

REMEDIES FOR BREACH OF CONTRACT AND NEGLIGENCE

INTRODUCTION

Whilst the tests for establishing the existence of liability in contract and tort are different many principles are common to both forms of claim. The approach of the English court to damages claims is fact-specific (as opposed to being formulaic). Damages require quantification taking into account the appropriate method of calculation, the rules of remoteness, and the rules about mitigation of loss. Cases are decided on their precise facts. Every relevant detail will need to be looked at, along with the question of the reasonableness of each particular claim.

Under English law where a set of factors constitutes both a breach of contract and a tort a claimant may choose to base their claim either on contract or on tort. A claim based on negligent misstatement can give rise to contractual remedies under the **Misrepresentation Act 1967** (if a contract results) or to a common law claim in tort (whether or not a contract resulted).

Any claims in tort will remain subject to any defences available to the defendant under a contract with the claimant, subject to the availability of such defences under English law.

GENERAL PRINCIPLES

1. RECOVERY OF LOSSES IN CONTRACT

1.1 Compensation and remoteness of damage

The basic principle of assessment is that a claimant should as nearly as possible be awarded a sum of money that will put him in the same position as he would have been in if he had not sustained the wrong for which he is now claiming compensation. In applying this principle to an individual case a claim can either

be made to obtain damages to fulfil the claimant's expectations, for example a claim for loss of profit, or to obtain damages to restore the claimant to their pre-contractual position, for example a claim for wasted expenditure or loss of use. The general principle is subject to a policy that limits the items that can be claimed ('heads of damages').

The general principle for the assessment of damages is compensatory. However the Courts therefore set a limit to the loss for which damages are recoverable, and loss beyond such limit is said to be too remote. Another sense in which remoteness is used is to defend a claim on the grounds that the alleged breach did not cause the loss claimed.

Therefore a contractor cannot be liable for the consequences of a breach on any basis if the sole effective cause of the breach is attributable to the claimant, because the breach did not cause the loss. Alternatively there should be an apportionment of damages under the provisions of the **Law Reform (Contributory Negligence) Act 1945** if the claimant contributed to the failure. However this will only apply to a claim in contract if the underlying fault also constitutes a tort. It will not be available where there has been breach of a strict duty in contract.

1.2 **The Rule in Hadley v Baxendale**

The principle of remoteness of damage for breach of contract was stated in **Hadley v Baxendale (1854)9 Ex.341** by way of two tests (the 1st and 2nd Limbs of the rule): '*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either:*

1.2.1 *arising naturally, i.e. according to the usual course of things, from such breach of contract itself, [1st limb of the rule] or*

1.2.2 such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it [2nd limb of the rule].'

1.3 Scope of the First Limb of the Rule in Hadley v Baxendale

1.3.1 The aggrieved party is only entitled to recover such part of the loss actually arising as may fairly and reasonably be considered as arising naturally, that is according to the usual course of things, from the breach of contract.

1.3.2 The question is to be judged as at the time of the contract.

1.3.3 In order to make the contract breaker liable it is not necessary that he should actually have asked himself what loss was liable to result from a breach of a kind which subsequently occurred. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss of the type in question, not necessarily the specific loss, was liable to result.

1.3.4 The words "*liable to result*" should be read in the sense conveyed by the expressions "*a serious possibility*" and "*a real danger*" and "*not unlikely to occur*" [for which purpose] knowledge of certain basic facts according to the usual course of things is imputed, but no special knowledge.

1.3.5 The important factor is whether the particular type of loss which occurs is within the contemplation of the contracting parties as a serious possibility.

1.3.6 A type or kind of loss is not too remote a consequence of a breach of contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their

reasonable contemplation as a not unlikely result of that breach.

1.3.7 The reference to the 'loss' in the formulations of the test for remoteness of damage is to be interpreted as the type or kind of loss in question. The party who has suffered damage does not have to show that the contract breaker ought to have contemplated, as being not unlikely, the precise detail of the damage or the precise manner of its happening. It is enough if he should have contemplated that damage of that kind is not unlikely. If the parties ought to have contemplated a particular type of loss they need not have contemplated the extent of that loss. The application of the test of remoteness to a particular set of facts therefore depends largely on the juridical discretion to categorise losses into broad categories, without requiring any contemplation of the precise manner in which the loss was caused, or the precise details of the loss.

1.4 Scope of the Second Limb of the Rule in Hadley v Baxendale

1.4.1 This depends upon additional special knowledge by the defendant [as stated in the following passage from **Hadley v Baxendale**]: *'If the special circumstances under which the contract was actually made were communicated by the claimants to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated'*.

But, on the other hand if these special circumstances were wholly unknown to the party breaking the contract, he at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the multitude of cases not affected by any special circumstances, from such breach of contract.

For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

1.4.2 The question is to be judged at the time of contract so that damages claimed under the second limb will not be awarded unless the claimant has particular evidence to show that the defendant then knew the special circumstances relied on.

1.4.3 In order to make the contract breaker liable it is not necessary that he should actually have asked himself what loss was liable to result from a breach of a kind which subsequently occurred. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss of the type in question, not necessarily the specific loss, was liable to result.

1.4.4 The words '*liable to result*' should be read in the sense conveyed by the expressions '*a serious possibility*' and '*a real danger*' and '*not unlikely to occur*'. But the result in any particular case need not depend upon giving pride of place to any one of such phrases. It seems that the degree of likelihood can be less than evens, even slight.

1.4.5 It is always a matter of circumstances what one contracting party was presumed to know about the activities of the other. The fact that the failure of the power supply would result in the need for demolition and reconstruction of an aqueduct had been found as a matter of evidence to be a fact that the supply company did not know about, and they would not have been reasonably expected to know about it.

1.5 **Heads of damage generally recoverable**

The following losses are generally recoverable under the first limb of the rule in **Hadley v Baxendale**:

1.5.1 Cost of re-statement or replacement of damaged property.

The measure of damages recoverable by the building owner for the breach of a building contract is the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases of the amount of profit or earnings lost by the breach.

1.5.2 Loss of profits.

- (1) In principle recoverable under either limb of the rule.
- (2) It will be necessary to prove facts sufficient to come within one limb or the other of the rule in **Hadley v- Baxendale** and in particular that the defendant had sufficient general or specific knowledge that the product of the contract was to be put to profit earning commercial use affecting customers or clients.
- (3) Knowledge will be imputed according to the test in **Victoria Laundry v Newman**, if in the ordinary course of things, and it would seem that similar criteria will apply in deciding what the defendant should have known, to deciding what he should have realised would be not unlikely to result. Each case however must be taken on its own facts in deciding what knowledge is to be imputed to the defendant: all that can be pointed to are the following factors which are relevant in arriving at a decision.
 1. The business or profession of the parties, and particularly of the Claimant, may throw light upon what knowledge can be imputed.
 2. Where the defendant defaults in supplying a self-contained profit-

earning whole, the knowledge imputed may be greater than where his default is in part of that whole, being, as Asquith L.J. said in **Victoria Laundry v Newman**, '*significant in so far as it bears on the capacity of the supplier to foresee the consequences of non-delivery.*'

- (4) A defendant will still only be liable for damage resulting from special circumstances when those special circumstances have been brought home to him in such a way as to show that he has accepted, or is taken to have accepted, the risk. Not only must the parties contemplate that the damage resulting from the special circumstances may occur, but they must further contemplate that the defendant is taking the risk of being liable for such consequences should they occur.

1.5.3 Wasted expenditure.

- (1) Such losses are recoverable if they are reasonably in the contemplation of the parties as likely to be wasted when the contract is entered into.
- (2) However this head of damages may only be claimed instead of a claim for loss of profits.
- (3) A claimant can only recover wasted expenditure if the expenditure would have been recovered as profit if the contract had been performed. The burden of showing that it would not have been so recovered is on the defendant.
- (4) Expenditure wasted during the currency of a loss making contract is not recoverable if it resulted from a bad initial bargain and not from the defendant's breach of contract.

1.5.4 Sums paid in settlement of third party claims.

- (1) Where a defendant's breach of contract renders the claimant liable to a third party, the claimant can normally recover the amount of that liability as damages for the breach.
- (2) If the claimant reasonably compromises the third party liability, the amount paid under the compromise is admissible prima facie evidence of the loss caused by the defendant's breach, although further evidence may be adduced to determine the actual loss.
- (3) The claimant must prove that the settlement was reasonable but does not have to prove strictly the claim made against him in all its particulars.
- (4) It will usually also be necessary to establish the claimant's liability to the third party and the defendant's liability to the claimant, since evidence of the compromise is relevant only to the measure of damages.
- (5) It is relevant to prove that the compromise was made upon legal advice, but in such circumstances evidence of the legal advisors is not normally relevant or admissible. It is unclear whether the content of such advice can ever be admissible.

1.5.5 Managerial expenses.

The expenditure of managerial time in remedying an actionable wrong done to a trading concern can be claimed under the principle in **Tate & Lyle v GLC**.

1.5.6 Loss of contracts and loss of business.

1.5.7 Loss of value or diminished value.

1.5.8 Loss of use or amenity.

1.5.9 Interest of financing charges.

1.5.10 The cost of performing the obligations of the party in breach.

Direct economic losses are recoverable under the first rule. Indirect economic losses (often called '*consequential losses*' by contractors) are recoverable under the second limb of the rule. Unless the term 'consequential loss' is expressly defined in a contract it will not exclude direct economic losses.

2. RECOVERY OF LOSSES IN TORT

2.1 The elements of liability

2.1.1 To establish a claim in negligence, a claimant must show that the defendant owes him a duty of care and that there has been a breach of that duty causing actionable damage.

2.1.2 Definition of the circumstances in which a defendant owes a duty of care is closely related to definition of what is actionable damage.

2.1.3 The critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the claimant claims to have suffered.

2.1.4 Whatever the nature of the harm sustained, the court asks whether the damage was reasonably foreseeable and considers the nature of the relationship between the parties and whether in all the circumstances it is fair, just and reasonable to impose a duty of care.

2.1.5 Generally, the damage necessary to sustain a claim in negligence must be actual physical injury to person or property other than property which is

the product of the negligence itself.

2.1.6 Normally a claimant claiming in negligence cannot recover economic loss. Economic loss is monetary loss and pure economic loss is monetary loss unrelated to physical injury to person or other property

2.1.7 Economic loss is only recoverable where there is:

- (1) a special relationship amounting to reliance by the claimant on the defendant; or
- (2) where the economic loss is truly consequential upon actual physical injury to person or property.

2.1.8 It is thought that the right to recover pure economic loss in tort, not flowing from physical injury, does not extend beyond situations where the loss is sustained by a claimant who relies on a defendant who has assumed responsibility to the claimant as in **Hedley Byrne v Heller & Partners.**

2.2 **Foreseeability of damage**

2.2.1 The only damage for which a Defendant can be held liable in the tort of negligence is damage which is of such a kind as a reasonable man should have foreseen.

2.2.2 Where damage of a particular kind is suffered, then damage of that kind, and not of any other kind must have been foreseeable.

2.2.3 Where damage of a particular kind is foreseeable, then it does not matter that the precise manner in which such damage was caused by the Defendants negligent act is not foreseeable.

2.2.4 Where damage which occurred is of a kind which a reasonable man

would have foreseen, then (all other things being equal) the Defendant will be liable for the full extent of the Claimants loss, even if a reasonable man could not have foreseen the extent of that loss.

2.2.5 “*kind of loss*” refers not to the distinction between economic loss and physical damage, but to the distinction between physical damage caused by one means (say by direct impact) rather than by another (say by fire).

2.2.6 The crucial question is whether damage of the type claimed was reasonably foreseeable by the defendant.

2.3 Proximity

2.3.1 *‘In addition to the foreseeability of the damage, the necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of proximity or neighbourhood and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other’ per Lord Bridge **Caparo Industries plc v Dickman.***

2.3.2 *‘Proximity is, no doubt, a convenient expression, so long as it is realised that it is no more than a label which embraces not a definable concept, but merely a description of circumstances, from which, pragmatically, the courts conclude a duty of care exists’ per Lord Oliver in Caparo.*

2.4 Scope of the duty

2.4.1 One of the most important concepts to comprehend when considering whether a duty of care is appropriate in any particular category of case is that, although the first two of the essential ingredients (i.e. foreseeability

and proximity) might be satisfied, and although it might in a general sense seem just and reasonable to impose a duty of care, the courts will refuse to do this if this would result in a duty of care being imposed which is of a wider scope, ambit or extent, or in respect of damage of a different kind than the judges believe is warranted in the interests of fairness, justice or pragmatism.

2.4.2 *'The true question in each case is whether the particular defendant owed to the particular claimant a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the claimant. A relationship of proximity in Lord Atkin's sense [Donohue -v- Stevenson] must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case. So in determining whether or not a duty of care of a particular scope was incumbent upon a defendant, it is material to take into consideration whether it is just and reasonable that it should be so.'* **Lord Keith in Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd.**

2.5 Justice and reasonableness

2.5.1 Even if the claimant's loss caused by the defendant's negligent act was foreseeable, and even if the relationship between them was proximate, the court will not impose a duty of care on the defendant for the claimant's loss unless the court is satisfied that, in all the circumstances, the interests of justice and fairness or what is simply called policy, would be better served by doing so than by not doing so... the problem for legal advisors is that it is very difficult to predict in advance how any judge will decide a policy issue in an area of law where the precise question for consideration has not arisen before.

2.5.2 The approach which the House of lords would like the Courts to follow is

a composite approach in which all of the relevant considerations relating to the actual facts of the case and the wider implications of imposing or not imposing a duty of care on the defendant for the claimant's economic loss are considered. While such well-known concepts as foreseeability and proximity may be invoked as guides to the answer in any particular case, they are not to be applied as steps in a rigid formula in which the answer will self-evidently appear if certain questions are answered one way or the other. Rather judges are exhorted to bear in mind that they are involved in a delicate balancing exercise of all the circumstances of the case, with a view to achieving a just and reasonable result. In conducting this exercise, judges are to pay especial regard to settled decisions relating to the same category of case as the individual case calling for their decision, and are to move slowly and, by way of analogy, in small incremental steps in enlarging established duties of care, if at all.

2.5.3 *'At bottom I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds for damages recoverable - they maintain that they are, or not, too remote - they do it as a matter of policy so as to limit the liability for the defendant. ... it seems to me better to consider the particular relationship in hand and see whether or not, as a matter of policy economic loss should be recoverable, or not'. Lord Denning in Spartan's Steel and Alloys Limited v Martin & Company (Contractors) Limited.*

2.6 Property damage

2.7 Damage to other property

In Tunnel Refineries Limited V Bryan Donkin Company Limited Alsthom SA and Others a fan supplied by Alsthom to a main contractor who incorporated it

into a compressor sold to Tunnel Refineries shattered wrecking the compressor but causing no damage to anything else and no personal injury. The Court had to decide whether the compressor was a chattel of which the fan was a part, making the compressor defective and precluding recovery when it was itself damaged; or whether the fan or some section of the compressor of which the fan was part (such as the rotating assembly) was defective, so that recovery is possible in relation to the damage suffered by the other property comprising the rest of the compressor. The Court held that the compressor was one item and therefore that the fracturing of the fan did not cause damage to other property. Therefore Tunnel Refineries could not recover in tort for the replacement cost of the compressor or consequential loss of production, because there is an exclusionary rule precluding recovery in tort in respect of damage suffered by the defective chattel itself. The Judge stated that, one well established limitation is that a claimant cannot recover in tort the cost of replacing a defective chattel or building, or any consequential loss, when only the chattel or the building itself is damaged as a result of the defect. The cost of replacement is therefore irrecoverable. It is usually characterised as economic loss, even though the chattel itself has suffered physical damage.

2.8 Truly consequential loss

2.8.1 Bernstein links the concept of recovery of truly consequential loss to the length of time that it takes to repair the damage to a machine caused by negligence, or, as in **Spartan Steel**, to clear the material out of the furnace and to make it ready for use again. He contends that in **Spartan Steel** it could thus be said that the loss of profits which the claimant suffered on the first melt was truly consequential on the property damage caused by the defendant and the inability to use the furnace while the problems associated with that property damage were being rectified, and that the loss of profits on the further 4 melts which could have been done in the period of time between the furnace being ready to accept further melts and the reconnection of the electricity was only truly consequential

on the fact that the electricity had been cut off, irrespective of any physical damage caused as well. He argues that this is borne out by Lord Denning's statement at page 39 that the claimant could not recover its loss of profit on the additional 4 melts '*because that was economic loss independent of the physical damage*'.

2.8.2. In **London Waste Limited v Amec Civil Engineering Limited** , as a result of cables being severed the claimant's power station was out of operation for 2½ days. The damages claimed from the defendant included (1) physical damage to the plant, and (2) loss of income from the sale of electricity. The defendant's counsel conceded that the defendant was liable for the costs of repairing physical damage caused to the claimant's plant and equipment by the defendant's sub-contractor's negligence. However on the question of whether the claimant's loss of income was truly consequential on any physical damage caused by the defendant to the claimant's property Judge Hicks held that it was not because there was no overt damage to the claimant's plant which required repair or imminent replacement. The only damage to the claimant's plant and equipment which had occurred was latent fatigue damage to the turbines which diminished their value by reducing their useful working life. The only physical damage which could be said to have directly caused the claimant's loss of income was the damage caused the Defendant to electricity cables, which were not owned by the claimant. Judge Hicks QC stated: '*There is therefore a clearly established, but limited head of recoverable economic loss consisting of that which is consequential upon any physical damage caused to the claimant's property. the difficult for the present claimant is that although there was physical damage to its turbines, the nature of that damage is such that it could not cause, and is not alleged to have caused, the loss of income claimed. The cause of that loss was, and is pleaded as being, the severance of the cables. In my view the claimant has surmounted this difficulty which is fatal, and cannot recover loss of income via this route ...*

the clean-up costs in Spartan Steel were recovered precisely because they were attributable to the damage to the claimant's property, whereas the disposal of the excess waste here was a consequence of the damage to Eastern Electricity's cable, and had nothing to do with the alleged damage to the claimant's turbines'.

2.8.3 Where a defendant causes physical damage to the claimant's property (or to property in which the claimant has a proprietary or a possessory interest) and, in addition, the claimant suffers consequential economic loss, whether that loss will be recoverable will depend on whether it was truly consequential on (or the immediate consequence of) the physical damage or whether it was independent of it.

2.9 Special relationship of proximity

2.9.1 **Junior Books Limited v Veitchi Company Limited** is the only case in which it has been held specifically that there was a sufficiently close relationship of proximity to justify the imposition of a duty of care in tort on the manufacturer of a defective item in respect of the claimant's economic loss incurred through not being able to obtain the full benefit of the item in question. This was decided by a 4:1 majority. The majority recognised that the relief they were granting was exceptional, and emphasised the following factors:

- (1) That the defendant, though not in a direct contractual relationship with the claimant, was, as a nominated sub-contractor, in almost as close commercial relationship with the claimant as it is possible to envisage short of privity of contract.
- (2) That the claimant relied on the defendant's skill and experience.
- (3) That the defendant, as nominated subcontractor, must have known that the claimant was doing so.
- (4) That the sufficiently close relationship of proximity which they held

to exist by virtue of factors (1) and (2) above, would not easily be found to exist between a purchaser and a manufacturer in the ordinary everyday transaction of purchasing chattels, where it is obvious that in truth the real reliance was upon the immediate vendor and not upon the manufacturer, and per Lord Fraser '*I would decide this appeal strictly on its own facts. I rely particularly on the very close proximity between the parties which in my view distinguishes this case from the case of purchasers of goods to be offered for sale to the public*'.

2.9.2 In **Muirhead v Industrial Tanks Specialties Limited** a claim by the owner of a fish tank for estimated loss of profit on intended sales resulting from the failure of pumps in the tank installed by a sub-sub-contractor was rejected on the grounds that '*there was no very close proximity between the third defendant and the claimant.*' Contractually there were several stages removed from each other. More important, there was no reliance by the claimant on the defendant in the sense in which that concept was applied in **Junior Books v Veichi**. The people on whom the claimant relied to install the system and get the right equipment, including pumps with electric motors which worked, were the first defendants. On the other hand the court held that the sub-sub-contractor did owe a duty of care to the claimant of lobsters which had died in the tanks as a result of the failure of the pumps and financial loss suffered by the claimant in consequence of that damage has fell within the principle of Spartan Steel. This meant that the claimant did not recover the total loss of profits which he had claimed, but only such lost profits as was attributable to the lobsters which were actually in the tank and which died when the pumps failed.

2.9.3 In **Henderson v Merrett Syndicates Limited** the House of Lords held that managing agents at Lloyds, in performing services in the knowledge that indirect names were placing reliance on their expertise, must be

taken in law to have resumed a responsibility to the indirect names to perform their services competently. The Lordships went out of their way to stress however that in their view the present case was exceptional. Lord Goff at p 195 stated: *'I strongly suspect that the situation which arises in the present case is most unusual; and that in many cases in which A contractual chain comparable to that in the present case is constructed it may well prove to be inconsistent with an assumption of responsibility which has the effect of short circuiting the contractual structure so put in place by the parties. It cannot therefore be inferred from the present case that other sub-agents will be held directly liable to the agents principal in tort'*.

Lord Goff distinguished the situation in this case from the contractual chain which would arise in a building contract: *'Let me take the analogy of the case of an ordinary building contract, under which main contractors contract with the building owner for the construction of the relevant building, and the main contractor sub-contracts with sub-contractors or suppliers (often nominated by the building owner) for the performance of work or the supply of materials in accordance with the standards, and subject to the terms established in the sub-contract.... if the sub-contracted work or materials do not conform to the required standard, it will not ordinarily be open to the building owner to sue the sub-contractor or supplier under the Hedley Byrne principle.... for there is generally no assumption of responsibility by the sub-contractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility.'*

2.10 Proximity based on reliance

2.10.1 In **Murphy** Lord Oliver stated the following propositions:

- (1) The critical question is not the nature of the damage in itself,

whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such which the claimant claims to sustain.

- (2) The essential question which has to be asked in every case given that damage which is the essential ingredient of the action has occurred, is whether the relationship between the claimant and the defendant is such - or, to use the favourite expression, whether it is of sufficient proximity - that it imposes on the latter a duty to take care to avoid or prevent that loss which has in fact be sustained.
- (3) That the requisite degree of proximity may be established in circumstances in which the claimant's injury results from his reliance upon the statement or advice upon which he was entitled to rely and upon which it was contemplated that he would be likely to rely is clear from **Hedley Byrne** and subsequent cases, but **Annes** was not such a case and neither is the instant case.

2.10.2 If as the House of Lords has said, the key factor in establishing proximity is reliance, or, more accurately, knowledge, actual or imputed, by the defendant that the claimant would be relying on his (defendants) skill and experience, that this test would be capable of being satisfied where the defendant knew, or ought to have known, that the claimant, or a person within the same class of the claimant, would be likely to use the defendant's product without making an independent intermediate examination of his own which would be likely to reveal the hidden defect. The claimant's reliance and the defendant's foresight of such reliance, does not in these circumstances have to be only a statement or advice. Whether this test will actually be satisfied in any particular case will depend on what the parties actually said or did, or ought in the circumstances to have said or done.

2.11 **Misstatement and Misrepresentation**

- 2.11.1 The Law Lords in **Hedley Byrne** all made statements which demonstrate that the basis of the existence of duty of care in this type of case is knowledge or foreseeability, actual or imputed, by the defendant that A particular person or class of persons would most probably place reliance on the defendants statement, advice or service rendered without making any further enquiries to verify the accuracy of that statement, advice or service.
- 2.11.2 A negligent misstatement or misrepresentation may give rise to an action for damages for financial loss since the law will imply a duty of care when a party seeking information from a party possessed of special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgement.
- 2.11.3 Liability for economic loss due to negligent misstatement is confined to cases where the statement or advice is given to a known recipient for a specific purpose of which the maker of the statement is aware and upon which the recipient has relied and acted upon to his detriment.
- 2.11.4 The law adopts a restrictive approach to any extension of the scope of the duty of care beyond the person directly intended by the maker of the statement to act upon it.
- 2.11.5 Matters to be considered are the purpose for which it was made and the purpose for which it was communicated to the claimant: the relationship between the maker and the receiver of the statement and any relevant third party; the size of the class to which the claimant belongs; the state of knowledge of the defendant; and whether and to what extent the claimant was entitled to rely on the statement (**James McNaughton Paper**

Group v Hicks Anderson & Co.

In Caparo Plc v Dickman Lord Oliver said;

*“It can be deduced from the **Hedley Byrne** case that the necessary relationship between the maker of a statement or giver of advice (the “Advisor”) and the recipient who acts in reliance upon (the “Advisee”) may typically be held to exist where (1) the advice is required for a purpose, whether particular specified or generally described, which is made known, either actually or inferentially, to the Advisor at the time when the advice was given; (2) the Advisor knows, either actually or inferentially, that his advice will be communicated to the Advisee, either specifically, or as a member of an ascertainable class, in order that it should be used by the Advisee for that purpose; (3) it known either actually or inferentially, that the advice so communicated is likely to be acted upon by the Advisee for that purpose without independent enquiry; and (4) it is so acted upon by the Advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive, but merely that the actual decision in the case does not warrant any broader propositions.”*

Lord Jauncy emphasised that *“the crucial question is the purpose in which the report was made.”*

- 2.11.6 The misstatement must play a real and substantial part in inducing the claimant to act, though it need not by itself be decisive.
- 2.11.7 No duty arises if the person making the statement shows that he is not assuming or accepting a duty to be careful.
- 2.11.8 There must be something more than misstatement. There is the

additional requirement that expressly or by implication from the circumstances the writer has undertaken some responsibility.

- 2.11.9 There may be liability deriving from relationships which are equivalent to contract, that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract, **Caparo Industries v Dickman.**
- 2.11.10 The **Hedley Byrne** principle has been expressly applied to a number of categories of person who perform services of a professional or quasi - professional nature including architects, engineers, and quantity surveyors.
- 2.11.11 Although the duty of care will normally be owed to the recipient of the Statement, that will not always be exclusively so.
- 2.11.12 Circumstances where a liability for negligent misstatement has been or might be held to arise include '*Specialist sub-contractors*'
1. It is still judicially suggested that **Junior Books v Veichi** might be understood on the basis that there was a special relationship of proximity between the building owner and the sub-contractor which was sufficiently akin to contract to introduce the element of reliance so that the scope of the sub-contractor's duty of care was wide enough to embrace economic loss. But it is not clear that the case was decided on such a basis nor is it clear what features of its commonplace facts support a sufficient special relationship. The duties were averred to flow from the defender's position as reasonably competent flooring contractors, and not from any relationship which they had as such with the

pursuers. The case has been classified as unique and it is thought that it should at most be regarded as a case of no general application.

2. Usually where an an Employer obtained advice from a specialist, there is a direct contract or collateral warranty and this may regulate or even negate a duty of care in tort **Greater Nottingham Co-Operative Society v Cementation Piling and Foundation (1989)QB 71 (CA).**

2.11.13 It is however possible that special factual circumstances may arise where an an Employer relies on specific advice from a specialist with whom he is not in contract so that the specialist assumes a duty to guard the an Employer against economic loss **Simaan General Contracting Co -v- Pilkington Glass (No.2).**

2.11.14 The most recent case in which liability under the **Hedley Byrne** principle was considered is **Hamble Fisheries Limited -v- Gardner & Sons Limited** in which Tuckey LJ said;

*‘What is required to establish a special relationship of proximity? In **White v Jones** at p.274 Lord Brown Wilkinson said:*

although the category of cases in which such a special relationship could be held to exist are not closed, as yet only two categories have been identified viz. 1. where there is a fiduciary relationship and 2. where the defendant has voluntarily answered a question or tendered skilled advice or services in circumstances where he knows or ought to know that an identified Claimant will rely on his answers or advice. In both these categories this special relationship is created by the defendant voluntarily assuming to act in the manner by involving himself in the Claimant’s affairs or by

choosing to speak. If he does so seem to act or speak he is said to have resumed responsibility of carrying through the matter he has entered upon.

*But for the absence of consideration there would have been a contract between the parties **Hedley Byrne v Heller**. In **White v Jones** there was no privity of contract between the solicitor and the beneficiary although the contract was intended to benefit the latter. This is now the accepted explanation for the decision in **Junior Books Limited v Veitchi Company Limited (1983)** where the nominated specialist subcontractor was to replace flooring for the benefit of the building owner. The emphasis in the recent cases is on the assumption of responsibility by the Defendant.*

*In **Williams v Natural Life Health Foods Limited (1998)** 1 LLR 830...*

Lord Stein at p.835 said:

The touchstone of liability is not the state of mind of the Defendant. An objective test means that the primary focus must be on things said and done by the Defendant or on his behalf in dealings with the Claimant. Obviously the impact of what a defendant says or does must be judged in light of relevant contractual and textual scene. Subject to disqualification the primary focus must be on exchanges (in which term I include statements and conduct) which crossed the line between the defendant and the Claimant).

... The test is an objective one so that the focus of the enquiry must be on statements and conduct which crossed the line between the parties. Here the appellants had no dealings with the Respondents or the manufacturers at any time. The Appellants were unknown to them as one of an unspecified number of customers who had purchase Gardner engines. Only the manual crossed the line to the Appellants and that had not been issued by

the Respondents.

I cannot spell out of the facts something akin to contract. The parties simply had no dealings with one another.'

And Lord Justice Mummery said;

'There is no general duty in English law to take reasonable care to avoid inflicting financial loss on those whom it is reasonably foreseeable will suffer such loss in consequence of acts or omissions.

If a generalisation can competently be made about this controversial and difficult aspect of the law of negligence, it is that the recent decisions of the House of Lords cited by Lord Justice Tuckey affirm a general principle ruling out the recovery for carelessly inflicted foreseeable financial loss in the absence of the contract or a special relationship of proximity between the parties, giving rise to a voluntary assumption of responsibility for the financial loss.

If this recent authority is upheld, liability for purely financial losses confined to cases of special relationships involving the voluntary assumption of responsibility, there cannot be any liability on this case because, as Mr G put it, there has been no crossing of the line between the parties so as to bring them into proximity of one and other: no direct supply of goods, advice or services, no commercial contract.'

2.12 Relational Economic Loss

2.12.1 *'In a relational economic loss case the defendant negligently damages property belonging to a third party and the claimant suffers economic loss because of a dependance upon that property or its owner. The general rule is that no duty is owed to the claimant in such a situation'* **Clerk and Lindsell on Torts**. This

formulation was approved by Judge Hicks in **London Waste Limited v Amec Civil Engineering Limited** , in which an owner of a power station claimed Loss of profit arising from loss of power generation caused by the negligent cutting of power cables owned by a third party in his judgement Judge Hicks reviewed the authorities applicable to the recovery of this type of loss in tort.

2.12.2 It is important to appreciate that the rule operates to exclude recovery where economic loss suffered by a claimant is consequential on damage to a third party's property by a negligence where the claimant does not have a proprietary or a possessory interest in the property of the third party.

2.12.3 A proprietary interest is absolute ownership or an interest which allows the owner of it to exercise rights equivalent to rights of ownership.

2.12.4 In **London Waste v AMEC** Judge Hicks stated:
'The claimant has the contractual rights and duties under the connection agreement and the power purchase agreement. Those rights and duties do not on the authorities suffice to give the claimant a right of action for economic loss caused by the damage to the cables. It is to be noted that the claimant in the Spartan Steel case also was the exclusive user of the electricity passing through the damaged cable'.

It should also be note that in **London Waste v AMEC** the claimant's Counsel argued that, even if the claimant did not have a proprietary or a possessory right in the electricity cables which the defendant negligently severed, the claimant should be entitled to sue the defendant for its loss of profits while the claimant's power station was out of commission on the ground that the claimant and the owner of the cables were involved in a

common venture by virtue of the claimant being the exclusive user of the cables. Judge Hicks rejected this argument stating, that he was *'satisfied that there is no exception to the rule of (this) nature.'*