THE EXPANDING DOMAIN OF NEGLIGENT MISSTATEMENT

by

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The House of Lords decision in *Hedley Byrne* v. *Heller*[1] heralded a major development in the law of negligence, and one whose full implications are only now being realised. In *Hedley Byrne*,[2] the extension of negligence liability to a situation where a statement, written report or representation gave rise to financial loss as opposed to physical harm, acknowledged, for first time, liability for financial loss where neither fraud nor a fiduciary relationship existed.

According to Lord Reid,[3] a duty of care existed in

> ... all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew, or ought to have known, that the inquirer was relying on him.[4]

From this analysis, and that of other of their Lordships, the essential elements of the action may be extracted. Those elements are the seeking of information or advice in a business or professional context, reliance upon the source of that advice, and, hence, reliance upon the accuracy of the information proffered, and assumption of responsibility by the party proffering the advice. In this regard, emphasis was placed upon a 'special relationship' between the parties which, in effect, replaced the proximity test in liability for negligent acts under *Donoghue* v. *Stevenson*.[5] This relational requirement was designed to counteract floodgate fears based upon the capacity of words and documents to extend their harmful effect beyond the original recipient.

In *Hedley Byrne*,[6] a disclaimer of responsibility for the advice proffered was seen as a complete bar to liability.[7] Lord Morris put a further gloss on the proximity requirement, referring to the possession of a special skill.[8]

Despite initial uncertainty as to the parameters of liability, development in the succeeding years has been rapid, and uncertainty has increased with expansion and contraction of the basic requirements. The

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1 [1964] A.C. 465.
2 Ibid.
3 Ibid at p. 486.
4 Ibid.
5 [1932] A.C. 562.
6 [1964] A.C. 465.
7 Ibid at p. 483.
8 Ibid at pp. 502-503.

major *foci* have included the level of skill or expertise required of the profferee, the extent of liability for public documents such as corporate financial statements, and the degree to which the remedy in tort may run concurrently with any contractual relationship. An issue which has recently risen to prominence is the precise characterisation of the negligence required.

Further uncertainty has emerged through the development of tort actions for pure financial loss caused by negligent acts. Liability for such surfaced first in the High Court decision in *Caltex* v. *The Dredge 'Willemstand'*,[9] and development has continued in England in *Junior Books* v. *Veitchi*.[10] The relationship of these actions to negligent misstatement *per se* awaits clarification, as does the extent of any liability for failure to warn.

The first High Court decision accepting the new head of liability was *M.L.C.* v. *Evatt*[11] in 1968. That decision was particularly notable for the judgment of Barwick C.J. The Chief Justice extended liability to an identifiable class of persons.[12] He regarded *trust* rather than purely *technical skill or expertise* as the heart of the special relationship: that is, the relationship emerged because the recipient had reason to suppose that the other party had access to the relevant information or expertise.[13] Most significantly, particularly with regard to professional documents, he doubted, given that a duty of care was imposed by law, whether a disclaimer would always be effective.[14]

Interestingly, although the 'expert advice' component suggested by Lord Morris[15] was affirmed by the majority of the Privy Council when *M.L.C.* v. *Evatt*[16] was appealed, this requirement may now be considered as defunct, even in jurisdictions such as New Zealand, which are putatively bound by the Privy Council. In Australia, it was thoroughly disapproved in *Shaddock* v. *Parramatta*[17] in 1981, and any requirement for expertise was held merely to encompass considered advice or information given on a serious occasion.[18]

Shaddock v. *Parramatta*[19] was also significant for other radical extensions in misstatement law. First, it made it clear that the giving of information, as well as advice, was incorporated.[20] Second, it was made plain that, in Australia, the duty extended to public authorities having a statutory duty to impart information or advice, and that this duty was non-delegable.[21] Finally, and, it is submitted, most significantly for

9 (1976) 136 C.L.R. 529.
10 [1983] 3 W.L.R. 477.
11 (1968) 122 C.L.R. 556, (1968-69) 42 A.L.R. 316.
12 Ibid at p. 321.
13 Ibid at pp. 321-322.
14 Ibid at p. 322.
15 [1964] A.C. 465 at pp. 502-503.
16 (1970) 122 C.L.R. 628.
17 (1981) 55 A.L.J.R. 713.
18 Ibid at p. 723.
19 Ibid.
20 Ibid at p. 723.
21 Ibid.

future development, the duty was extended to a failure to provide information in a context where the omission suggested, based on prior practice, a state of affairs which did not in fact exist. This aspect of the decision is intimately related to negligent failure to warn. In this respect, it will be assessed in some detail subsequently.

While these decisions represent the extent of the settled high authority in England and Australia, they by no means comprehend even a fraction of the developments in misstatement liability as a whole. It is to analysis of the major trends in discreet areas of application to which one must turn to assess the major trends and their implications.

Development of negligent misstatement liability has not followed any coherent or consistent pattern since the formulation given by the House of Lords in *Hedley Byrne*.[22] *Hedley Byrne*[23] established as basic criteria the giving of advice or information in circumstances where it was intended to be relied upon, reliance, and loss eventuating from acts carried out in reliance. The required relationship was described as one equivalent to or similar to a contractual relationship. Lord Reid, notably, cautioned against too restrictive and definitional an approach.

1. *Liability of Corporate Auditors and Directors*

Development is most readily surveyed within general sub-areas. One of the most important of these, the liability of the corporate auditor for negligently prepared financial statements, has risen to prominence in part because of the deficiencies in corporate law with respect to accounting procedures and financial reporting. Historically, this is one of the earliest areas in which liability has been considered, and the 'floodgates' *dictum* of Cardozo C.J. in *Ultra Mares* v. *Touche*[24] continues to exert attraction for those who seek to restrict liability. The dissenting judgment of Denning L.J. in *Candler* v. *Crane, Christmas & Co.*[25] in 1951 was the direct precursor for the judgments of their Lordships in *Hedley Byrne*.[26] Since that time, expansion in this area has been rapid, if erratic, and has focussed upon the limits of the class who are entitled to rely upon the contents of the audited documents.

In an early and significant decision, *Dominion Freeholders* v. *Aird*,[27] the New South Wales Court of Appeal stated that reliance could not be employed to shield an auditor from breach of his own statutory duty to independently certify and verify the elements in the company accounts essential to formulation and certification of balance sheets and profit-loss statements. These documents were misleading and inaccurate due to alleged reliance upon materials supplied by the company's accountants. Thus, where the common law duty of care runs parallel to and derives

22 [1964] A.C. 465.
23 Ibid.
24 (1931) 174 N.E. 441.
25 [1951] 2 K.B. 164.
26 [1964] A.C. 465.
27 [1966] 2 N.S.W.L.R. 293.

support from a statutory duty, liability cannot be shifted or shared. The same principle was recently reiterated in the decision of the Outer House of the Scottish Court of Session in *Twomax* v. *Dixon*.[28] There, the auditor alleged reliance upon representations by directors. This is an important qualification and ensures that, where a statutory duty is concurrently present, the loss spreading function terminates with the individual or partnership giving certification. In this regard, it is critical to note that corporate directors also certify corporate public documents, and, therefore, their role may also come under examination in the future. It has been suggested that current computerised accounting procedures make it possible for management accountants to conceal dubious accounting practices so successfully that they may be beyond detection by the auditor. In such a case, the auditor would not be negligent, while the directorate, under whose authority the accounts were prepared and to whom the accountants are directly responsible, may well be.

Initially, development of the liability of auditors was retarded by the New Zealand decision in *Dimond Manufacturing* v. *Hamilton*[29] where the auditor was not found liable for negligently prepared financial documents which he had himself shown to a third party investor. The critical factor according to Tompkins J., was that, despite the fact that the auditor, who had prepared the accounts and appended an unqualified certificate, had himself given the accounts to the plaintiff to peruse, and was aware the plaintiff would rely upon them in making an offer for shares,

> ... [t]he accounts were not prepared and certified with any knowledge that they would be submitted to or relied on by any potential purchasers of the shares.[31]

Tompkins J. concluded,

> I do not think that accountants or auditors who certify an annual balance sheet are by that fact alone under a liability to third parties for negligence in the preparation or certifying of such accounts.[32]

In some respects, the dichotomy employed is parallel to the characterisation test later employed in the recent and significant decision in *San Sebastian*.[33] This decision and the ramifications of the characterisation test will be analysed later in this essay. Thus, the fact of negligence in the preparation and certification of the documents was held to have spent its force by the time the documents were given by the auditor to the investor. The critical knowledge was that available at the time of preparation. This was inapplicable to subsequent events. This came very close to saying, as did the court in *San Sebastian*,[34] that mere negligent preparation could not result in negligence liability for later deliberate

28 [1983] S.L.T. 98.
29 [1969] N.Z.L.R. 609.
30 Ibid.
31 Ibid at p. 709.
32 Ibid.
33 [1983] 2 N.S.W.L.R. 268.
34 Ibid.

dissemination. Similarly, in *Dimond*,[35] despite the fact that audited accounts are certified 'true and fair', the certification on the face of the accounts and the negligent acts of preparation incorporated therein were isolated structurally from their later presentation. Preparation was perceived as an isolated and discreet phenomena culminating in certification, one incapable by its nature of rendering negligent the knowing presentation of the documents to a potential investor.

This distinction becomes incoherent when it is compared to liability for a negligently prepared chattel. With a chattel, no less than with documents prepared for a serious business purpose, the purchaser or recipient relies upon the skill and care of the source in preparation and preparation. The only intelligible distinction is that any document whatsoever, from financial accounts or planning reports to a simple letter, is subject to interpretation by the recipient. The appropriate manner in which to canvass interpretive problems, it is submitted, is by way of a counter-claim of contributory negligence.

The *Dimond*[36] decision explicitly contradicted the critical passage from Lord Denning's judgment in *Candler*,[37] although that passage had been approved by the House of Lords in *Hedley Byrne*:[38]

> They owe the duty of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts.[39]

The New Zealand formulation was more restrictive than that applied by a later Canadian court in *Haig* v. *Bamford*,[40] where it was held to be sufficient that the auditors knew that the statements were prepared for assessment by unnamed third parties. Dickson J. concluded by saying that,

> I can see no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer, and the case in which the information is handed to the employer, who, to the knowledge of the accountant, passes it to members of a limited class.[41]

In a somewhat earlier Canadian decision, auditors were found liable to a director, who, as a private individual, invested in corporate shares on the faith of an audit.[42]

The most sweeping decisions in this area are those in New Zealand in *Scott* v. *MacFarlane*,[43] and in the Outer House of the Court of Session in Scotland in *Twomax* v. *Dickson*.[44] While, in the first of these, Richmond P. negatived liability because the defendant auditor lacked specific knowledge that a takeover bid was pending and that the accounts would

35 [1969] N.Z.L.R. 609.
36 Ibid.
37 [1951] 2 K.B. 164.
38 [1964] A.C. 465.
39 [1951] 2 K.B. 164.
40 (1976) 72 D.L.R. 3d. 68.
41 Ibid at p. 80.
42 *West Coast Finance* v. *Gunderson* (1974) 44 D.L.R. 3d. 232.
43 [1978] 1 N.Z.L.R. 553.
44 [1983] S.L.T. 98.

therein be relied upon, Woodhouse J. and Cooke J. took a more expansive view and, in effect, nullified the decision in *Dimond*.[45] Both emphasised the fact that the financial position of the corporation was such that a takeover bid was almost a foregone conclusion. Woodhouse J. described the dictum of Cardozo C.J. in *Ultra Mares*,[46] often the touchstone for those who seek to limit liability, as,

> ... substantially a plea in mitigation on behalf of a particular class of defendants that they should be altogether excused from liability for their negligent conduct because the consequences are too serious to justify responsibility.[47]

Woodhouse J. went on to apply the *Anns*[48] test to the facts before him. He suggested that the

> ... sifting mechanisms that have been erected by the courts in favour of defendants are not founded on any logical application of principle but upon a cautious view of what has seemed to be expedient at the time.[49]

In negativing the need for personal assumption of responsibility and knowledge of the identity of those relying, he continued,

> I cannot think that the first qualification can be justified as a shield for those who give careless advice any more than it would seem right to use it for the protection of those who cause damage on the roads or elsewhere by their careless acts. And a need to establish the very identity of those proposing to act upon advice would seem not merely an extremely stringent but an almost fortuitous test of responsibility.[50]

As a more realistic test, he offered,

> ... the significance of the information, the means by which it was formulated, the degree of deliberation with which it was released, its likely circulation and uses, and the extent to which it might be necessary for third persons to rely or depend upon it.[51]

Of particular importance was the certified accounts would become part of the public record. These observations on the principles which ought to be applied in stage two of an *Anns*[52] analysis are, it is submitted, both telling and pertinent. Applied to a wide variety of misstatement situations in the public sphere, they offer a comparatively clear-cut analysis of the precise nature, content and circumstances of the alleged representation. Cooke J. also laid great stress on the public nature of the documents in *Scott* v. *MacFarlane*.[53] This approach, with its emphasis on the public nature of the documents was adopted, and somewhat extended, in *Twomax*.[54] There, the duty was extended to cover, not only

45 [1969] N.Z.L.R. 609.
46 (1931) 174 N.E. 441.
47 [1978] 1 N.Z.L.R. 553 at p. 572.
48 [1977] 2 W.L.R. 1024.
49 [1978] 1 N.Z.L.R. 553 at p. 574.
50 Ibid.
51 Ibid at p. 575.
52 [1977] 2 W.L.R. 1024.
53 [1978] 1 N.Z.L.R. 553.
54 [1983] S.L.T. 98.

the engineer of the takeover of Kintyre, but also two smaller investors who proposed to concern themselves in its management. Notably, one of the smaller investors had sought independent advice.

The concept of a public duty correlative with the public nature of corporate financial documents has not yet been adopted in Australia, nor has the *Anns*[55] dictum been applied to negligent misstatement. There does not appear to be any reason founded on principle why this approach should not be followed.

2. *Liability of Surveyors and Appraisors*

Development of the liability of surveyors and appraisors has followed a somewhat parallel course. In *Cari-Van Hotel* v. *Globe*[56] the valuer was held liable to all persons he should have known might rely to their detriment upon his valuation. Rutten J. stated that

> ... the appraisor in this case, and in every case where the valuation is done without restriction on its subsequent use, owed a duty of care to such persons as the plaintiff in this action, whom he should have known might rely upon the appraisal.[57]

The nature of an appraisal imports the concept that it is obtained in order that it might be relied upon in serious business dealings, and thus reliance has not been seriously questioned. Further, despite the presence of disclaimers, it has been relatively easy for the courts to limit the effect of any disclaimer and extend the scope of liability well beyond the original recipient. In *Yianni* v. *Edwin Evan & Sons*,[58] the fact that a valuer's report was commissioned by a building society and expressed as being for their use and reliance only, was held not to negative liability to a purchaser who obtained finance through the society and indirectly relied upon the report in proceeding with the purchase. In a similar tenor to the English decision, in *B.T. Australia* v. *Raine & Horne*,[59] a specific disclaimer was construed so as not to exclude liability to a third party for whose benefit the valuer's client had obtained the valuation and for whose investments it was utilised. This area has not, apparently, raised such floodgate fears as the liability of auditors, perhaps because the liability carries with it built in limits. Furthermore, an appraisal or valuation pertains only to a specific property, and, therefore, the effects of any negligence are incapable of spreading.

3. *Liability of Estate Agents*

An area where evolution has been slower, and much more erratic, is the liability of an estate agent for representations made during the course of pre-contractual negotiations. The development here has been plagued by several conflicts of principle. Liability for misstatements made in the

55 [1977] 2 W.L.R. 1024.
56 [1974] 6 W.W.R. 701.
57 Ibid at p. 717.
58 [1981] 3 All E.R. 592.
59 [1983] 3 N.S.W.L.R. 221.

course of pre-contractual negotiations was not firmly established in England until *Esso* v. *Mardon*,[60] and has been established still more slowly in Australia.[61] It may be difficult to distinguish the sort of factual or advisory statement necessary to give rise to an action in negligence from the 'puffs' of the professional salesman. In the early Australian decision in *Presser* v. *Caldwell*,[62] the Court of Appeal was bedevilled, not only by the foregoing contractual problem, but also the 'expert advice' requirement thought present in *Hedley Byrne*[63] and finally demolished in Australia by *Shaddock*.[64] In *Presser* v. *Caldwell*,[65] Mason J.A., referring to the Privy Council judgments in *M.L.C.* v. *Evatt*,[66] said that it

> ... decisively rejected the wider basis on which it was suggested that persons might be liable for statements negligently made and confine the class of persons who are under a duty of care in relation to the provision of advice or information to those who possess, or profess, some special skill or competence in the subject matter of the advice or information.[67]

He went on to say that,

> Evatt's case indicates that the principle of *Donoghue* v. *Stevenson* does not underlie the existence of a duty to take care in relation to the making of statements, that there is no exact correspondence between liability for negligent words and liability for negligent acts and that the duty is imposed primarily on those who give advice (including information) in the course of a business or profession which involves the giving of skilled and competent advice, and, in addition, on those who, although not carrying on such a business or profession, profess to have a degree of skill and competence in a particular subject matter which is comparable to those who do carry on the business or profession of advising on the subject matter.[68]

In view of the agent's statement that he had checked and ascertained that the land was not filled, and in view of the refining of the expertise factor, it is virtually certain that this case would now be decided otherwise.

Certainly, in other recent decisions, the level of expertise has been varied according to the nature of the representation and the circumstances in which it was made. In New Zealand, a contractor has been held liable to a back-hoe operator for failing to warn him of underground cables.[69] In *Barrett* v. *J. B. West*,[70] also decided in New Zealand, an estate agent was held liable for a representation that a house was

60 [1976] Q.B. 801.
61 *Aluminium Products* v. *Hill* [1981] Qd. R. 33.
62 [1971] 2 N.S.W.L.R. 471.
63 [1964] A.C. 465.
64 (1981) 55 A.L.J.R. 713.
65 [1971] 2 N.S.W.L.R. 471.
66 (1970) 122 C.L.R. 628.
67 [1972] 2 N.S.W.L.R. 471 at p. 490.
68 Ibid at pp. 490-491.
69 *Clark* v. *Drewett* [1977] 2 N.Z.L.R. 556.
70 [1970] N.Z.L.R. 341.

sewered, made in reliance upon his listing notes, when the presence of a 'mushroom' in the back yard should have alerted him to the presence of a septic tank.

In Australia, the liability of estate agents is now established. In *South Australia* v. *Johnson*,[71] the State Government was found to have been negligent in representing to a potential lessee that primarily subterranean clover pasture land was suitable for fat lamb production. On those facts, both superior expertise and access to information were established. *Roots* v. *Oentory*[72] demonstrates the flexible approach of the courts. In this decision, a misstatement as to the turn-over of a business was held to lie clearly within the area of expertise of an estate agent specialising in commercial properties. Thus, both the ghost of the pre-contractual representation issue and that of expertise appear to have been laid firmly to rest, even in jurisdictions putatively bound by the view of the majority of the Privy Council in *M.L.C.* v. *Evatt*.[73] The expertise factor clearly varies according to the nature of the transaction, and according to what might be reasonably expected by the parties. Attention currently focusses upon the business context of the representation, and emphasis appears to be placed upon whether the party seeking the information or advice ought, given the relationship of the parties at the time, to have placed reliance upon its contents.

4. *Liability of Share and Commodity Brokers*

An interesting area of development is that dealing with the liability of a share or commodity broker to clients acting upon his advice. Whilst this area appears to be of limited application, owing to the inherent risks and the fact that such advice is necessarily a matter of judgment, an action has proved successful in several Canadian cases. In *Central C.B. Planners* v. *Hocker*,[74] McFarlane J.A. clearly accepted that the relationship of broker and customer generated the special relationship required. On the facts of that case, the broker, Grundberg, advised a client on the faith of a 'tip' from a fellow broker, Hocker. But for the fact that the information tendered by Grundberg to his customer was markedly different from that contained in the original 'tip', the court considered that Hocker would have been jointly liable.

In England, this area was considered in *Stafford* v. *Conti*,[75] where the court dismissed an action alleging negligent advice noting that the client was as likely to make his own decisions as to rely upon the advice proffered. Mocatta J. observed that exceedingly strong evidence of negligence would be required, because, given the nature of the market, losses could not, of themselves, afford evidence of negligence. On the particular facts in *Stafford*,[76] while the broker was theoretically sought

71 (1982) 42 A.L.R. 461.
72 [1983] 2 Qd.R. 745.
73 (1970) 122 C.L.R. 628.
74 (1970) 10 D.L.R. 3d. 698.
75 [1981] 1 All E.R. 691.
76 Ibid.

out as an expert commodity trader, his customer was strong-willed and possessed of firm opinions, and frequently reluctant to heed proffered advice. Out of the losses alleged to be due to reliance upon the broker's advice, determination of the scope of actual, rather than purported reliance defied analysis. This was exacerbated by the highly speculative nature of the commodity market. By contrast, in *Elderkin* v. *Merril Lynch,*[77] a sharebroker who, acting outside the guidelines imposed by his employer, advised clients to purchase and hold highly speculative shares, was held liable for inducing the purchase and for failing to advise sale when signs of market collapse were imminent. The development in this area, perhaps more than any other, demonstrates the willingness of courts in Commonwealth jurisdictions to extend liability into areas where the advice relied on was a matter of undiluted judgment, and the misstatement was a consequence of a failure of judgment, rather than *negligence per se* in the preparation of advice or documents.

LIABILITY OF STATUTORY AUTHORITIES UNDER *HEDLEY BYRNE*

1. *Introduction*

The area of negligent misstatement liability most difficult to analyse, and most internally inconsistent, is the tort liability of public bodies and officials. The basic principle underlying recovery was stated in the *Anns*[78] case in 1977; however, the uncertain parameters of the general principle enunciated by Lord Wilberforce have not provided anything approaching a consistent guide. Lord Wilberforce, dealing with liability for physical damage, distinguished between the policy area and the operational area of statutes relating to public bodies. He suggested that the more operational a power or duty was, the more readily a common law duty of care might be superimposed upon the statutory obligations. Most of the factual situations which have arisen have not yielded readily to the *Anns*[79] formula.

Whilst this head of liability is soundly established and reflected in decisions of the High Court of Australia[80] and the New Zealand Court of Appeal,[81] conflicting strands of policy and principle have frequently rendered these decisions almost incoherent. A major recent reflection of these tendencies, and a compelling illustration of the political conflicts inherent in application of negligence principles to public authorities is the recent decision of the New South Wales Court of Appeal in *Minister Administering the Environmental Planning and Assessment Act* v. *San Sebastian.*[82] It is to the facts and reasoning reflected in the *San Sebastian*[83] case we now turn. The particular problems facing the Court of

77 (1977) 80 D.L.R. 3d. 313.
78 [1977] 2 W.L.R. 1024.
79 Ibid.
80 *Shaddock* v. *Parramatta* (1981) 55 A.L.J.R. 713.
81 *Takoro Properties* v. *Rowling* [1978] 2 N.Z.L.R. 314.
82 [1983] 2 N.S.W.L.R. 268.
83 Ibid.

Appeal in the *San Sebastian*[84] decision made explicit many of the tensions implicit in earlier decisions involving public authorities. Thus, assessment of that decision illuminates earlier decisions involving public authorities, and is a valuable guide in considering the broader problems implicit in misstatement liability as a whole.

2. *The* San Sebastian *Decision*

The uncertainty of the parameters of tort liability for financial loss, and in particular, financial loss arising from negligent misstatement, has arisen in an unusually complex and perplexing form in the recent decision in *San Sebastian.*[85] Both the facts and the reasoning in *San Sebastian*[86] illustrate dramatically the interrelationship between the various heads of negligence liability and the difficulty, in complex situations, of ascribing loss to any one head.

While the facts may be stated without difficulty, the legal issues arising from them do not yield so easily. The judge at first instance, Ash J., in finding for the plaintiffs, found the following as facts. During 1968-1969, the State Planning Authority of New South Wales, acting as consultant to the Sydney City Council, negligently prepared a redevelopment study for the Woolloomooloo area, which was subsequently adopted by the Council. In 1969, this study was placed on public exhibition for the purpose of attracting substantial private commercial investment, it having been determined as policy that this was the most appropriate means of attracting the large scale private investment needed if the plan were to succeed. In 1972, the study and all aspects of the redevelopment plans were aborted due to inadequate consideration of variables in site density, resulting in potential attraction of a non-resident population of workers vastly in excess of the present or planned future capacity of the transportation network for the region. This discrepancy was held to be due to failure to adhere to normal and usual standards of town planning. The plaintiffs were property developers who attended the exhibition, and, between 1969 and 1972, purchased substantial holdings in 'Stage 1' of the development in alleged reliance upon the study and the site ratios therein proposed. They alleged further reliance upon ongoing representations made by Council officials until one month before abandonment of the plan.

The heads of negligence liability alleged were, per Mahoney J., first:

> ... that the defendants owed them a duty of care because, upon the proximity test taken from Lord Atkin's speech in *Donoghue* v. *Stevenson,* it was foreseeable that they might be injured by the defendant's lack of care in the preparation of the study; that the defendants breached that duty; and that it was that breach that caused their loss.[87]

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84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid at p. 321.

Clearly, here, an attempt was made to adopt the dictum of Lord Wilberforce in *Anns*[88] and to expand upon the House of Lords decision in *Junior Books*.[89] Second, it was submitted that,

> ... where a person is exercising statutory powers and, upon the proximity test, the possibility of damage to another is foreseeable, a duty of care is owed to that other.[90]

Third, it was submitted that

> ... the defendants stated to them, in the relevant sense, that the study was 'feasible of implementation'; that they acted on the basis of that statement; that because of lack of care in its preparation it was not feasible; and that because it was not feasible, the council ceased to apply it, and the plaintiffs suffered loss accordingly.[91]

Finally, reliance was placed upon failure to warn in that

> ... by about September 1970, the council knew that it would (or there was a substantial likelihood that it would) shortly thereafter determine not to continue to implement the study; that in the circumstances this cast on the council a duty to warn the plaintiffs.[92]

As can be seen from the foregoing, it is not easy to disentangle the precise elements of negligence essential for each separate submission. This is reflected in the inconsistency of approach among the members of the Court of Appeal: Hutley J.A., Glass J.A. and Mahoney J.A. A High Court appeal has been lodged against the finding of no negligence which overturned the decision at first instance on both the *Donoghue* v. *Stevenson*[93] claim and that under *Hedley Byrne*.[94]

3. *The Characterisation Test as the Focus of Analysis*

Gordon Walker, in discussing the decision of Ash J., described the problem as a 'classic question of characterisation'.[95] The fundamental issue is whether, and in what respect the character of the negligence required changes when the focus is shifted from preparation (acts) to publication (words). This has been elaborated at great length in the Court of Appeal judgments. Hutley J.A. indicated clearly that the mere negligent preparation (preparation not in accord with normal and proper standards of town planning) of such a plan was insufficient for liability in delict:

> I am unable to see how carelessly preparing such a plan can lead to any liability to the respondents. The negligent preparation of a plan followed by its exhibition with the intention of it being acted upon may give rise to a *Hedley Byrne* type of liability if there is a *false statement in the plan which it is intended shall be acted upon.* Though the drafting of a plan in itself has no effects

88 [1977] 2 W.L.R. 1024.
89 [1983] 3 W.L.R. 477.
90 [1983] 2 N.S.W.L.R. 268 at p. 321.
91 Ibid.
92 Ibid.
93 [1932] A.C. 562.
94 [1964] A.C. 465.
95 Walker, G., 'Negligent Words — The San Sebastian Case' [1983] *N.Z.L.J.* 63-64.

> on anyone and only if it is adopted and put into effect by someone that it has any effect (sic), it may be submitted that the planner may still be liable for the foreseeable effects of its adoption.[96]

In response to this reasoning, it should be emphasized that there is no instance in the law of tort where the mere negligent preparation of a chattel, structure or document is sufficient. Liability can only arise when the chattel or structure is put into use, or the document into circulation, for the simple reason that, until that point, loss is impossible. A duty to take care in its preparation may still exist. What is lacking is any evidence of harm ensuing from breach thereof. The portion of the reasoning of Hutley J.A. which appears strained is that which requires an identifiable falsehood in the presentation of the plan, separate and distinct from the substantial evidence of negligence in preparation, for liability under *Hedley Byrne*.[97] While a negligently prepared document will often contain a 'false' statement, for example, the calculation of profit in *Scott* v. *MacFarlane*,[98] a document may be misleading in its entirety without a readily identifiable statement. The sole area in which preparation and misstatement telescope is in speech *simpliciter*, for example, the erroneous boundary identification in *Richardson* v. *Norris Real Estate*.[99] Otherwise, the negligent statement complained of must arise from negligence in the preliminaries giving rise to the representation, and the distinction between such preparation and the representation complained of is arbitrary.

In assessing the *Donoghue* v. *Stevenson*[100] claim, Hutley J.A. commenced with a legal analysis of the status of the plan. He concluded that

> ... [t]he only official role for the plan was that of a guide adopted by the council as to how it would exercise its powers ... a guide to the public interest.[101]

Thus, he treated it as devoid of statutory force. Heavy emphasis was laid on the public interest factor in ascertaining whether a duty existed:

> The pursuit of the public interest involves the disregard of, perhaps the crushing of, other interests. [102]

4. *An* Anns *Two Stage Analysis*

Significantly, although it has been applied not infrequently in somewhat analogous cases,[103] Hutley J.A. did not allude to the dictum of Lord Wilberforce in the *Anns*[104] case:

> Through the trilogy of cases in this House ... the position has now been reached that in order to establish that a duty of care exists in a particular situation, it is not necessary to bring the facts of that

96 [1983] 2 N.S.W.L.R. 268 at p. 278.
97 [1964] A.C. 465.
98 [1978] 1 N.Z.L.R. 553.
99 [1977] 1 N.Z.L.R. 152.
100 [1932] A.C. 562.
101 [1983] 2 N.S.W.L.R. 268 at p. 278.
102 Ibid at p. 279.
103 See *Scott* v. *MacFarlane* [1978] 1 N.Z.L.R. 553.
104 [1977] 2 W.L.R. 1024.

> situation within those of previous situations in which 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 an alleged wrongdoer and the person who has suffered damage there is sufficient proximity or neighborhood 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 persons to whom it is owned or the damages to which a breach of it ought to give rise.[105]

While the Court of Appeal may have considered itself bound by the limitations expressed in the High Court decision in *Shaddock*,[106] and therefore unable to adopt such an approach; application of the principle elucidated in *Anns*[107] has the substantial merits of internal logic and consistency with negligence liability generally. Further, it avoids entirely the spectre of indeterminate liability raised in *Ultra Mares*.[108] It is submitted that it is this spectre which underlies the *San Sebastian*[109] reasoning.

The approach adopted by Hutley J.A., by contrast, focussed at the outset upon policy considerations to the exclusion of considerations of whether a duty had arisen. Had the duty issue been given primacy, the relevant considerations were clearly put by Glass J.A.:

> The defendants intended that private enterprise should play a major role in any such redevelopment of Woolloomooloo. By exhibiting the study documents their purpose was to stimulate the interest of developers in the purchase of properties in the area, the consolidation of sites and the making of development proposals. It was therefore foreseeable by the defendants that the proposals contained in the study documents would, when published, cause developers to invest money in land within the study area. It was also foreseeable that loss would or might be suffered by persons who invested money in land in Woolloomooloo in the expectation of being allowed to develop in accordance with its proposals, if the plan due to its inherent defects was incapable of implementation and for that reason had to be abandoned.[110]

The plaintiffs were such persons.

From the foregoing, it is clear that the requisite duty is present. The plaintiffs were members of a limited and defined class whose co-operation was actively sought by the defendant. The critical area is the presence or absence of factors which ought to negative, reduce or limit the scope of the liability or the persons to whom it is owned. The *Anns*[111] dictum allows ample scope for the interplay of considerations of both principle

105 Ibid at p. 1032.
106 (1981) 55 A.L.J.R. 713.
107 [1977] 2 W.L.R. 1024.
108 (1931) 174 N.E. 441.
109 [1983] 2 N.S.W.S.R. 268.
110 Ibid at p. 293-294.
111 [1977] 2 W.L.R. 1024.

and policy. The central issue, as an issue of principle, is whether a public body seeking private investment funds ought to be held to the same standards in presenting accurate information as would a private body such as a corporation. While there is no question of profit as such for the public body, where planning success is predicated upon substantial private support, self-interest is present to a significant degree. If it is not to be held to the same standards, on matters within its provenance, it can only be because, in this situation, it is not considered appropriate to overtly spread the loss throughout the municipality via rates, whereas it is appropriate, in, for example, areas involving defective products, to do so throughout the community via increased costs. These considerations of principle must, it is submitted, be given primacy. If policy is allowed to defeat considerations of principle, the danger is present as was the case before *McLaughlin* v. *O'Brien*[112] in liability for negligently caused nervous shock, of a forest of *ad hoc* decisions.

The policy arguments against liability are easy to state, but somewhat harder to justify. First, the plaintiffs were developers, experienced in property speculation and prepared to venture what, on any understanding, must be characterised as risk capital. Second, the Woolloomooloo plan was, in the words of Hutley J.A., 'a guide to the public interest'.[113] Hutley J.A. suggests that the fact that the council was bound to give the public interest primacy negated any responsibility towards private, individual interests. Third, the council was unable to bind itself absolutely to carry out the plan. The plan only achieved its statutory force indirectly through the *City of Sydney Planning Scheme* Ord. Cl. 32 (e). The council remained at liberty to alter its approach in responding to outside conditions, including, but not limited to, public pressure. These broad policy considerations were dismissed abruptly by Glass J.A.:

> I cannot discern any wider policy considerations based upon an overriding social interest which would negate a prima facie duty of care even though the council had a discretion whether to publish or not and even though the circulation of such information aids it in the performance of its statutory functions.[114]

The other general policy consideration is that contained in the oft repeated dictum of Cardozo C.J. in *Ultra Mares*,[115] that of introducing

> ... liability in an indeterminate amount for an indeterminate time to an indeterminate class.[116]

While this was dismissed by Lord Fraser of Tullybelton as 'unattractive', leading as it does to

> ... drawing an arbitrary and illogical line just because a line has to be drawn somewhere,[117]

on the facts of *San Sebastian* it clearly held some attraction for the court. The question of whether delict is an appropriate watchdog where

112 [1982] 2 All E.R. 298.
113 *Minister* v. *San Sebastian* [1983] 2 N.S.W.L.R. 268 at p. 293.
114 Ibid at p. 307.
115 (1931) 174 N.E. 441.
116 Ibid at p. 446.
117 *Junior Books* v. *Veitchi* [1983] 3 W.L.R. 477 at p. 482.

public bodies have performed their functions negligently was not addressed openly. One may well ask whether, if tort liability is negated, there remains any adequate redress for individuals joining with public bodies for the public interest.

In the judgment in *Junior Books*,[118] Lord Roskill was wholly unimpressed by the 'floodgates' argument, stating that the

> ... scope (of the tort of negligence) is best determined by considerations of principle rather than policy.[119]

He concluded:

> I see no reason why, if it is just that the law should henceforth accord that remedy, the remedy should be denied simply because it will, in consequence of this particular development, become available to many rather than few.[120]

Thus, it is submitted that, following the two stage analysis in *Anns*,[121] a *prima facie* duty of care exists and there are no considerations which ought to negative it. A council owes a *prima facie* duty both in preparation and dissemination of a planning scheme which it is intended will be used to induce private investment in furtherance of its aims. That duty is a narrow and specific duty to take care that there are no errors in the preparation which will increase the risks *normally attendant* upon the investment it seeks.

Having concluded that a duty is present, the second question is whether the breach alleged was such that it was reasonably foreseeable it might cause some kind of damage to the property, including economic interests, of the plaintiff. Here, the focus is on a factual determination of the parameters of the breach, and it is here, in my view, that the characterisation issue comes into consideration. The dictum of Lord Wilberforce in the *Anns*[122] supports the contention that on principle there ought not be any differentiation between the duty element regardless of the form of the alleged negligent conduct — that is, whether it be damage to person or property *simpliciter*, economic loss attendant upon a negligent act, or economic loss attendant upon negligent words. The dimensions of the breach alleged provide the relevant variables. On what was characterised as the *Donoghue* v. *Stevenson*[123] claim, the negligence alleged was in preparation of a plan not in accord with proper standards of town planning. As noted earlier, preparation *per se* is incapable of causing loss. The snail in the ginger beer remained entirely harmless until the beer was drunk. Therefore, the dissemination of the plan is the only act capable of giving rise to a breach of the duty of care. The duty may be redefined as a duty to take such care in the preparation of the plan that its dissemination would not be capable of producing the loss alleged. In this respect, the facts are closely akin to the duty of a

118 Ibid.
119 Ibid at p. 485.
120 Ibid.
121 [1977] 2 W.L.R. 1024.
122 Ibid.
123 [1932] A.C. 562.

manufacturer to take care in the manufacture of a product so that negligent preparation cannot cause physical harm, and at a much further remove from the *Caltex*[124] type of situation.

The characterisation test was one upon which much time and effort was expended in the *San Sebastian*[125] judgments, and upon which little light was shed. Hutley J.A., in concluding that, on costs, a special order was warranted, observed:

> Certainly in its published form, the plan left much to be desired, in that it was *calculated to encourage* incautious developers who did not read the whole text and understand the matrix of powers in which the plan was embedded to make what can only be classified as foolish investments.[126]

This must be contrasted with his earlier discussion of the *Hedley Byrne*[127] claim. There, he commented that

> the alleged deficiencies in the range of skills in the planning scheme or of the consultation with transport authorities are all irrelevant if the plan did not give false information or advice.[128]

Planning documents, and indeed almost any serious business document, may be grossly misleading taken as a whole, and may suggest a state of affairs totally unlikely to transpire, as this was found, as fact, to do, without containing an identifiable falsehood. While most instances to date of negligent misstatement do contain 'falsehoods', it is by no means clear that this is an essential element in the action. Certainly, it strains logic to classify the absence of information in *Shaddock*[129] as a positive denial and, hence, a falsehood. It would be more in accord with reason to suggest that the omission in *Shaddock*,[130] as with that in *Sacca* v. *Adam*,[131] invalidated the information proffered, when taken as a whole.

Hutley J.A. went on to consider the nature of the representation which must have been proffered if the defendants were to be found liable. He required an unconditional representation that the plan was feasible. His analysis may be disputed upon two grounds: first, the nature of the representation should be stated as one affirming that there were no defects in the plan itself which would destroy its feasibility, and second, it is submitted that the publication with the avowed intention of inducing investment was just such a representation and was reasonably taken to be such by the developers.

According to Hutley J.A., the following specific inferences were essential for a representation of feasibility: First, that the Commonwealth, which had extensive land holdings in the area, would provide active support; second, that the council would ensure that the road closure necessary for site consolidation would follow unconditionally; and third,

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124 (1976) 136 C.L.R. 529.
125 [1983] 2 N.S.W.L.R. 268.
126 Ibid at p. 293.
127 [1964] A.C. 465.
128 [1983] 2 N.S.W.L.R. 268 at p. 280.
129 (1981) 55 A.L.J.R. 713.
130 Ibid.
131 (1983) 83 A.T.C. 4326.

that the council would remain prepared to sell such of its land holdings as would be needed to assist the developers in realisation of the consolidation plan. All these areas were ones in which the governmental bodies concerned retained a virtually unfettered discretion until the time appointed for action. It was not in any of these areas that negligence could even be suggested. Further, no planning scheme could have represented that these factors would remain constant, or even that failure in any one would not disrupt the scheme for reasons quite unconnected with the study *per se*. None of these factors are ones upon which the developers could or should have relied, and, indeed, reliance was not alleged in these areas. *The sole area of reliance was upon the internal integrity of the planning scheme.*

Glass J.A. adopted a similar approach, concluding that a defendant

> ... cannot assume responsibility for the accuracy of information given unless it is expressly imparted to the plaintiff or his conduct amounts to the giving of express information.[132]

Mahoney J. concluded that an express statement that '[T]his study is feasible of implementation'[133] was an absolute requirement. He suggested that the proximity test was inadequate because, in looking to careless statements, the court should have regard to the

> ... interests of the defendant in being able to speak freely, and if he chooses, volunteer information without his freedom to do so being conditioned by what a plaintiff may choose to do about it.[134]

These approaches are predicated upon a perceived need to narrow the scope of the liability. Both fail to consider the character of a situation where a defendant is vitally interested in having its information acted upon. Furthermore, both are out of step with current developments in liability in negligent misstatements elsewhere in the Commonwealth, and indeed, with the full implication in *Shaddock*[135] itself. In both *Scott* v. *MacFarlane*[136] and *Twomax*,[137] liability of an auditor for corporate financial documents was implied from the public nature of the documents. While town planning proposals are far more open-ended than corporate financial statements, the documents in question were intended to be relied upon. This was essential to their purpose. Further, while the plaintiff was a member of a limited defined class, it was a class whose involvement formed part of the purpose of the exposition, unlike the investors in both *Scott*[138] and *Twomax*.[139]

A case which, while factually very different, offers interesting parallels and thus may shed some light upon this aspect is the Canadian decision

132 [1983] 2 N.S.W.L.R. 268 at p. 328.
133 Ibid at p. 330.
134 Ibid.
135 (1981) 55 A.L.J.R. 713.
136 [1978] 2 N.Z.L.R. 553.
137 [1983] S.L.T. 98.
138 [1978] 2 N.Z.L.R. 553.
139 [1983] S.L.T. 98.

in *Walter Cabot* v. *The Queen.*[140] There the trial judge described the defendant Crown as

> ... actively and systematically engaged in the process of bringing the entire hatchery development into existence and it cannot be said it did not have in mind the future steps essential to that end.[141]

In that case, the plaintiff was not advised that the plan required that he contend with interference from two subsequently tendered contracts, interference which led to considerable cost over-runs.

The parallel lies in that the appellant council in *San Sebastian*[142] likewise depended for the success of its redevelopment program on the active participation of a range of public and private developers. While, clearly, it could not guarantee that all factors would come together according to plan, or that policy considerations would not result in modification or abandonment, it could be taken to represent that *the one factor* within its control, and devoid of political influence or policy, the internal structure of the plan *as a planning document,* did not build in failure in the way in which the proposals for hatchery development built in interference and delay.

5. *Consideration of Contributory Negligence and Disclaimers*

Although emphasis was placed in some judicial arguments on the developers having placed undue reliance upon the plan in the heady days of Sydney's real estate boom,[143] the possibility of contributory negligence was not alluded to in any of the judgments. On the *San Sebastian*[144] facts, such an argument may have been open. While an argument of contributory negligence is a rarity in the reported cases, it has succeeded at least once.[145] Such was alluded to briefly in *J.E.B. Fasteners* v. *Marks & Bloom,*[146] where it was thought to be of limited application, cases more often rising and falling on reliance. The matter was also mentioned in passing in *Twomax.*[147] In *Nickerson* v. *Wooldridge,*[148] where contributory negligence was established, while the defendant had represented that the plaintiff would experience no difficulty or delay in obtaining a Canadian master's certificate following migration, the plaintiff's recovery was curtailed because his employer (the defendant) had, prior to the formal employment agreement, afforded him an opportunity to make independent inquiries. The defence was raised in *South Australia* v. *Johnson.*[149] However, the critical element there was lack of reliance, in that, during a portion of the time for which recovery was claimed, the plaintiff had altered the character of the property to incorporate crop-

140 (1974) 44 D.L.R. 3d. 82.
141 Ibid at p. 91.
142 [1983] 2 N.S.W.L.R. 268.
143 Ibid at pp. 282, 308-309, 333.
144 Ibid.
145 *Nickerson* v. *Wooldridge* (1981) D.L.R. 3d. 97.
146 [1981] 3 All E.R. 289.
147 [1983] S.L.T. 98.
148 (1981) 148 D.L.R. 3d. 97.
149 (1982) 42 A.L.R. 161.

ping and beef cattle production. The losses during that period were not attributable to reliance upon the statement that the property was suitable for fat lamb production. The defence succeeded partially for an earlier period, the plaintiff not having taken adequate steps to ensure persistence of rye grass pastures to replace subterranean clover detrimental to sheep.

Substantial difficulties arise when a plaintiff attempts to demonstrate reliance upon a statement or representation so subject to interpretation that he may himself be negligent in its uncritical use. However, where the negligence is not an identifiable simple falsehood, and where the statement or document is only of value if interpreted by the recipient, contributory negligence should be available as a partial defence. The same considations are applicable in situations such as *Nickerson*,[150] where independent investigation was reasonable. One area, apart from evidently complex materials such as planning documents, where widespread application seems appropriate, is in liability for negligently prepared corporate financial documents. In the United States, the Senate has described negligence liability as the single most important factor in ensuring the accuracy of corporate financial reports.[151] While liability in the reported commonwealth cases has most often involved arithmetic errors[152] or wholly false valuations,[153] financial documents are capable of giving a totally false impression without clear-cut errors.

Related to the problem of contributory negligence is the precise scope and effect of any disclaimer present. In *B.T. Australia* v. *Raine & Horne*,[154] a valuation report was issued with a disclaimer excluding liability to any party other than the contracting party. This clause was construed by the court as incapable of excluding liability to members of the unit trust for whom the property was purchased by the recipient of the report. This decision adopted the dictum of Barwick C.J. in *Evatt*[155] which expressed doubt that a disclaimer would be universally effective. Given the complexity of valuations and financial documents, it is reasonable to suggest that a disclaimer, rather than simply negativing liability, should place on the recipient an increased burden of demonstrating that his reliance was reasonable in all the circumstances. This approach has been adopted in England in *Yianni* v. *Edwin Evan*.[156] There, the building society obtained a valuation to ascertain if the property was an acceptable mortgage risk. The building society allowed the prospective mortgagor to rely upon the valuation in his decision to purchase. The court held that in such circumstances it was reasonable for the mortgagor to rely upon the valuation despite the presence of the disclaimer, and held that the disclaimer was ineffective.

150 (1981) 148 D.L.R. 3d. 97.
151 *Metcalf Report*, United States Senate, 1978.
152 *Scott* v. *MacFarlane* [1978] 1 N.Z.L.R. 553.
153 *J.E.B. Fasteners* v. *Marks & Bloom* [1981] 3 All E.R. 289.
154 [1983] 3 N.S.W.L.R. 221.
155 (1968) 122 C.L.R. 556.
156 [1981] 3 All E.R. 592.

6. *General Liability of Statutory Authorities*

The Canadian decision in *Bowen* v. *City of Edmunton*[157] is a compelling illustration of the problems besetting this area. There, the defendant city council had negligently replotted a subdivision under its statutory powers. As a consequence, certain building blocks were sold for housing construction which were unusable due to soil instability. The court, purporting to apply *Anns*,[158] declared the loss to be irrecoverable, having arisen out of the exercise of legislative or quasi-judicial powers. This decision was on all fours with an earlier decision of the Supreme Court of Canada in *Welbridge* v. *Greater Winnipeg*.[159] There it was held that a legislative body exercising its powers in good faith owed no duty of care to those exposed to loss through the passage of an invalid by-law. The cause of action in *Welbridge*,[160] per Laskin J., delivering the judgment of the court, involved

> ... the applicability of the principles of law canvassed in *Hedley Byrne* ... to a municipal corporation in certain circumstances of alleged reliance on the validity of a zoning by-law which, in litigation terminating in this Court, was declared to be invalid. The plaintiff-appellant in the present proceedings was not a party to the action which attacked the by-law but in the result it abandoned plans for and work on a multi-storey aparement building.[161]

The *Welbridge*[162] facts differ sharply from those in *San Sebastian*[163] in that the court found

> ... no suggestion that the defendant was importuning or encouraging the plaintiff in its proposed development.[164]

In reaching his decision in *Welbridge*,[165] Laskin J. adopted the dissenting judgment of Jackson J. in *Dalehite* v. *U.S.*:[166]

> When a [municipality] exerts governmental authority in a manner which legally binds one or many, [it] is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognised the public policy that such [municipality] shall be controlled solely by the statutory or administrative mandate, and not by the added threat of private damage suits.[167]

In the *Dalehite*[168] case, the cause of action against the United States was founded upon the *Federal Tort Claims Act* 28 U.S.C. (1946) which, under specified circumstances, waives the immunity of the United States to suit. Thus, both the majority decision and the dissent were predicated upon statutory interpretation. Jackson J., together with Frankfurter and

157 (1978) 80 D.L.R. 501.
158 [1977] 2 W.L.R. 1024.
159 (1970) 22 D.L.R. 3d. 470.
160 Ibid.
161 Ibid at p. 471.
162 Ibid.
163 [1983] 2 N.S.W.L.R. 268.
164 (1970) 22 D.L.R. 3d. 470 at p. 473.
165 Ibid.
166 (1953) 346 U.S. 15.
167 (1970) 22 D.L.R. 3d. 470 at p. 477.
168 (1953) U.S. 15.

Black J.J., in dissent, found the United States liable for serious damage consequent upon the explosion of chemicals being on-loaded to cargo vessels. In so doing, they treated the statutory provisions as analogous to the existing liability of municipal corporations. After observing that

> ... the Government, as defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest,[169]

Jackson J. went on to observe that

> ... although the municipality may not be held liable for its decision to undertake a project, it is liable for negligent execution.[170]

The passage just cited immediately preceded the passage relied upon by Laskin J. It is submitted that the subsequent passage should be interpreted in the light of the earlier remarks.

The political question doctrine has permeated United States law in this area. Its uncertain parameters have foreclosed development of a coherent body of common law, and the matter is governed by statute in many American jurisdictions. The most usual distinction in those jurisdictions governed by the common law is that between governmental functions and proprietary or business powers, although this is susceptible to extreme ambiguity in application. Exploration of its ramifications is beyond the scope of this discussion. Suffice it to say that the distinction appears of little real assistance either on the facts of *Welbridge*[171] or on facts such as those in *San Sebastian*.[172] The distinction actually made by Jackson J., contrary to the interpretation apparently placed upon it by Laskin J., would appear to support liability in both situations.

Recently, the New Zealand Court of Appeal confronted a somewhat similar situation in *Takaro Properties* v. *Rowling*.[173] On the facts, there was *prima facie* evidence that the Minister had improperly refused permission for an increased proportion of foreign ownership of a New Zealand owned corporation. As a consequence, the corporation was forced into receivership. The remarks of Woodhouse J. on the question of a duty of care are compelling. Woodhouse J. stated that:

> The judge who is obliged to decide in a novel situation whether a duty of care is owed by one party to another, has rarely had an easy task. The difficulty is that the concept is not based upon any particularly equitable, or even consistent, principle. A few exceptional groups such as rescuers apart, its purpose is simply to spare the property interests of a chosen category of careless defendants.[174]

He suggests that:

> The basic purpose of the negligence action being to shift or distribute losses, the more recent attitude of the Court may reflect to

169 Ibid at p. 51.
170 Ibid at p. 58.
171 (1970) 22 D.L.R. 3d. 470.
172 [1983] 2 N.S.W.L.R. 268.
173 [1978] 2 N.Z.L.R. 314.
174 Ibid at p. 322.

> some degree a realisation that potential defendants today are often well able to foresee and guard against the economic effects of their carelessness.[175]

Woodhouse J. further suggests that the Canadian decisions reflect strong United States influence grounded in an almost single minded concentration upon separation of powers. Richardson J. concurred in remitting the matter for full trial, citing Lord Salmon in *Anns*:[176]

> The exercise of power without responsibility is not encouraged by the law.[177]

In *Takaro Holdings*,[178] the allegation of the plaintiff was that, in negligently denying approval, the Minister had acted *ultra vires*. Thus, the operational/policy dichotomy was not material. New Zealand courts have not imported the governmental/proprietary separation utilised in the United States. Other major recent decisions also have not turned upon a fine distinction between the policy area and the operational area. In the decision of the High Court of Australia in *Shaddock*,[179] for example, the area of duty was circumscribed and could not be reasonably construed as containing policy elements. Therefore it was easy for Gibbs C.J. to observe that he

> . . . saw no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons.[180]

Similarly, in two recent New Zealand decisions, *Brown* v. *Heathcote County*,[181] and *Carll* v. *Berry*,[182] the issues were relatively well defined with respect to the operational/policy distinction. An *Anns*[183] claim failed in *Brown*[184] because the county had elected as policy to delegate all matters concerned with flooding to the regional *Drainage Board* and therefore the flood prone nature of the subject land (for which a building permit had been issued) was outside the scope of its area of expertise and its responsibility. The distinction relied upon was one between the clear authority of the county in matters concerned with zoning — compliance with dwelling size, construction and siting requirements — and the authority it argued had been delegated to the *Drainage Board* to determine all matters connected with the suitability of the land for construction, having regard to its proximity to the river. Susceptibility to flooding was not one of the factors upon which permit issuance was predicated. Further, it was not clear that the entire block was prone to

175 Ibid.
176 [1977] 2 W.L.R. 1024.
177 Ibid.
178 [1978] 2 N.Z.L.R. 314.
179 (1981) 55 A.L.J.R. 713.
180 Ibid at p. 752.
181 [1982] 2 N.Z.L.R. 596.
182 [1981] 2 N.Z.L.R. 76.
183 [1977] 2 W.L.R. 1024.
184 [1982] 2 N.Z.L.R. 596.

flood. Critically, the plaintiffs were long time residents of the river area, and were aware of the conditions.

A *Hedley Byrne*[185] claim also failed. According to Hardie Boys J.:

> A building permit is not in my opinion a representation of anything. The applicant does not seek information or advice. The local authority does not proffer it... Any negligence by the local authority merely in the investigation of the application or the granting of approval arises out of the performance of its statutory functions and not from the tendering of information or advice. Though fine, the distinction is important and must be maintained.[186]

This distinction is both fine and elusive. It would appear to be a variant upon the characterisation test employed in *San Sebastian.*[187] In this situation, it is operative to segregate any negligence in issuance of the relevant permit (*arguendo* a negligent act) from any representation contained in the permit *per se.* Certainly, in the case of a building permit, it is marginally easier to sustain such a distinction than on the *San Sebastian*[188] facts. Arguably, the sole representation was that contained upon the face of the permit, that building could proceed without conflict with municipal regulations and by-laws, a representation which was unquestioned. However, if the *Anns*[189] criteria are employed, the granting of a permit appears clearly operational. Policy decisions only determine the pre-conditions for the grant. This returns the focus to a question of characterisation of the negligence alleged.

By way of support for his reasoning, Hardie Boys J. cited the Canadian decision in *The Pas* v. *Porky Packers.*[190] On the facts of *The Pas,*[191] the township was held not to be liable for allowing construction of an abattoir contrary to the provisions of its planning scheme. The telling factor was stated to be the lack of any representation in the planning permit. Spence J. stated:

> It is a requisite for liability under the Hedley Byrne principle that the representation be made to a person who has not expert knowledge himself by a person whom the representee believes has a particular skill or judgment in the matter, and that the representations were relied on to the detriment of the representee. As I have pointed out, the representee in the present case, Mr. Tawse, had more knowledge than the representor, Mr. Moule. In my view, there were, in all probability, no representations by Mr. Moule, or if there were such representations, they were not relied on by Mr. Tawse or Porky Packers Ltd. to their detriment but rather Mr. Tawse relied on his own knowledge and judgment throughout.[192]

185 [1964] A.C. 465.
186 [1982] 2 N.Z.L.R. 596.
187 [1983] 2 N.S.W.L.R. 268.
188 Ibid.
189 [1977] 2 W.L.R. 1024.
190 (1976) 65 D.L.R. 3d. 1.
191 Ibid.
192 Ibid at p. 13.

The passage from *The Pas*[193] contains its own ambiguities. A strong factual similarity links *The Pas*[194] and *Brown* v. *Heathcote*.[195] In both, the representee was taken to have both greater knowledge and greater opportunity to determine the relevant facts. It is submitted that in both cases, the representees were entitled to rely upon the issue of the permits, but that, given their knowledge and opportunity to otherwise acquire relevant information, contributory negligence afforded a complete defence. Certainly, this provides a far more coherent analysis than does a distinction between negligence in the investigation preceding the granting of the permit, and the lack of representation upon its face.

The foregoing distinctions represent a policy approach which seeks to restrict negligence actions against local authorities to the narrowest possible compass. It is submitted than an overriding concern with delineating policy parameters has encouraged the courts to disregard comparatively straightforward criteria for negativing liability where these are present. Thus, in *The Pas*,[196] the negligence in granting the permit was confined to the area of statutory duty where it could be ruled out on a technicality. The permit was then described as not containing advice or information upon which a *Hedley Byrne*[197] claim could be based. Only where the issues are extremely clear cut, as in *Carll v. Berry*,[198] will this device be unavailable. There, the defendant health inspector was held liable for negligently certifying restaurant premises free from cockroach infestation to a prospective purchaser who had sought his advice upon that very matter. Bisson J., upon the special facts of that case, was primarily concerned with whether the 'expertise' of the health inspector extended to the giving of advice on cockroaches, under the restrictive criteria of the majority decision of the Privy Council in *Evatt*.[199]

At the present stage of development, actions involving a governmental or quasi-governmental body cause the courts the most difficulty and tend to produce the most mental gymnastics. It is submitted that the undesirable features and logical inconsistencies reflect concern with the loss spreading function of tort liability where, in effect, success in the action would spread the loss through the municipality via increased rates. No satisfactory clarification has emerged from any of the recent decisions. In the *San Sebastian* case,[200] Glass J. was unwilling to suggest that policy was, in fact, a major element in his decision, although the policy aspect overtly dominated the other judgments.

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193 Ibid.
194 Ibid.
195 [1982] 2 N.Z.L.R. 596.
196 (1976) 65 D.L.R. 596.
197 [1964] A.C. 465.
198 [1981] 2 N.Z.L.R. 76.
199 (1968) 122 C.L.R. 556.
200 [1983] 2 N.S.W.L.R. 268.

THEORETICAL ASPECTS OF CHARACTERISATION

A theoretical question of substantial interest is reflected in the various facets of the characterisation problem, which only appears to surface overtly in cases involving public authorities. As observed earlier, the opportunity for a negligent misstatement *simpliciter* is circumscribed, and is most readily apparent in cases where the representation is both spontaneous and oral. In the strictest sense, this has occurred in cases such as *Phil Clark* v. *Drewet* and *Barrett* v. *West Ltd.*[202] In both these situations, the careless statement was uttered in response to a direct oral inquiry and under circumstances where no pre-existing 'negligent act' was operative.

1. *Characterisation in Failure to Warn*

The characterisation problem is closely related to considerations in cases acknowledged to straddle the border between *Hedley Byrne*[203] and *Donoghue* v. *Stevenson.*[204] These may be subsumed under the heading 'failure to warn'. This area is difficult to assess theoretically. A good example is *Sacca* v. *Adam.*[205] There, an accountant negligently failed to warn his client and his client's family that transfer of property to a private trust within twelve months of purchase would incur taxation liability. The sole purpose of the trust scheme was to reduce the incidence of taxation. Zelling J., with whom Mitchell A.C.J. concurred, in finding Adam negligent, stated the basis of the *Hedley Byrne*[206] claim as follows:

> It is true that the basis of the complaint in the instant case is not because of a representation made but of something not said when it ought to have been said. However... provided the inquiry which is made sufficiently indicates the seriousness of the inquiry for information and the importance attached to the answer... then whether the correctness of the answer depends on what is given or what is not given, the defendant is still liable.[207]

As in the recent 'wills cases',[208] which appear as ghosts on the boundary between *Donoghue* v. *Stevenson*[209] and *Hedley Byrne,*[210] the negligence lay in the failure to give appropriate advice in a situation where its absence rendered futile advice already extended in the same matter.

In New Zealand, *Abrams* v. *Ancliffe*[211] reflects the same principle. This line of authority emphasises an omission to warn in a situation which *prima facie* calls for a positive warning, given the relationship

201 [1977] 2 N.Z.L.R. 556.
202 [1977] N.Z.L.R. 596.
203 [1964] A.C. 465.
204 [1932] A.C. 562.
205 (1983) A.T.C. 4326.
206 [1964] A.C. 465.
207 (1983) A.T.C. 4326 at p. 4333.
208 *Ross* v. *Caunters* [1980] 1 Ch. 297; *Watts* v. *Public Trustee* [1980] W.A.R. 97; *Seale* v. *Perry* [1982] V.R. 193.
209 [1932] A.C. 562.
210 [1964] A.C. 465.
211 [1978] 2 N.Z.L.R. 420.

between the parties. In *Sacca* v. *Adam*,[212] the scheme had been properly contrived, the sole negligence lay in not spelling out the taxation implications of any error in timing. Similarly, in *Abrams*,[213] the failure lay, not in the original estimate, acknowledged to be provisional, but in lack of response to repeated requests for an updated estimate, when, to the builder's knowledge, costs were running almost double. Casey J. applied the *Anns*[214] dictum in reaching his decision in *Abrams*[215] and stated:

> I think a reasonable builder in the plaintiff's position would have told Mr. Ancliffe of the misgivings when he found himself in serious trouble with the foundations during October.[216]

A curious feature of the judgment, and one symptomatic of the pervasive confusion permeating the area, occurred in Casey J.'s application of the *Anns*[217] dictum. While he predicated basic liability upon *Hedley Byrne*,[218] in discussion of damages available for the breach, he appeared to regard damages as unavailable without the assistance of *Caltex*.[219] He stated that

> While *Hedley Byrne* and subsequent cases accepted a liability for economic loss unaccompanied by physical injury or damage to property, the law was in a confused state in other areas of negligence.[220]

His 'confusion' in this regard illustrates the border-line nature of the 'failure to warn' cases.

While, in Australia, this particular situation may be thought to have been clarified by the decision of the High Court in *Shaddock*,[221] areas of theoretical ambiguity remain, and despite the statements of the Court, the requirements for and basis of such liability remain uncertain. Gibbs C.J. described the omission of the relevant data as to road widening proposals as 'giving . . . a negative answer'.[222] He continued:

> The fact that its negative answer was given by the omission to make a positive answer does not affect the question.[223]

The other members of the Court did not deal explicitly with the effect of a negligent omission — in the terms used here something approaching a negligent failure to warn. The situation was ambiguous, and, significantly, ambiguous in factors which related to characterisation of the omission. Was this omission consequent upon failure to check all the relevant information, a negligent act? Or was it consequent upon carelessness in response to the inquiry *per se*, and hence, a positive negative

212 (1983) A.T.C. 4326.
213 [1978] 2 N.Z.L.R. 420.
214 [1977] 2 W.L.R. 1024.
215 [1978] 2 N.Z.L.R. 420.
216 Ibid at p. 429.
217 [1977] 2 W.L.R. 1024.
218 [1964] A.C. 465.
219 (1976) 136 C.L.R. 529.
220 [1978] 2 N.Z.L.R. 420.
221 (1981) 55 A.L.J.R. 713.
222 Ibid at p. 717.
223 Ibid.

answer? On the approach used by the court in *San Sebastian*,[224] the precise characterisation is critical. The same considerations apply to other cases in this area. In each case, it is submitted, the appropriate analysis is not concerned with a pre-existing negligent act, or with characterising an omission as a positive negative answer, but rather with the fact that the omission invalidated the information given when taken in the context of the relationship between the parties.

These problems are intimately related to the characterisation question delineated in *San Sebastian*.[225] In the failure to warn cases, an omission has been pervasively characterised as equivalent to a positive false statement to bring it within the scope of *Hedley Byrne*.[226] The position is substantially more difficult in the 'wills cases'.[227] Here, the border between negligent statement and negligent act is so blurred as to be indistinguishable. This was acknowledged by Lush J. in *Seale* v. *Perry*[228] where he stated that the

> ... case in my opinion falls between cases of negligent conduct and negligent words.[229]

His Honour, in negativing liability, observed that

> ... in the reported cases, the speeches and judgments have been expressed in terms which concentrate on examining the question of whether a duty exists. A duty, however, cannot exist by itself. To the duty as seen as imposed on the defendant, there must be a correlative right in the plaintiff: for either to exist, both must be capable of being identified.[230]

He went on to discuss at some length the difficulty of identifying such a right in cases where financial loss is the sole detriment.

2. *Characterisation as a 'Sifting Mechanism'*

The intrinsic difficulty in characterising a complex factual situation as either focussed upon negligent acts or negligent words has emerged as a major theoretical problem in Australia. While the position appears to be otherwise in England, it is still too early to assess whether decisions such as *Anns*[231] and the recent decision in *Junior Books*[232] have rendered characterisation in these terms superfluous. Certainly, in analytical terms, the decision in *Junior Books*[233] is of less positive assistance than might have been hoped.

Characterisation has not been raised in many situations to which it is, *prima facie*, applicable. This is particularly apparent in the cases on negligent audits. There, invariably, it was the failure to conduct the

224 [1983] 2 N.S.W.L.R. 268.
225 Ibid.
226 [1964] A.C. 465.
227 *Ross* v. *Caunters* [1980] 1 Ch. 297; *Watts* v. *Public Trustee* [1980] W.A.R. 97; *Seale* v. *Perry* [1982] V.R. 193.
228 [1982] V.R. 193.
229 Ibid at p. 199.
230 Ibid at p. 200.
231 [1977] 2 W.L.R. 1024.
232 [1983] 3 W.L.R. 477.
233 Ibid.

audit properly, a negligent act, which made the statement contained in the financial documents negligent, and thus some discussion of characterisation would be appropriate if, in fact, it is an element in the action. The inconsistency of its application suggests that the characterisation problem is not, in ordinary circumstances, a structural element in the action at all, and that the dichotomy which was elaborated upon in *San Sebastian*,[234] dominating the analysis of Hutley J.A., and playing an important role in all the judgments, is an artificial barrier erected solely to avoid dealing with the central issue. This barrier serves a distinct and identifiable purpose. It provides an outstanding example of the sort of

> ... sifting mechanism ... founded upon what has seemed to be expedient at the time,[235]

derided by Woodhouse J. in *Scott* v. *MacFarlane*.[236] Given its open ended character, theoretically it should be the initial hurdle in every instance of reliance upon the contents of a document. It is capable of serving as an absolute barrier to liability in all cases where documents are misleading either as a whole or rendered so by the omission of vital information.

Further examination of the treatment by the *San Sebastian*[237] court of the *Donoghue* v. *Stevenson*[238] claim, so-called, is illustrative of this selective sifting function at work. Glass J.A. examined in some detail the three English decisions relied upon by the plaintiff. He treated the *Sharp*[239] case as outside the scope of both *Donoghue* v. *Stevenson*[240] and *Hedley Byrne*,[241] as these principles have been delineated by the High Court in both *Shaddock*[242] and *Caltex*.[243] In so doing, Glass J.A. took particular exception to the statement of Lord Denning M.R. in *Sharp*[244] that the

> ... duty to use due care in a statement arises, not from any voluntary assumption of responsibility, but from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act on the faith of the statement being accurate. That is enough to bring the duty into being ... But it is also owned to any person whom he knows will be injuriously affected by a mistake.[245]

Glass J.A. must also be taken to have rejected the explicit statement of Lord Salmon that the distinction between the *Donoghue* v. *Stevenson*[246] duty to avoid foreseeable physical harm and the duty to avoid financial

234 [1983] 2 N.S.W.L.R. 268.
235 [1978] 1 N.Z.L.R. 553.
236 Ibid.
237 [1983] 2 N.S.W.L.R. 268.
238 [1932] A.C. 562.
239 [1970] 2 Q.B. 223.
240 [1932] A.C. 562.
241 [1964] A.C. 465.
242 (1981) 55 A.L.J.R. 713.
243 (1976) 136 C.L.R. 628.
244 [1970] 2 Q.B. 223.
245 [1983] 2 N.S.W.L.R. 268 at p. 269.
246 [1932] A.C. 562.

loss 'no longer matters'.[247] His concern with the Court of Appeal reasoning took two primary forms. First, he considered reliance to be an essential element; and second, as both Salmon L.J. and Cross L.J. accepted in principle the extension of *Donoghue* v. *Stevenson*[248] to negligent statements, he considered that their reasoning was erroneous. The apparent approval of the High Court in *Shaddock*[249] must, therefore, be qualified, in the view of Glass J.A., as lack of reliance was not canvassed by Gibbs C.J. Glass J.A. stated clearly that the facts of *Sharp*[250] fell

> ... outside both the *Donoghue* v. *Stevenson* principle and the *Hedley Byrne* principle as defined by higher authority.[251]

In alluding to the reasoning of their Lordships in *Junior Books*,[252] he stated that

> ... a potent source of confusion is created by excluding a *Donoghue* relationship (eg. treating the case as dealing with purely economic loss) upon a relationship described in terms virtually indistinguishable from it.[253]

Glass J.A. considered that in Australia the

> ... three generative principles of a duty of care so defined operate in three mutually exclusive areas marked out by the legal concepts of physical damage due to carelessness in statement or action, economic loss due to careless statement and economic loss due to careless conduct. When the nature of the risk presented to the plaintiff by the defendant's carelessness is allotted to the appropriate sphere of human conduct, the situation linking plaintiff and defendant is to be measured to determine whether the evidence discloses the appropriate relationship.[254]

Regrettably, as *San Sebastian*[255] itself compellingly demonstrates, human conduct does not always appear designed to suit a legal category: 'round facts' are ill designed to fit 'square legal holes'. While the analysis of Glass J.A. has the substantial merit of being both coherent and internally consistent, in direct contrast to that of Hutley J.A., having approached the legal facts with the necessity in mind of sharply characterising their legal effect, he inevitably reached the conclusion that:

> ... Since loss could only ensue following publication of the study and reliance upon it, the plaintiffs perforce are remitted to a *Hedley Byrne* claim ... based upon that chain of events and can claim nothing for the preceding act of preparation, whether it was carelessly performed or not.[256]

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247 [1983] 2 N.S.W.L.R. 268 at p. 278.
248 [1932] A.C. 562.
249 (1981) 55 A.L.J.R. 713.
250 [1970] 2 Q.B. 223.
251 [1983] 2 N.S.W.L.R. 268 at p. 298.
252 [1983] 3 W.L.R. 477.
253 [1983] 2 N.S.W.L.R. 268 at p. 300.
254 Ibid.
255 Ibid.
256 Ibid at p. 302.

In his discussion of the *Hedley Byrne*[257] claim, Glass J.A. took it as settled law that the *Hedley Byrne*[258] relationship was applicable to information volunteered to a limited class. The essential requirements were that information or advice be tendered exactly corresponding to the area of reliance, and the authority must be clearly seen to have accepted responsibility for its accuracy. On the facts, Glass J.A. accepted that the relevant duty was present, but not that a breach occurred. Having decided that an explicit statement that the plan was feasible was critical for liability, he regarded inference as too far removed from the express language of the study documents. The conclusion which followed was that

> ... the defendants cannot in law assume responsibility for the accuracy of any information upon which the plaintiffs might reasonably rely which they did not clearly and unmistakably communicate to them.[259]

Just as the narrowing of the requirement of expertise present in the majority approach by the Privy Council in *Evatt*[260] has been taken by members of the New Zealand appellate courts to foreclose development and application of *Hedley Byrne*,[261] if strictly followed,[262] it is submitted that the requirement enunciated in *San Sebastian*[263] for a representation so explicit it would be capable of standing alone as an outright falsehood would cripple further development in what is essentially an evolving action. This, of course, is a far more serious issue where strict characterisation is adhered to and the consequences of negligence are compartmentalised.

A further dichotomy occurred when Glass J.A. dealt with the failure to warn claim. This claim, essentially, was that, after the council became aware of the gross impracticability of the plan, it failed to warn the plaintiffs, who, by then, were known to it individually, that the

> ... plan might have to be abandoned because of its inherent defects.[264]

Glass J.A. considered that the *prima facie* duty of care in *Anns*,[265] if it arose, would be negatived by policy considerations, adherence to the planning study being a discretionary act. This is significant, inasmuch as it was only in regard to this claim that Glass J.A. gave policy considerations explicit force. It is significant that failure to warn was treated as a wholly discreet and isolated claim, and completely segregated from the preceding events. Here, as well, strict compartmentalisation of acts and legal elements was perceived as the critical element.

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257 [1964] A.C. 465.
258 Ibid.
259 [1983] 2 N.S.W.L.R. 268 at p. 302.
260 (1970) 122 C.L.R. 628.
261 [1964] A.C. 465.
262 [1981] 2 N.Z.L.R. 76.
263 [1983] 2 N.S.W.L.R. 268.
264 Ibid at p. 312.
265 [1977] 2 W.L.R. 1024.

The judgment of Mahoney J. stood alone. He emphasised that a critical distinction between 'pure' economic loss and other loss is that,

> ... in the latter case, the loss arises from infringement of a recognised and pre-existing right; in the former it has no such basis.[266]

Mahoney J. regarded the duty as non-correlative in both financial loss caused by negligent words and financial loss caused by negligent acts, the careless act or statement

> ... being sanctioned because ... careless statements are seen as unacceptable to the extent that the defendant should be liable for them.[267]

In that light, with particular regard to statements, Mahoney J. continued that the

> ... court should not, I think, confine its attention as the proximity test does to the interests of the plaintiff ... [T]he court should look also to the interests of the defendant in being able to speak freely and if he chooses, volunteer information without his freedom to do so being conditioned by what a plaintiff may choose to do with it.[268]

Where, as on the *San Sebastian*[269] facts, the plaintiff's actions are precisely those sought by the statement 'volunteered', this principle loses much of its force. Unlike the other members of the court, Mahoney J.A. did not devote the majority of his judgment to strictly segregating differing aspects of the factual situation in an attempt to curtail responsibility. Rather, taking a wholly policy oriented approach, he considered, in dismissing the proximity test promulgated in *Anns*,[270] that

> ... it would be better to put aside the proximity test and concentrate overtly upon the weighing of interests.[271]

Summarising his conclusion he stated:

> If the duty of care concept is to be seen frankly as the instrument, or the occasion, for determining whether there should be a right to sue for careless infringement of existing rights or determining what new restrictions on conduct are necessary to protect plaintiffs from the relevant pure economic loss, then in determining whether there is a duty of care, the considerations to be taken into account should be wider than heretofore have been seen as relevant.[272]

Specifically, with regard to the *Hedley Byrne*[273] claim, he ruled out any liability for statements in which implication by the plaintiff formed an intrinsic part of the meaning. According to Mahoney J.A.,

> ... the statement in question in this part of the law is a statement actually made by the defendant. It does not, in my opinion, include an implication which the plaintiff may, albeit reasonably, draw from the addition to what is said of facts or assumptions supplied

266 [1983] 2 N.S.W.L.R. 268 at p. 328.
267 Ibid.
268 Ibid at p. 330.
269 Ibid.
270 [1977] 2 W.L.R. 1024.
271 [1983] 2 N.S.W.L.R. 268 at p. 335.
272 Ibid at pp. 335-336.
273 [1964] A.C. 465.

> by the plaintiff; nor does it include warranties or representations imposed upon the parties by the law.[274]

This statement forms the nexus of the decision. If it stands, the characterisation test stands with it, and for the present, liability in negligent misstatement will not encompass misleading documents or statements, even those intended to be relied upon, unless they contain demonstrably false statements.

TOWARDS A META-THEORY OF NEGLIGENCE

The critical issue in negligence liability today, one which is intimately related to the foregoing, is to what extent the movement, begun in England and fostered in New Zealand, towards integration of the negligence liability for negligent statements and, to some extent, pure financial loss, with the main body of authority will be accepted in Australia. The dictum of Lord Wilberforce in *Anns*,[275] citing *Donoghue* v. *Stevenson*,[276] *Dorset Yacht*[277] and *Hedley Byrne*[278] was clearly intended as such a unifying principle. While some recent decisions[279] have set the *Hedley Byrne*[280] line of authority clearly apart, in other areas, most particularly where the loss is other than purely financial, it has been accepted as a broadening and development of general negligence principles. The statement of Megarry V.C.[281] is a useful departure point:

> The basis of the solicitor's liability is either an extension of the *Hedley Byrne* principle [where reliance is not a requirement] or a direct application of the principle in *Donoghue* v. *Stevenson*.[282]

Hedley Byrne[283] has been applied outside the area of direct reliance upon a statement. It was treated as merely a special application in *Smith* v. *Auckland Hospital*,[284] and argued in an attempt to establish a failure to warn claim in the *John's Period Furniture*[285] case. The essence of that unsuccessful argument, was that the bank's failure to issue a public warning after the theft of blank bank cheques fell within negligent misstatement law. Reliance was also placed in *John's*[286] upon the dissent of Bray C.J. in *Leitzke* v. *Morgan*,[287] where Bray C.J. observed:

> It could be said with pardonable simplification that the principle . . . is no more than an application of the principle in *Donoghue* v. *Stevenson*.[288]

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274 [1983] 2 N.S.W.L.R. 268 at p. 338.
275 [1977] 2 W.L.R. 1024.
276 [1970] A.C. 1004.
277 [1964] A.C. 465.
278 [1932] A.C. 562.
279 [1980] 1 Ch. 297.
280 [1964] A.C. 465.
281 [1980] 1 Ch. 297.
282 Ibid at p. 305.
283 [1964] A.C. 465.
284 [1965] N.Z.L.R. 191.
285 (1983) 24 S.A.S.R. 224.
286 Ibid.
287 (1973) S.A.S.R. 224.
288 Ibid at p. 227.

The failure in *John's*[289] was inevitable, there being no identifiable relationship between the bank and the plaintiff, and no context of information or advice to give the omission a positive meaning, or, in the terms used herein, to permit the omission to invalidate any proffered information.

The *Anns*[290] dictum has been far more widely applied in England and New Zealand than in Australia. In the areas where it has been applied, it is apparent that the concept of reliance is treated as a part of negligence law generally, in appropriate contexts, and not as an application of *Hedley Byrne*[291] in the strict sense. The difficulty which occurs in the application of the concept of reliance arises, or appears to arise, in distinguishing between the level of reliance required where the implied or express communication relied upon by the plaintiff leads to physical injury and that required where it results in economic loss. Clearly, an implied representation which is ambiguous and open to interpretation is sufficient foundation for an action based upon physical loss. A relevant example is the reliance of the plaintiff in *Shirt* v. *Wyong*[292] upon signs open to the interpretation that there was deep water within a water ski channel. The decision of the New South Wales Court of Appeal was upheld by the High Court. The court's readiness to allow implication from the location and wording of the sign may be contrasted with the reluctance of the court to allow implication from the nature and structure of the planning documents in *San Sebastian.*[293]

1. *Negligence as a Concurrent Remedy*

The general trend towards a meta-theory of negligence liability has been accompanied by the evolution of negligence as a concurrent remedy to that afforded by contract. While concurrent status has not yet received the express approval of the High Court of Australia, it is submitted that it is not in any substantial doubt at the present time. This is certainly the case in contracts for professional services. The absence of substantial recent case law in Australia in other areas of contractual relationships must be considered to leave this area somewhat open, however the trend in England, New Zealand and Canada supports the submission made. *South Australia* v. *Johnson*[294] should be noted here. While this case before the High Court did involve a pre-contractual relationship outside the professional sphere, the court there indicated that it was not to be taken as authority on that matter outside its own peculiar facts.

The most illuminating of the recent Australian cases is the Victorian decision in *MacPherson* v. *Prunty.*[295] Lush J. was unusually forthright in his treatment of concurrent liability and in identifying the considerations which led him to his conclusion. He stated:

289 (1983) 24 S.A.S.R. 224.
290 [1977] 2 W.L.R. 1024.
291 [1964] A.C. 465.
292 [1978] 1 N.S.W.L.R. 631.
293 [1983] 2 N.S.W.L.R. 268.
294 (1982) 42 A.L.R. 461.
295 [1983] V.R. 573.

> I think that the *Hedley Byrne* case began a development which brought the law to this state, if this was not always its state. Secondly, it is now accepted that concurrent liability in tort and contract is imposed upon a number of skilled professions. Third, in the welfare state, the performance of professional services in situations where there is no real contract between the skilled man and his patient or client is increasingly common. *Hedley Byrne* imposes a duty of care and provides a remedy in such cases. It is desirable that the remedy provided by law would be the same in cases in which the duty arises under the law of tort as in cases in which it arises under contract, subject always to the right of the parties to modify their contract. Fourthly, although the introduction of collateral statutory provisions such as statutes of limitation and the now universal contributory negligence and joint tortfeasors legislation cannot alter the nature of legal concepts, ... if a situation of even choice between lines of authority existed, it would be justifiable to follow that line which best fitted into contemporary legal provisions.[296]

This forthright acceptance of concurrent liability should be contrasted with the almost contemporaneous dissent of Connolly J. in *Aluminium Products* v. *Hill*:[297]

> It seems to me with respect, not to accord with principle to apply the wide language of these two judgments out of their context so as to add, in parallel with the existing contractual liability, an unseen and hitherto unsuspected doppelganger of liability in tort.[298]

In contrast to earlier decisions, a choice is now available between contract and tort predicated upon the same facts in circumstances where the duty of care arose as part of the contractual relationship. The majority in *Aluminium Products*[299] relied upon *Midland Bank* v. *Hett*,[300] and *Ross* v. *Caunters*[301] in declining to follow New South Wales decisions directly in point.[302] Importantly, while Lush J. approved concurrent liability in the *MacPherson*[303] case, he explicitly and vigorously disapproved *Ross* v. *Caunters* in *Seale* v. *Perry*.[304] The issue of concurrent liability stands as a wholly separate consideration from the general theoretical problem of the parameters of financial loss liability.

The same principle was applied in Canada in *Nickerson* v. *Wooldridge*.[305] In holding it applicable to a contract of employment, Hart J.A. stated:

> As long as there is an independent tort arising from the relationship between them, they are free to pursue their remedies in either tort or contract or both.[306]

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296 Ibid at p. 580-581.
297 [1981] Qd. R. 33.
298 Ibid at p. 47.
299 Ibid.
300 [1979] Ch. 384.
301 [1980] 1 Ch. 297.
302 See *Pennant Hills* v. *Barrett* [1977] 2 N.S.W.L.R. 827.
303 [1983] V.R. 573.
304 [1980] 1 Ch. 297.
305 [1983] V.R. 573.
306 (1981) 115 D.L.R. 3d. 97.

The increasing scope of concurrent liability in these decisions suggests that the courts have moved well away from the position in *Dillingham* v. *Downs*,[307] where Hardie J. stated that a

> ... pre-contractual relationship would not normally qualify as a special relationship of the type which would subject one or other of the parties to a duty of care in the assembly or presentation of facts, figures or other information as to the subject matter of the contract.[308]

It is now accepted that a duty may exist, despite the arms length bargaining position of the parties, such being a duty to ensure that the actual information presented is accurate and does not misstate the facts it purports to provide. The question, on facts such as those in *Dillingham*,[309] is not, as the court took it to be, a question of the absence of the relevant duty, but rather, whether the plaintiff, given his own contractual obligations and the nature of their relationship was not himself negligent in the performance of his own checks. The duty to provide accurate information was clearly present. The plaintiff, as an expert in his own right, and having contracted as such, was himself negligent in site investigation. Alternatively, again in conventional negligence terms, not only did the plaintiff have an opportunity for intermediate inspection, but had himself contracted that he had so inspected, and this affirmation was reflected in his estimates.

In New Zealand, liability has been found in a pre-contractual relationship between a car dealer and purchaser,[310] in a contractual relationship between a head contractor and sub-contractor,[311] and in the real estate cases.[312] In the *Capital Motors*[313] case, the salesman had, after a dilatory investigation, and in response to a specific inquiry, affirmed that the subject vehicle had only two owners. The duty was affirmed despite the presence in the contract of sale of a statement negativing responsibility for warranties, representations or promises made pre-contractually. In *Day* v. *Ost*,[314] the plaintiff had been induced to resume work on his subcontract by representations that funds would be made available by the owner. As noted, representations by estate agents as to the presence or absence of sewerage connections,[315] the location of boundaries,[316] and the takings of a business are sufficient to sustain an action.[317]

This suggests that in many factual situations, an action under *Hedley Byrne* is available as an alternative to the often futile attempts to establish a collateral contract or contractual warranty so as to recover damages rather than merely recission for a pre-contractual representa-

307 Ibid at p. 118.
308 [1972] 2 N.S.W.L.R. 49.
309 Ibid at p. 55.
310 *Capital Motors* v. *Beecham* [1975] 1 N.Z.L.R. 576.
311 *Day* v. *Ost* [1973] 2 N.Z.L.R. 385.
312 *Barrett* v. *West* [1970] N.Z.L.R. 596; *Roots* v. *Oentory* [1983] A.C.L.D. 812.
313 [1975] 1 N.Z.L.R. 576.
314 [1973] 2 N.Z.L.R. 385.
315 *Barrett* v. *West* [1970] N.Z.L.R. 596.
316 *Richardson* v. *Norris Real Estate* [1977] 1 N.Z.L.R. 152.
317 *Roots* v. *Oentory* [1983] 2 Qd.R. 745.

tion. This contains important implications for the courts in quantum of damages, particularly in those cases where the action would have been equally available in contract but for the provisions contained in statutes of limitations, or where the sole reason for bringing the action in tort was that no consideration passed between the professional and his client as under legal aid or the bulk billing provisions of Medicare.

CONCLUSION

The *Hedley Byrne* action has demonstrated its value and adaptability, not only in the broad areas in which it is clear a body of authority is evolving, but also in a variety of unpredictable situations. In Canada, it has been extended to include representations by an insurance agent as to the presence and extent of cover.[318] This has occurred both where the representation was a clear single instance, as in *General Motors* v. *Fulton*,[319] and where the representation was implied from a course of dealings in which the agent had invariably sent a renewal notice, and, when the company elected to terminate cover as the policies expired, failed to warn the policy holder.[320] Such failure to warn situations exist on the boundary between a negligent statement and pure financial loss arising from a negligent act.

The presence of such boundary line cases, as well as the erratic nature of other current developments in this area, demonstrate that the theoretical basis of *Hedley Byrne* action has yet to be resolved. Neither its relationship to the negligence action in *Donoghue* v. *Stevenson*, nor its relationship to cases involving financial loss caused by negligent acts has been satisfactorily analysed by the courts. This is unsatisfactory, particularly as the same facts are often open to a number of interpretations. A body of electic authority has developed which defies ready assignment to any established action. Although the 'wills cases' and other cases involving negligent failure to warn to advise provide the clearest examples, the same trend is present in the commercial sphere where its influence may be both critical and dramatic. In commercial cases, it is typified by *Standard Chartered Bank* v. *Walker*,[321] and other authorities dealing with the now substantially expanded tort liability of mortgagees[322] and receivers[323] acting under powers of sale. While the wills cases have been considered and approved by the Supreme Court of Canada[324] and the Court of Appeal in New Zealand,[325] neither the High Court of Australia nor the House of Lords has directly addressed the issue. The closest parallel in settled high Australian authority is *Shaddock* v. *Parramatta* where failure to warn was held to be within negligent misstatement on the facts then before the court.

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318 *G.A.C.* v. *Fulton* (1978) 24 N.S.R. 2d. 114.
319 Ibid.
320 *Morash* v. *Lockhart* (1978) D.L.R. 3d. 647.
321 [1982] 3 All E.R. 938.
322 *Cuckmere Brick* v. *Mutual Finance* [1971] Ch. 949.
323 *Standard Chartered Bank* v. *Walker* [1983] 3 All E.R. 938.
324 *Wittingham* v. *Crease* (1978) 78 D.L.R. 3d. 353.
325 *Gartside* v. *Sheffield* [1983] N.Z.L.R. 37.

In the wills cases, the ramifications in the misstatement area revolve around the failure to warn or properly advise the client regarding attestation requirements. The matter is further complicated by the fact that the beneficiary is a third party and, as such, unable to allege reliance. Megarry V.C. in *Ross* v. *Caunters*[326] expressed uncertainty as to the applicability of *Hedley Byrne* in view of the impossibility of reliance, preferring to rely upon *Sharp*.[327] If the wills cases are to be interpreted as cases of economic loss consequent upon a negligent act, the failure of the professional to check so as to ensure that the attesting witnesses were not also beneficiaries represents the core of the negligence. In the more common failure to warn situations, it is submitted that the absence of a warning, in a context clearly calling for its presence, may also be interpreted in several ways. While substantial authority exists for treating omitted material in the context of concurrent provision of positive information as a positive representation, as in *Shaddock* v. *Parramatta*, and this approach was also taken in *G.A.C.* v. *Fulton*,[328] an alternate analysis appears open. It is submitted that it is logically more coherent to regard such an omission either as a negligent act, rather than a positive representation, or, in the alternative, to treat the omission as negating the information proffered, taken as a whole. It is also to be noted that, in direct contrast to other authority in the area, these authorities must depend upon an inference by the recipient of the information.

A hallmark of the commercial cases is the interrelationship between the statutory or contractual powers of a receiver or manager, and his duties to the appointor, and his evolving common law duty of care. A similar problem was present in *Todd* v. *Tessie*,[329] where a trustee in bankruptcy was held liable for misrepresenting the quality and quantity of stock sold by tender. It is submitted that the conflicts of principle which arise in this area, and which were explicitly considered by the majority of the court in *Leitzke* v. *Morgan*[330] are not relevantly different from those which have plagued the courts when considering the liability of public authorities. The pattern of conflicting duties and obligations would no longer appear a major stumbling block in the commercial sphere. Again, a conservative stance must be taken because of the lack of settled high authority. It is submitted that the problems do not appear as acute primarily bacause of the primacy of questions of policy in the case law dealing with public authorities. It is further submitted that this factor has prevented the courts from dealing effectively in these cases with the issues of principle before them.

The interrelationship of financial loss liability as a consequence of a negligent act, as a consequence of a negligent misstatement and as an element in the failure to warn cases, must be made clear and explicit if a

326 [1980] 1 Ch. 297.
327 [1970] 2 Q.B. 223.
328 (1978) 24 N.S.R. 2d. 114.
329 (1977) 79 D.L.R. 3d. 632.
330 [1973] 7 S.A.S.R. 224.

coherent body of law is to develop. While the *San Sebastian* facts compellingly illustrate the interplay of these areas of liability, the judgments represent a retrograde attempt to compartmentalise the legal consequences flowing from the facts. The policy considerations dominating the judgments are inconsistently applied and serve as a last resort when the problems fail to yield to the analysis undertaken. A more rational approach would, it is submitted, treat the area of financial loss as a coherent whole. Certainly, in *San Sebastian,* the attempt to segregate negligent acts of preparation from the publication of the resulting information and the capacity of that publication to make a representation are forced and manoeuvre the reasoning of the court in artificial and undesirable ways. It is recognised that the components of the *Caltex* type of situation present very different problems, however, it is submitted that they, too, are susceptible to anlysis utilising the tests of neighbourhood and proximity developed in other areas of negligence liability.

In Australia, recently, policy considerations have assumed a dominant role. They have been discussed at length and treated as being of primary importance not only in the *San Sebastian* decision, but also in *Seale* v. *Perry* and *MacPherson* v. *Prunty.* This is an undesirable development, and one which is out of line with major recent English decisions such as *Junior Books,* where its role in limiting liability was strongly disapproved. Because of the shifting nature of policy considerations, their prominence militates against the development of a body of coherent law.

It is, therefore, submitted that resolution is required in the following areas. First, the prominence given to the characterisation issue in *San Sebastian* has made it mandatory to establish the exact theoretical and practical relationship of the actions presently available for pure financial loss. Second, the relationship of these actions to negligence law generally is becoming substantially less certain and explicit as new factual situations arise to perplex the courts. It is, therefore, desirable that, in Australia, the area be examined as a whole, and broad guidelines be developed. Finally, and most critically, the role of policy in tort liability in Australia awaits clarification rather than *ad hoc* application.