## REASSERTION OF THE OLD APPROACH TO DUTY IN NEGLIGENCE

### *Yuen Kun-yeu* v. *Attorney General of Hong Kong*[1]

THIS case, which went right up to the Privy Council from Hong Kong, involves a pure omission and raises issues relating to the duty of a statutory body to the public, the obligation to control others for the protection of another, and the recovery of purely economic loss. The issue of law discussed is the question of approach in determining the existence of duty in the tort of negligence in these exceptional situations (outside the settled area of physical interference). This is the pertinent part of the Privy Council decision.

The Privy Council differed in its formulation of the duty of care in these special negligence situations from the, by now, fairly well recognised approach taken by the House of Lords in *Anns* v. *Merton London Borough.*[2] In this, the Privy Council found support in the High Court of Australia in *Sutherland Shire Council* v. *Heyman.*[3] Together these two highest courts have set the clock back and reasserted the element of confusion (the place of policy considerations) which inherently exists in the legendary Atkinian formulation of the duty of care in the tort of negligence. The note will deal with the decision first, then the Privy Council's approach to duty, and finally comment on both.

#### *The Decision*

The facts of the case are simple. The appellants were four individuals who deposited money with a registered deposit-taking company (American and Panama Finance Co. Ltd.) in Hong Kong. The company went into liquidation and the appellants lost their deposits. The appellants claimed against the respondent, the Attorney-General of Hong Kong (representing the Commissioner of Deposit-taking Companies), in negligence in the discharge of the commissioner's functions under the Hong Kong Deposit-Taking Companies Ordinance (Cap. 328) for the lost deposits and interest.

The issue was put by Lord Keith of Kinkel:

> "The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in a fraudulent or improvident fashion."[4]

His Lordship later posed the issue more specifically:

> "The primary and all-important matter for consideration, then, is

[1] [1987] 2 All E.R. 705.
[2] [1978] A.C. 728.
[3] (1985) 59 A.L.J.R. 564.
[4] [1987] 2 All E.R. 705 at p. 709.

> whether in all the circumstances of this case there existed between the commissioner and would-be depositors with the company such close and direct relations as to place the commissioner, in the exercise of his functions under the ordinance, under a duty of care towards would-be depositors."[5]

It was held by the Privy Council on four distinct grounds that there was no duty owed by the commissioner to the depositing public and, therefore, no liability in negligence. First, the Commissioner of Deposit-Taking Companies (representing a statutory body) did not owe the appellant depositors (individual members of the public) a duty to protect them against losses assumed by them in depositing with an unsound deposit-taking company. The failure to provide this protection against losses under the governing Ordinance was considered a policy, not an operational, matter:

> "It might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi-judicial in character as is demonstrated by the right of appeal to the Governor in Council conferred on companies by s 34 of the ordinance, and the right to be heard by the commissioner conferred by s 47. The commissioner did not have any power to control the day-to-day management of any company, and such a task would require immense resources. His power was limited to putting it out of business or allowing it to continue. No doubt recognition by the company that the commissioner had power to put it out of business would be a powerful incentive impelling the company to carry on its affairs in a responsible manner, but if those in charge were determined on fraud it is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed on such a statutory framework."[6]

Although *Anns* v. *Merton London Borough*[7] was not specifically referred to by the Privy Council in coming to this decision, this first ground merely applied *Anns.* The difference on the facts between this case and the *Anns'* line of cases is that the claim here involved the failure of a statutory power to save depositors from ill-fated deposits, as opposed to the previous actions which involved the failure of a statutory power to protect owners and occupiers against structural defects. This difference is not significant in respect of the duty here in the tort of negligence.

Secondly, there was no duty by the commissioner to supervise the deposit-taking company for the protection of the appellant depositors

[5] *Ibid.,* at p. 712.
[6] *Ibid.,* at p. 713.
[7] [1978JA.C. 728.

because there was insufficiency of control for the duty to arise:

> "[A]ccording to the appellants' averments there had been available to [the commissioner]... information about the company's affairs which was not available to the public and which raised serious doubts, to say the least of it, about the company's stability. That raises the question whether there existed between the commissioner and the company and its managers a special relationship of the nature described by Dixon J in *Smith* v. *Leurs* (1945) 70 CLR 256, and such as was held to exist between the prison officers and the borstal boys in the *Dorset Yacht* case [1970] 2 All ER 294, [1970] AC 1004, so as to give rise to a duty on the commissioner to take reasonable care to prevent the company and its manager from causing financial loss to persons who might subsequently deposit with it.
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> In contradistinction to the position in the *Dorset Yacht* case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on business, and the decision whether or not to do so was clearly well within the discretionary sphere of his functions. In their Lordships' opinion the circumstance that the commissioner had, on the appellants' averments, cogent reason to suspect that the company's business was being carried on fraudulently and improvidently did not create a special relationship between the commissioner and the company of the nature described in the authorities."[8]

The third ground was related to the issue of the special nature of the loss suffered by the appellant depositors: purely economic loss, as opposed to physical damage. Since there is always the fear of indeterminate liability in purely economic loss (not limited by physical impact), duty to the appellant depositors was excluded on the ground of the unreasonableness, in the circumstances, of reliance on the commissioner, as a governmental regulatory agency, to safeguard their deposits:

> "The ordinance was designed to give added protection to the public against unscrupulous or improvident managers of deposit-taking companies, but it cannot reasonably be regarded, nor should it have been by any investor, as having instituted such a far-reaching and stringent system of supervision as to warrant an assumption that all deposit-taking companies were sound and fully creditworthy. While the investing public might reasonably feel some confidence that the provisions of the ordinance as a whole went a long way to protect their interests, reliance on the fact of registration as a guarantee of the soundness of a particular company would be neither reasonable nor justifiable, nor should the commissioner reasonably be expected to know of such reliance, if it existed. Accordingly their Lordships are unable to accept the appellants' arguments about reliance as apt, in all the circumstances, to establish a special relationship between them and the commissioner such as to give rise to a duty of care."[9]

[8] *Ibid.,* at pp. 713–714.
[9] *Ibid., at p.* 714.

The Privy Council referred to *Junior Books Ltd.* v. *Veitchi Co. Ltd.,*[10] a case on misconduct causing purely economic loss, and *Hedley Byrne Co. Ltd.* v. *Heller & Partners Ltd.,*[11] a case on misstatement causing purely economic loss. Here there was no misstatement or misconduct, but a pure omission. Nevertheless, liability for purely economic loss, irrespective of the mechanics of harm (given that the respondent here was a statutory body — a special defendant), rested on the voluntary undertaking by the commissioner, or more properly, on the reasonableness of the reliance by the appellant depositors on the commissioner to safeguard them (which is slightly different, and which the Privy Council also referred to). Normally in cases of pure omission, duty to confer a benefit requires a plaintiff to show dependence on the defendant, or the defendant's control of others *vis-a-vis* the plaintiff (second ground, above). But the liability of a statutory body for pure omission may arise out of a statutory obligation to perform operational matters. This "operational" matter could arguably be construed as approximating the concept of "reliance" in *Sutherland Shire Council v. Heyman.*[12] Given that liability for misstatement causing purely economic loss is also based upon "reliance", the commonality for satisfaction of duty, in the circumstances here, of omission, purely economic loss and the special position of the defendant-respondent, was the "reliance" concept. In this way, perhaps, this decision of the Privy Council is explainable.

The last ground for the exclusion of duty was based upon public policy consideration: the commissioner deserved the same well-established immunity as that given to barristers in the conduct of litigation *(Rondel* v. *Worsley*[13]*)* in order to maintain his department's efficacy and effectiveness in the performance of their public function (see also *Hill v. Chief Constable of West Yorkshire*[14]*).* Otherwise:

> "A sound judgment would be less likely to be exercised if the commissioner were to be constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind. In the result, the effectiveness of his functions would be at risk of diminution. Consciousness of potential liability could lead to distortions of judgment. In addition, the principles leading to his liability would surely be equally applicable to a wide range of regulatory agencies, not only in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few. If such liability were to be desirable on any policy grounds, it would be much better that the liability were to be introduced by the legislature which is better suited than the judiciary to weigh up competing policy considerations."[15]

This policy consideration was, however, not used by the Privy Council to decide the case because the Privy Council preferred using the first three grounds to reach its decision, instead of relying on public policy argument:

10 [1983] 1 A.C. 520.
11 [1964]A.C. 465.
12 (1985) 59 A.L.J.R. 564, Aust. H.C..
13 [1969] 1 A.C. 191, H.L.
14 [1987]2W.L.R. 1126.
15 [1987] 2 All E.R. 705 at pp. 715–716.

> "Their Lordships are of opinion that there is much force in these arguments, but as they are satisfied that the appellants' statement of claim does not disclose a cause of action against the commissioner in negligence they prefer to rest their decision on that rather than on the public policy argument."[16]

This might seem a little strange since the narrower duties in negligence arising in the earlier grounds of the decision were also, undoubtedly, based upon policy considerations.

### *Approach to Duty*

While disposing of the case, the Privy Council took the opportunity to discuss the formulation of duty in the context of the case; that is, the exceptional circumstances which operated in the case: where the defendant was a public body (unlike the normal private individual), where the mechanics of harm were by omission (unlike the usual positive misconduct), where the harm was not done by the defendant himself but by others under his apparent control, and finally where the nature of damage was purely economic loss (unlike the usual physical damage). On any one of these unique features, the issue of duty in negligence would have been brought into contention. In the normal cases involving ordinary defendants interfering with physical interests, duty is a non-issue. The irony is that when duty is in debate, the Atkinian formulation of duty is apparently inadequate, and where it applies best, in the settled road or work accident situation, the test is not in issue, to the extent that, it is, in practice, almost superfluous.

The Privy Council started off by citing the now fairly well recognised House of Lords two-stage duty (foreseeability qualified by policy) approach enunicated by Lord Wilberforce in *Anns* v. *Merton London Borough:*

> "Through the trilogy of cases in this House — *Donoghue* v. *Stevenson* [1932] AC 502, *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] AC 465, and *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] AC 1004, the position has now been reached that 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…."[17]

[16] *Ibid.,* at p. 716.
[17] [1978] A.C. 728 at pp. 751–752.

The Privy Council rejected this approach: "Their Lordships venture to think that the two-stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended",[18] and continued later that, "their Lordships consider that for the future, it should be recognised that the two-stage test in *Anns* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care".[19] The Privy Council pointed to reservations expressed in subsequent cases in the House of Lords to the two-stage duty, in particular by Lord Keith in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd.,*[20] by Lord Brandon in *Leigh & Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd.*[21] and by Lord Bridge in *Curran* v. *Northern Ireland Co-ownership Housing Association Ltd.*[22]

The Privy Council preferred the "incremental negligence" (foreseeability with particular restrictions) approach taken by Brennan J.:

> "In *Sutherland Shire Council* v. *Heyman* (1985) 60 ALR 1 Brennan J. in the High Court of Australia indicated his disagreement with the nature of the approach indicated by Lord Wilberforce, saying (at 43–44):....
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> 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "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". The proper role of the "second stage", as I attempted to explain in *Jaensch* v. *Coffey* ((1984) 54 ALR 417 at 437), embraces no more than "those further elements [in addition to the neighbour principle] which are appropriate to the particular category of negligence and *which confine the duty of care within narrower limits* than those which would be defined by an unqualified application of the neighbour principle'."[23]

And also the "composite duty" approach taken by Gibbs C.J. in the same case:

> "Gibbs CJ pointed out in *Sutherland Shire Council* v. *Heyman* (at 13) there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs CJ, is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs CJ himself, is that Lord Wilberforce meant the expression 'proximity or neighbourhood' to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue* v. *Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. In their Lordships' opinion the second view is the correct one."[24]

[18] [1987] 2 All E.R. 705, at p. 710.
[19] *Ibid., at p.* 712.
[20] [1985]A.C. 210 at p. 240.
[21] [1986]A.C. 785 at p. 815.
[22] [1987] 2 W.L.R. 1043 at pp. 1047–1048.
[23] [1987] 2 All E.R. 705 at p. 710. (Emphasis by P.C.).
[24] *Ibid.,* at p. 710.

By Gibbs' C.J. second view, the first stage in the two-stage duty test includes policy considerations (if any), rendering the second stage unnecessary. Indeed the Privy Council made it clear that the second stage in the two-stage duty is practically useless:

> "The second stage of Lord Wilberforce's test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. One of the rare cases where that has been held to be so *isRondelv. Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, dealing with the liability of a barrister for negligence in the conduct of proceedings in court. Such a policy consideration was invoked in *Hill* v. *Chief Constable of West Yorkshire* [1987] 1 All ER 1173, [1987] 2 WLR 1126."[25]

In respect of the duty of care claimed by the appellant depositors of the commissioner in the case, the Privy Council concluded: "To hark back to Lord Atkin's words, there were not such close and direct relations between the commissioner and the appellants as to give rise to the duty of care desiderated."[26]

For completeness, the Privy Council could have referred, in support of their position, to the approach taken by Deane J., in *Heyman,* who also disagreed with the two-stage duty approach. His Honour's approach to duty is the "foreseeability and proximity" criterion:

> "Reasonable foreseeability of loss or injury to another is an indication and, in the more settled areas of the law of negligence involving ordinary physical injury or damage caused by the direct impact of positive act, commonly an adequate indication that the requirement of proximity is satisfied. Lord Atkin's notions of reasonable foreseeability and proximity were however distinct and the requirement of proximity remains as the touchstone and control of the categories of case in which the common law of negligence will admit the existence of a duty of care....
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> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or 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 a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained....
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> Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the

[25] *Ibid,* at p. 712.
[26] *Ibid,* at p. 714.

> processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable'... or from the considerations of public policy which underline and enlighten the existence and content of the requirement."[27]

And indeed the Privy Council's approach to duty is much the same as that of Deane J. — the foreseeability and proximity approach:

> "The truth is that the trilogy of cases referred to by *Lord* Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.
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> *Donoghue* v. *Stevenson* established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury to health. The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity."[28]

Lord Atkin's legendary statement of duty in *Donoghue* v. *Stevenson*[29] has always been considered repetitious. The full part that is frequently quoted is:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. [And repeating] 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."[30]

Now it is said to contain another element; that of "proximity", apart from "foreseeability". After more than fifty years since the judgment, this apparently new dimension is seen in the repetitious part of Lord Atkin's formulation. The problem is what is the meaning of "proximity"? Robert Goff L.J. (as he then was) observed in *Leigh and Sillavan Ltd.* v. *Aliakmon Shipping Co. Ltd.* :[31] "Once proximity is no longer treated as expressing a relationship founded simply on

27 (1985) 59 A.L.J.R. 564 at pp. 594–595.
28 [1987] 2 All E.R. 705 at p. 710.
29 [1932]A.C. 562.
30 *Ibid.,* at p. 580. (Not entirely the same parts quoted by the P.C.).
31 [1985]2 W.L.R. 289, at p. 327, C.A.

foreseeability of damage [more accurately, "of plaintiff"], it ceases to have an ascertainable meaning; and it cannot therefore provide a criterion for liability." It must then be taken that "proximity" in part or *in toto* refers to policy considerations that may arise in the less developed or the exceptional situations of the tort of negligence. It refers to policy considerations, if policy matters are not part of foreseeability, and in part to policy considerations, if foreseeability also covers policy considerations. If so, "proximity" is just part or the second stage of the two-stage duty, expressed in a different and less exact terminology.

The actual difference between the Privy Council approach and the earlier House of Lords approach in the formulation of the duty of care boils down to this: as far as the Privy Council is concerned, policy can be intrinsic to foreseeability (and proximity), whereas the House of Lords has made it clear that policy, where relevant, is extrinsic of foreseeability.

## *Comments*

Now, coming back to the decision of the Privy Council in the case and the contest between the two approaches in the formulation of duty, the following concluding comments can be made. The Privy Council could have disposed of the case on the issue of the duty of a statutory body to the public. Since the matter involved largely policy decisions on the part of the commissioner, there was no duty owed to appellant depositors for failure to protect them against their ill-fated deposits (see *Anns,* or by *Heyman* — "no [reasonable] reliance", above). This, by itself, would have disposed of the case against the appellants. Unlike earlier breach of statutory power cases, the case here involved a further aspect (unfavourable to the appellant) of a claim for purely economic loss involving potentially unascertainable depositing members of the public. Since there is no recovery in negligence for purely economic loss unless there is "reliance or near contract" *(Junior Books,* above and *Muirhead* v. *Industrial Tank Specialists Ltd.*[32]*),* or if the plaintiffs are considered "determinate" (*Caltex Oil (Aust.) Pty. Ltd.* v. *The Dredge "Willemstad"*[33]), this is another ready ground to exclude the appellants' claim.

The next ground, of absence of duty due to the insufficiency of control of the deposit-taking company by the commissioner to protect the appellant depositors against losses, used by the Privy Council as another basis for their decision, is acceptable in principle. But the application of this narrower duty was not quite appropriate here: the deposit-taking companies cannot, in any way, be equated with wayward children or borstal inmates *(Smith* v. *Leurs*[34] and *Dorset Yacht Co. Ltd* v. *Home Office*[35]*).*

The above grounds for denial of duty are based upon the failure by the appellants to satisfy the narrower or restricted duty categories required of them under the tort of negligence arising out of the

32 [1985]3 All E.R. 705, C.A.
33 (1976) 136 C.L.R. 529, Aust. H.C.
34 (1945)70C.L.R. 256, Aust. H.C.
35 [1970] A.C. 1004, H.L.

application of the two-stage duty test: the "operational" duty for statutory bodies in respect of omission to benefit the public, the "control" duty in respect of mischief by others and the "reliance" duty in purely economic loss. The various policy considerations involved in these exceptional situations restrict the normal duty based upon foreseeability to a more limited or a narrower relationship (propinquity, involvement, proximity, connection, link, closeness or neighbourliness — call it by any name) between the defendant and plaintiff — the special relationships — before recovery is allowed in negligence.

In respect of statutory bodies, as a matter of sensible policy, they cannot be treated as private persons; they operate under statutes which create them and have limited resources to meet the competing claims made by the community. They have, therefore, to order their priorities. The correctness of the ordering of their priorities is a matter for the electorate and not the courts. They can only be liable in tort for failure in respect of operational or technical matters, once the priorities are set. In respect of omissions as opposed to acts, there clearly cannot be, as a matter of practical policy, an equivalent duty in respect of avoiding causing harm by misconduct and conferring benefit by omissions. Purely economic loss by the nature of the harm is not too different from physical damage. But its impact is different: purely economic loss is usually more disastrous to the defendant than physical damage (barring modern mass chemical or technological disasters, like Bhopal). This is because purely economic loss is not limited by physical impact. Of necessity, therefore, recovery for purely economic loss must be confined to narrow limits — situations, perhaps, where the defendant and plaintiff in dealings or involvement are very closely connected — much narrower than the foreseeability of harm relationship. No one should be his brother's keeper and, therefore, he should not generally be liable for the mischief of others which causes harm to another. Liability can only be imposed where there is, exceptionally, a sufficient measure of control by the defendant over those who cause mischief to avoid that mischief.

Foreseeability as a basis for duty is clearly too wide in all these special circumstances to prescribe situations where carelessness should give rise to liability in tort. The various policy considerations restrict the normal duty based upon foreseeability to narrower and more realistic limits, where carelessness in such situations will fairly and appropriately impose liability on the defendant to compensate the plaintiff for damage or loss suffered.

The last ground which was mentioned in the case, but was not used by the Privy Council as the basis for its decision, was exclusion of duty on policy consideration: immunity from liability was granted to the commissioner in order to maintain the efficacy of his department's public function. The Privy Council explained clearly the relevant policy considerations which necessitated the immunity here in respect of the commissioner's supervisory functions (see above).

All these modified or negated duties applying in the special situations arising on the facts of the case are explainable by and consistent with the two-stage duty of care approach. Foreseeability *defines* the duty situation for liability in negligence, and policy *limits*

this range of liability, where peculiarities of the situation necessitate it (foreseeability qualified by policy — for recent application, see: *Paterson Zochonis Ltd.* v, *Merfarken Packaging Ltd. (1982)*[36] and *Banque Keyser Ullmann S.A.* v. *Skandia (UK) Insurance Co. Ltd.*[37]). The same result, dismissal of the appellants' case, would be achieved by the "incremental negligence" (foreseeability with particular restrictions) approach of Brennan J., or the "composite duty" approach of Gibbs C.J., or the "foreseeability and proximity" approach of Deane J. and the Privy Council.

But the first approach has the benefit of clarity. Policy is treated as extrinsic of foreseeability and is recognised, where necessary, as the second element in the formulation of the duty of care in the tort of negligence. In the latter approaches, policy is intrinsic to foreseeability (and proximity). This policy aspect may or may not be discussed in duty even when used to formulate the duty. Clarity must be a virtue, and thus the two-stage duty approach is to be preferred. The Privy Council and the Australian High Court approach restores the confusion (the uncertainty of the place of policy factors) inherent in Lord Atkin's formulation of duty.

"Foreseeability" is sufficiently vague to include or exclude policy considerations. It is futile to argue one way or the other. For clarity, it is better, as a matter of choice, to take "policy" out of "foreseeability" and adopt this approach as the point of reference so that everyone knows what is meant by "foreseeability" in duty under the tort of negligence. It is no use denying that policy considerations feature in judicial decisions since everyone knows that they do *(contra* Lord Scarman, but see Lord Edmund-Davies, *McLoughlin* v. *O'Brian*[38]*).* Engaging in policy considerations undoubtedly introduces a measure of uncertainty in judicial decisions. But, better this, than be found wanting in judicial decision-making. It is surely accepted that where policies are complex and wide-ranging Parliament should have a say in the matter where it is minded to do so. But this should not exclude the courts in lesser and demonstrable policy matters, or where Parliament is out of reach. Worse still, would be to use policy factors to reach decisions but deny this. Few can appreciate such subtleties and the law is worse-off for it.

At the end of it all, duty is merely a control device (together, to a lesser extent, with "breach", "causation" and "remoteness of damage") to determine the situations where carelessness, or more accurately, behaving below the standard of a reasonable person in the community, should give rise to a civil remedy under the tort of negligence. If rationality is to be attributed to the content of duty, it must surely be put on as rational, and as clear, a basis as possible.

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36 [1986]3 All E.R. 522, C.A.
37 [1987]2 All E.R. 923.
38 [1983] 1 A.C. 410.

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