more likely to arise, assuming the same degree of reliance and notoriety, if the lighthouse were operated by a public body in exercise of its power to do so.

Nonetheless, the reliance must be justified. If it is considered that the public do not rely, or are not justified in relying on the authority, then the argument must fail. The authority cannot come under a duty solely because the public expects them to take care. The expectation must be reasonable. This is perhaps the rational explanation of the divergence between England and other Commonwealth jurisdictions (including Canada) on the question of public authority liability in building cases. A possible limitation along the same lines is Mason J.'s view, expressed in the High Court of Australia, that this approach only applies where the powers are "designed to prevent or minimise a risk of personal injury or disability".106

106 Supra note 29 at 464.
In summary, the role of non-causal specific reliance need only be implicit, showing that there is a vulnerability of the plaintiff to the defendant which might deserve the protection of the law. General reliance, on the other hand, must explicitly justify the imposition of a duty on a public authority, where such reliance is justifiable. Yet while both general and specific reliance play a role in the imposition of the duty of care, they play no role in the determination of remedy. Damages are in the compensation interest, not the reliance interest.

IV.3 A separate private law obligation?

Given the distinctions between the two forms of liability identified above, it seems only natural to ask whether the interpretation of Hedley Byrne liability as a duty of care is inappropriate and misleading. The characterisation of the undertaking as involving a duty of care can be blamed in part for the failure to differentiate the two forms of liability, with consequent problems for both liability structures.

Earlier, other reasons for the confusion were identified. The main problem is the identification of Hedley Byrne as the sole source of liability for economic loss. The second, related problem is the failure to appreciate that the duty of care under Hedley Byrne is limited to loss in the reliance interest.

Confusing the two forms of liability has a number of implications. As in any situation where two liability structures are incorrectly forced together, each
suffers the dilution of its constituent elements. The conclusion that failure to appreciate that there can only be liability for economic loss under *Hedley Byrne* leads to spurious findings of “undertakings” and “reliance”. Such findings reduce confidence in the law and weaken the strength of *Hedley Byrne*. An understanding that these are in fact two different forms of liability would allow the courts to develop independent jurisprudence for each. Each form of liability has its own approach to the recovery of loss. Moreover, this would include different approaches to economic loss. Furthermore, the confusion of *Hedley Byrne* liability with economic loss has contributed, in part at least, to support for the view that reliance is not necessary under *Hedley Byrne* liability. Had the two forms of liability been kept separate, there would not have been such pressure on reliance.

The next logical step arising out of this approach to *Hedley Byrne* liability is to consider the suggestion that the law ought to recognise a distinct form of liability based on reliance. This is no new suggestion. Is there sufficient justification for complete separation? A number of factors support such a view.

First, at the level of relations between the parties, a distinction may be drawn between an involuntary burden imposed by law (a duty) and a voluntarily
assumed burden enforced by law (an obligation). In this sense the "duty" under *Hedley Byrne* has more in common with contract than with negligence, for it is voluntarily assumed in a way that duties of care under *Donoghue v. Stevenson* are not.

Second, liability under *Hedley Byrne* is directed solely at reliance loss, and the compensation interest is protected by proximity-based liability. Again, such a view suggests that *Hedley Byrne* has more in common with contract than with tort.

Third, *Hedley Byrne* has a common normative value with reliance-based liability in other areas of law. In estoppel, the normative value is to require individuals to stand by their word when others are likely to rely on them. The normative value of liability under *Hedley Byrne* is almost identical. If *Hedley Byrne* is read as an obligation other than a duty of care, then the comparison is striking. In seeking rationalisation of the law, it seems pertinent to ask whether forms of reliance-based liability ought to be merged.

It is clear that before all forms of reliance loss liability might be united, a number of questions need to be resolved. The most difficult would be the

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integration of estoppel; as its multitudinous varieties and unsettled basis make it difficult to rationalise in the context of reliance. In particular, two aspects of estoppel would be problematic: first, the view that estoppel is evidentiary only and precludes the defendant from bringing certain evidence on certain matters; and second, the view that promissory estoppel provides a basis for awarding expectation damages.

It is beyond the scope of this thesis to consider the different causes of action which protect the reliance interest in order to discern whether they have sufficient ground in common to be considered a whole. The discussion on this topic will therefore be brief.

IV.3.1 Estoppel

Estoppel is a broad-based doctrine which provides relief for parties who have relied to their detriment on representations made by another party. Certain formulations of estoppel bear striking similarities to the outline of liability under *Hedley Byrne*, and it is difficult to quell the suspicion that the two have been mutually influenced. Estoppel is also a doctrine currently in a state of flux, with
case law in Australia\textsuperscript{108} and Canada\textsuperscript{109} taking a unitary and progressive approach where the English courts remain tradition-bound.\textsuperscript{110} It is clearly based in all its forms on the detrimental reliance of one party, however remedies vary.

The suggestion that estoppel is evidentiary only appears to be aimed at restricting its ambit. A similar restriction appears in the oft-cited dictum that "estoppel acts as a shield, not a sword".\textsuperscript{111} Both approaches are however difficult to reconcile with modern formulations of the doctrine. Furthermore, the binary effect of such an approach - creating all-or-nothing alternatives - is ill-suited to reliance loss and provides little flexibility. This is clearest in situations where a deserving defendant has suffered a significant detriment, but where the detriment is nevertheless disproportionately small compared to the recovery. The move to partial recovery tailored to the detriment suffered is in my view appropriate to the action.


\textsuperscript{110} See, for example, Avon County Council v. Howlett, [1983] 1 W.L.R. 605 (C.A.).

The second problem relates to promissory estoppel. Promissory estoppel suggests that a party may be able to enforce a bare promise on the basis of detriment suffered in reliance on the promise. Its remedy is in the expectation measure. Incorporation of this form of estoppel therefore provides a problem for reliance-based forms of action. It must either be distinguished as a variant of reliance liability, which straddles reliance and contract, and retain the expectation measure; or its remedy must be altered to be solely based in reliance. If the latter course, which is expressed in §90 of the Second Restatement of Contracts, is correct, then promissory estoppel could be integrated into the above outline. Recovery would be solely based on detrimental reliance, and the fact that this may be equivalent to the expectation measure will be a matter for the circumstances of the case, and not an argument that the principle is corrupt.

[112] Past discussion of promissory estoppel has suggested that it evidenced the decline, if not the final chapter, in the doctrine of consideration, and the demise of the formal view of contract. See G. K. Gilmore, The Death of Contract (Columbus: Ohio State, 1974). That controversial view does not appear to have been correct, for the courts continue to distinguish between contracts and torts, and between consideration and promissory estoppel.

IV.3.2 Is reliance liability properly interpreted as a duty of care?

It could be argued that the primary division of obligations ought to be according to the nature of the relations between the parties. Such a division does not suggest that reliance loss liability ought to be anything other than a form of tort. The strongest argument which could be made in favour of a completely different division of liability is that, due to the formation of a relationship between the plaintiff and defendant in the formation of the undertaking, there is a commonality in the interests being pursued which distinguishes it from tort. The relations between the parties have as much in common with contract, on this point of view, as they do with tort. Rather than the independent pursuit of separate interests (tort), or the common pursuit of separate interests (contract), reliance liability could be said to involve the quasi-common pursuit of separate interests.

But the use of such an inelegant label does not of itself justify a separate division of private law. In fact, the basic argument of this thesis is that there should be recognition that the duty of care under *Hedley Byrne* applies to only one form of loss: loss in the reliance interest. And because of the similarity with tort, in that there is some independent pursuit of separate interests, there is clearly a duty of care at work. There is not an absolute duty to ensure a certain result, in the sense of a contract. It is a duty to take (or to have taken) reasonable care to
ensure the truth of the representation. The use of a duty of care in negligence therefore seems appropriate - at least in the interim.

The disadvantage of the use of the term “duty of care” is the confusion, and concomitant mistaken application of the law, which has resulted from the correlation of *Hedley Byrne* with *Donoghue v. Stevenson*. All that is needed at present is the recognition that *Hedley Byrne* liability is exclusively restricted to reliance loss.

Second, the mere fact that there is a slightly different normative value in *Hedley Byrne* liability does not compel its division from the duty of care. In fact, if reliance is recognised as a form of harm caused to another, then it seems congruent with negligence in general: a duty to take care not to cause harm to others. In the same way that proximity-based duty of care protects the individual from injury to his other protected interests, the duty of care under *Hedley Byrne* protects the individual from injury to his reliance interest. Obviously, liability for injuring the reliance interest of another must be more restricted than liability for injury to person or property, and so *Hedley Byrne* sets out the criteria on which that liability should rest.

The way forward is to distinguish *Hedley Byrne* from proximity and understand its separate protection in the law of tort. It may be that estoppel develops in such a manner that it can be coalesced with *Hedley Byrne* into a form
of estoppel or reliance liability. At that point a full review of the classification of reliance loss ought to be undertaken.
Part V: Economic loss

I now turn to the implications of this discussion for the recovery of economic loss. Three main points can be made. First, in a technical sense, economic loss is not actually recoverable under the Hedley Byrne structure of liability. The recovery is of reliance loss only, although this may equate to the plaintiff's economic loss. Second, recovery of economic loss is not limited to the Hedley Byrne structure of liability. Third, economic loss raises specific questions of policy and justification which are the true source of difficulty in determining its recovery.

The approach I therefore advocate is that the recovery of economic loss can be considered without resort to questions of undertakings and reliance. Once the specific considerations related to economic loss are recognised, a claim for economic loss need not be treated differently from any other; the plaintiff must show a duty of care owed specifically to him; a breach of that duty; and that the loss claimed is not excluded from recoverability.

V.1 What is economic loss?

As set out above at III.4.2, economic loss is damage to the plaintiff's intangible property, and is distinguished from physical damage. Pure economic loss is "financial loss suffered by a plaintiff which does not flow from any
Consequential economic loss flows from damage to the plaintiff's person or property, and is a part of the measure of the physical damage to the plaintiff.

Early cases did not identify economic loss as a separate form of loss. The courts approached the claims as broad questions of the appropriateness of liability. The earliest cases dealt with questions of economic loss consequential on physical damage, but where the damage was to property which did not belong to the plaintiff. The courts pointed to the extent of liability which would result if such a claim were allowed. In *Simpson & Co. Ltd. v. Thomson,* Lord Penzance stated:

Such instances [of liability] might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.

The early cases make useful comments related to indeterminacy of liability and proportion of fault to liability; but they are not helpful in assessing
the extent of any rule against the recovery of economic loss. They consider the matter solely as a question of indeterminate liability. However, because economic loss clearly attracts difficult questions of policy which need to be addressed in individual cases, it needs to be understood as a special form of loss.

V.2 Considerations relating to economic loss

I look first at the indeterminacy of liability which may result if claims for economic loss are allowed. Second, I look at the general nature and position of economic loss in the modern economic system, for it has a strong effect on the scope of recoverable losses.

Indeterminacy of liability is no more or less than a floodgates argument: if the claim is allowed, the scope of the duty of care will in future be impossible to limit. The objection was concisely expressed by Cardozo J. in *Ultramares Corp.* v. *Touche.* The case related to a claim against accountants for negligently certifying the correctness of a company’s accounts:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms
are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.\textsuperscript{118}

Indeterminacy is detailed as involving not only indeterminacy of the number of plaintiffs, but also of the size of their losses.\textsuperscript{119} But in one sense to say that indeterminate liability is the reason economic loss is irrecoverable is to assume that there are no other limits on liability.\textsuperscript{120} Yet as noted below, liability for economic loss is extremely limited because economic injury is an integral assumption of our economic system. Rights which would support the recovery of economic loss would in many cases contradict assumptions of the economic system.

It is also useful in this regard to also consider exactly what would be recoverable if such claims were allowed. For example, in\textit{Weller v. The Foot and

\textsuperscript{118} Ultramares Corp. v. Touche 255 N.Y. 170, 174 N.E. 441 (C.A. N.Y. 1931) at 444.

\textsuperscript{119} Stapleton uses the example of a car breaking down in a busy commercial tunnel as a result of the defendant's negligence. The defendant could in theory be liable not only to each and every driver in the tunnel but also for all their economic losses, which could arguably stretch ad infinitum. But such an example ignores the limit of proximity on the foreseeability of harm and the limitation of the class of plaintiff. While the defendant will owe all other drivers in the tunnel a duty of care in relation to a car accident causing physical harm, there is simply no duty in relation to their economic interests - not because of indeterminacy of liability but because such losses are disadvantages only. Stapleton, supra note 5.

\textsuperscript{120} As Benson puts it, "[u]nderlying this justification is a conception of liability for negligence, usually associated with the now overruled case of\textit{Anns}, that defines proximity solely in terms of the creation of a risk of foreseeable loss. It is not difficult to
Mouth Disease Research Institute\textsuperscript{121} the Institute was sued for profits lost by local cattle auctioneers, when (allegedly due to its negligence) the disease broke out on farms in the area and local cattle sales were prohibited. The Institute would, had the claim been proven, been liable only for the lost profits on sales of cattle, and the value of destroyed cattle, from the farms which were closed. In Ultramares Corp. v. Touche\textsuperscript{122} the maximum liability of the accountants would have been the amount of credit extended to the company in reliance on the accounts.

These maximums of liability seem more determinate than indeterminate, but perhaps this is simply because it can be articulated. The fact that liability may be indeterminate may be taken as a good indication that there is a problem with the foundation of liability; but alone it cannot provide a good reason for limiting that liability.\textsuperscript{123} Alternatively, the implication of indeterminate liability might support limitation not on the ground that liability would be unreasonably large, but on the ground that it would be unreasonably large in relation to the defendant's fault. The purpose of the law is not to compensate every single loss

\textsuperscript{121} Mouth Disease Research Institute, (1965) 1 All E.R. 560.\textsuperscript{122} Ultramares Corp. v. Touche, (1931) 1 Q.B. 569.\textsuperscript{123} Supra note 118.
which results from the defendant’s negligence, but to correct those which are sufficiently proximate that they must be considered wrongs. Implicit in a limitation based on fault is the view that some losses are purely accidental, or so remote from the cause that the causal chain will not support liability. Such losses must be accepted in the course of any activity.

The question of indeterminate liability also leads back to the determination of the class of persons to whom a duty of care will be owed. The duty can only be owed to a foreseeable class of plaintiff, and the foreseeability of the plaintiff is a limit which keeps liability from being indeterminate. That foreseeability cannot be allowed to extend too far, for it will otherwise become a general duty of care. On this view, Cardozo J.’s objection is that the plaintiff could not be considered foreseeable because the class of persons to whom the duty would be owed would be disproportionately large in the circumstances.

Nevertheless, the allay of the concern of indeterminate liability, for example by fixing the defendant with knowledge of the specific plaintiff, has in recent cases been used as the key to allowing recovery of relational economic
loss. But it is clearly wrong to accept that the objections to liability for economic loss are answered solely by reference to the number of plaintiffs if the claim were allowed. The only proper approach is to ask whether there is a sufficiently close relationship between the parties that a duty of care would be owed, whether that means one plaintiff or fifty. Numerical issues seem not to have deterred the courts in class actions for physical damage, particularly in the so-called "toxic torts".

The second – and greater – problem with recovery for economic loss is that economic injury is essential to the capitalist economic system. The infliction of economic harm is encouraged in the spirit of competition in business. The plaintiff's rights and the defendant's liability are limited in order not to contradict this principle:

In the case of liability for economic loss, the line of thought that limits must be imposed upon a generalised liability is based on good sense. It is to the effect that the philosophy of the marketplace presumes that it is lawful to gain profit by causing others economic loss, and that recognised wrongs involving interference with others' contracts are limited to specific intentional wrongs, such as inducing a breach of contract or conspiracy.  

124 See, for example, Canadian National Railway Ltd. v. Norsk Pacific Ltd. (1992), 91 D.L.R. (4th) 289 (S.C.C.), per McLachlin J esp. at 376-77; and Bow Valley Husky, supra note 26 at 412-413, per McLachlin J.

In a nutshell, this is the strongest limit on the recovery of economic loss. Liability for negligently causing economic loss cannot be imposed in situations where intentionally doing so is encouraged. Many losses, although clearly foreseeable, cannot therefore be recoverable whether caused intentionally or negligently. A defendant who opens a business competing with the plaintiff cannot be liable for the loss of profits which is suffered by the plaintiff. If this is a loss, it is not recognised by the law of tort. It is a loss of an advantage (and therefore irrecoverable) rather than an infringement of the plaintiff’s rights.

The use of the labels “right” and “advantage” provide a way of showing that there are numerous and extensive losses which are not – and ought not to be – recoverable under the law of tort. But these labels provide no further insight into why economic loss ought not to be recoverable, referring the question back to the determination of duty. Indeed, the determination of duty appears to be the actual question which is being asked when considering whether economic loss is recoverable. While strong objections can be made to the recovery of economic loss, and the situations in which it is recoverable can be rationalised to a certain degree, the answer cannot be definitively ‘yes’ or ‘no’, but only a ‘maybe’ and a list of considerations.

A third, limited, reason for the exclusion of economic loss is that not infrequently it involves an expectation interest, in the form of a failure to confer a benefit. For example, a developer may decide not to build a large hotel after other
companies have bought adjoining properties with the aim of profiting from the development. That decision cannot result in liability for the lost profits of the other companies, for this is mere failure to confer a benefit or expectation, and no right has been infringed.

Therefore, subject to these considerations, the limited recovery of economic loss for breach of a duty of care under Donoghue v. Stevenson – and independent of Hedley Byrne – ought to be possible.
Part VI: White v. Jones

A recent House of Lords decision, White v. Jones,\(^{126}\) provides a clear example of a situation which involves economic loss falling outside the understanding of Hedley Byrne I have set out above. Its strong merits – in an intuitive sense – impel a rationalisation, yet this is a difficult task.

\textit{VI.1 The decision of the House of Lords}

The plaintiffs were intended by their father to be the beneficiaries of his will. Although he instructed the defendant solicitors to draw up a new will, they took some time in doing so, and the testator died before the new will was executed. The plaintiffs received nothing under the existing will. They therefore sued the solicitors in tort. The House of Lords held that they were entitled to recover.

It is clear that the defendant solicitors had breached their contract with the testator, but he had suffered no appreciable loss. His estate was in no way diminished, though it was distributed in a different way. The plaintiffs had

\(^{126}\) White v. Jones, supra note 3.
suffered loss but had no recourse in contract against the solicitors. They were unable to make a claim in negligence based on proximity because of the perceived restriction of liability for economic loss to Hedley Byrne. Yet in terms of Hedley Byrne liability, although an undertaking could — at a stretch — be found in the promise to the testator, the plaintiffs had clearly not relied on the solicitors, and could not show any detriment resulting from reliance.

The House of Lords allowed the claim by 3-2, holding that there did not need to be reliance in order to support liability under Hedley Byrne.127 In the majority, Lord Goff reasoned that there ought to be a remedy in such circumstances, and that the head of liability defined in Hedley Byrne was the appropriate one. Lord Browne-Wilkinson’s analysis is by far the most extensive in the majority. After reviewing the case law, including a new interpretation of Hedley Byrne based on Nocton v. Lord Ashburton, his Lordship concluded that reliance was not an essential requirement of liability. Lord Browne-Wilkinson drew this conclusion by reference to fiduciary duties, which were in part the source of the special duty held to exist in Hedley Byrne:

The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B’s

127 The majority was formed by Lords Goff, Browne-Wilkinson, and Nolan; the minority by Lords Keith and Mustill.
affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. The importance of these considerations for present purposes is that the special relationship (i.e. a fiduciary relationship) giving rise to the assumption of responsibility held to exist in Noctor's case does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B's affairs.

Moreover, this lack of mutuality in the typical fiduciary relationship indicates that it is not a necessary feature of all such special relationships that B must in fact rely on A's actions. If B is unaware of the fact that A has assumed to act in B's affairs (e.g. in the case of B being an unascertained beneficiary) B cannot possibly have relied on A. What is important is not that A knows that B is consciously relying on A, but A knows that B's economic well being is dependent upon A's careful conduct of B's affairs.128

Lord Browne-Wilkinson continues with the comparison to fiduciary relationships, using this in support of his view that special relationships there is no essentiality about the requirement of mutuality, which also supports the requirement of reliance. All that equity requires is a sufficiently formal declaration of responsibility. Lord Browne-Wilkinson therefore posits the following view of the state of the law after White v. Jones:

The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such a special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these

128 White v. Jones, supra note 3 at 713.
situations the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. Such relationship can arise even though the defendant has acted in the plaintiff's affairs pursuant to a contract with a third party.\(^\text{129}\)

Although Lord Browne-Wilkinson correctly depicts fiduciary relationships in equity, there appears to be no proper justification for his direct application of equitable jurisprudence in a tort case. The only apparent justification is the analogy to the special relationship in equity used when the House was developing the special relationship in *Hedley Byrne*. Beyond this, there is no clear justification for further importation of the concept. Indeed, there are numerous factors which militate against the direct use of equitable concepts.

Not the least of these is the distinct difference in the model of the relationship between the plaintiff and the defendant. In tort, the two parties are conceived to be in the independent pursuit of separate interests, and have come into contact through the wrong which has been committed. In equity, the interests of the fiduciary are subservient to those of the beneficiary – one party acts in the interests of the other. The two are simply not equivalent, and although principles can be traded from one area to the other, this must be done with an eye to these differences. Particular doctrines may in fact be linked so closely to the different

\(^{129}\) *Ibid.* at 716.
normative values that they cannot be borrowed without bringing some of those normative values with them.

In *Hedley Byrne* the House of Lords cannot have intended to import the entire approach of equity — whereby the interests of the defendant are subordinated to those of the plaintiff — into tort. The House borrowed the concept of a special duty in order to show how one party could become responsible for negligently misleading another. It is to be expected that in fiduciary relationships no reliance will be necessary where one party is required to act in the interests of the other. But in tort the parties are not expected to act in each other's interests. The only limitation on their behaviour is that they are expected not to injure each other. However formal the undertaking, it cannot be sufficiently serious to invoke fiduciary principles and still remain a doctrine of tort.

In the minority, Lord Mustill, with whom Lord Keith agreed, took a view of *Hedley Byrne* consistent with that in this thesis:

*Hedley Byrne* was not seen by the House as being in a direct line from *Donoghue v. Stevenson*. The situations were far removed, and the solutions adopted by the House in the two cases were not at all the same. In *Donoghue v. Stevenson* the liability was derived by the court from the position in which the parties found themselves. It was imposed externally. In *Hedley Byrne* all the members of the House envisaged, perhaps in slightly different ways, that the liability arose internally from the relationship in which the parties had together chosen to place themselves. ... [T]he legal responsibility accepted or undertaken by the person in question was one where the acceptance or undertaking was a
reflection of the relationship in question. On the facts of Hedley Byrne this relationship was bilateral... What conclusion the House would have reached if the element of mutuality had been absent if, for example, the defendants had for some reason despatched the reference spontaneously, without prior request cannot be ascertained from the speeches, but even if a claim had been upheld the reasoning must, I believe, have been fundamentally different.  

Later on, his Lordship concluded:

My Lords, I am obliged to say that in my opinion the reasoning of Hedley Byrne and Henderson does not apply to such a case. If a cause of action exists at all it must fall into the first, not the second, of the two categories recognised by Lord Devlin. It is not a responsibility voluntarily accepted or undertaken, but is "imposed by law upon certain types of person in certain situations."  

Lord Mustill then examined the possibility of recovery under Donoghue v. Stevenson, and concluded that it was not possible to find a duty of care based on proximity, given the current state of precedent.

The decision in White v. Jones is clearly in conflict with the analysis of the law presented in this thesis. I have argued above that reliance is the central aspect of liability under Hedley Byrne, and I continue to take that view. First, I will discuss why White v. Jones is impossible to accommodate within the structure of liability under Hedley Byrne. Second, I will consider the alternative

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130 Ibid. at 729.
131 Ibid. at 731.
approach, considered briefly by Lord Mustill: whether it is possible to rationalise the case within liability under *Donoghue v. Stevenson.*

**VI.2 Altering the structure of liability under Hedley Byrne**

The majority in *White v. Jones* held that the basis of liability under *Hedley Byrne* did not require that there be both undertaking and reliance. The mere assumption of responsibility by the defendant would be sufficient. Where there is no reliance, but an undertaking of responsibility, the defendant is responsible for foreseeable harm resulting from her negligence. I have dealt with this issue in part in IV.1 above, and to some extent that will be repeated here.

A number of questions arise. First, how is an undertaking to be identified if not by reference to reliance? Second, what limit is there on the defendant’s liability? Third, what is the basis for recovery?

Above in IV.1 I argued that, in cases of an undertaking, it is not possible to allow recovery in both the reliance interest and in what I have termed the compensation interest. The majority approach in *White v. Jones* would however take the view that there can be recovery for either (or even perhaps for both) depending on the circumstances. Lord Browne-Wilkinson specifically adverts to the different forms of recovery, noting that reliance is essential in cases of negligent misstatement as part of the causal link to harm. His Lordship accepts that foreseeability of reliance is an essential element of liability in such cases, but
suggests that it is not essential in cases of negligent action. Finally, Lord Browne-Wilkinson relied on *Henderson v. Merrett Syndicates Ltd.*,\(^{132}\) decided not long before *White v. Jones*,\(^{133}\) which held that a defendant could be subject to concurrent liability in contract and in tort. In *Henderson v. Merrett Syndicates*, liability in tort was founded on the fact that the defendant was responsible for the affairs of the plaintiff through a contract with a third party.

As I argued above, this approach to undertakings is problematic. Without the question of the foreseeability of reliance the proper identification of an undertaking is a difficult exercise, for there is no obvious delimitation between bare promises and undertakings. Reference to foreseeable reliance or intention to encourage reliance has little purpose. Indeed, the defendant might be bound by any statement which would benefit another.

Most difficult of all is the basis for recovery. Providing a compensatory award for loss resulting from an undertaking is effectively an award of expectation damages in tort. Assume that the defendant has acted in such a way as to be said to have assumed responsibility for the plaintiff's affairs, that there is no contract with the plaintiff, and that the assumption of responsibility does not

fall within equity. The plaintiff does not rely on the assumption of responsibility. If the defendant now breaches the duty which is said to have arisen, what is the nature of the harm which results? The plaintiff is by definition not in a worse position than prior to the undertaking.

The only way in which he can be conceived to be worse off is by considering that the undertaking was to confer a benefit on him. Breach of the undertaking is therefore a failure to confer a benefit, a benefit which was promised by the assumption of responsibility. Yet the ground rule in private law is, as discussed above, that there is no duty to confer a benefit on others. Because there is no contract, and no reliance, there is no basis for enforcing such a duty. The “undertaking” in these circumstances is reduced to a bare promise, and therefore ought to be unenforceable.

Allowing such a form of action infringes not only the basic rule against conferral of benefits, but also undermines the law of contract. It does so in a much more serious way than liability for reliance was said to have done, for it completely removes any requirement of consideration of any type. Reliance was

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133 *Henderson v. Merrett Syndicates Ltd.* was heard as a matter of urgency immediately after the hearing of *White v. Jones*, and the decision was given before that in *White v. Jones*. 
said by some to have debased the value of consideration; this form of action would remove it altogether.

In conclusion, allowing compensatory damages in this instance completely skews the basis of liability under *Hedley Byrne* and has profound implications for the underlying assumptions of the law of tort. But this conclusion does not necessarily mean that the result was wrong. The alternative analysis is liability in the form of a duty of care under *Donoghue v. Stevenson*. The actions which Lord Browne-Wilkinson considered to be an assumption of responsibility would be relevant to the imposition of a duty of care based on *Donoghue v. Stevenson*, and not under *Hedley Byrne*. This is consistent with the suggestion above that *Donoghue v. Stevenson* liability is the source of protection of the compensation interest in negligence, where *Hedley Byrne* liability protects the reliance interest.

I now turn to discuss this possibility.

**VI.3 Extending liability under Donoghue v. Stevenson**

If there is any way to rationalise the decision in *White v. Jones*, I suggest that it is through liability under *Donoghue v. Stevenson*. This approach was ruled out by the House of Lords because of its insistence that the only recourse for
economic loss is through *Hedley Byrne*, although the possibility was briefly mentioned in the speech of Lord Mustill.134

Under this approach, the circumstances of the defendant, combined with the relationship between the defendant and the plaintiff, give rise to a duty of care based on proximity. Whether through the contract between the defendant and a third party, or otherwise, the defendant has come into a position where damage to the plaintiff is foreseeable. Sufficient proximity to give rise to a duty of care may result from the circumstances. The acceptance by the defendant of responsibility may assist in giving rise to a duty.

The real problem which stands in the way of this approach is the question whether the plaintiff is in fact receiving expectation damages without sufficient reason for the award. A failure to confer a benefit without a duty to do so is no loss. In what way can the plaintiff be said to have suffered harm?

In support of liability, the following analysis of the harm suffered by the plaintiff might be offered. The solicitor is not asked to confer a benefit on the plaintiff; he is asked to provide his services in meeting the requirements of the law for the conferral of that benefit. These services are essential for most of the

134 *White v. Jones*, *supra* note 3 at 725.
population in executing wills. It is irrelevant for this purpose that the testator may subsequently revoke the will, and that even if fully executed the plaintiff beneficiary would only have a *spes successionis*. Damage can only occur if the testator dies while the will for which the solicitor was employed was pending\(^\text{135}\) or, in a case of negligent execution, where the will is current.\(^\text{136}\) In each the *spes* of the plaintiff beneficiary would have crystallised into a legacy but for the negligence of the solicitor. From the point of view of the testator and of the beneficiary, the solicitor's negligence has thwarted the gift. Thus, arguably, the solicitor has not been employed to confer a benefit on the plaintiff beneficiary, but to assist the testator in effecting her desire to confer a benefit on the plaintiff.

A second analysis in favour of liability is based in misfeasance. If it could be considered that the defendant solicitor has embarked on the action requested by the testator then he could be considered to be under a duty of care to carry out the task with reasonable care. This is a doctrine most easily seen in the rescue cases (as mentioned above). The defendant is under no duty to rescue the plaintiff, but if he begins to act then he is under a duty to act with reasonable care. The difficulty is in knowing when the task has been undertaken.

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\(^\text{135}\) As in *White v. Jones*.

Combining the two analyses, the defendant solicitor has commenced action to allow the testator to confer a benefit on the plaintiff. In the circumstances, like that of the rescue cases, he has commenced conferring a benefit on the plaintiff. Again, like the rescue cases, policy reasons related to the nature of testamentary laws could support the imposition of liability. In the rescue cases this seems to stem from the interposition of the defendant rescuer between the plaintiff and alternate rescuers (whether they exist or not). By analogy, the interposition of the defendant into the relationship between the testator and the plaintiff as intended beneficiary may be sufficient to support liability.

The circumstances appear to favour rather than detract from the imposition of liability. The only objection to liability which has not properly been answered is whether this is an award of an expectation and an enforcement of a bare promise rather than a purely compensatory measure. The objection is, I suspect, fatal to the argument.

The singular difficulty of the case arises from the formal requirements of the statutes of wills, the unique position of the lawyer to advise on making such wills. It also stems from the rule of privity which precludes the plaintiff beneficiary from suing on the contract between the testator and the solicitor. If the problems caused by these two cannot be resolved within the current structure of the law, the courts ought not to resort to the creation of tortuous forms of
liability in order to rectify the perceived injustices which result from these doctrines.

**VI.4 Approaches in analogous cases**

It is instructive to consider the several cases ruling on similar fact situations, both in England and in other common law jurisdictions. In *Ross v. Caunters*, Megarry V.-C. allowed exactly such a claim. His Honour noted in particular that there was no reliance in the case, and nor would there be in such cases. What is interesting, however, for present purposes, is that Megarry V.-C. rejected the view that the case fell within *Hedley Byrne*, concluding that “the true basis of liability flows directly from *Donoghue v. Stevenson* and not via *Hedley Byrne*.“

His Honour discussed the 1970 decision of *Ministry of Housing and Local Government v. Sharp*. In that case a clerk at the defendant local authority had negligently failed to note the plaintiff Ministry’s charge over a property in a title search, with the result that the charge had been lost. Lord Denning considered

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137 * [1980] Ch. 297.
that the case fell within *Hedley Byrne*, suggesting an extension along the lines eventually taken in *White v. Jones*. Lord Justice Salmon, whose judgment Megarry V.-C. preferred, took the view that the case fell within the principles of *Donoghue v. Stevenson* and not *Hedley Byrne*. After reviewing the case, Megarry V.-C. commented:

> [T]hree features of the case before me seem to stand out. First, there is the close degree of proximity of the plaintiff to the defendants. There is no question of whether the defendants could fairly have been expected to contemplate the plaintiff as a person likely to be affected by any lack of care on their part; or whether they ought to have done so ... This is not a case where the only nexus between the plaintiff and the defendants is that the plaintiff was the ultimate recipient of a dangerous chattel or negligent misstatement which the defendants had put into circulation. The plaintiff was named and identified in the will that the defendants drafted for the testator. Their contemplation of the plaintiff was actual, nominate and direct. ... Second, this proximity of the plaintiff to the defendants was a product of the duty of care owed by the defendants to the testator: it was in no way casual, accidental or unforeseen. The defendants accepted a duty towards the testator to take reasonable care that the will would, *inter alia*, carry a share of residue from the testator to the plaintiff. ... [T]hat duty included a duty to confer a benefit on the plaintiff. When a solicitor undertakes to a client to carry through a transaction which will confer a benefit on a third party, it seems to me that the duty to act with due care which binds the solicitor to his client is one which may readily be extended to the third party who is intended to benefit. Third, to hold that the defendants were under a duty of care towards to plaintiff would raise no spectre of imposing on the defendants an uncertain and unlimited liability.

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140 As Megarry V.-C. noted, the third judge in the case, Cross L.J., was doubtful but felt "unable to dissent".

141 *Supra* note 137 at 308.
His Honour concluded that the relationship between the plaintiff and defendant was, on *Donoghue v. Stevenson* principles, sufficiently close to warrant the recovery of the loss, even though it was economic loss.

The Vice-Chancellor accepted that the judgment would be opening up the prospect of indeterminate liability for economic loss. However, his Honour concluded that, because there was clearly no possible test which would exclude recovery in the case, he did not need to determine the test to be applied.

This clear confidence was not, however, borne out. Although the case remained unchallenged as authority on the point — it was regarded as a decision not to be interfered with by Lord Nolan in *White v. Jones*\(^{142}\) — only one further step towards recovery for economic loss under *Donoghue v. Stevenson* was attempted in England. In *Junior Books v. Veitchi Co Ltd*\(^{43}\) the plaintiff had contracted for the construction of its factory. The defendant was sub-contracted to construct the flooring, but did so negligently. The floor had to be replaced, and the plaintiffs sued for the cost of doing so. The House of Lords concluded, applying *Donoghue v. Stevenson*, that the defendants were liable. The case incited extensive debate and criticism, however, and the House of Lords

\(^{142}\) *Supra* note 132.
subsequently distanced itself from the decision, which must now be regarded as defunct.144

*Junior Books* presents some problems on its facts, not least of which is the question of the impact of the contractual relations which brought the parties together. But insofar as it sought to determine the limits of recovery for economic loss on the basis of *Donoghue v. Stevenson*, it does I suggest represent a step – albeit perhaps an incautious one – in the right direction for the recovery of economic loss. Lord Oliver recognised this line of argument in *Murphy v. Brentwood District Council*:

> It is not necessarily to be assumed that the reliance cases form the only possible category of cases in which a duty to take reasonable care to avoid or prevent pecuniary loss can arise. *Morrison Steamship*, for instance, was clearly not a reliance case. Nor, indeed, was *Ross v. Caunters* so far as the disappointed beneficiary was concerned.145

This one note of relief has since been drowned in a number of cases identifying *Hedley Byrne* as the sole route to recovery.

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144 The signs of change are visible in *Peabody*, supra note 28, and *The Aliakmon*, supra note 125, but *Junior Books* was not fully repudiated until *D & F Estates Ltd. v. Church Commissioners for England*, [1989] A.C.177 (H.L.).

In other countries, however, different approaches have been taken. In Canada, in *Whittingham v. Crease & Co* the British Columbia Supreme Court had held prior to *Ross v. Caunters* that in this type of case a duty of care arises on the basis of *Donoghue v. Stevenson*.

In New Zealand, the Court of Appeal applied *Ross v. Caunters* directly only a few years later, accepting the view that the case was based not on a special relationship derived from *Hedley Byrne*, but on a direct application of *Donoghue v. Stevenson*. The case is not unusual in the broad approach taken in applying the *Anns* test in New Zealand. Proximity is the brake on reasonable foreseeability, but economic loss is not treated with the caution which one might expect after reading the English cases.

In Australia, the High Court recently followed *White v. Jones* in *Hill v. Van Erp*, overturning the previous Australian precedent of *Seale v. Perry*. The judges almost unanimously rejected the development of the law put forward

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148 Supra note 136.
149 [1982] V.R. 193 (S.C.(Vic.)). Lord Cooke reports in his 1997 Hamlyn lecture that the plaintiff’s appeal to the High Court was stopped by a settlement in full on the part of the
by Lord Browne-Wilkinson in *White v. Jones*, but held (McHugh J dissenting) that the solicitor nevertheless owed a duty of care. The High Court was to some extent assisted by its earlier decision in *Caltex Oil (Australia) Pty Ltd. v. The Dredge "Willemstad"*. In that case the Court had suggested that there could be liability for economic loss outside of *Hedley Byrne* on the simple basis of proximity.

**VI.5 Conclusion**

While the decision in *White v. Jones* may be right in the result, the methodology and alterations to the law seem to have been forced by the situation in which the House of Lords has found itself. The sealing off, after *Junior Books*, of any recourse for economic loss other than through *Hedley Byrne* seems to have been the error which lead the House to this situation. A quick comparison with the approach taken in other jurisdictions makes this clear.

The jurisprudence in *White v. Jones* is clearly open to strong criticism. The case places an interpretation on *Hedley Byrne* which cannot be sustained

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150 *Caltex Oil (Australia) Pty Ltd. v. The Dredge "Willemstad"* (1976), 136 C.L.R. 529 (H.C.A.). The latest discussion of the issue by the High Court of Australia seems to be in...
against the overarching principles of the law of tort. The better solution to the case would appear to be to find a duty of care within *Donoghue v. Stevenson*, in the same way that the courts in Australia, New Zealand, and Canada have done. However, this raises questions relating to the principles for recovery of economic loss which are beyond the scope of this thesis.

Part VII: Conclusions

At the start of this thesis I quoted Fuller & Perdue’s study, and their conclusion that the reliance interest was the driving force which overarched contract damages. I have applied that analysis to the law of negligence in order to determine the role of reliance in negligence, with particular emphasis on the decision of *Hedley Byrne v. Heller*.

Looking at the structure of liability in negligence, it quickly becomes clear that there is a marked difference between liability under *Hedley Byrne* and liability under *Donoghue v. Stevenson*. These two cases were some way from each other when *Hedley Byrne* was first decided, and it seemed that they were part of the same family. But while the initial growth of the two forms of liability could have been understood as part of the same overall design, as they have come to overlap, the differences between them have become more and more apparent. Nowhere is this more apparent than with economic loss. The pressure which has come to bear on *Hedley Byrne* liability from its identification with recovery for economic loss has been extraordinary. There are clear problems when the courts seek to find undertakings and reliance where there patently are none.

The way to extricate the law from this tangle is, I suggest, to understand that reliance is the basis of liability under *Hedley Byrne*, and that liability for economic loss – as has already been recognised by common law jurisdictions
around the world – can arise without reference to *Hedley Byrne*. Then the courts will be able to consider more freely the considerations at play in economic loss, without searching – in meritorious cases – for fictional undertakings and spurious reliance.

In examining the nature of liability for negligent representations, I argued that liability can only avoid infringing the parameters of private law if it is based in reliance. The combination of the possibility of recovery for reliance and restriction of the expectation measure to contract cases forces this conclusion. There could be no recovery in the compensation or the expectation interest. Taking that into account, it is abundantly clear that actual detrimental reliance is utterly central to this form of liability. In the same way that *Donoghue v. Stevenson* and other causes of action in the law of tort protect certain interests of the individual, liability under *Hedley Byrne* protects the reliance interest. As one would expect, the scope of situations in which an individual is entitled to the protection of the law is restricted. The form of liability under *Hedley Byrne*, like that in estoppel, sets out the structure of that restriction.

I have noted also that reliance is also present in other forms of negligence. But the crucial difference is in how that reliance contributes to harm. Reliance in the *Hedley Byrne* sense is part of the causal chain from representation to harm. The negligence of the defendant causes that reliance to be harmful, or to become
harmful, depending on whether the reliance took place before or after the negligence. In liability under *Donoghue v. Stevenson*, reliance is not causal. It may have contributed to the plaintiff's vulnerability to the defendant; but it does not link a representation to the plaintiff's harm. Reliance in a general sense, however, may contribute to the imposition of a duty of care, particularly in the case of public authorities and actions for public purposes.

Finally, I note also that there are numerous cases where there can be liability "concurrently" in both forms of negligence. In fact, any case involving a representation and reliance could be subjected to an analysis based on proximity. The determination of which form of liability ought to be applied is in the first place determined by the nature of the harm claimed. It will of course also be affected by the question of whether one or other is not likely to be successful.

I also canvassed the argument that reliance ought therefore be used as the basis of a separate form of liability. It seems to me that such an action could at present only be considered radical and possibly undesirable. It is not clear at this stage whether reliance-based liability can be justified, or whether it is simply another form of tort liability. The formation of a separate private law obligation based on reliance would at the basic level also require the re-formulation of the doctrine of estoppel. Certainly the doctrine is in a state of flux in the commonwealth at present. It may be that *Hedley Byrne* should be seen as a form
of estoppel; but the question of the role a duty of reasonable care plays in the cause of action needs to be addressed before such a change can be made. Negligence is not a component in estoppel cases. It is unclear which way reliance-based liability would develop.

At the broader theoretical level, any suggestion that a wider estoppel doctrine (including Hedley Byrne liability) might form the basis of a separate division of private law, rather than a form of tort based on reliance, would require further alteration of the basis of the classification of actions. At this point, however, it does not seem that a wider estoppel doctrine of that type is warranted outside of the law of tort. As long ago as Fuller and Perdue were writing, other commentators were calling reliance a “tort principle”, and there does not seem to be any reason yet to disagree with them.

In any event, the first and most important step which must be taken is the distinction of Hedley Byrne and understanding that it is restricted to the recovery of reliance loss. Such an alteration to the law would also open the way to

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considering the proper application of the principles of *Donoghue v. Stevenson* to economic loss. Once that has been achieved, a review of the torts of negligence – for there would be two rather than one – could also consider the state of reliance-based liability across private law.
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