THE THREE-PART TEST: YET ANOTHER TEST OF DUTY IN NEGLIGENCE

The article discusses the major tests that have been applied since *Donoghue* v. *Stevenson* to determine the existence of a duty of care in the tort of negligence. It is critical of the more recent tests that are based upon the "proximity" element. The article argues for a resuscitation of the Wilberforce two-stage test of the foreseeability basis that is qualified by public policies as the best available test that has been evolved so far. This test must, however, be applied, in the future, with greater circumspection and with greater regard for prior decisions that restricted or excluded recovery than before.

I. INTRODUCTION

THE latest duty of care formulation in the tort of negligence is the "three-part" test of "foreseeability, proximity, justice and reasonableness". In order not to add to the existing confusion in this theoretically important and challenging, but statistically insignificant, area of the tort of negligence, the article will examine the beginnings of the formulation of the duty concept *in Donoghue* v. *Stevenson*[1] and its developments in the subsequent phases, before discussing this latest approach. This three-part test is yet another of the unhelpful, indeed positively confusing, recent formulations of the notion of duty. The article will rely fairly heavily on direct quotations from judgments, not to avoid analysis, but for fear of adding more, even insignificantly, to the recent hyperactivism of the courts.

Altogether there are six identifiable formulations of the notion of duty since the landmark decision in *Donoghue* v. *Stevenson.* The first four are: the original Atkinian "pure foreseeability", followed by "foreseeability construed as a matter of public policy", then by "foreseeability construed as a matter that includes public policies" and finally, by the rationalizing phase of the Wilberforce two-stage test of the "foreseeability basis that is qualified by public policies". These formulations involve either the element of foreseeability or policy, or both, as the bases for duty. The recent two formulations: Lord Keith's two-part test of "foreseeability and proximity", and the latest three-part test (referred to above), contain the new troublesome component of "proximity". The initial three tests will be examined expeditiously as they are now largely historical. The more pertinent two-stage test and the later two added "proximity" tests will be discussed in greater detail. The article will argue for a resuscitation of the two-stage test, applied though, with greater circumspection than before, as the best test that has been evolved so far.

[1] [1932] A.C. 563.

II. Pure Foreseeability

A universal basis for duty in the tort of negligence began in 1932 with the now legendary Atkinian biblical "neighbour" principle in *Donoghue v. Stevenson.* Lord Atkin said, and this is the oft-cited passage:

> "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."[2]

The formulation of duty is based upon foreseeability of harm and this original foreseeability basis is repeated twice as "reasonable foreseeability" and as "reasonable contemplation" of likely harm.

This was an outstanding starting point for a universal formulation of the duty element. The formulation was obtained by induction from the earlier cases of recovery in negligence. Foreseeability of harm was the common factor in the existence of a duty to take care. Foreseeability is not the mathematical probability of harm. This is not possible in human affairs which are more organic than mechanistic. Hence the foreseeability test is not reducible to purely quantitative terms. Neither is foreseeability judged subjectively – it is not according to the view of a particular person, certainly not the defendant. Foreseeability is the objective reasonable foreseeability – the probability or likelihood of harm determined according to the knowledge and the common experience of an objective reasonable person in the position of the defendant. If harm to someone in this sense is likely, probable or foreseeable, a duty to take care is imposed; the breach of which results in liability.

Three out of the five Law Lords, including Lord Atkin, in *Donoghue* v. *Stevenson* were for the imposition of a duty of care on the manufacturer to the ultimate consumer even in the absence of privity of contract between the parties. Only Lord Atkin arrived at the foreseeability basis for liability. This foreseeability test is possibly not part of the *ratio decidendi* of the case. The oft-cited Atkinian passage is repetitious of the notion of foreseeability and this would prove, on re-interpretation, decades later, to be a serious problem. Lord Thankerton, one of the other majority Law Lords, was against any universal test. This view is much echoed nowadays. The furthest which Lord Macmillan, another majority Law Lord, would go was to say that, "the categories of negligence are never closed".[3] The Privy Council, however, shortly afterwards, in another manufacturer's liability case, *Grant* v. *Australian Knitting Mills,*[4] endorsed the test.

2 [1932] A.C. 563, 580.
3 [1936] A.C. 585,619.
4 [1936] A.C. 85.

Buckland regarded the duty consideration as "an unnecessary fifth wheel on the coach, incapable of sound analysis and possibly productive of injustice".[5] But even Buckland was prepared, at that time, to concede that unlike intentional torts, a duty-type issue, called by any other name, was present in the tort of negligence. In intentional torts, deliberate interference gives rise to a relationship of liability: the plaintiff is targetted and a duty not to injure is not at issue. Unintentional careless harm to another – the careless relationship — is, however, too wide as a basis for liability. Careless conduct, as a state of mind, cannot, by itself, provide the basis for tortious liability. It is only carelessness in breach of a duty to take care that there is liability in negligence - hence the duty issue and the need to identify duty. Duty, therefore, sets the boundaries of liability. The duty to take care, according to Lord Atkin, is not owed to the whole world; it is only owed to the foreseeable neighbour who is likely to be harmed by the failure to take reasonable care.[6]

As the original basis for the duty notion, Lord Atkin's concept of foreseeability of harm was brilliant and simple. It had the quality of universality, was somewhat identifiable, and it provided a fair enough basis for liability in negligence at that time. Indeed, it still works well enough nowadays in the normal physical interference situations so much so that a duty based on foreseeability has become axiomatic. It is practically impossible to find a situation of a physical act causing physical harm in which a duty to take care on this basis does not exist. In the road and work accidents, which constitute the bulk of negligence actions, the existence of this duty is assumed. Litigation in such cases involve merely the question of the factual breach of this duty and the issue of measure of damages. Most lawyers in practice only encounter this limited form of duty.

The only fault with the foreseeability test, and this proved to be a serious defect over time, was that it can be too wide and too pliable as a basis of liability in unusual situations. In the case of special parties like that of advocates as defendants, or trespassers on land as plaintiffs, or in respect of non-act interferences like misstatements or omissions, or for non-physical damage like that of nervous shock and purely economic loss, the foreseeability basis is far too wide. Even when the plaintiffs are undeniably foreseeable, there are sufficient public policy reasons to limit recovery to a basis that is narrower than mere foreseeability or, even to exclude recovery altogether. The irony is that in such situations, when a proper basis to restrict recovery is most needed, the foreseeability basis is inadequate. In order to limit or exclude what is deemed as unwarranted recovery, the courts frequently resort to deciding artificially that the plaintiffs are "unforeseeable".[7] The foreseeability basis in the hard cases then becomes a forced conclusion that cannot be explained logically. When applied in this way

[5] "The Duty to Take Care" (1935) 51 L.Q.R. 637, 639.

[6] If there is a duty, the breach of this can include carelessness and also, rarely though, intentional conduct that is below the standard of reasonable care. Robert Goff L.J. (as he then was) pointed to this in *Paterson Zochonis & Co. v. Merfarken Packaging Ltd.* [1986] 3 All E.R. 522,541: "the action of negligence lies not only for carelessness but also for intentional conduct".

[7] *In King V. Phillips [1951] 1* Q.B. 429, C.A., the nervous shock to a mother witnessing the slow backing of a taxi-cab into her child was held "unforeseeable" in contrast to the foreseeability of the nervous shock suffered by *a mother in Hambrook v. Stokes Bros.* [1925] 1 K.B. 141, C.A., who feared for the safety of her children from a descending lorry. If the nervous shock in the latter case was foreseeable, equally, and may be even more so, the nervous shock in *King* v. *Phillips* should have been held foreseeable.

the test is too pliable and too meaningless. Heuston, in examining the test twenty-five years after its introduction in *Donoghue* v. *Stevenson,* said:

> "It was not intended to be, and cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence.... [T]he principle has its greatest value in some comparatively straight forward cases of negligence...."[8]

Similarly, the latest edition of a leading tort textbook states:

> "Indeed, it can be argued that the only necessary function performed by the duty of care concept in the present law is to deal with those cases where liability is denied not because of lack of foreseeability but for reasons of legal policy and that in all other cases (the great majority) everything can be handled by asking whether the defendant behaved with the prudence of a reasonable man."[9]

This frustration with the inadequacy of the test led to the next phase of development.

III. Foreseeability Construed as Policy

The duty notion or the foreseeability basis, construed as a matter of public policy, was championed by Lord Denning who was never known to be meek in his decisions. "Public policy" is a nebulous term, but in essence, it encompasses all the broad current moral, social, economic, administrative and political interests of the community (what is best for "we, the people at large"[10]) and all the other "relevant extra-legal considerations, including the interests of the parties involved and the courts themselves."[11] On the use of public policy in judicial decisions Lord Denning once said:

> "I know that over 300 years ago Hobart C.J. said the 'Public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said *(per* Burrough J. in *Richardson* v. *Mellish (*1824) 2 Bing. 239,252) that no judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice...."[12]

[8] "*Donoghue* v. *Stevenson* in Retrospect" (1957) 20 M.L.R. 1, 23.

[9] W.V.H. Rogers, *Winfield and Jolowicz on Tort (1989)* at p. 83.

[10] Leon Green, "Tort Law Public Law in Disguise" (1959) 38 Texas Law Rev. 1, 2.

[11] C.R. Symmons "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394. Symmons identified four major policy considerations in Commonwealth negligence cases:

> "(1) the 'administrative factor' - 'where will it all end?';
> (2) the 'public interest' or 'looking over the shoulder' factor;
> (3) the 'social occasion' factor;
> (4) the legislative policy factor."

Markesinis, "Policy Factors and the Law of Tort" in *The Cambridge Lectures* (1981), 199, identified the "administrative, superior value, environmental and insurance" factors as the most frequently encountered policy considerations in tort.

[12] *Enderby Town Football Club Ltd. v. Football Association Ltd. [*1971] 1 Ch. 591, 606, C.A.

To Denning the existence of a duty is, at the end of the day, simply a question of public policy. The purpose of the concept is not to define situations of liability in negligence but to limit the range of liability: it is a conclusion that acts as a control device on recovery. The tort, therefore, goes beyond the simple element of "foreseeability" repeated three times in respect of the plaintiff, event and the damage. If it is desirable, on public policy reasons, to impose liability, the courts can create such a duty. If it is the reverse, the court can, on grounds of public policy, deny the existence of a duty.

The duty element is therefore a question and a matter of public policy, and if it is necessary, the original "foreseeability", introduced by Lord Atkin as the basis of this duty, is sufficiently meaningless and pliable to be construed as containing within itself this factor of public policy, although the original Atkinian foreseeability may not have included such consideration. Lord Denning said: "Whenever the courts draw a line to make out the bounds *of duty,* they do it as a matter of policy so as to limit the responsibility of the defendant."[13] Again, in the Court of Appeal in *Dorset Yacht Co. Ltd.* v. *Home Office* his Lordship said:

> "[Duty]... is, I think, at bottom a matter of public policy which we, as judges, must resolve. This talk of "duty" or "no duty" is simply a way of limiting the range of liability for negligence".[14]

In *Dutton V. Bognor Regis United Building Co. Ltd.,* Lord Denning reiterated:

> "It seems to me that it [duty] is a question of policy which we, as judges, have to decide. The time has come when, in cases of new import, we should decide them according to the reason of the thing. In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt? But the question has always been there in the background. It has been concealed behind such questions as: Was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? *Was it foreseeable or not?* Was it too remote? And so forth. *Nowadays we direct ourselves to considerations of policy."*[15]

The classic illustration of the application of public policy as the basis of duty is *Rondel v. Worsley*,[16] where the House of Lords reaffirmed the ancient principle that advocates owe no duty of care to their clients in the conduct of litigation. It is undeniably foreseeable that a negligent barrister will harm the client's cause. The immunity is given on public policy grounds and not on account of the lack of foreseeability of damage. Advocates engaged in litigation owe a higher duty to the court and the administration of justice above the immediate interests of their clients. Advocates must, therefore, be accorded the same immunity as that

[13] *Spartan Steel & Alloys Ltd.* v. *Martin & Co. Ltd.* [1972] 3 All E.R. 557, 561.
[14] [1969] 2 Q.B. 412, 426.
[15] [1972] 1 All E.R. 462 ,475, emphasis added. *In Lamb* v. *London Borough of Camden* [1981] 2 All E.R. 408, C. A., Lord Denning held that the local council did not owe an affirmative duty to protect the plaintiff's premises against squatters on the policy ground that the plaintiff could have insured against such damage.
[16] [1969] 1 A.C. 191.

given to others engaged in the judicial process. As a matter of public interest, it is also necessary that there is finality in litigation. In order to ensure this, immunity is granted to avoid indirect re-trial of the case by litigation on the possible negligence of the advocate. These public policy demands exclude the liability of advocates, even when this means protecting negligent advocates at the expense of their clients.

But there are objections to resting the basis of duty exclusively on public policies. The judiciary will be given an uncontrolled choice of wide-ranging public policies, and one judge's construction of policy may be very different from another's. This can lead to a greater level of uncertainty in judicial decisions than can be tolerated by the system. Even in respect of advocates' immunity, there is the allegation that the immunity given exclusively to advocates as professionals is an "anachronism maintained by lawyers for lawyers".[17] Worse still is the perennial fear of judges usurping the functions of the elected Parliament by the over-use of public policies in their decision-making. Broad policy review, in the interest of people at large, is within the purview of elected representatives, not appointed professionals. Lord Scarman in *McLoughlin* v. *O'Brian* said:

> "Policy considerations will have to be weighed; but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament.... If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path .... [P]olicy issue ... is not justiciable."[18]

Lord Edmund-Davies strongly objected to this:

> "[T]he proposition that'... the policy issue ... is not justiciable' is as novel as it is startling. So novel is it in relation to this appeal that it was never mentioned during the hearing before your Lordships. And it is startling because... it runs counter to well-established and wholly acceptable law.... I hold that public policy issues are 'justiciable'".[19]

The truth lies somewhere in between pure principle-based decisions and policy-based decisions. It is obviously impossible to decide cases *in vacuo*, exclusive of the interests and the context of the community for which the decisions are made. No principle of law that is significant enough is purely technical. However, over-using policy in judicial decision-making, at the other extreme, is also uncalled for. This leads judges to a level of consideration that they are ill-equipped and are not entitled to handle. Sitting before two contending parties, judges are without the investigative and administrative support, and without the representative views and debate present in Parliament. From this unelected and limited platform, over-indulgence in policy considerations results in the worst form of capricious "judicial legislation". It must, however, be conceded that in

[17] Miller, "The Advocate's Duty to Justice: Where Does it Belong?" (1981) 97 L.Q.R. 127,138.
[18] [1982] 2 All E.R. 298, 310-11. This accords with the views of R. Dworkin in *Law's Empire* (1986).
[19] [1982]2 All E.R. 298, 308-9.

the unsettled areas of the law, including those in the tort of negligence, some measure of public policies must be considered. This consideration is neither at the extreme level of all consuming public policies nor at the other extreme of not considering any policy at all, but at the intermediate level of weighing clear, cogent and demonstrable public policies that are pertinent and immediately relevant to the type of case at hand.[20] After all, the best answer to poor policy arguments are strong counter-arguments and not the abdication from such arguments.

In some situations, where the duty question is at issue, it may be that cogent and clear public policy is the sole determinant for excluding a duty of care: the rare situations, for example, of the immunity of judicial functionaries and the high executive,[21] and the exclusion of claims that are based on wrongful life[22] and illegality.[23]But in other non-immunity cases, there must surely be some bases for the existence of a duty of care, apart from public policy considerations. Duty that is based upon the consideration of both the foreseeability basis and public policies led to the next phase of the development of the duty concept.

IV. FORESEEABILITY INCLUDING POLICY– THE COMPOSITE TEST

In this phase, the existence of a duty of care was based on satisfying foreseeability, but the foreseeability element was construed in such a way as to include public policy factors. This phase lasted for awhile after *Donoghue* v. *Stevenson.* In many cases when a duty to take care was at issue, the foreseeability basis was used as the criterion. Unarticulated, however, was the inclusion of policy factors in this element of foreseeability. Few judges were as bold as Lord Denning in determining the existence of duty solely on the basis of public policies. Many of them imposed, restricted or excluded a duty of care on grounds of both foreseeability, which was articulated, and public policy, which was not articulated. The foreseeability element, therefore, contained two composite notions: that of foreseeability in the original Atkinian predictability sense and that of foreseeability in the special "public policy" sense. A learned commentator stated:

> "In retrospect, until as recently as the 1960s, it might be said without controversy that Lord Atkin's 'neighbour' test in *Donoghue* v. *Stevenson* based as it is on reasonable foreseeability, has been used by the courts... as a convenient facade behind which they could extend, or restrict extension of, the existing categories of negligence.... [I]n creating 'notional' duties of care in novel 'situation-patterns'... the courts have been accused of concealing the true judicial process by their reticence in articulating underlying policy considerations and their almost inevitable resort to the vague and

[20] See Symmons C.R., "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394, 528 and Markesinis B.S., "Policy Factors and the Law of Tort" in *The Cambridge Lectures* (1981) at p. 199.

[21] *Sutcliffe* v. *Thackrah* [1974] A.C. 727, H.L.; *Rowling v. Takaro Properties Ltd* [1988] 1 All E.R. 163, P.C.; *Hill v. Chief Constable of West Yorkshire* [1988] 2 All E.R. 238, H.L.

[22] *McKay v. Essex Area Health Authority* [1982] 2 All E.R. 771.

[23] *Ashton* v. *Turner* [1981] 1 Q.B. 137; *Sounders* v. *Edwards* [1987] 2 All E.R. 651.

> facile test of reasonable foreseeability to determine this highly important issue."[24]

The exclusion of liability for nervous shock, at the early stage of the development of this claim, illustrates this notion of foreseeability including policy. In *Hay (or Bourhill)* v. *Young*[25] the House of Lords held that the test of liability for nervous shock was foreseeability of injury by nervous shock. Here a bystander's claim for nervous shock arising from hearing a motor-cyclist colliding fatally into a motor-car and from seeing the aftermath of the accident was excluded on the ground that her nervous shock was unforeseeable. Was her claim excluded on the ground that the shock to her, as a bystander, was uncommon or unlikely and, therefore, unforeseeable? Or, was her claim disallowed, as a matter of public policy, because she was claiming for a type of harm that was mental in nature, which arose out of someone else's physical plight and which was, therefore, less deserving and potentially more indeterminate than the usual physical harm? It was unclear from the judgments of the House of Lords whether her nervous shock claim was excluded on the ground of lack of foreseeability of such harm or on public policy reasons. It is likely that the exclusion was based on both grounds, although the policy factors were not articulated. The foreseeability element here, therefore, included policy considerations.

The trouble with formulating a duty of care on this basis of foreseeability construed as including policy factors was that such formulation, in encompassing both the elements of pure foreseeability and public policies, was confusing. The extent of the role of policy in shaping foreseeability was uncertain. Indeed, policy might play a major role, but this was either hidden or left insufficiently articulated. So long as there were not too many duty-issue cases, this imperfection could be tolerated. But later, from the 1960s onwards, more exotic and novel claims were made: arising out of non-act interferences like that of negligent misstatements, negligent omissions and breaches of statutory power, and for losses that were non-physical in nature, for example that of purely economic losses and more nervous shocks. All these special claims forced the issue of duty to the fore and the notion of duty based upon foreseeability, construed as including policy factors, proved too confusing and unsatisfactory in coping with the emerging problems. This led to the next stage of development: the rationalizing phase of the foreseeability basis being treated separately from public policy factors under the two-stage test.

V. FORESEEABILITY QUALIFIED BY POLICY – THE TWO-STAGE TEST

Foreseeability had, by now, become established as the universal basis for duty. Lord Reid in *Home Office* v. *Dorset Yacht* said:

> "[Foreseeability]... 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

[24] C.R.Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 M.L.R. 394, 394.
[25] [1943] A.C. 92, H.L.

> come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."[26]

At the same time, it was undeniable that public policy, at times, played a critical role in formulating the duty concept. The original Atkinian pure foreseeability alone was too wide when applied in relation to the non-physical interference cases; foreseeability construed as a matter of public policy was not always the correct way of applying the test; and the composite test of foreseeability construed as including within itself concealed public policies was too confusing. In came Lord Wilberforce's two-stage test: the rationalizing phase, where the foreseeability basis was treated separately and apart from any public policy factors. This test did not purport to extend the existing criteria. It sought only to clarify the existing conceptions and to rationalize the process by which the existence of a duty to take care is determined. The rationalization was much needed by this time, and as a test, it is brilliantly simple and elegant.

This formulation was put forward in *Anns \ Merton London Borough Council,*[27] case with unique features which raised difficult issues pertaining to duty. The long lessee plaintiffs claimed against the local authority (facts assumed) for loss due to inadequate foundations in their building. The defendants were special - they were not private individuals, but a statutory body, whose functions were prescribed by statute, and who had limited public resources to perform their role. The harm complained of was not caused by the defendants, but by the builders, against whom the plaintiffs did not claim. At the most, the defendants were at fault in performing their statutory function of inspecting the construction of the building in an improper manner by their failure to ensure that the foundations were built adequately. They failed to confer this protection on the plaintiffs, but they did not cause the defect in the foundations. Their liability in negligence was, therefore, based upon pure omission and not on misfeasance. Furthermore, the defect was in fact a defect to the building itself. This dangerous defect claim for expenditure to render the building safe was actually a purely economic loss claim,[28] but the House of Lords, at that time, conveniently treated this as physical damage. Given the special position of the defendant and the special mechanics of harm by omission, the issue was whether the defendants owed the plaintiffs a duty of care.

Lord Wilberforce held that the basis for determining the existence of a duty of care here was by two stages:

> "Through the trilogy of cases in this House - *Donoghue* v. *Stevenson* [1932] AC 502, *Medley 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 neigh-

[26] [1970] 2 All E.R. 294, 297-8.
[27] [1978] A.C. 728.
[28] *See D & F Estates Ltd* v. *Church Commissioners for England* [1988] 3 W.L.R. 368, H.L.

> bourhood 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...."[29]

It was clearly foreseeable under the first stage of the test that the defendant council's breach of statutory power would lead to the consequence suffered by the plaintiffs. But, because of the special position of the defendants and because of the special mechanics of harm, public policies dictated that a duty of care based upon the normal foreseeability basis was too wide. Lord Wilberforce held for the majority of the House of Lords that it was necessary for the plaintiffs to show that a duty of care was owed to them on a basis that was narrower than the foreseeability criterion. The council only owed a duty in the exercise of their statutory power to safeguard the plaintiffs, as members of the public, in matters pertaining to their operational or executory functions: such as administrative, professional or technical matters, but not in regard to discretionary or policy matters involving broad financial, economic, social or political considerations. The council could not satisfy all demands made on them by the public. In serving the community, the council had to order their priorities and attend to some needs at the expense of others. In making such policy choices and in balancing between efficiency and thrift, the council could not be challenged by an action in the tort of negligence: the correctness of then policy decisions was for the electorate, not for the courts, to judge. The narrower "operation" duty, short of the normal foreseeability basis, is the result of applying the two-stage test of foreseeability qualified by the necessary public policy constraints.[30]

This restricted duty based on the "operation" notion is arguably equivalent to the notion of "reliance" employed in the similar case of *Sutherland Shire Council* v. *Heyman* by the Australian High Court.[31] In fact, this special duty originated with the differentiation between "duty-function" and "power-function" in *East Suffolk Rivers Catchment Board* v. *Kent*[32] If the prescribed functions of a statutory body were held to be mandatory and such functions were inadequately performed, a duty of care was owed to the public. But no duty arose in respect of failure to exercise non-obligatory functions. Lord Denning in *Dutton* v. *Bognor Regis U.D.C.*,[33] however, rejected this on the ground that legislation governing statutory bodies did not draw such a distinction. Instead he applied the "control" test. A statutory body was liable for failure to exercise its statutory power in matters within its control. Lord Wilberforce in *Anns* felt that a distinction between "control" and "non-control" was not sustainable and he introduced the distinction between "operation" and "policy", discussed above. The "control" test has since been restrored in *Curran* v. *Northern Ireland Co-Ownership Housing Association Ltd*.[34] A series of recent cases after *Anns,* those

[29] [1978] A.C. 728,751-2.
[30] See Craig P.P., "Negligence in the Exercise of a Statutory Power" (1978) 98 L.Q.R. 428.
[31] (1985) 59 A.L.J.R. 564.
[32] [1941] A.C. 74.H.L.
[33] [1972] 1 All E.R. 462.
[34] [1987] 2 All E.R. 13,H.L.

of *Yuen Kun-yeu* v. *A-G of Hong Kong*,[35] *Rowling* v. *Takaro Properties Ltd*[36] and *Hill* v. *Chief Constable of West Yorkshire,*[37] went even further and these cases indicate that the executive in failing to perform its statutory functions may now even be exempted from liability. This means that statutory bodies are given full immunity in respect of the exercise of their supervisory functions, equivalent to that accorded to judicial functionaries, instead of the partial immunity given under the earlier restricted duty bases. The public policy considerations in excluding the duty of care rest on the necessity to maintain the efficacy and the effectiveness of the public service. *Lord* Keith in *Yuen,* as an illustration, pointed to this:

> "A sound judgment would beless likely to be exercised if the commissioner [representing a public body] 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 in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few."[38]

All these levels of refinement in the restricted duty of care basis, and even the later exclusion of such a duty, are explicable by the two-stage test.

The two-stage test was reiterated by Lord Wilberforce in *McLoughlin* v. *O'Brian,*[39] nervous shock case where applying the pure foreseeability basis by itself, again, was too wide. Qualifying public policies, did not exclude liability for such mental harm, but restricted its recovery to a narrower basis than that of foreseeability: the "three proximities" based upon relational, spatial and perceptional proximities. The essential limiting policy factor was the fear of the potential indeterminacy of such claims. Lord Wilberforce said: "'shock' in its nature is capable of affecting so wide a range of people, [that there is] a real need for the law to place some limitation on the extent of admissible claims".[40] This trite "flood-gate" argument is obviously more true in respect of nervous shock than physical impact harm: as a claim it is parasitic - the defendant has to compensate not only the person who is actually injured physically, but also potentially many others who are shocked by the injury.

The remaining four Law Lords agreed that the nervous shock suffered by a mother in witnessing the immediate aftermath of a motor accident which killed her child and injured her husband and two other children was recoverable. But their approach on the limits of duty differed. Lord Edmund-Davies and Lord Russell agreed that public policies could play a part in restricting recovery for

[35] [1987]2All E.R. 705.P.C.
[36] [1988] 1 All E.R. 163, P.C.
[37] [1988] 1 All E.R. 238, H.L.
[38] [1987] 2 All E.R. 705,715-6. The larger issue here is whether tort law should provide a remedy when there are more appropriate administrative law remedies in existence.
[39] [1978] 2 All E.R. 298, H.L.
[40] *Ibid* at p. 304.

such claims, but they did not consider it necessary to deal with them in the case. Lord Bridge, on the other hand, held that public policy was irrelevant, and Lord Scarman, that it was non-justiciable; and they both allowed the plaintiff to recover on the unqualified foreseeability basis. Applying the pure foreseeability test without policy constraint to this type of non-physical impact claim would undoubtedly result in unduly generous recovery. Nervous shock in *McLoughlin* was foreseeable, as are most other nervous shocks where one or more of the "three proximities" required by Lord Wilberforce are absent. Artificial "unforeseeability" will have to be introduced to limit recovery. This was precisely the problem of applying unqualified foreseeability in the hard cases under the original Atkinian formulation.

The two-stage test best explains the restricted or special duty basis that applies in nervous shock cases by virtue of the peculiarity of the harm. By this test the neccessary components of foreseeability and policy are clearly separated and set out. The applicable restricted duty is then formulated and identified. The policies that are employed, the fairness and the ascertainableness of the restricted duty basis that is obtained may be open to challenge. This is expected. The narrower basis of the duty of care can be extended, restricted or refined over time. Indeed, the recovery for nervous shock has since been extended by the Court of Appeal in *Attia* v. *British Gas plc*[41] to include shock arising out of property damage. Spatial and perceptional proximities must still be shown, but the relational proximity is no longer restricted to a familial relationship between the plaintiff and the person physically injured. It extends to the proprietary and emotional interests of the plaintiff in respect of the property that is negligently damaged or destroyed. In that case, the plaintiff recovered for the nervous shock she suffered as a result of witnessing the destruction of her home and some possessions by fire that was caused by the defendants' negligent installation of a heating system.

The beauty of the two-stage test is that the pure foreseeability element in the original Atkinian sense is retained as the universal starting point, and the ubiquitous policy factors required in restricting this basis in the hard cases involving non-physical interference are included; but these are, for clarity, taken out of the foreseeability basis and externalized as further considerations. Nothing new in content is added, but the process of formulating a duty of care is rationalized and clarified. Duty, instead of being confusingly construed as constituting two mixed composites of foreseeability and public policy, is considered in two stages, that of foreseeability and that of qualifying policies.

In normal cases of physical interference there is no qualifying policy to limit the existence of a duty of care based on foreseeability. But in the non-normal cases of special parties, non-act interference and non-physical damage, there are cogent and imminent policies which go to restrict, or even exclude, the existence of a duty of care. Public policy can exclude the existence of a duty as in the case of the immunity of judicial functionaries and the executive, or in respect of claims based on wrongful life or illegality.[42] Where policy does not exclude a duty of care altogether, it may restrict the basis of duty to a narrower ambit than that of foreseeability. The test provides the basis for formulating such duties, and

[41] [1987] 3 All E.R. 455, C.A.
[42] See *supra.*

it explains, for example, the restricted duty bases of "reliance" in respect of negligent mistatement,[43] the "three relational, spatial and perceptional proximities" for nervous shock,[44] the "operation" test in respect of breach of statutory power,[45] and the "control" requirement in relation to liability for third-party wrongdoing.[46] It is predicted that "legitimate dependence" by the plaintiff on the defendant to safeguard the former from natural hazard or from third-party wrongdoing will, by the test, eventually form the universal basis of a restricted liability in respect of failure of affirmative action.[47]

The two-stage test thus accounts for the three categories of duty-situations existing in the tort of negligence. The first, the category of duty based upon Atkinian pure foreseeability which applies in the settled physical interference situations where there is no outstanding public policy against liability. The second, the category of non-normal and statistically rare, restricted duties which apply in situations of special parties, mechanics and types of harm where the foreseeability basis is rendered narrower by relevant policy constraints. The third, the category of negated duty-situations, of public policies excluding the creation of a duty of care that would otherwise arise on the foreseeability basis: here, although the plaintiffs are foreseeable, overwhelming public interests negate the existence of a duty of care and the defendants are exempted from liability.

Given all these, one would have thought that the basis for determining the existence of a duty of care has reached an advanced and, certainly, a less confusing phase. The two-stage test will not be easily bettered. There were, however, over-zealous criticisms of the test.[48] It is said that the much sought-after universal basis for duty is unattainable and even undesirable, and that a clearer incremental basis to establish duty by a close analogy with previous decisions on a case by case basis was preferable. The argument, at this late stage, negates the whole history of formulating a universal basis for duty. To resist a generalized notion, such as the two-stage test, and to seek the return of the earlier disparate single-duty situations before *Donoghue* v. *Stevenson* is, at best, retrogressive. The test by its prima facie duty, which arises after satisfying the element of foreseeability, unequivocably calls for public policy considerations. This employment of policy can lead to unprecedented judicial legislation when policies are over-used, and to a massive escalation of liability when policies, which ought to restrict or negate liability, are insufficiently canvassed or considered. This has happened, but it is not the fault of the criterion that public policies are not properly utilized. It is the fault of judges. A corollary criticism from this is that the test places an unfair burden on the defendant to restrict or

[43] *Medley Byrne &Co.Ltd* v. *Heller & Partners Ltd* [1964] A.C. 465, H.L.
[44] See *supra.*
[45] See *supra.*
[46] *Home Office* v. *Dorset Yacht Co.* [1970] A.C. 1004, H.L.
[47] This probable restricted duty of care basis for negligent omissions is deduced from "contractual dependence" in *Stansbie* v. *Troman* [1948] 1 All E.R. 599; "control" basis in *Dorset Yacht, supra,* n. 46; "high foreseeability" relationship in *Peterson Zochonis & Co. Ltd.* v. *Merfarken Packaging Ltd.* [1986] 3 All E.R. 522; and the "unusual danger" relationship in *Smith* v. *Littlewoods Organisation Ltd.* [1987] 1 All E.R. 710, H.L. *Contra,* Smith J.C. and Burns P., "*Donoghue* v. Stevenson – The Not So Golden Anniversary" (1983) 46 M.L.R. 147. See also Markesinis B.S., "Negligence, Nuisance and Affirmative Duties of Action" (1989) 105 L.Q.R. 104.
[48] See Smith and Burns, *supra,* n.47, and also the speech of Lord Oliver "Judicial Legislation : Retreat from *Anns"* reported in (1988) 1 Supreme Court Journal (Malaysia) 249.

negate the existence of a prima facie duty which automatically arises on satisfying foreseeability. This objection is more apparent than real, as the burden is not one of establishing factual evidence, but of establishing the law, which is actually shared by the defendant with the plaintiff, who seeks to establish liability, and with the court, which ought to know the law. Then, finally, it is said that the test fails to provide the ultimate restricted duty criteria applicable to unsettled non-physical interference cases. This again is only partly correct, and it is, to this extent, also true of all the other tests. But, by the test, the process of arriving at the bases for restricted duties is clarified and rendered more rational and less difficult.

Although the criticisms against the two-stage test can be refuted in theory, the test was, indeed, found unsatisfactory in practice:

> "Perhaps what was wrong with *Anns* was less the formula itself than the way in which it was applied, particularly in striking down prior established immunities or restriction with little regard for previous case law. If the first stage was comparatively easy to pass (as it was based on nothing more than foreseeability) there was a risk that the bounds of liability would be unreasonably extended, particularly if judges were reluctant (as some were) to engage in the policy issues which the second stage demanded."[49]

The outstanding example of this expansive approach that was taken under the test was in *Junior Books Ltd.* v. *Veitchi Co. Ltd.*[50] when the majority in the House of Lords allowed recovery for a defect of quality in a flooring that was negligently constructed. This loss was a purely economic loss in nature. The imposition of liability was against the long-established principle prohibiting such recovery on a tortious basis, outside contract law. The House of Lords retracted from this unfounded escalation of liability in the following case *of D & F Estates Ltd.* v. *Church Commissioners for England*.[51] The enthusiasm by which the courts used the elegant test to overturn well-entrenched principles against liability produced a quick, and indeed too swift, reaction against the test. Within less than ten years after *Anns,* well before the test really had the chance to be applied properly and prove its true value, the test was displaced.

VI. Foreseeability and Proximity– The Two-Part Test

In the Privy Council case of *Yuen Kun-yeu* v. *Attorney-General of Hong Kong*,[52] Lord Keith rejected the universality of the two-stage test and introduced the two-part test of "foreseeability and proximity" in its place. The test was intended to avert the unwarranted escalation of liability that took place under the test it replaced. The test introduces for the first time the element of "proximity". The difficulty in this test and, indeed, the test after this, is the meaning of "proximity".

[49] W.V.H. Rogers, *Winfield and Jolowicz on Tort* (1989) at pp. 79-80.
[50] [1982] 3 All E.R. 201, H.L.
[51] [1988] 2 All E.R. 992, H.L.
[52] [1987] 2 All E.R. 705.

Lord Keith was heavily influenced by the High Court of Australia in *Sutherland Shire Council \. Heyman*[53] in creating this proximity element.

The facts of *Yuen* were simple, but the case raised difficult issues pertaining to the question of duty. The appellants were four individuals who deposited money in Hong Kong with a registered depositing-taking company, the American and Panama Finance Co. Ltd., which subsequently went into liquidation. This caused the appellants to lose their deposits. The appellants claimed against the Attorney-General of Hong Kong, representing the Commissioner of Deposit-taking Companies,for negligence in the discharge of his supervisory functions prescribed under the statute governing such companies. The issue was put thus by Lord Keith:

> "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."[54]

This raised the question as to whether the defendant, a public body, with limited resources to perform its prescribed statutory functions (unlike the case of the ordinary private individual), owed a duty to safeguard the depositing members of the public against wrongdoing by another, the liquidated finance company (unlike the usual interference by positive misconduct), which caused the depositors purely economic loss (as opposed to the usual physical damage). There thus existed the unique features of a defendant in a special position, of non-act interference and of non-physical damage. On any one of these features, the issue of the existence of a duty of care would have been brought fully into contention.

This issue in *Yuen* could have, however, been narrowed to the question of whether the restricted duty based on the "operation" test established, in a series of cases before *Yuen,* in particular *Anns,* to determine the existence of a duty of care in respect of breach of statutory power was satisfied on the particular facts of *Yuen.* If the *Anns'* "operation" test was considered unsatisfactory, the Privy Council could have used the two-stage test to reformulate the criterion. The only added difficulty here, and this was serious enough, by itself, to exclude recovery in *Yuen,* was that the claim, unlike those in the previous cases, was not for physical harm, but for purely economic loss.

Instead, the Privy Council excluded the duty of care here on other grounds.[55] In excluding the duty, Lord Keith, giving the advice of the Privy Council, specifically rejected the two-stage test:

> "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

[53] (1985) 59 A.L.J.R. 564.
[54] [1987] 2 All E.R. 705, 709.
[55] See Tan Keng Feng, Note on *Yuen* (1987) 29 Mal. L.R. 308.

> perhaps than its author intended.... [F]or 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."[56]

The Privy Council pointed to reservations to the test expressed in the subsequent cases of the House of Lords after *Anns.* In particular, it referred to Lord Keith in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd* when he said:

> "There has been a tendency in some recent cases to treat these passages [Lord Wilberforce's *Anns'* two-stage test] as being themselves of a definitive character. This is a temptation which should be resisted. The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case."[57]

To Lord Brandon in *Leigh & Sillavan Ltd* v. *Aliakmon Shipping Co Ltd,* who in referring to Lord Keith (quoted immediately above), said:

> "There are two preliminary observations ... with regard to ... Lord Wilberforce's [two-stage test].... The first... is that that passage does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence.... The second... is that Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analogous to any factual situation in which the existence of such a duty had already been held to exist."[58]

And to Lord Bridge in *Curran* v. *Northern Ireland Co-ownership Housing Associates Ltd* who said:

> "My Lords, *Anns* v. *Merton London Borough* may be said to represent the high-water mark of a trend in the development of the law of negligence by your Lordships' House towards the elevation of the 'neighbourhood' principle derived from the speech of Lord Atkin in *Donoghue* v. *Stevenson* into one of general application from which a duty of care may always be derived unless there are clear countervailing considerations to exclude it. In an article by Professor J C Smith and Professor Peter Burns, 'Donoghue v. Stevenson-The Not So Golden Anniversary' (1983)46 MLR 147, the trend to which I have referred was cogently criticised, particularly in its tendency to obscure the important distinction between misfeasance and non-feasance."[59]

[56] [1987] 2 All E.R. 705,710-12.
[57] [1984] 3 All E.R. 529, 534.
[58] [1986] 2 All E.R. 145,153.
[59] [1987] 2 All E.R. 13, 17.

In place of the two-stage test, the Privy Council formulated the two-part test:

"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.

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.* The relevant passages are:

> '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.'"[60]

The new dimension of "proximity" is now seen, some fifty years after *Donoghue* v. *Stevenson*,[61] in the repetitious part of the oft-cited Atkinian passage: the "reasonable contemplation" part (quoted above) after the "foreseeability" part (see the full quotation at the beginning of article). The question is what is meant by this new notion of "proximity". Proximity in its natural meaning is only descriptive of the existence of some relationships. According to the Oxford English Dictionary it means "the fact, condition, or position of being near or close by; nearness, neighbourhood". Even Kidner, who defends the two-part test, concedes in a recent article that proximity refers to "the degree of relationship between plaintiff and defendant for the duty of care to arise".[62] Proximity, therefore, merely points to the relative situation of the defendant and the plaintiff, just as other similar words, such as "nearness", "link", "closeness", "neighbourliness", "connection", "propinquity" or "nexus". It cannot be a criterion or a basis of the relationship that is required to establish the existence of a duty to take care.

"Proximity", however, in referring to the basis of a relationship could cover the foreseeability basis as originally intended by Lord Atkin. Robert Goff L.J. (as he then was) in *Muirhead* v. *Industrial Tank Specialities Ltd,* a case before *Yuen,* pointed to this: ". . . [Proximity] is used as a convenient label to describe a relationship between the parties by virtue of which the defendant can reasonably foresee that his act or omission is liable to cause damage to the plaintiff of the relevant type."[63] Similarly, in the recent Australian High Court case *of Hawkins*

[60] [1987] 2 All E.R. 705,710-1 l.emphasis added.
[61] [1932] A.C. 562,580.
[62] Kidner R., "Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence" (1987)7L.S. 319.
[63] [1985] 3 All ER 705,714, C.A.

v. *Clayton,* Brennan J. said: "The notion of proximity as I understand it is simply Lord Atkin's neighbourhood principle which depends on the reasonable foreseeability of loss."[64] However, if proximity does not refer to this foreseeability basis, Robert Goff L.J., in another case, *Leigh and Sillavan Ltd* v. *Aliakmon Shipping Co Ltd,* had this to say: "Once proximity is no longer treated as expressing a relationship founded simply on foreseeability of damage, it ceases to have an ascertainable meaning; and it cannot therefore provide a criterion for liability."[65] Similarly, Brennan J. in *Hawkins* said: "Lacking the specificity of a precise proposition of law, the wider concept [of promixity] remains for me a Delphic criterion, claiming an infallible correspondence between the existence of the 'relationship of proximity' and the existence of a duty of care, but not saying whether both exist in particular circumstances."[66]

It would thus appear that "proximity" after "foreseeability" in Lord Keith's two-part test refers to the same element of "foreseeability". If so, it is redundant. But since the word is used, it should not be treated as superfluous. However, if it is not superfluous, its meaning is unascertainable. In spite of all this, it is necessary to give it meaning, even a special one, as proximity is used for the first time as a test to determine the existence of a duty of care. The closest one can get to a definition of proximity is by referring to Deane J.'s judgment in *Heyman.* Unfortunately, this judgement was not referred to in *Yuen,* although *Heyman* was heavily relied upon. Deane J., like Lord Keith, disapproved of the two-stage test, and his approach to duty formed the basis of Lord Keith's subsequent two-part test:

> "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....
>
> 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.... 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 processes of legal

[64] (1988) 62 A.L.J.R. 240,246.
[65] [1985] 2 W.L.R. 289.327.C.A.
[66] (1988) 62 A.LJ.R. 240,246.

> 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."[67]

The physical, circumstantial (or relational) and causal proximities referred to by Deane J. above can all arguably be included in the notion of foreseeability. The extra element left out is that of "fairness and reasonableness".[68] If proximity, as an additional element to foreseeability, refers only to this "fairness and reasonableness", then proximity is just another word for "policy". "Fairness and reasonableness" is possibly just another way of referring to public policies. Indeed, Bingham L.J. in *Caparo Industries plc* v. *Dickman,* quoted slightly out of context, does not see any difference between the two: "just and reasonable ... covers very much the same ground as ... policy."[69]

If "proximity" covers "policy", then what is the difference between the two-part test of "foreseeability and proximity" and the two-stage test of "foreseeability qualified by policy"? The only difference discernible, apart from semantics, is that policy considerations are now internalized and concealed in the two-part test under proximity. This leads to the reassertion, by a different name, of the earlier confusing composite test of duty based upon foreseeability construed as a matter that includes policy factors (see part IV, above). Under the two-stage test, policy factors are, for clarity, externalized and articulated as a qualifying second stage. By the use of proximity, Lord Keith has set the clock back and has restored the inherent confusion as to the role of policy in determining the existence of a duty to take care.

If "proximity" after "foreseeability" in the test does not refer to "policy", then as a basis, apart from the foreseeability basis, it could also refer to a relationship that is narrower than foreseeability. If proximity refers to this, and it covers all the elements of "foreseeability" and that of "fairness and reasonableness", it is again not different from the earlier composite test based upon foreseeability that is construed to include public policies. Proximity in this sense is, therefore, effectively the same as proximity defined as "policy". Proximity can, therefore, be indifferently defined as referring to a relationship that is narrower than the foreseeability basis or as policy. Either way, "proximity" will suffer from the same problem of indefiniteness as to the role of policy in determining duty.

Just as the two-stage test, the two-part test does not provide the ultimate criteria for the restricted duties that apply in non-physical interference situations.

[67] (1985) 59 A.L.J.R. 564, 594-5, emphasis added. Deane J. elaborated on this proximity in the recent High Court of Australia case of *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240: it refers to the foreseeability basis in settled situations of negligence involving physical interference, and to some bases narrower than the foreseeability basis in the other areas of liability. Although there is some clarification, the precise meaning of proximity is still unclear. See John G. Fleming, "Must a Solicitor Tell?" (1989) 105 L.Q.R. 15.

[68] "Foreseeability" can include "public policy" as under the earlier tests of "foreseeability construed as a matter of public policy" and of "foreseeability that is construed as a matter that includes public policies" but, for clarity, as under the two-stage test, foreseeability can be used to mean Atkinian pure foreseeability independent of public policies.

[69] [1989] 1 All E.R. 798, 803, C.A. The case will be discussed later for the three-part test.

In this sense, together with all the other difficulties, the two-part test is more, not less, difficult to apply than the test it replaced. In *Smith* v. *Littlewoods Organisation Ltd.,* Lord Goff, in dealing with the difficult issue of whether the defendant cinema owners owed an affirmative duty to safeguard the adjoining premises from fire that was started by vandals in their premises, observed:

> "It is very tempting to try to solve all problems of negligence by reference to an all-embracing criterion of foreseeability.... But this comfortable solution is, alas, not open to us. The law has to accommodate all the untidy complexity of life; and there are circumstances where considerations of practical justice impel us to reject a general imposition of liability for foreseeable damage. An example of this phenomenon is to be found in case of pure economic loss, where the so-called 'floodgates' argument... compels us to recognise that to impose a general liability based on a simple criterion of foreseeability would impose an intolerable burden on defendants. I observe that *in Junior Books Ltd* v. *Veitchi Co Ltd* [1982] 3 All ER 201 some members of your Lordships' House succumbed, perhaps too easily, to the temptation to adopt a solution based simply on 'proximity'. In truth, in cases such as these, having rejected the generalised principle, we have to search for special cases in which, on narrower but still identifiable principles, liability can properly be imposed."[70]

Since *Yuen,* Lord Keith has gone on to promote the two-part test. His Lordship uses the test as a varying formula for "incremental negligence" in the way envisaged by Brennan J. in *Hey man* (referred to in *Yuen):*

> "... [T]he 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'."[71]

Apart from this, Lord Keith has not clarified the meaning of proximity. To quote Lord Keith on this use of proximity, his Lordship in *Rowling* v. *Takaro Properties Ltd*., emphasizing the necessity for careful case by case analysis, said:

> "One of the considerations underlying certain recent decisions of the House of Lords *(Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529) and of the Privy Council *(Yuen Kun-yeu* v. *A-G of Hong Kong* [1987] 2 All ER 705) is the fear that a too literal application of the well-known observation of Lord Wilberforce in *Anns* v. *Merton London Borough* [1977] 2 All ER 492 at 498, may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed. Their Lordships consider that question to be of an intensely pragmatic character, well suited for gradual development but requiring most careful analysis."[72]

[70] [1987] 1 All E.R. 710,736, H.L. Surprisingly, Lord Keith agreed with Lord Goff in the case.
[71] (1985) 60 A.L.R. 1,43-44.
[72] [1988] 1 All E.R. 163,172.

And in *Hill* v. *Chief Constable of West Yorkshire* his Lordship reiterated:

> "It has been said almost too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and defendant, and all the circumstances of the case must be carefully considered and analysed in order to ascertain whether such an ingredient is present. The nature of the ingredient will be found to vary in a number of different categories of decided cases."[73]

It is undoubted that proximity as something that is by no means the same thing as foreseeability (whatever its precise meaning) calls for an incremental development of liability in negligence, as it provides judges with the vehicle to develop the law more gradually by the attention it places on the particular relationship at hand between the plaintiff and the defendant and by its emphasis on analogous proximities that were previously required for liability. But the fear of a massive escalation of liability by the inadequate consideration of constraining public policy factors under the two-stage test is much exaggerated. This, admittedly, occurred in the past when the test was wrongly applied.[74] "Proximity" in the two-part test with its ambivalent meaning of either foreseeability, or policy, or something narrower than foreseeability, is capable of being even more misunderstood. Professor Julius Stone pointed out that Deane J's proximity requirement "threaten[s] a further proliferation of false issues and cross-purposes in this area" and he felt so strongly against his former student's "foreseeability and proximity" test that he had to remark regretfully that this "new-fangled bifurcation would submerge this whole area of the law in an ocean of raging chaos".[75] The same, with the greatest respect, can be said of Lord Keith's two-part test. This test is a step forward with two, and possibly more, steps backward.

VII. Foreseeability, Proximity, Justice and Reasonableness – The Three-Part Test

The confusion inherent in the notion of proximity did not end here. Recent interpretation of the two-part test led to the formulation of an extended version of this test: the three-part test based on "foreseeability, proximity, justice and reasonableness". Confusion is now compounded with more confusion. This was introduced by the Court of Appeal in *Caparo Industries plc* v. *Dickman and Others.*[76] Bingham LJ. said, and it is worth quoting him more fully here:

> "The many decided cases on this subject, if providing no simple ready-made solution to the question whether or not a duty of care exists, do indicate the requirements to be satisfied before a duty is found.

[73] [1988] 2 All E.R. 238,241.

[74] For example, as *in Junior Books Ltd* v. *Veitchi Ltd* [1982] 3 All E.R. 201, H.L., which allowed recovery of purely economic loss arising from defect of quality in a building structure which was later disapproved by *D & F Estates Ltd* v. *Church Commissioners for England* [1988] 2 All E.R. 992, H.L. See text *supra.*

[75] *Precedent and Law* (1985), 263-265.

[76] [1989] 1 All E.R. 798, C. A. See A.M. Tettenborn, "When Must Accountants Account?", (1989) 48 C.L.J. 177.

> The first is foreseeability. It is not, and could not be, in issue between these parties that reasonable foreseeability of harm is a necessary ingredient of a relationship in which a duty of care will arise: see *Yuen Kun-yeu* v. *A-G of Hong Kong* [1987] 2 All ER 705 at 710. It is also common ground that reasonable foreseeability, although a necessary, is not a sufficient condition of the existence of a duty....
>
> The second requirement is more elusive. It is usually described as proximity, which means not simple physical proximity but extends to -
>
> > '... such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'
>
> (See *Donoghue v. Stevenson* [1932] AC 562 at 581 per Lord Atkin).... The content of the requirement of proximity, whatever language is used, is not, I think, capable of precise definition. The approach will vary according to the particular facts of the case, as is reflected in the varied language used. But the focus of the inquiry is on the closeness and directness of the relationship between the parties. In determining this, foreseeability must, I think, play an important part: the more obvious it is that A's act or omission will cause harm to B, the less likely a court will be to hold that the relationship of A and B is insufficiently proximate to give rise to a duty of care.
>
> The third requirement to be met before a duty of care will be held to be owed by A to B is that the court should find it just and reasonable to impose such a duty; see *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 534 per Lord Keith. This requirement, I think, covers very much the same ground as Lord Wilberforce's second stage test in *Anns's* case [1977] 2 All ER 492 at 498, and what in cases such as *Spartan Steel and Alloys Ltd* v. *Martin & Co (Contractors) Ltd* [1972] 3 All ER 557 and *McLoughlin* v. *O'Brian* [1982] 2 All ER 298 was called policy."[77]

This was endorsed by the other majority judge, Taylor L.J.:

> "The judge held that three factors must be present to establish a duty of care in the field of negligent misstatement: firstly, foreseeability of loss, secondly, proximity of the plaintiff to the defendant; and, thirdly, the court must be satisfied that it is fair, just and reasonable that the defendant should owe a duty to the plaintiff. The judge incorporated the element of public policy in his third factor...."[78]

The three-part test was alluded to by Lord Griffiths in *Smith* v. *Eric S Bush, Harris* v. *Wyre Forest District Council* when he asked:

[77] [1989] 1 All E.R. 798, 802-3.

[78] *Ibid.* 816. The dissenting judge, O'Connor L.J., did not use the three-part test. He merely stated that proximity is "uncoupled … from foreseeability" (at 829) and used this proximity to describe a special duty that is narrower than foreseeability.

> "... [I]n what circumstances should a duty of care be owed by the advisor to those who act on his advice? I would answer: only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability."[79]

What is this new version of "proximity" that is specifically formulated as being apart from "foreseeability" and "justice and reasonableness"? This requires an examination *of Caparo.* The case involved the question of liability of a company's auditors for the negligent audit (assumed) of a company's annual accounts. The plaintiffs owned shares in a public company and they made a take-over bid for the company on the audited annual accounts. They suffered financial loss because the accounts were inflated. The trial judge held that the auditors owed no duty to the plaintiffs either as shareholders or as non-shareholders. The majority of the Court of Appeal, applying the three-part test, reversed this. By the defendants' negligent audit, financial loss was foreseeable to the plaintiffs when they invested in the company in their capacity as existing shareholders or as non-shareholders. But this alone was insufficient to establish a duty to take care, and correctly so. The Court held that it was only in respect of the plaintiffs investing in their capacity as shareholders, not as non-shareholders, that there was sufficient proximity (the second element of the test) and that it was only in such a relationship that it was just and reasonable (the third requirement) that a *Hedley Byrne*[80] liability for negligent misrepresentation should be imposed.

Bingham L.J. held in respect of the requirement of proximity:

> "... [V]oluntary assumption of responsibility, although a very useful expression does not provide a single, simple litmus test of proximity ... If, however, one asks whether the auditors here voluntarily assumed direct responsibility to individual shareholders it seems to me inescapable that they did. They did not have to accept appointment as auditors. Their work was not in reality unrewarded....
>
> There is, of course, no contract between the shareholders (either as a class or individually) and the auditor. But certainly as between the shareholders as a class and the auditor the relationship seems to me to be very close indeed to contract. The auditor's contract is made with the company, but it is a contract made on the company's behalf by the shareholders.... As between the shareholders individually and the auditor the analogy with contract is less compelling, but in my view it remains close. If a company engaged a doctor to examine and advise its senior employees, I would regard the relationship between the doctor and each individual employee as equivalent to contract for all except strictly legal purposes. The relationship between auditor and individual shareholder is less close, but not in my opinion critically so....
>
> I accordingly conclude that the auditor of a public company does owe individual shareholders a duty to exercise reasonable care in carrying out his audit and making his audit report....

[79] [1989] 2 All E.R. 514, 536, H.L.
[80] [1964] A.C. 465, H.L.

The judge held that a buyer who was not a shareholder could show the foreseeability of economic damage caused by reliance on a negligent audit report.

When, however, one turns to the second requirement, of proximity, it is in my view apparent that the relationship between the auditors and Caparo on the facts assumed (but on the assuimption that Caparo is not a shareholder) is very much less proximate than that of auditor and shareholder. There is here no statutory duty. The auditor is not engaged by the company to report to such a buyer, even though it is known that the report will be available for his inspection. Such a buyer may be, almost literally, anyone in the world.... The nexus or link between the parties is tenuous. If the report were a dangerous chattel likely to cause physical injury the requisite proximity might be found, but the relationship does not in my view satisfy the more stringent standards required of negligent misstatement. In truth, Caparo's case on proximity rests on foreseeability alone and foreseeability alone is not enough."[81]

And the other majority judge, Taylor L.J. held:

"*Caparo as shareholders*

[A]though the legal entity which contracts with and pays the auditors and to which the auditors owe a statutory duty is the company, Parliament entrusted the appointment of auditors to the shareholders and required the auditors to render their report to the shareholders rather than the directors, so that those owning the company's shares should receive an independent account of its financial state.

Auditors have thus in my judgment a close and direct relationship with the shareholders. Once auditors accept appointment they know that their report has to be sent to each shareholder as a named individual who will or may act on it.... Indeed, the only reason there is no contract with the shareholders derives from the rule giving a limited liability company a legal identity separate from that of its members.

Even if one were to apply the voluntary assumption of responsibility test, it would in my view be satisfied here.... For these reason, I conclude that there was the requisite proximity between Caparo as shareholders and the auditors.

Caparo as investors

The position of a potential investor is very different. He plays no role in the statutory scheme relating to auditors. He has no part in appointing them; he does not receive their report directly from them. He may, of course, be shown the accounts and the report by others.... Within the auditors' contemplation there is no focus on any person or class of person who may inspect their report and act on it. By the same token other unascertained persons may

[81] [1989] 1 All E.R. 798, 807-12.

> also do so, eg a bank contemplating the grant to the company of a loan or its suppliers or creditors. In none of these instances is there any close or direct relationship with the auditors. Foreseeability of reliance is conceded but the element of proximity is in my judgment lacking."[82]

The question is, on this application of the three-part test, what is the difference between the notions of "foreseeability" and "proximity"? All the relational and circumstantial matters considered necessary by the two judges (above) for proximity between the auditor and the plaintiffs investing as shareholders can, on analysis, be subsumed under the foreseeability notion. If so, "proximity" is superfluous since it is just another word for foreseeability. But since it is a separate element apart from the other two elements of "foreseeability" and "justice and reasonableness" it cannot, or rather, it should not, be considered superfluous. It must, therefore, be something beyond these two elements. What this is, is unfortunately not disclosed. Aside from this interpretation, "proximity" as a constituent element in the test could also refer to something that is narrower than foreseeability. The Court probably intended proximity to mean this. Bingham L.J. said (quoted earlier): "The content of the requirement of proximity, whatever language is used, is not, I think, capable of precise definition.... In determining this, foreseeability must, I think, play an important part...."[83] But the problem is, how is this "proximity", that is narrower than the foreseeability basis, arrived at without considering foreseeability together with "justice and reasonableness", or more accurately, without the foreseeability basis being narrowed down by constraining public policies? At this juncture it is worth remembering that Bingham L.J. accepted that, "just and reasonable ... covers very much the same ground as ... policy"[84] and that this is treated, under the test, independently from the other two elements. A learned commentator posed the problem succinctly: "is 'proximity' (i) another word for foreseeability; (ii) an aspect of whether it is 'just and reasonable' for a duty to exist; or (iii) a separate and independent requirement?"[85]

It would be much more sound and less confusing to apply the earlier two-stage test here. This test rationally provides for a restricted duty founded on "reasonable reliance" as the basis of liability for negligent mistatements as established some time ago under the leading case *of Medley Byrne.* The public policies that restrict recovery pertain to the unique mechanics of harm by misstatement (unlike acts, this can circulate widely) and the potential indeterminacy of such claims based on purely economic loss which, in range, unlike physical harm, is not limited by physical impact. Foreseeability of harm as a basis to determine the existence of a duty is far too wide. The reliance basis is particularly suitable to restrict recovery for negligent misrepresentation, since "active" reliance is meaningful here. This means that the plaintiff must show actual reliance or must have actually acted on the misrepresentation to his financial detriment before recovery is allowed.

There is nothing new in all this, so far. At the most, there was a subsidiary issue as to whether the real basis *of Hedley Byrne* was "voluntary undertaking"

[82] *Ibid.* 819-20.
[83] *Ibid.* 803
[84] See *supra.*
[85] A.M. Tettenborn, "When Must Accountants Account?" (1989) 48 C.L.J. 177, 179.

or "reasonable reliance". By the two-stage test, it could have been settled that the wider "reliance" was preferable to "voluntariness" as the basis of the special duty. It has long been settled that a contractual basis is unnecessary to establish liability under *Hedley Byrne.* The only step required to extend liability was to provide that even a unilateral voluntary undertaking on the part of the defendant was unnecessary, so long as there was reasonable reliance by the plaintiff on the defendant's misrepresentation.[86] This accords with the general involuntary basis of liability in tort law. Here it was even immaterial whether the basis of liability was that of "voluntariness" or "reliance". In respect of the plaintiffs' claim for financial loss in their capacity as shareholders, there was both voluntary assumption of responsibility by the defendant auditors as well as reasonable reliance by the plaintiffs on the audit. The critical basis *of Hedley Byrne* was only material in the recent spate of cases[87] involving surveyors who excluded their responsibility for the accuracy of their surveys to purchasers of homes at the lower end of the housing market. The courts here held that *Hedley Byrne* liability still applied because of the prevailing market practice of reliance on such surveys, inspite of the surveyors excluding their responsibility.

What was new and really at issue was whether the class of plaintiffs, under the *Hedley Byrne* principle, should only cover, in this type of case involving negligently audited annual accounts, investors who were existing shareholders, or whether it should also include those who were non-shareholders. If the second class were excluded, then whether, at least those of them, who were "suitors" of a company vulnerable to take-over, were included.[88] This was simply a question as to the outer limit of the scope *of Hedley Byrne* liability. The plaintiffs in their various capacities relied on the audited accounts to invest further. This was indisputable. But as a matter of foreseeability and policy, as reasoned by the majority judges in the Court of Appeal,[89] it could be argued that only when the plaintiffs invested further into the company in their capacity as existing shareholders was their reliance on the audit considered reasonable. They may have actually relied on the audit when they invested in their other capacities, but their reliance, as non-shareholders, was unreasonable.

The two-stage test arrives at the same result as the three-part test in limiting the liability of auditors under the *Hedley Byrne* principle to existing shareholders.[90] This same result that is reached by both the tests is unobjectionable. A limit

[86] A number of other bases have been put forward for *Hedley Byrne* liability: those based on "expertise" *(Mutual Life & Citizen Assurance Co.* v. *Evatt* [1971] A.C. 793, P.C., rejected by *Esso* v. *Mardon* [1976] Q.B. 801, C.A., *and Shaddock & Associates Pty. Ltd.* v. *Parramatta City Council* (1981) 36 A.L.R. 385, Aust.H.C.), "equivalence to contract" (*per* Lord *Delvin, Hedley Byrne* [1963] 2 All E.R. 575, 610), "determinate plaintiff *(per* Taylor L.J., *Caparo* [1989] 1 All E.R. 798, 820- a basis used in *Caltex Oil Pty. Ltd.* v. *Dredge Willemstad* (1976) C.L.R. 529, Aust. H.C., for recovery of economic loss caused by negligent act arising from somebody else's property damage, which was rejected in *The Mineral Transporter* [1985] 2 All E.R. 93, P.C., and *The Aliakmon* [1986] 2 All E.R. 145, H.L.) and "voluntary undertaking" (rejected by *Yianni* and *Smith* v. *Eric S Bush,* cited below).

[87] *Yianni* v. *Edwin Evans & Sons* [1981] 3 All E.R. 592; *Smith* v. *Eric S Bush, Harris* v. *Wyre Forest District Council* [1989] 2 All E.R. 514, H.L.

[88] See *J.E.B. Fasteners* v. *Marks, Bloom & Co* [1983] 1 All E.R. 583, C.A.

[89] See *supra.*

[90] *Al Saudi Banque* v. *Clarke Pixley* [1989] 3 All E.R. 361. Millett J. held, by the three-part test, that a company's auditor owed no duty of care to the company' s creditors. The case has been allowed, exceptionally, to leap-frog to the House of Lords. See also *Van Oppen* v. *Clerk to the Bedford Charity Trustees* [1989] 3 All E.R. 389, C.A., and *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd., The Good Luck* [1989] 3 All E.R. 628, C.A.

on an auditor's liability has to be drawn somewhere, and the limit placed here may not be wholly equitable, but it is, at least arguably, the least inequitable. But using the new three-part test to reach this very same conclusion is both confusing and unsound: "proximity" which does not mean "policy", as it probably originally meant under the earlier two-part test, is now interposed between "foreseeability" and "justice and reasonableness" as a further requirement. The difference between this and other elements is unknown and wanting. If it is construed as a relationship that is narrower than the foreseeability basis, the difficulty remains as to how this narrower basis is obtained independent of "justice and reasonableness". The three-part test is yet another of the recent meaningless and confusing tests for determining the existence of a duty to take care. Compared with the earlier two-stage test, and even with the two-part test, this latest test promises more confusion and greater analytical difficulties – in short, further chaos.

VIII. CONCLUSION

The latest three-part test has to be clarified urgently. If it cannot be clarified, it should be quickly abandoned. The same can be said of the earlier two-part test. The solution is to go back to applying the Wilberforce two-stage test, albeit with greater caution. At the end of the day, what is clear is that not all carelessness, or more accurately, acting below the standard of a reasonable person in the community (which includes intentional sub-standard conduct) amounts to the tort of negligence. The function of duty, as a question of law, is to select fairly those situations which ought to be compensated.

The selection is based on foreseeability and public policies: on pure foreseeability in the regular physical interference situations where there is no public policy against recovery; on the foreseeability basis that is qualified by policy considerations in the special, theoretically difficult, but statistically infrequent, non-physical interference cases where the foreseeability basis, by itself, is too wide; and upon public policies in those exceptional instances when a duty that would otherwise arise on the foreseeability basis is negated. It is undeniable that these three categories of duty situations exist today in the tort of negligence: first, the pure foreseeability basis, secondly, the restricted or special duty bases and, thirdly, the negated duty situations. The two-stage test explains these categories and provides the most rational basis for their existence.

The unqualified Atkinian pure foreseeability basis that applies in situations of physical act causing physical harm is simple enough. In fact, the logic of pure foreseeability works so well here that a duty of care is almost always assumed. In the restricted duty situations, because of the peculiarities of the parties, mechanics and types of harm, various narrower bases, short of the foreseeability basis, must apply. The test does not formulate the ultimate criteria for these special duties in novel situations, but it provides the process by which they are formulated. The test, indeed, goes further here and provides also for the refinement, restriction or extension of these special duties after formulation, when this is necessitated by further development. In the third negated duty situations, although the plaintiffs are foreseeable, overwhelming public policies negate the existence of a duty of care.

If the overall effect of the new proximity dimension in the recent two-part and three-part tests is to clarify the application of two-stage test, this is unobjec-

tionable and may, indeed, even be helpful. The two-stage test is, in application, actually only the first stage of applying the Atkinian pure foreseeability in the settled physical interference situations. In non-physical interference situations, the application of the test is more complex. It is the two stages of using public policies to exclude the prima facie duty of care that arises on satisfying foreseeability in situations when the duty is negated. An example of this is the immunity given to a negligent advocate on public policy grounds, inspite of the foreseen harm caused to the client by the negligence of such an advocate. And it is really three stages (not "parts") when public policies do not exclude liability, but merely restrict the prima facie duty of care to a narrower ambit or proximity than the foreseeability basis. The formulation of this narrower basis of liability is at a third stage, after considering foreseeability and the restriction of this basis by public policy considerations under these two earlier stages. An example of this formulation is the "reasonable reliance" basis of liability in respect of negligent misstatements. The restricted duty that is obtained at this unarticulated third stage can be described as a special "proximity" (the "third stage proximity"), if this word is ever needed. Kidner in defending the proximity element in the two-part test in a recent article stated:

> "... [T]he notion of proximity... is... used... as a legal concept denoting that degree of closeness of relationship which is necessary before the obligation to take care arises. [This]... concept of duty means an obligation to take care when it is foreseeable that a person who is within a sufficient degree of relationship or proximity may suffer damage. That sufficient degree of proximity may be established by foresight alone (as in cases of physical damage) but in some categories a closer relationship may be required, as in the case of negligent misstatement."[91]

Proximity in this sense is purely descriptive and innocuous. It may, however, be useful to note the element in this sense when applying the two-stage test. In the past the test had been too loosely applied and the prima facie duty that arose too easily after satisfying the element of foreseeability in the non-physical interference situations, led to an unfounded escalation of liability when public policies which ought to restrict or exclude recovery were under-considered. A more careful consideration of restraining policies is called for, and a greater emphasis on a closer analogy with previous judicial decisions restricting recovery (previous proximities) and with those excluding liability must be given in the future, if the test is to be applied properly.

Proximity is, however, confusingly, not used in the above sense under the two-part and, the latest, three-part tests. In the two-part test, proximity means possibly "policy", and in the three-part test, proximity means either something new (apart from "foreseeability" and "justice and reasonableness") which has yet to be ascertained, or something that is narrower than the foreseeability basis, but somehow independent of the public policies that are applicable in restricting the foreseeability basis. This proximity in these two tests adds a new dimension that is more apparent than real. It is confusing. Proximity, however construed, will never be a sufficient basis for duty. At the very most, proximity is a useful

[91] Kidner R., "Resiling from the *Anns* Principle: The Variable Nature of Proximity in Negligence" (1987) L.S. 319, 322.

and convenient label to refer to a restricted basis of liability that applies in circumstances apart from the settled physical interference situation when the normal foreseeability basis for duty is rendered narrower by constraining public policies under the two-stage test.

Invoking the two-stage test is fraught with difficulties, especially in novel situations; so are many aspects of human affairs. But it is, at least, more rational, less difficult and less confusing as a basis to determine the existence of a duty to take care than all the other bases, including the two newer bases with the proximity element. It has yet to be surpassed. Unfortunately, it has been displaced too quickly and too soon. It should be revived, but applied with greater circumspection, before it is too late.

TAN KENG FENG*

Postscript: The House of Lords has reversed the decision of the Court of Appeal in *Caparo Industries plc* v. *Dickman* [1989] 1 All E.R. 710. Caparo's claim under the *Medley Byrne* principle against the auditor for investment loss arising from the assumed negligent audit of the accounts of a company purchased by them has been disallowed even in their capacity as shareholders who invested further in the company on the audit. The report does not indicate as to how the House of Lords dealt with the test of duty in the appeal. *The Times,* February 9, 1990. From *The Times,* Law Report, February 12,1990 it would appear that the approach taken in the article on duty is consistent with the opinion of Lord Bridge.

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