

The case for contractual solutions in third party pure economic loss. - A comparative review of the law in Germany, Greece, the United States, Scotland, England, Australia, Canada and New Zealand.

Themistoklis G. Mersinis

Thesis for the degree of the Ph.D submitted to the University of Edinburgh,

1996



I confirm that this thesis is my own work, has been composed by myself, and does not include work submitted for any other degree or professional qualification.

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volume 2

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| | |
|--|-----|
| 2.1.2. Compulsory transfer of danger (<i>obligatorische Gefahrenlastung</i>) | 80 |
| 2.1.3. Cases involving a duty of care (<i>Obhutsfälle</i>) | 83 |
| 2.1.4. Trust relationships (<i>Treuverhältnisse</i>) | 86 |
| 2.1.5. Agreed <i>Drittschadensliquidation</i> (<i>vereinbarte Drittschadensliquidation</i>) | 88 |
| 2.1.6. Special cases | 92 |
| 2.1.6.1. <i>Drittschadensliquidation</i> and corporate identity | 92 |
| 2.1.6.2. Third party compensation in public contracts | 95 |
| 2.1.6.3. Product liability and <i>Drittschadensliquidation</i> | 96 |
| 2.1.6.4. Retail chain and <i>Drittschadensliquidation</i> | 99 |
| 2.1.6.5. Dispatch of defective goods by the buyer | 101 |
| 2.2. Questions of enforcement -- The problem of a direct claim | 101 |
| 2.3. General review | 104 |
| 2.3.1. The nature of <i>Drittschadensliquidation</i> | 105 |
| 2.3.1.1. Conceptual links | 107 |
| 2.3.1.1.1. <i>Schadensverlängerung</i> ; transfer of loss | 107 |
| 2.3.1.1.2. <i>Interessenverknüpfung</i> ; union of interests | 110 |
| 2.3.1.1.3. Agreement | 111 |
| 2.3.1.1.4. Conclusion | 113 |
| 2.3.1.2. Two questions. Similar institutions | 115 |
| 2.3.1.2.1. <i>Drittschadensliquidation</i> and insurance | 115 |
| 2.3.1.2.2. <i>Regreß</i> | 116 |
| 2.4. Theoretical considerations | 117 |
| 2.4.1. Until 1971: Focus on unlawfulness | 118 |
| 2.4.2. Second phase; after 1971 | 120 |
| 2.4.3. Conclusion | 125 |
| 3. The contract with protective effect <i>vis-à-vis</i> third parties | 127 |
| 3.1. Introduction | 127 |
| 3.2. Initial stage | 130 |
| 3.3. Doctrinal Basis | 132 |
| 3.4. The BGH view | 134 |
| 3.5. The Capuzol 22 decision | 135 |
| 3.6. Special features | 138 |
| 3.6.1. Liability for physical injuries, property damage and economic loss | 138 |
| 3.6.2. Link to a contract | 143 |
| 3.7. Prerequisites | 143 |
| 3.7.1. Contract or precontractual relationship of confidence | 143 |
| 3.7.1.1. Contract | 143 |
| 3.7.1.2. Precontractual relationships | 144 |
| 3.7.2. Third party proximity to the contractual relationship | 146 |
| 3.7.3. Creditor's interest in the protection of the third party | 148 |
| 3.7.4. Debtor's awareness of the proximity and of the creditor's legitimate interest | 152 |
| 3.7.5. The need for protection | 155 |
| 3.8. Theoretical considerations | 157 |
| 3.8.1. Critique on the theoretical views; the problem of a legal basis | 162 |
| 3.8.1.1. Solutions based on the autonomy of the parties' will | 162 |
| 3.8.1.1.1. Direct application of § 328 BGB | 162 |
| 3.8.1.2. Solution which do not rely on the parties intentions | 167 |
| 3.8.1.2.1. Reconsidering §328 BGB; application by analogy | 167 |
| 3.8.1.2.2. The question of customary law | 169 |
| 3.8.1.2.3. The case for factual contracts | 171 |
| 3.8.1.2.4. Reliance between the parties | 172 |

| | |
|--|-----|
| 3.8.1.2.5.Delict | 172 |
| 3.8.1.2.6.Good faith | 173 |
| 3.8.1.2.7. <i>Extra legem - intra jus</i> | 176 |
| 3.9.Special problems | 177 |
| 3.9.1.Release from liability | 177 |
| 3.9.2.Contributory negligence | 179 |
| 3.9.3.If both debtor and creditor are liable -- The case of joint and several liability | 181 |
| 3.9.4.Limitation period | 182 |
| 3.9.5.Contractual guarantee in lease cases | 183 |
| 3.10.Areas of application | 184 |
| 3.10.1.Advocates' contracts | 184 |
| 3.10.1.1.Drafting wills | 187 |
| 3.10.2.Information, expert opinions and reports | 192 |
| 3.10.2.1.Expert opinion | 194 |
| 3.10.2.2.Critique | 200 |
| 3.10.3.Banking law contracts | 204 |
| 3.10.4.Contracts for medical treatment | 209 |
| 3.10.5.Transport contracts | 212 |
| 3.10.6.Contracts for services | 214 |
| 3.10.7.Contracts for works | 217 |
| 3.10.8.Contracts of lease | 220 |
| 3.10.9.Contracts of sale - Production liability | 226 |
| 4.Contracts with protective effects and <i>Drittschadensliquidation</i> ; delimitation. | 229 |
| 4.1.Introduction | 229 |
| 4.2.Borderline cases; critique | 231 |
| 4.3.Distinction based on the kind of loss | 237 |
| 4.4.The quality of the creditor-third party relationship | 238 |
| 4.5.Transfer of damage -- The criterion of risk | 239 |
| 4.6.Conclusion | 241 |
| 5.Judicial assertiveness | 243 |
| | |
| Chapter 3: Third parties in Greek law. | |
| 1.Introduction | 248 |
| 2.Third party questions before the AK | 252 |
| 2.1.Academic views | 257 |
| 2.2.Conclusion | 260 |
| 3.Third parties after the AK | 260 |
| 3.1.Contract for the benefit of third parties | 261 |
| 3.1.1.Carriage contracts | 262 |
| 3.1.2.Building contracts | 264 |
| 3.2.Subleases and loans for use: §599(2) AK, §819AK | 266 |
| 3.3.Employees' wages: §702 AK | 267 |
| 3.4.Innkeepers' liability: §834 AK | 269 |
| 3.5.Mandators and depositors: §§716(3) AK, §825(2) | 270 |
| 3.6.Unjust enrichment and third party loss: §904 AK | 273 |
| 3.7.Delictual protection | 274 |
| 3.8.Theory | 281 |
| 3.9.Conclusion | 291 |
| 4.Critique on the delictual option. Contract v. delict | 291 |
| 4.1.Delict's potential | 291 |
| 4.2.Is the contractual approach advantageous? | 298 |
| 5.Reception | 305 |
| 5.1. <i>Drittschadensliquidation</i> (restoration of third party loss -- AZT) | 306 |
| 5.2.Contract with protective effects | 308 |

| | |
|--|-----|
| 2. The <i>jus quaesitum tertio</i> | 439 |
| 2.1. Introduction | 439 |
| 2.2. Development and applications | 444 |
| 2.3. Defences | 453 |
| 2.4. Theoretical basis | 454 |
| 2.5. Explaining inadequate development | 457 |
| 3. Protection for third parties on the basis of delict | 461 |
| 3.1. Introduction | 461 |
| 3.2. Third party pure economic loss | 463 |
| 3.3. The effects of <i>Caparo</i> and <i>Murphy</i> on Scots law | 474 |
| 3.4. Third party loss: Privity oriented retreat from <i>Junior Books</i> | 477 |
| 3.5. Third party pure economic loss: Contractual approaches | 485 |
| 3.6. Third party loss in delict: Interpretations | 494 |
| 3.7. Third party loss in the Scots law of delict: In favour of the third party | 502 |
| 3.8. Recent developments | 507 |
| 3.9. Subcontractors' liability | 514 |
| 4. The case for contractual solutions | 520 |
| 4.1. Introduction | 520 |
| 4.2. Purpose of discussion | 522 |
| 4.3. A question for the judiciary | 524 |
| 4.4. Advantages | 526 |
| 4.5. Allowing third party claims - Critique | 530 |
| 5. Legal basis for a contractual solutions | 534 |
| 5.1. Introduction | 534 |
| 5.2. Scots law doctrines | 540 |
| 5.3. The balance between contract and delict | 543 |
| 5.4. Revitalising <i>culpa</i> | 546 |
| 5.5. Law making by analogy | 549 |
| 5.6. Permissible judicial authority | 550 |
| 5.7. Promoting contractual solutions | 555 |
| 5.8. Conclusion | 559 |
| | |
| Chapter 6: A brief overview of recent developments in Commonwealth jurisdictions. | |
| 1. Introduction | 561 |
| 2. Pure economic loss and third party beneficiary claims | 562 |
| 2.1. Third party pure economic loss | 562 |
| 2.1.1. Conclusion | 574 |
| 2.2. Third party beneficiary claims | 576 |
| 3. Is English law isolated? | 580 |
| 4. Judicial considerations | 591 |
| 5. In support of traditional doctrine | 599 |
| 6. Economic arguments | 606 |
| 7. <i>London Drugs Ltd. v. Kuehne & Nagel International Ltd.</i> | 609 |
| 8. Liability of private defendants for defective construction in New Zealand law | 611 |
| 9. The task of reform | 612 |
| 10. Advantages of the contractual solution | 617 |
| 11. The case for contract | 619 |
| 12. Conclusion | 629 |
| | |
| Chapter 7: Conclusion. | |
| 1. Introduction | 630 |
| 2. Methodological issues revisited | 631 |
| 3. Judicial assertiveness | 634 |
| 3.1. Legitimate authority | 639 |

| | |
|--|-----|
| 3.2.Conclusion | 641 |
| 4. Suggested reform: Increased contractual input | 641 |
| 4.1.Flexibility in a civil liability system | 644 |
| 4.2.Similarities between the systems | 647 |
| 4.3.The way for reform | 653 |
| 5.Conclusion | 654 |
| | |
| Bibliography | |
| English language bibliography | 658 |
| German language bibliography | 674 |
| Greek language bibliography | 681 |
| | |
| Appendices | |
| 1. German law | 684 |
| 2. Greek law | 693 |
| 3. American law | 695 |
| 4. Scots law | 700 |
| 5. Commonwealth laws | 702 |
| 6. Case law | 705 |

Abbreviations.

| | |
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| AcP | Archiv für die civilistische Praxis |
| AIA | American Institute of Architects |
| AID | Αρχεῖον Ἰδιωτικῆς Δικαίᾶς |
| AK | Αστικὸς Κώδικας (Greek Civil Code) |
| ALJ | Australian Law Journal |
| AllER | All England Law Reports |
| AmJComL | American Journal of Comparative Law |
| BGB | Bürgerliches Gesetzbuch (Civil Code) |
| BGH | Bundesgerichtshof |
| BGHZ | Entscheidungen des Bundesgerichtshofes in Zivilsachen |
| CamLJ | Cambridge Law Journal |
| CanBarRev | Canadian Bar Review |
| CLP | Current Legal Problems |
| CLR | Commonwealth Law Reports |
| ColLR | Columbia Law Review |
| ConLJ | Construction Law Journal |
| DLR | Dominion Law Reports |
| ED | Ελληνική Δικαιοσύνη |
| FamRZ | Zeitschrift für das Gesamte Familienrecht |
| FCC | French Code Civil |
| FordhamLR | Fordham Law Review |
| GG | Grundgesetz |
| GWD | Green's Weekly Digest |
| HarvLR | Harvard Law Review |
| HGB | Handelsgesetzbuch (Commercial Code) |
| HL | House of Lords |
| HUD | Department of Housing and Urban Development |
| IntCLQ | International and Comparative Law Quarterly |
| IntEncCompL | International Encyclopedia of Comparative Law |
| JBL | Journal of Business Law |
| JCL | Journal of Contract Law |
| JMLC | Journal of Maritime Law and Commerce |
| JQT | jus quaesitum tertio |
| JR | Juridical Review |
| JuS | Juristische Schulung |
| JZ | Juristenzeitung |

| | |
|-----------------------|---|
| LC | Law Commission |
| LG | Landesgericht |
| LIMCLQ | Lloyd's Maritime and Commercial Law Quarterly |
| LQR | Law Quarterly Review |
| LSt | Legal Studies |
| MLR | Modern Law Review |
| NJW | Neue Juristische Wochenschrift |
| NomB | Νομικόν Βήμα |
| NYSE | New York Stock Exchange |
| NYULR | New York University Law Review |
| NZLR | New Zealand Law Reports |
| OLG | Oberlandesgerichtshof |
| OxfJLSt | Oxford Journal of Legal Studies |
| QB | Queen's Bench Division |
| Restatement first | Restatement of the Law of Contracts 1932 |
| Restatement second | Restatement of the Law of Contracts 1979 |
| SC | Seccion Cases. |
| SCR | Supreme Court (Canada) Reports |
| SEC | Securities and Exchange Commission |
| SLC | Scottish Law Commission |
| SLT | Scots Law Times |
| SLT | Scottish Law Times |
| StanfLR | Stanford Law Review |
| Stathopoulos I and II | Σταθόπουλος |
| TexasLR | Texas Law Review |
| TulLR | Tulane Law Review |
| UCC | Uniform Commercial Code |
| UTLJ | University of Toronto Law Journal |
| UWALR | University of Western Australia Law Review |
| VaLR | Virginia Law Review |
| WLR | Weekly Law Reports |
| YaleLJ | Yale Law Journal |
| ZEP | Zeitschrift für Europäisches Privatrecht |
| ZPO | Zivilprozeßordnung |

Chapter 5. Third parties in Scots law.

1. Introduction.

There is certainly more than one way to view the position of third parties in the Scots law of obligations¹ whether one refers to third parties' rights or losses. Compensation for those injured due to the violation of a private arrangement to which they are not parties could be sought on the basis of delict under the central principle of *culpa*. A right can be created in favour of third parties by means of a contract on the basis of the mechanism of *jus quaesitum tertio* (JQT). Both *culpa* and JQT are provisions which distinguish Scots law from its English counterpart. However, it should be kept in mind that distinctly Scottish doctrines might not reflect the state of the law and that the presentation of Scots law will be incomplete unless the English influence is taken into account.

As will be discussed, it is easy to assess that the position of third parties in Scots law is better than in English law². It will be argued that, not only do contract-based approaches offer the best protection for third party loss, but that the Scottish system of civil liability as a whole gives priority to contract-based views, as, for instance, American law.

2. The *jus quaesitum tertio*.

2.1. Introduction.

¹ For an introduction to the Scots law of obligations see Gloag and Henderson *Introduction to the Law of Scotland*, 1987, 45 et seq, Walker, David M. *Principles of Scottish Private Law-vol II Law of Obligations*, 4th ed, 1988 and McBryde, W.W. *The Law of Contract in Scotland*, 1987.

² The JQT will be referred to first since the purpose of this study is to review the potential of contract law in compensating third party loss and the JQT is the most promising Scottish doctrine as far as the contractual protection of third parties is concerned. Considerable reference will be made to third party loss in delict where most relative cases are dealt with in the UK. This reference to delict will necessarily involve an account of English law at the same time. The overall purpose is to underline the possibility of incorporating contractual reasoning in the law of delict and to consider the meaning of such an approach from a Scottish perspective.

This limited reference to the JQT³, will focus on its potential to expand. On the basis of the JQT, the contracting parties confer rights on non-parties. It is a special mechanism, yet an integral part of the Scots law of contract, in which the rule is that the parties only acquire rights under the contract⁴.

It is difficult to describe JQT with certainty in the absence of a legislative basis, as particular issues are still disputed and the relatively limited case law is of little help. The JQT is certainly similar to the contract in favour of third parties of civil law systems⁵. No two Scottish lawyers would agree on a description of the JQT. The confusion is, to a considerable extent, a product of this century⁶ and is accentuated by academic debate, often due to obsolete positions which still carry substantial weight. The first reported case dates from 1591⁷. JQT was established by Stair in his *Institutions of the Law of Scotland*⁸. The

³ The reference to the JQT will be limited as there are adequate studies on the subject. See "Jus Quaesitum Tertio: Remedies of the Tertius" in *Studies Critical and Comparative*, T.B. Smith, 1962, p.183, and the Memorandum No:38 of the Scottish Law Commission (10 March 1977) "Constitution and proof of voluntary obligations: Stipulations in favour of third parties". The most comprehensive reference can be found in the notes provided by Professor Hector MacQueen for the contract honours students under "Title to sue", which is now published in "The Laws of Scotland -- Stair Memorial Encyclopaedia", Smith & Black eds., volume 15, '(i) Title to sue. §§814-864, pp.526-561. See also Rodger, Allan "Molina, Stair and the Jus Quaesitum Tertio", *JR*, 1969, 34-44, and 128-151, MacCormick, D.N. "Jus Quaesitum Tertio-Stair v. Dunedin" 15 *JR* 1970 pp.228-242, McBryde, W.W. "Jus Quaesitum Tertio", *JR* 1983, 137-151, and Cameron, J.T. "Jus Quaesitum Tertio: The true Meaning of Stair I.X.5." *JR* 1961 103-118.

⁴ Unless, that is, there are provisions to the contrary (as a JQT). For the general rule see Walker *Principles vol II*, 120. In continental doctrine the contract in favour of third parties is an exception for contractual relativity but not from obligational relativity, on the idea that sanctioned by the law a new obligational relationship is created. As will be seen by the discussion on the theoretical basis of JQT on the theoretical basis the question of the nature of the third party right is complicated. Certainly the third party is not succeeding the promisee in his rights. See under "Obligations and third persons", in Chapter 2.

⁵ In that sense it is typical of a civil law jurisdiction. See the reference in Zweigert & Kötz 489 et seq.

⁶ See the reference under "Third party beneficiary rule" in Chapter 4 on American law. Abandoning the Roman rule according to which only exceptionally can a third party can acquire rights for a contract is a matter of the last two centuries in the European codifications starting with the provisions for contracts in favour of third parties in the 1804 FCC. Relative provisions appear basically in this century when the German law contractual mechanisms discussed in this thesis are crystallised. It was in 1937 that an English Law Commission suggested the introduction of a contract in favour of third party in English law a suggestion that never materialised.

⁷ The case is *Wood v. Moncur* (1591) Mor 7719. Tenants were held able to enforce a provision in an excambion of lands that they should not be removed during the currency of their leases. According to T.B. Smith the earlier case dates from 1627 (Smith *Studies* 185). McBryde, W.W. "Scots and English Contract Laws", in *The Frontiers of Liability*, Birks,

uncertainty as to its content and implications derives, to a considerable extent, from the debate on the meaning of Stair's statements. There is actually no clear authority on a number of issues. The relative case law is hardly conclusive (important points are often found in *obiter dicta*) and any review of the JQT should take into account the varying academic opinions as well.

The debate was fuelled by Lord Dunedin's speech in the leading case of *Carmichael v. Carmichael's Executrix*⁹. The basic controversy involved Lord Dunedin's argument that, in Stair's view, the irrevocability of the third party's right is a condition for the creation of a right and not a consequence of the relative contractual provisions. It has been aptly demonstrated that this interpretation of Stair's work was wrong¹⁰. Lord Dunedin was not the only one to blame for seeking to justify preconceived ideas; the later editions of Stair's *Institutions* gave an inexact picture of the author's work¹¹.

Peter (ed), vol.2, 1994, p.151, footnote 77, thinks that the second reported case, following *Wood v. Moncur*, was *Irving v. Forbes* (1676) Mor. 7722.

⁸ In paragraph I 10. 5, of the *Institutions of the Law of Scotland*, (The first edition of the *The Institutions of the Law of Scotland*, was published in 1681. The second edition, revised and edited by Stair, was published in 1693.). See the edition by Walker, from 1981, 197-198. Reference is usually made to the provisions of the 5th edition, which offers a less accurate picture of what Stair actually wrote. Rodger, JR, 1969, 34-44, and 128-151.

⁹ 1920 S.C. (H.L.) 195. In this case a father had entered an insurance contract over the life of his son. The father would pay the premiums until the son's majority. If the son died before reaching majority the premiums were to be repayable to the father. If the son attained majority and took over the payments of the premiums the sum assured would be payable on his death to his estate or assignees. The son reached majority but was killed before taking over the payments. The father had paid all the premiums up to the son's majority and had retained custody of all the policy documents. (The son had been aware of the existence of the policy.). The House of Lords held for the executrix, reversing the Court of Session's seven-judge decision. Lord Dunedin thought that the majority of the court below had approached the question of JQT from the narrow point of view of donation only. There were two meanings in the phrase *jus quaesitum tertio*; that referring to the third party's interest in a contract between others and that related to the third party's right to sue the debtor of the contract. He agreed with the Court of Session that the crucial test was that of the irrevocability of the benefit. After the date of majority "the whole scheme alters, the grantee no longer engages to pay the premiums, but the life assured is given several options.". An irrevocable JQT had been constituted in the son's favour. Lord Shaw noticed that " what happened after the son's majority was amply sufficient to constitute an investiture of the son with the right to the sum assured.". See the comment on the case in 33 JR (1921) p.55.

¹⁰ Rodger, JR, 1969, 34-44, and 128-151, Memorandum No:38 SLC, 6-15, McBryde JR 1983, 143, MacCormick, 15 JR 1970 236.

¹¹ As Rodger has amply indicated, the organisation of the material and the headings used are largely misleading. Later editions referred to cases which did not exist in the first and the second editions while the passage of Molina which Stair seems to be

It is fairly clear now that Stair did not consider the irrevocability of the contractual right as a precondition for a JQT. Instead, he probably thought that a personal right is born with the conclusion of the contract, i.e. with the expression of serious intention by the parties¹². The third party right could be revocable as many other rights in Scots law¹³.

Lord Dunedin's requirement of "*delivery* [of the contract to the third party] *or something equivalent*", for the creation of an (irrevocable) right was said to be a mere expression of Scottish doctrine¹⁴ requiring deeds to be delivered in order to be enforceable. As was rightly assessed, the key for the development of the JQT was the "equivalent" to the delivery requirement. The contract's content could be interpreted as equivalent, as was

referring to in the 5th edition, in order to reinforce his argument doctrinally, is not the one he originally referred to. Rodger, JR, 1969, 34-44, and 128-151.

¹² Memorandum No:38 SLC, 6-15, McBryde JR 1983, 145.

¹³ McBryde JR 1983, 148. McBryde distinguishes between irrevocability with regard to the creation of a right and irrevocability with regard to the content of a right which has been created. The comment in *Carmichael* was relevant for the former only. Until delivery the deed may be cancelled or revoked. However it is wrong to speak of irrevocability in the contents of a term in favour of third parties. In *Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland*, 1912 S.C. 1078, the rules of a union provided for benefits for the relatives of an insured member. The agreement under which these rules were established was revocable but had not been revoked when the pursuer's claim arose, when, that is, a relative claimed a benefit. Thus a third party can acquire a right under a revocable contract; the fact that the JQT is under a resolutive condition does not affect the validity of the third party right if it crystallises before the condition takes effect.

As MacQueen notices conditional rights pose certain questions in *Carmichael*. The insurance contract in that case seemed to have placed two conditions for the son to acquire a right under the original policy; him reaching majority and taking up the payment of premiums. The court was satisfied with the fact that the son achieved majority. (His death brought the assurance to an end.) Had he started paying the premiums, his right would have been contractual, and he would have the obligations to make these payments as well. (MacQueen *Title* 11-12.).

The case of *Dunnett v. Dunnett's trs.* 1985 SLT p.382, involved the execution by a pursuer of a deed of settlement in 1949, which she expressly declared irrevocable. The pursuer purported to revoke the deed in 1980 by letter sent to the defenders trustees. She then sought declarator that she was entitled to revoke the deed. She argued that the deed was simply a will (some purposes appeared testamentary) with a declaration of irrevocability. The defenders argued that the declaration disclosed an intention to create a JQT than to confer a *spes successionis* upon them. The existence of a power of appointment was a strong indication of irrevocability. The deed was not a universal settlement but largely covered acquirenda. The Lord Ordinary (Stewart) held that, as a practical matter, if the beneficiaries of the trust were prepared to renounce any future claims, the trust could be treated as if its non-testamentary purposes were spent, and he would be prepared to grant the declarator sought. He continued the cause in order that such renunciations may be made in probative form.

¹⁴ McBryde JR 1983, 143.

indeed the case in *Carmichael*¹⁵. However, in few decisions the creation of a JQT is accepted on the basis of the contract alone. Some additional element is usually required¹⁶.

Revocability questions have led to controversy over the types of cases where the JQT applies, especially as regards the existence of a right to sue or the right of the parties to alter the content of the contract¹⁷. Thus, for instance, Lord Dunedin spoke of two sets of

¹⁵ In *Allan's Trustees v. Inland Revenue* 1971 SC (HL) 45, 1971 SLT 62, a weakly old lady was concerned about the amount of duty to which her estate would be liable on her death. At first she drafted a will in which she bequeathed legacies of £ 20,000 to two of her friends and was appointing a third friend as a residuary legatee. Subsequently, trying to reduce the duty her estate would be liable for, she revoked the will and arranged with an insurance company for an endowment policy, which was to be held in trust to the extent of £20,000 value for each of the two friends, and to the extent of the remainder for the residuary legatee. The insured was the trustee. During the negotiations with the insurance company the residuary legatee was consulted and kept informed. On the old lady's death the Inland Revenue conceded that the interest of the residuary legatee under the policy should be treated as property in which the deceased never had an interest since the benefit was vested in her, to the exclusion of the deceased from the moment the policy came into being. The Inland Revenue held that the sums accruing to the other two beneficiaries should be aggregated with the remainder of the deceased's estate, since the deceased did not inform them of the insurance policy and the right was not vested in them when the policy was effected. The House of Lords, reversing the judgment of the Second Division held that no *jus quaesitum tertio* had been created in favour of the two trustees who had not been informed for the trust. However a person could validly appoint himself as the trustee of his own property provided that something was done equivalent to delivery or transfer of the trust fund. The intimation was equivalent to delivery. The whole trust came into operation with the intimation to the residuary legatee, notwithstanding the fact that no intimation was made to the other two beneficiaries. The sums received by all three beneficiaries should be treated as "property in which the deceased never had an interest".

¹⁶ *Inverloch Castle Ltd. v. Lochaber Power Co.*, 1987 SLT 466, involved the liability of an electricity supply company, which had agreed with the proprietor of heritable subjects at Inverloch Castle for the supply of electricity to the pursuers who had inherited a part of this land. The pursuers turned against the electricity company which ceased to supply electricity. Lord Ross held that the benefit was inextricably linked to the lands at which the transformer was located, and if the pursuers were the owners they were entitled to the benefit of the defender's obligation. No assignation of intimation was necessary for the pursuers to acquire the benefit.

In the BGB and the AK the courts in case of doubt have to decide on the basis of the intentions of the parties and the nature and purpose of contract on whether the beneficiary should be allowed to claim his benefit with a direct claim against the promisor, §328(2)BGB, §411AK. The courts apparently have to look into the surrounding circumstances and possibly take evidence from practices in transactions. It is a sign of the liberal character of the relative provisions whether they create a presumption in favour of the third party's entitlement to a direct claim. The Greek, Austrian and the Louisiana Civil Codes contain such presumptions (§411AK, §881, 2, ABGB, §1978 Louisiana Civil Code).

¹⁷ Gloag distinguishes between cases where the question is whether the tertius had a right to sue and cases where the obligation to the third party amounted to an irrevocable gift. In the latter case delivery was required to constitute the right, but not in the former. In respect of the broader question of the irrevocability of the third party's right he thinks that the idea that according to Stair the provision for the tertius would be enough for the creation of an (irrevocable) right, had been rejected in *Carmichael*. The parties can

controversies, one between the debtor-promisor and the beneficiary/third party concerning the right to claim performance (whether the *tertius* has a right to sue)¹⁸, and the other between the stipulator/promisee and the beneficiary concerning who is the creditor¹⁹. Cameron²⁰ considered that the question was whether the terms of the debtor's obligation were enough to infer a donative intent in favour of the third party and argued that the provisions of the contract alone would not suffice for that purpose²¹.

From another point of view, MacCormick argued that the revocability issue should be related with the policy question whether or not to establish a presumption of an (irrevocable) JQT²². MacCormick was rightly criticised on his view that any legal system must make a choice on the presumption²³.

generally reserve the right to revoke the third party right. This, Gloag argues, giving the example of trade union rules which meant to benefit the dependants of a member if the latter became insane, (*Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland*, 1912 S.C. 1078) does not apply to all cases. (Gloag, W.M. *Law of Contract*, 1929, 235 et seq.)

Lord Skerrington, dissenting in the Court of Seven Judges decision in *Carmichael*, tried to distinguish between the cases where the obligation which the debtor undertakes to the benefit of the third party is done with the unequivocal and final intention to benefit the third party or with no such intention. (MacQueen *Title* 12). The House of Lords accepted the views of the dissenting Lords Salvesen and Skerrington. See the comment on the case in 33 JR (1921) p.54.

MacQueen notes that "at least two categories of case" are treated under JQT. MacQueen *Title* 12.

¹⁸ In these cases according to Lord Dunedin the stipulator is either no longer existent, or is content with the *tertius* exacting his rights.

¹⁹ The emphasis in these cases is not on the *jus*, as in the previous one but on the *quaesitum*. The question is who the creditor is; the debtor is willing to perform.

²⁰ Cameron thought that all but one of the cases in the second category concerned the stipulator laying out money in order to obtain an obligation or repayment in form directed to the third party. Cameron, 1961 JR 103. The obligation was obtained by either lending money to the debtor, depositing money or paying premiums on an insurance policy.

²¹ Some additional element such as delivery was required. This is not the case with situations where the stipulator has agreed to create a benefit for a third party, in the form of an obligation, but retains the bond -- title to this obligation. Additional, special evidence should be looked at in such cases in order to infer that the JQT is irrevocable.

²² MacCormick, 15 JR 1970 236. The existence of a presumption of JQT offers significant evidence for the predisposition of a legal system towards third parties beneficiaries. MacCormick's view is endorsed by the Scottish Law Commission (SCL), Memorandum No:38 SLC, 30. See under "Real contracts in favour of third parties" in Chapter 2, on the existence of a presumption in favour of a direct third party right against the promisor in civil law certain systems.

²³ McBryde JR 1983, 148.

Finally, the possible conflict between the third party's and the stipulator's right seems to complicate considerations on the JQT²⁴. It was rightly acknowledged that the content of the contract should be examined in order to infer whether the stipulator retains rights which might exclude those of the *tertius*²⁵ or whether the beneficiary's right is good against the stipulator²⁶.

The attempts to categorise the JQT applications are useful mainly because they enable a more competent understanding of the mechanism. However, if one conclusion is possible, it is that the JQT cannot be limited to particular applications. It can in principle be applied to any kind of contractual relationship.

2.2. Development and applications²⁷.

The courts have generally taken a conservative view of the mechanism. Thus, although the beneficiary need not be identified in the contract but can be a member of an identifiable class, or might not even exist²⁸ at the conclusion of the contract, no right is

²⁴ The basic issue involved was whether the *tertius* has a right to claim performance or it was the stipulator (or the stipulator as well) who had a such a right

²⁵ Thus although the latter always acquires a personal right to claim performance it is possible that the stipulator might have such a right as well.

²⁶ MacQueen *Title* 14

²⁷ The reference to the applications of the JQT is not meant to be exhaustive. The purpose is rather to give an idea of the mechanism's potential for expansion.

²⁸ See MacQueen, H. "Promoters' Contracts, Agency and the Jus Quaesitum Tertio", SLT 1982,257-260, and *Title* 16 et seq. The question of promoters' contracts in favour of a company not yet in existence is complicated and does not concern the JQT only. It has been the steady view of the English and Scottish courts alike that a company cannot ratify or adopt contracts made on its behalf before it came into existence. As far as Scots law is concerned MacQueen observes that the authority used in the well known case of *Cumming v. Quartzag Ltd* 1980 SC 276; 1981 SLT 205, was not conclusive. It had been decided that the agent of a non-existent principal can enter contractual relations validly. In MacQueen's view practical considerations and common sense suggest that the company should in law acquire a right as a *tertius*. The provisions of the European Communities Act 1972, support the argument that in the cases where the company does not come into existence the contract in question will be valid as a contract with the agent acting as a principal. The fact that a company in the case the contract in its favour is valid, might be burdened with obligations as well, is not a problem as the company does not have to accept the contract concluded on its behalf.

Cumming v. Quartzag Ltd, involved an agreement for a lease between the purchasers and a person who signed "for and on behalf of a company ... under the name Quartzag Ltd or some such other name", from January 1965. The defenders began to extract minerals from February 1966. In 1978 the pursuers successfully applied to the sheriff to halt the extraction of minerals. The defenders argued that the aforementioned agreement created a *jus quaesitum tertio* in their favour, and in any case, on the basis of the actings of

recognised in favour of a company from a contract negotiated on the company's behalf before the latter comes into existence. The intention to benefit must be substantially clear; a mere interest in the performance or an incidental benefit are not enough²⁹. Moreover, no claims are accepted in situations involving subcontracting³⁰. A popular explanation is that the parties involved (owner, contractor, subcontractor), by choosing this form of organisation for the promotion of their projects, aimed to distance themselves from the others; otherwise they could have chosen to create direct relationships³¹.

the pursuers and defenders an agreement with the same terms has been set up. The court of first instance considered that the person who signed the agreement acted as an agent and not as a principal. The agreement was thus null and did not give rise to a *jus quaesitum tertio*. The other arguments of the defenders were rejected as well. Their appeal was not successful. *Cumming v. Quartzag Ltd.* comes after a series of decisions leading to the same result in the 19th century. However, none of those gave rise to suggestions for the application of the JQT, which indicates a conservative approach by the lawyers.

²⁹ In *Finie v. Glasgow and South Western Railway Co.*, (1857)20 D (HL) 2, two railway companies had agreed to keep their freight charges low. This agreement did not produce a JQT in favour of a customer as it had been made for the benefit of the companies.

In *Kaur v. Lord Advocate*, 1980, SC 319, 1981 SLT 322, where an individual claimed he had acquired rights under the European Convention on Human Rights, the claim was rejected as no intention to benefit specific individuals could be inferred.

³⁰ *MacQueen Title 19.*

³¹ The argument was expressed in *Blumer & Co. v. Scott & Sons*, 1874, 1 R 379. The purchasers of a new ship sued the sellers' subcontractors for damage caused due to the delayed delivery of the ship engines supplied by them to the sellers. The purchasers were not named in the subcontract, and the main contract and subcontract were not interdependent because they contained different provisions. According to the main contract the engines should be to the satisfaction of the purchasers, and according to the subcontract the engines should be to the satisfaction of the main contractor.

The case was referred to, as setting the principle in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244. The Ministry of Defence was employer under a contract between the ministry and a company of shipbuilders for the construction of a vessel. The shipbuilders subcontracted the design and manufacturing of certain parts of the vessel to subcontractors, who subcontracted certain work. The wiring of the surveillance and propulsion systems was allegedly defective and the ministry and the shipbuilders sought damages in delict and contract respectively against the subcontractors and the sub-subcontractors (three of whom lodged defences). The ministry further argued that they had a *jus quaesitum tertio* from the contract between the shipbuilders and the subcontractors by reason of their being referred to in that contract and the contract being a subcontract for the advancement of their interests in the vessel being built. With regard to the JQT the defenders argued that the ministry had not relevantly averred any such *jus* and that in any case the ministry's claim could refer to damages for non-performance but not to damages for defective performance. Lord Clyde held with regard to the JQT, that while a mere interest of the third party to the performance would not suffice as an intention to create a *jus* to the third party's benefit, the averment that the third party was named in the subcontract was enough to plead a relevant case. He found no reason why a tertius should not be entitled to sue for damages for defective performance, provided this was the intention of the parties. This intention could be implied. The actions against the sub-subcontractors were dismissed. Proof before answer was allowed against the subcontractors for the pursuer's contractual case. (The case was finally settled out of court.)

The JQT has not been applied in a wide range of situations, due to the courts' reluctance. The judicial approach is characterised by strict intention requirements and preference for delict³². This is especially the case with pure economic loss³³.

The JQT is generally accepted in cases where the purpose of the stipulator is donative, involving usually domestic, family or charity relationships³⁴. The approach reflects contentions on the character of the mechanism as donative.

The courts have been reluctant to apply JQT in commercial transactions. The JQT is accepted undisputedly in insurance contracts³⁵ and has been applied in certain banking

³² In cases where an overlap with the JQT was possible as in solicitors' liability. See under "Contracts for the benefit of third parties" in Chapter 3 on Greek law for an indication of the possible extension of the relative provisions.

³³ See generally Thomson J.M. *Delictual Liability*, 1994.

³⁴ In *Morton's Trustees v. Aged Christian Friend Society of Scotland*, (1899) 2 F 82, Morton wrote to a provisional committee which was promoting a charitable society, offering, under certain conditions regarding the creation of the society, to help it with a subscription of £1,000 payable in ten annual instalments of £100 each. The offer was accepted and the society was formed in accordance to the conditions. Morton paid £100 annually to the society, down to the time of his death at which date two instalments were unpaid. It was held that Morton had undertaken an obligation which conferred a *jus quaesitum tertio* on the society when formed which transmitted against his representatives, and that the society was entitled to enforce the implementation of the obligation. (There was an additional claim for subscriptions, which did not concern the JQT mechanism.) See *Love v. Amalgamated Society of Lithographic printers of Great Britain and Ireland*, 1912 SC 1078, 1912 2 SLT 50.

³⁵ Insurance contracts constitute the most important application of the JQT. There seems to be no doctrinal problem in accepting a JQT in life insurance and motor insurance cases. However the statutory provision that a married man, effecting a life assurance in favour of his wife and/or children, is deemed to be holding the policy in trust for the beneficiaries, might have complicated things in life insurance. In the case of insurance of motor vehicles, it is the duty of their owners, under the Road Traffic Act 1988, to take out assurance which covers third party risks. It is the statutory duty of motor insurers to satisfy judgements against the insured in respect of third party risks. MacQueen, observes that the legislation strengthens what would probably be a *jus quaesitum tertio* "by providing that the insurer must pay if entitled to avoid or cancel the policy or if the policy has in fact been avoided or cancelled.", (Title 25). A JQT case is that of an insurance policy under which other users of the vehicle acquire rights. Insurance benefiting third parties is possible for construction projects, or (under the Third Parties Act 1980) where the right of an insolvent insured party against an insurer, for liability to a third party covered by the policy in question, is transferred to the third party. (However the latter possibility would have to be inferred by the terms of the policy as well.) See *Allan's Trustees v. Inland Revenue* 1971 SC (HL) 45, 1971 SLT 62.

Kelly v. Cornhill Insurance Co Ltd 1964 SC (HL) 46, 1964 SLT 81, involved an insurance policy by the owner of a car who had stated that the car would be driven by his son inter alios. The policy insured any person driving the car with the owner's permission. The owner died and his death was not intimated to the insurance company. Later the car, being driven by the owner's son got involved in an accident. The son brought an action against the company to have declared that he was the beneficiary of the policy. The court, reversing interlocutor of the First Division, dismissed the defender's arguments, holding

contracts³⁶, (where experience from German and American law indicate third party rights are difficult to establish³⁷) and in one partnership case³⁸.

Only recently the courts showed willingness to accept exclusion clauses in favour of a third party³⁹. Moreover, the JQT had been associated with positive performance only, and irrevocability questions discouraged its application in cases involving inaction.

that the deceased's permission to the son to drive the car was not revoked after the owner's death, and that the son had a title to sue.

³⁶ In banking contracts JQT could be met in "deposit receipts and savings and other accounts taken out in the name of third parties", and it is generally accepted that a third party does acquire a right to sue on such a contract. Third party rights from negotiable interests are governed by statute. A banker's documentary credit to pay a seller of goods, provided for in a banker-buyer contract is rather an independent promise in Scots law. However in *Dickson v. National Bank of Scotland Ltd* 1917 SC (HL) 50, a sum forming part of a trust-estate was deposited with a bank on a consignment receipt, bearing that the money was received from the trustee's executors, and was to be repayable on the signature of a legal firm who were the law agents to the trust. The firm was subsequently resolved and some years afterwards one of the former partners endorsed the receipt with the firm's name and embezzled the money. The beneficiaries under the trust turned against the bank. The House of Lords affirming the judgment of the Second Division, held that as the uplifting of the deposit was necessary either "to wind up the affairs of the partnership" or a to complete transactions begun but unfinished at the time of the dissolution of the firm, the former partner who endorsed the receipt was entitled to exhibit the firm's signature, and the bank was warranted in paying over the money deposited. The action was dismissed as irrelevant.

³⁷ See under "Banking law contracts" in Chapter 2, and "Financing" in Chapter 4. s was said security or guarantee in the banking business often covers expressly only the liability to perform and not other protective duties. For a number of banks' actions no security is available. There are often exclusion or limitation clauses in the banks' contracts with their clients, contracts which are often standardised. Apart from the fact that the banking business is heavily regulated by statute, there is an extensive degree of self-regulation aiming at a mong others the limitation of the banks' liability.

³⁸ In *Thomson v. Thomson*, 1962 SC (HL) 28, 1962 SLT 109 a contract of co-partnership provided that each partner could "by will or otherwise nominate his widow, son or daughter to his share of the partnership". A partner died leaving in his will his entire property to his wife. His widow claimed that she was entitled to become a partner in the firm. The court, affirming the decision of the Second Division, held that the wife was entitled to the sums payable to the will's executor under the partnership agreement but was not entitled to become a partner as the deceased had not exercised his right of nomination.

³⁹ In *Magistrates of Dunbar v. Markersy* 1931 SC 180, an action for the payment of rates was brought by the magistrates of a burgh against a person who's name entered the Valuation Roll as bondholder in possession of certain subjects. The defender relied upon a letter granted by the pursuer's predecessors in favour of a former owner of the subjects in which he undertook "to free you and your successors ... of all cess, feu-duty and other public taxations payable ... to the Town from the date hereof for ever". (The actual owner of the subjects was the heir of the grantee of the letter. The defender was receiving the rents from the subjects under the instructions of the bondholders and the owner.) The court rejecting the pursuer's arguments held that the rule applicable to obligations of relief undertaken by the granter of a feudal conveyance (that such obligations do not extent to burdrens imposed by subsequent legislation), did not apply to such an obligation as that contained in the letter, and that, on its terms, it extended to rates imposed by subsequent legislation. (It was further

The courts have not yet accepted third party rights in cases involving restrictive covenants, usually limiting the right of an employee leaving a business to compete with the (former) employer or even with a subsidiary or associated business entity⁴⁰.

held that, as the obligation was not collateral to another contract, the owner, as successor in the tenement, would have been entitled to found on it without a special assignment, and the defender as representing the owner had the same rights.)

In *Melrose v. Davidson and Robertson*, 1993 SLT 611, a court of the First Division held that the property valuer employed by a building society to which the pursuer, a prospective buyer of a house, made an application for a loan, could claim against this prospective borrower the benefit from the exclusion of liability clauses of a mortgage application. In the court's view, with the return of the declaration contained in the application form for a loan (and which contained the exclusion clause) the pursuers had concluded a contract with the valuer. It was observed that there was no need to invoke the Unfair Contract Terms Act 1977 in order to accept the existence of such a contract.

In *Aberdeen Harbour Board v. Heating Enterprises (Aberdeen)*, 1990 SLT 416, claimant was a building owner who had leased part of his premises to tenants who employed contractors to work on the building, on the basis of a Standard Form of Building Contract. Due to negligence of the employees of a subcontractor a fire broke out causing extensive damages to the building. The defender subcontractor claimed the benefit of the indemnity the tenant had offered to the contractor. The decision referred to established case law on Standard Forms of Building Contracts which placed the risk of fire on the employer (main contractor), and that the latter's immunity was extended to the subcontractor causing fire if the contract and subcontract contained similar terms. In the present case the subcontractor, an outsider to the indemnity agreement, claimed that the employer was burdened with covering his liability. An Extra Division rejected his claim to an indemnity. However the view taken by the decision clearly supports the possibility of an exclusion clause benefiting a third party.

See the comment on the English case *Adler v. Dickson and Another* [1954] 3 WLR 696, in 67 JR (1955), 110, where the exclusion clauses in favour of the plaintiff's contracting party, a shipping company, were not accepted as valid defence by the shipping company's employees. It is possible to consider that the result in Scotland might have been different because of the JQT.

⁴⁰ In *Group 4 Total Security Ltd v. Ferrier*, 1985 SC 70, 1985 SLT 287, a company presented a petition to interdict one of their former employees from being directly or indirectly interested in any business activities which were in direct or indirect competition with those of the petitioners or any subsidiary or associated company for one year after the termination of the respondent's employment within a 50-mile radius of the petitioner's place of business at Aberdeen, and from being interested in two named companies insofar as their business was directly competing that of the petitioners. The respondent's employment contract had contained a restrictive covenant in those terms. The Lord Ordinary rejected the respondent's arguments and held that a clause seeking to protect the interests of a group of third parties was reasonable. On appeal the Second Division held, allowing the reclaiming motion, that it would be wrong to reach a concluded view on the parties' legal arguments which had not been adjusted and closed and only a *prima facie* view could be reached on these. It also held that the arguments for the respondent had *prima facie* merit but the Lord Ordinary had rejected them. Having regard to the fact that the restriction had little more than two months to run it was equitable to recall the interim interdict, particularly as the petitioners had a remedy in damages if they established that they had sustained loss by the respondent's breach of contract.

A similar approach was taken in *WAC Ltd v. Willock*, 1990 SLT 213. A company sought and obtained two orders for interim interdict of a shareholder and former director from carrying on business in competition with the company and from using confidential information concerning the company. The shareholders' agreement obliged the shareholder

Solutions which could have been based on JQT have been achieved in other instances by virtue of statute or on the basis of trust. One example is that of the treatment of the bills of lading and the relative rights of the buyer-consignee. Scottish lawyers would have every reason to suggest that giving the consignee a right to claim delivery could have been achieved on the JQT, instead of the Bills of Lading Acts of 1855 and 1992. Arguably the JQT is still an attractive solution for carriage transactions⁴¹.

This conservative judicial approach is illustrated from the still unsettled issues. It is thus questioned whether the third party can claim damages for defective performance⁴² although the majority of commentators consider that the beneficiary can bring claims for both misfeasance and nonfeasance⁴³.

not to carry on business in competition with the company so long as he remained a shareholder. The company alleged that the shareholder had been instrumental in setting up a rival business in direct competition with them. The shareholder sought recall of the order. The Second Division held that *prima facie* the agreement subsisted notwithstanding the death of one of the parties. A clear distinction fell to be drawn between an individual carrying on business and a company carrying on business. The complaint related to the defender's company (which was not regulated by the agreement) rather than the defender. It was finally held that an interdict in the terms sought would not prevent the defender's company from competing with the pursuers; the balance of convenience did not favour a grant of interdict. The reclaiming motion was allowed in part; the interdict was recalled as far as it related to the restrictive covenant.

See under "Transactions involving corporations" in Chapter 4. See *Supplies for Industry Inc. v. Christensen*, 135 Ariz. 107, 659 P2d 660, 1983.

⁴¹ Clive E.M. "Jus Quaesitum Tertio and Carriage of goods by sea" in *Comparative and Historical Essays in Scots Law* Carrey D.L. & Meyers D.W. (eds) 1993, 47. See The Law Commission and the Scottish Law Commission (Law Com No 196, Scottish Law Commission No 130) "Rights of suit in respect of carriage of goods by sea", 19/3/1991. See also Reynolds, F.M.B. "The significance of tort claims in respect of carriage by sea", *LIMCLQ* (1986), 97-111, referring to the desire of those who have suffered loss to sue other persons not parties to the contract of carriage.

See under "Carriage contracts" in Chapter 3 on Greek law on the efficient practice to consider carriage contracts at least when the consignee is a different person from the consignor as contracts in favour of third parties.

⁴² It is certain that the third party can claim performance.

⁴³ There is no reason in principle for the opposite as Lord Clyde noted in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244, at 260K.

An important exception among commentators is Gloag, *Contract*, 239, " ... because the real foundation of his [the third party's] title to sue is that the debtor in the contract has agreed to be liable to him, and it is not to be presumed that the debtor in the contract has agreed to be liable to a tertius in respect of his defective performance". Gloag's view, reinforced by examples from advocate's liability, is not however convincing. Arguing against decisions which allowed claims for misfeasance, he comments on the debtor's liability, " if he is liable at all, it must be on the ground that he owed a duty to the party injured and that his failure to perform that duty amounted to delict or negligence.". One case referred to was *Tully v. Ingram*, 1891, 19 R. 65, where an uncle employed a law agent to purchase a house to be presented to his nephew. The law agent omitted to notice the bond. In

The allocation of the burden of proof is not settled as well. The Scottish Law Commission (SLC) expressed⁴⁴ the wish that the particular circumstances, the triangular relationships, the validity of the main contract, whether the contract is an onerous transaction, etc. be taken into account in allocating the burden.

It is also doubtful whether the stipulator has a right to sue for failure of performance if he has retained no patrimonial interest. In one view such a claim should be accepted on the idea that the stipulator operates in a representative capacity and not against the wishes of the third party. A claim by the stipulator on the principle of *causa data causa non secuta* does not arise from the contract itself. It could be expressly provided that the stipulator is entitled to claim performance to himself if the performance was not rendered to the third party⁴⁵.

In areas where third party loss is likely, the JQT has proven of little use. Scottish courts reject JQT claims by the beneficiaries of a negligently drafted will against the negligent solicitor⁴⁶. This tendency, which has been criticised, can be attributed to the difficulty of inferring an intention to offer the beneficiary such an enforceable right and to the possible revocability of the benefit. However, a JQT can be conditional and a claim by a

an action by the nephew the court held that the agent was employed solely by the uncle, and the nephew had no title to sue as damages for professional negligence could be claimed only by the agent's employer.

⁴⁴ See Memorandum No:38 SLC, 42. Reference is made to another memorandum by the SLC, No39, on "Formalities of Constitution and Restrictions of Proof", (10 March 1977).

⁴⁵ Memorandum No:38 SLC, 42-43.

⁴⁶ It is doubtful whether the case of *Robertson v. Flemming*, (1861) 4 Macq 167, the basic precedent for rejecting solicitor's liability to third parties, is a valid authority for JQT cases on solicitor's liability for negligent drafting of a will. The JQT was not discussed in the decision. There have been suggestions that the policy to reject JQT for will drafting cases should change. (T.B. Smith *Short Commentary*, 653 et seq). This is unlikely in view of the attachment of Scottish courts to delict for such cases. See in contrast the situation in German and American law where (probably as regards the latter) the third party beneficiary rule can be applied in relation to attorney/advocate liability. See under "Advocates' contracts" in Chapter 2., and "Attorney liability to non-clients" in Chapter 4.

Robertson v. Flemming, sets a precedent for liability for other solicitor's services. In MacQueen's view this exclusion of liability has been superseded by the development of the modern law of negligence. (MacQueen *Title* 28) The question of solicitors liability will be discussed later in relation to delict.

will beneficiary is an effective way to remedy the non-realisation of the will's content, as highlighted in the discussion on the relative German law⁴⁷.

The JQT is rejected for other solicitors' services as well, possibly due to lack of intention to offer an enforceable right to a third party. The treatment of solicitors' services is the same in third party claims in delict⁴⁸. Professional liability is generally dealt with on the basis of delict. For instance, the JQT is not an option for the liability of surveyors or accountants⁴⁹, in contrast to the situation in German law⁵⁰.

The application of the JQT has been considered in a number of other instances, often with substantial academic support. One such example is that of collective agreements⁵¹. In

⁴⁷ See under "Drafting wills" and "Borderline cases: critique" in Chapter 2 on the discussion as to whether advocate's liability for negligent drafting of wills should be treated under *Drittschadensliquidation* or the contract with protective effects.

⁴⁸ Thomson, *Delictual Liability*, 134-136, Norrie, K. "Liability of Solicitors to third parties", 1988 SLT, 309-311, 317-320. Blaikie, J. "Negligent Solicitors and Disappointed Beneficiaries" 1989 SLT, 317-323. On English law see Kaye, J.M. "The liability of solicitors in tort", 100 (1984) LQR, pp.680-716.

⁴⁹ Thomson, *Delictual Liability*, 132-134, 72-74.

⁵⁰ See under "Information, expert, opinions and reports", in Chapter 2."

⁵¹ Casey (Casey, James "Collective Agreements: Some Scottish Footnotes", JR 1973 22-42, at 35-36), observed that the idea had clearly occurred to Scottish judges and commentators. He provides evidence from (Citrine's) "Trade Union Law", 1967, 137, and (Miller's) "Industrial Law in Scotland", 364. He also quotes *Downie v. Cowie & Son*, (1935) 51 Sh.Ct.Rep. 212, where the question was referred to by implication, and *Eunson v. Johnson & Grieg*, 1940 SC 49, where the questions was openly contemplated. In the latter case, concerning a claim by a workman, it was held that the rate of the wages is defined by usage of the parties alone and not by custom or trade.

There are a number of obstacles before a collective agreement could be thought as creating right in favour of individual employees. It is widely acknowledged (as in England) that collective agreements are not contracts (Casey, at.23). It was argued however that although certainly they are not ordinary contracts, following Stair's view that the intention to conclude a binding contract should be presumed in industrial and commercial cases, collective agreements should in Scots common law be regarded as contracts. Casey, 25. Hunter thinks that collective agreements are contracts in Scots common law provided they are seriously intended to create legal relations. He notices however that "they are surely contracts which normally contain an implied term to the effect that neither party will enforce them against the other by legal process." (Hunter, R.L.C. "Collective agreements, fair wages clauses and the employment relationship in Scots law", 20 JR 1975, 52-53). The views of Casey and Hunter run against established opinion by Gloag (*Contract*, 8 et seq) and Walker (*Walker Principles vol II*, 479-480) on the requirements for a binding contract etc.

In any case it would be difficult to infer an intention to benefit third parties in collective agreements. Similarly difficulties for the acceptance of JQT would be created from the frequent practice to modify collective agreements (thus changing vested rights), the frequent absence of a termination date, and the impossibility of imposing duties on a JQT agreement (Hunter, p.55).

It was observed conclusively that "the Scots doctrine of the *jus tertii* ... is not well adapted to the environment of labour relations". Hunter, 20 JR 1975, 55. He noticed that the

one moderate view, the application seemed possible only when the right conferred to an individual employee/third party is unenforceable by statute or common law⁵². However, even such an option would require a daring spirit that the Scottish courts seem to lack⁵³.

Even less promising are the suggestions to apply JQT on the fair wages clauses in contracts between "central and local government departments and those who supply them with goods or services"⁵⁴, in order to extend the application of the clauses to the employees of the latter. Apart from the difficulty in inferring an intention to benefit, fair wages clauses are too complicated to be easily applicable⁵⁵.

Finally, a possibility worth mentioning is that of expanding the cases where JQT has been traditionally applied as in claims of co-feuars⁵⁶ to treat modern situations as that of claims of co-lessees holding leases from the same landlord, under the same or similar conditions, against other co-lessees⁵⁷, where liability has been rejected in German law⁵⁸.

JQT had "grown up among questions of insurance, financial guarantees and gifts to charity", and was not suitable for labour relations.

⁵² Memorandum No:38 SLC, 47.

⁵³ " ... they would need to be to be convinced that it is not only legally proper, but also practically desirable and necessary, for a form of the third party beneficiary theory to be applied in the context of collective agreements. In view of the fact that "... many collective agreements [for workers in Scotland] are made by union officials and managers in England, the fact that the dominant English system does not recognise a *jus tertii* at all, and the fact that adaptation of the Scots law of the *jus tertii* to labour relations would require unusual boldness, there is ample scope for judicial hesitation." Hunter, 20 JR 1975, 57.

A comparison of the case of a JQT in collective agreements to the application of the third party beneficiary rule to government contracts in American law, would focus on the fact that in the latter case there is legislation supporting the relative claims, which are usually substitutes for private rights of action, and encouraging the decisiveness of the courts, while in the case of Scots law legislation and doctrine seem to work to the opposite direction. See "Government contracts: Third party beneficiary rule and private rights of action", in Chapter 4.

⁵⁴ Hunter, 20 JR 1975, 57.

⁵⁵ Hunter, 20 JR 1975, 57-59.

⁵⁶ The co-feuars hold from the same superior or over-superior to enforce a burden to which they are all subject. The same apply to co-disponees. MacQueen *Title* 34.

⁵⁷ *MacDonald v. Douglas*, 1963 SLT p.191, involved a claim by a superior and certain of co-feuars neighbouring the defender. The feu contract contained building restrictions which created servitudes on the plot of land, which were thus in favour of the neighbouring feuars and disponees of the remaining portions of land. The heir of entail in possession of the estate executed an instrument of disentail which was recorded in 1928 and thereafter disposed the estate in favour of himself by a disposition recorded in 1929. Two of their Lordships held that the superior had a title to sue because according to section 32 of the Entail Amendment Act 1848 (which enabled entailed estate to be disentailed and held in simple fee), everything which he had previously held as heir of entail in possession was held by him in fee simple as soon as the instrument of disentail had been recorded. Lord

2.3. Defences.

Little case law exists on the question of the promisor's defences. Particular uncertainty exists due to the possibility of the stipulator having retained rights from the contract. Unfortunately, no plain principle -- that the defender can have against the third party the defences that he would have against the stipulator from the contract -- can be found in case law⁵⁹. Nonetheless, it is reasonable to suggest that this is the law, as is the case with Continental systems⁶⁰.

The third party right depends on the promisor-promisee contract. If the latter is null, so is the beneficiary's claim and the relative defences are successful. It was noted, however, that if the contract is illegal or has been formulated in a defective manner or is unenforceable, this would not necessarily imply that the third party's right is also illegal or unenforceable⁶¹. In fact, in one case, a non-enforceable contract was considered to produce a valid JQT⁶².

Strachan recognised the superior's title to sue because the disentail did not alter the fact that he was an heir designated by the limitations of the entail and that he had not succeeded to the estate as an heir to the estate. The co-feuars had a title and interest to sue conferred upon them by their feu contracts.

In the Canadian case *Re Spike et al and Rocca Group Ltd et al*, (1979 107 (3d) DLR 62, it was held that in a case where tenants of a shopping centre had agreed with the landlord to restrict their activities in respect of a particular business, one of the tenants had a right to seek an injunction to prevent a violation of the agreement from another tenant, on the basis of the community of interests which had been created. See MacQueen *Title* 34.

⁵⁸ See under "Contracts of lease", in Chapter 2. See BGH, Urt. v. 16.10.1963-VIII ZR 28/62 Hamm.; NJW 1964 33. and BGH, Urt. v. 9.10.1968-VIII ZR 173/66 (Köln); NJW 1969 41.

⁵⁹ In the words of the SLC: "Any pleas available to a debtor against a creditor in connection with a contract which contains a term in favour of a third party shall also be available against that third party. However pleas available against the creditor which are not connected with the contract itself, such as compensation, shall not be available against the third party", (Memorandum No:38 SLC, 38.)

⁶⁰ This is the view taken in §334BGB and §414AK, §882II of the Austrian Civil Code and §1413 of the Italian Civil Code. See also under "Promisor's defences" in Chapter 4, on American law, where the approach is possibly the same.

⁶¹ MacQueen *Title* 22-23.

⁶² In *Love v. Scottish Amalgamated Society of Lithographic Printers*, 1912 SC 1078, 1912 2 SLT 50, the rules of a union provided benefits for the relatives of an insured member in the event that the members became insane. The agreement in those rules was revocable but had not been revoked when the pursuer's claim arose, that is, when a relative claimed a benefit.

The third party claim cannot succeed, it was argued⁶³, if the promisee's defective performance justifies the promisor's withholding of his performance. This would apply in cases where the debtor's performance is contingent upon the stipulator's performance or where due to the promisee's defective performance the debtor cannot perform⁶⁴. The same could be said for other events which frustrate performance; their impact on the third party's right will depend on their impact on the debtor's obligation. However, the debtor's claim of compensation against the stipulator is not available against the third party. The debtor can, of course, raise defences based on claims he has against the third party.

2.4. Theoretical basis.

The theoretical basis of the JQT has not been the object of particular concern. The majority of commentators⁶⁵ and the Scottish Law Commission (SLC) take the view that the mechanism is an expression of *pollicitatio*⁶⁶, that establishes the enforcement of unilateral promises⁶⁷, and generally of the priority given by Scots law to the realisation of the private will⁶⁸.

63 Memorandum No:38 SLC, 38.

64 MacQueen *Title 23*

65 Including Stair and Smith, the latter interpreting Stair's views. See in Smith *Studies* 183 and "Pollicitatio-Promise and Offer", 168.

66 Promises binding on the promisor without the need for acceptance. According to Rodger's approach of the relevant passages of Stair, there are two different kinds of promise; "*Pollicitatio*" and "Offer", the former not requiring acceptance. Smith on the other hand seems to be in confusion over the interpretation of the relative clauses in Stair, and is treating *pollicitatio* as equivalent to offer. Rodger, JR, 1969 130-131.

67 The same view is taken by Ashton-Cross, D.I.C. "Bare Promise in Scots Law", 2 JR 1957, 138-150.

68 See on the possible theoretical bases Millner, M.A. "Jus Quaesitum Tertio: Comparison and Synthesis" 16 (1967) *IntComLQ*, 446-463, at 450-451. He concludes: "if we abandon the contractual analysis entirely it becomes possible to say that it is not merely a power of acceptance which flows from the contract but a right of enforcement of A's [the promisor's] promise, a right which vests in C [the beneficiary] and is indefeasible *ab initio*. German law, Scots law and American law all do, to some degree, recognise this principle. But even those systems which are based upon acceptance, such as the French family of codes and the Roman-Dutch law, are bound to recognise that the contract between A and B [promisor and promisee] simultaneously confers distinct rights upon C [the beneficiary] who is a stranger; the triangular legal relationship which results shows that the *stipulatio alteri* is a legal institution *sui generis*, the incidents of which cannot be worked out exclusively in contractual terms."(p.151).

Arguably this drive to the realisation of the private will and the freedom of contract explain doctrinally the contract in favour of third parties in continental systems.

According to this view the third party right is based on the promisor's obligation but, although the source of the right is the contract, the right is not contractual in nature⁶⁹. MacCormick finds that the *pollicitatio* in question is made jointly by the parties to the contract. It would be more precise to say that each party makes a *pollicitatio* for his respective duties⁷⁰.

According to another view, supported by Lord Rodger, McBryde, MacQueen and Millner⁷¹, the JQT is a *sui generis* mechanism. This view was motivated by the difficulty in explaining the mechanism on the basis of known concepts. Lord Rodger considers that the nature of the third party rights "defies any neat analysis"⁷² and McBryde characterises the rights as "independent"⁷³. The emphasis, in this view as well, is on the intention of the parties (as expressed in the declaration of intent) and on the purpose of private law to have these intentions realised. The mechanism refers to situations which are special in contract

The right in several of those systems becomes irreversible if there is a statement by the beneficiary to the promisor that he will exercise this right. See §412AK, §1121 FCCI, §112(3) of the Swiss Code of Obligations, and §1411(2) of the Italian Civil Code, but the very conclusion of the contract creates the right. According to §413AK if the beneficiary by a statement to the promisor denounces the right it is considered that it was never acquired. Similar is the approach in §333BGB.

⁶⁹ The same view is taken by Ashton-Cross, 2 JR 1957, 138-150, and Lord Keith of Avonholm, "The Spirit of the Law of Scotland" pp. 25-27, (Memorandum No:38 SLC, 14). The view in continental systems is that the right of the beneficiary is contractual. It is true that this statement could be doubted. It can certainly give rise to criticism, since the third party's position is defined without his participation and he does not actually become a party. The fact is that the source of the right is the contract and the position of the third party is defined therein. The beneficiary can choose whether to exercise his right.

⁷⁰ Memorandum No:38 SLC, 15. MacCormick's view, it is argued, might create the impression that both parties are co-obligants for the performance.

⁷¹ Rodger, JR, 1969, 144, MacQueen *Title* 14, McBryde JR 1983, 139. Millner notices that this triangular legal relationship can not be explained on exclusively contractual terms. (Milner, 16 (1967) *IntComLQ*, p.451)

⁷² Rodger engages in an extensive analysis of Stair's reference to Molina. He notices the inconsistency of Ashton-Cross's approach to JQT from the point of view of *pollicitatio*. He acknowledges however the strength of the *pollicitatio*-based approach in that it implies that with the same act the debtor is entering the contract and makes a *pollicitatio*. Referring to the German theory of a contract in favour of a third party, he notices that the debtor is bound contractually. The *pollicitatio* argument is weakened by the unlikelihood of someone wanting to bind himself irrevocably. He finally thinks that "much time will be wasted if we try to work out an elegant theory over the facts". Rodger, JR, 1969, 144.

⁷³ McBryde JR 1983, 139. He argues that the JQT "shares some of the characteristics of other contractual rights but also has special features".

law and the promise-based theory might not be enough to explain JQT as it detaches the debtor's obligation from its bilateral context.

Treating JQT as *sui generis* is more precise; the emphasis on the realisation of seriously expressed intentions as a guideline of private law is sufficient to justify the place of the mechanism within Scottish doctrine⁷⁴. The main conclusion from this theoretical account is that, whether as a form of *pollicitatio* or an expression of the realisation of a seriously expressed intention, the JQT is an integral part of the Scottish system⁷⁵.

2.5. Explaining inadequate development.

The JQT, based on limited case law, has a limited scope compared to similar mechanisms in the USA and in civil law countries. Basic issues remain unsettled (notably the question of defences⁷⁶, if not that of the definition of the JQT⁷⁷), and the law remains uncertain and complex⁷⁸, tied to enduring problems⁷⁹.

⁷⁴ The third party rights are based on the contract and depend upon its validity, but the third party does not become a party to the contract. It is interesting to recall the treatment of the theoretical basis by the Pandektists. According to Windscheid (*Lehrbuch des Pandektenrechts*, 9th Aufl., von Kipp, Thomas editor, v.2, §316a1, pp.304 et seq), three are the relative theories. At first the theory of acceptance founded by Hugo Grotius: The third party right derives from the right of the promisee and is not created from the promisor-promisee contract but from a new contract between the third party and the promisee. The original promisor is not bound by the contract until the acceptance by the third party. If the contract is modified or repealed before the acceptance of the beneficiary the latter obtains no rights. Secondly the theory of special succession: the third party's right is produced from a right which is at first created in the promisee, and which later passes to the beneficiary via implied transfer or authorisation. According to the third theory (accepted by the majority in Germany today) the personal right is created in the face of the third party, immediately from the contract, provided this was the intention of the parties. (Zepos -- "Law of Obligations, vol I, General Part 1955 -- is referring to the theory of representation as well. The third party acquires his right directly from the contract. The third party-promisee relationship becomes one of representation when subsequently the third party approves the contract.). Milner notices that the "acceptance" view is powerful in the continent, notably in France, as is generally accepted in South Africa as well (Milner, 16 (1967) *IntComLQ*, 450-451).

⁷⁵ In Gloag's words : "A *jus quaesitum tertio* is the exception not the rule", Gloag, *Contract*,, 237. He makes this statement after noticing that " ... if two parties enter into a contract to secure their own purposes the mere fact that a third party is interested in the fulfilment of the obligations undertaken by any of them will not give him any title to sue". He is possibly stretching the special character of the JQT and in that sense he does not hold a different opinion than other theoreticians.

⁷⁶ With regards to defences there is a degree of uncertainty in any of the jurisdictions containing a contract in favour of third parties, as in the last extend the question of the validity of certain defences might depend on judgments based on equity or transactions' practices and morals. In Scots law however there is no clear outline of the fundamental

Scottish courts bear most of the responsibility for this. The mechanism was treated as an oddity and was applied hesitantly and in the most uncontroversial cases⁸⁰. The courts ignored the practical advantages of the JQT, and concentrated on speculating over hardly contentious issues, such as irrevocability.

The judicial attitude created its own momentum, undermining further the development of the mechanism. Thus, as important questions remain unsettled today⁸¹, the

view that the promisor is entitled to raise the defences from his contract. See under "Promisor's defences" and "Defences from the promisee-third party relationship", in Chapter 4, where there is no legislative guideline as to the defences as in the Scottish system in contrast to §334BGB and §414AK, §882II of the Austrian Civil Code and §1413 of the Italian Civil Code, for instance.

⁷⁷ It has been more than 400 years since the mechanism was first applied. Revocability is still a basic issue hindering the outline of the general principles of the mechanism while there is uncertainty over the treatment of defences.

⁷⁸ This complexity can be seen in decisions and in academic debate as well. A basic reason is the absence of an agreed sufficient definition of the mechanism. The complexity is accentuated by the uncertainty over important aspects of the JQT. As one could conclude from the provisions for contracts in favour of third parties in civilian codes the JQT could be expressed in a plainer manner which would facilitate its development.

⁷⁹ Notably revocability. It should be noted that in continental systems and in American law, even though the law of the contract in favour of third party or the third party beneficiary is more settled and developed, certain issues, although much debated remain paramount and continue to attract the concern of the lawyers, in what is not merely a textbook exercise but the expression of substantial concern. One such issue is the point where the beneficiary's right becomes irreversible, or until when can the parties modify the rights. The issue remains important due to its doctrinal connotations (when is the right created and the variety of circumstance that might arise (for instance, the form that the statement of §412AK, or §1411(2) of the Italian Civil Code, by the beneficiary to the promisor that he will exercise the right might take). See under "Promisor's defences" in Chapter 4 on American law, on the debate of when is the right 'vested'. On the other hand in these jurisdictions there is considerable development of the respective mechanisms and a substantive body of case law to look into.

⁸⁰ JQT is an ordinary product of the Scottish doctrine with the potential to apply to any kind of relationship. Evidence as of the courts' policy can be drawn from the slow and cumbersome development of the mechanism and the poor case law despite the fact that the JQT had been established for more than four centuries. The law is described with reference to decisions from the beginning of the century (*Morton's Trustees v. Aged Christian Friend Society of Scotland*, (1899) 2 F 82, *Love v. Amalgamated Society of Lithographic printers of Great Britain and Ireland*, 1912 SC 1078, 1912 2 SLT 50.), and the courts return to these precedents for guidance. The poor development of the range of JQT's applications offers further evidence of the tendency in case law: There are only two reported cases related to banking contracts while the application of the JQT on clauses limiting liability remains uncertain.

⁸¹ Revocability or defences for instance.

courts would not feel secure enough to venture into expanding the mechanism. Lawyers are, accordingly, less likely to use JQT as the legal basis of their arguments⁸².

The judicial approach can be attributed to a number of factors apart from the inherent conservatism of the judges. The uncertainty of the courts runs deep in the case of JQT. At first there are hardly substantial materials on which to base JQT; Stair's work is too distant in time and ambiguous to offer particular guidance. However, this uncertainty basically reflects the intangible but considerable impact of English law; the JQT is not actually constrained, but an opposing predominant legal culture is imposed⁸³.

The treatment of the JQT exemplifies the approach to the Scots law's distinctiveness in the institutional structure of the Scottish system. Starting from the expressed purpose not to disrupt commercial practice by applying Scottish provisions⁸⁴, (it is generally acknowledged that in commercial law the two systems hardly differ)⁸⁵, it is possible to argue the existence of a policy, not necessarily deliberate, to limit mechanisms such as JQT to their bare essentials, or to undisputed situations⁸⁶. The question of revocability was arguably used as a red herring to curb the development of the mechanism. This way, however, the very existence of two separate legal systems is doubted.

⁸² Disagreement over the meaning and significance of the relative material of the institutional writer has further undermined the application of the mechanism. It is now proven that the disagreement was unjustified. To this one could add the unlucky event that the editions of the *Institutions of the Laws of Scotland* which were used for most of the time gave an inexact picture of what Stair actually said. See Rodger, JR, 1969, 34-44, and 128-151, and Memorandum No:38 SLC, on Stair's approach to irrevocability.

⁸³ The Scottish system is undisputedly at a terrible disadvantage towards its English counterpart mainly due to the absence of a separate legislature and the existence of a common supreme civil court. The Scottish system is in a more disadvantaged position than any of the other civilian systems in common law countries namely The Federal State of Louisiana in the USA, and the province of Quebec in Canada.

As will be discussed in the following parts the influence of the English law is devastating in the area of delict where most third party loss cases are dealt with. On the overall influence see Smith, "The Common Law Cuckoo: Problems of 'Mixed' Legal Systems with special reference to restrictive interpretation in the Scots law of Obligations", in *Studies* 102 et seq.

⁸⁴ There is thus an unconfessed difficulty to expand JQT in a number of economically significant areas of potential application.

⁸⁵ See Forte, A.D.M. "A Great Future Behind it? Scottish Commercial Law and the Millenium". 2 *European Review of Private Law* 1994, 375-397.

⁸⁶ Thus the basic commercial application of JQT is in the field of insurance law, where the decisions would hardly be different. There seems to have been little evolution from the application of the mechanism in the case of co-feuars.

English law influences the approach to the JQT in multifarious and subtle ways. Thus, for a number of issues which could potentially be related to JQT, Scottish courts and lawyers usually have at their disposal substantial English case law or UK legislation⁸⁷. It is not only easier, it is more importantly uncontroversial for the Scottish courts to resort to acceptable solutions or mechanisms, such as trust, without examining alternatives in Scots law⁸⁸. In the same spirit, priority has been given to delict in situations of third party loss where both JQT and delict could apply⁸⁹.

⁸⁷ Furthermore the courts seem to feel that JQT could not be applied simultaneously with the ever-expanding statutory regulation of commerce. See McCall Smith, A. "Scots Law in a Comparative Context", in *Independence and Devolution: The Legal Implications for Scotland*, Grant (ed), 1976, 157.

⁸⁸ The parallel use of the law of trusts was an obstacle to the development of the JQT. Trust law came to be applied when JQT could have been applied, while trust law might have indirectly led to the emphasis on irrevocability considerations in the treatment of JQT. There are important differences between the two mechanisms, starting from the type of right the third party acquires (a personal right in the JQT, a possessory title in trust). As observed by MacQueen the trust and the JQT might seem to run in parallel in certain issues as that relating to the irrevocability of the beneficiary's right. In trust this irrevocability is accomplished when a solvent truster delivers trust deed and property to trustees on behalf of an ascertained beneficiary. In this case, it is arguable that the beneficiary obtains a JQT. However the trust can be created from juristic acts other than contracts, unlike the JQT. Delivery in trusts is between truster and trustee; in JQT one would think of delivery to the third party. Delivery could simply amount to intimation of the information of the establishment of the trust if truster and trustee is the same person. In JQT the delivery concerns the deed alone and not the property as well. The beneficiary's right in trust property, a *jus creditii*, is said to be higher than the mere personal right in a JQT (the right of the trust beneficiary prevails in the trustee's bankruptcy, and against those who acquire the right gratuitously or in bad faith. (MacQueen *Title* 14-15.)). The consideration of these differences could be important for a more competent understanding of the JQT.

⁸⁹ In numerous situations, especially those involving pure economic loss, where liability could have been discussed under a scheme such as the JQT, the choice is for delictual liability. Such cases which will be examined later, concern usually the provision of professional services; building subcontracts, solicitor's services etc. Preference for delict is evidenced in the cases which involve a chain of contracts (main contract and subcontracts) possibly in the light of the difficulty to infer an intention to benefit the pursuer. See for instance Lord Clyde's speech in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244, where he concentrates on considering the delictual basis of the claim. His conclusions on the delictual basis of the claim are used when he considers the JQT. See also Blom, Joost "Fictions and Frictions on the the Interface between Tort and Contract", in the *The Paisley Papers Donoghue v. Stevenson and the Modern Law of Negligence*, Burns, Peter, QC ed., 1991, 139-183. The priority attributed to delict will become more obvious latter in the discussion of liability for pure economic loss.

In English law due to the privity doctrine (which is not a part of Scots law), no delictual claim is allowed in principle between the parties to the contract. See however Swanton, J. "Concurrent liability in Tort and Contract: The problem of defining the limits", 10 (1996) *JCL*, 21, for a more accurate and elaborate account, of the cases where concurrent liability is possible. She suggests that the matters have progressed to the point that "the law in most common law countries seems inexorably to be proceeding ... towards recognition

Moreover, academic comment has not been sufficiently supportive⁹⁰, although the majority of commentators and the SLC argued for an expansion of the mechanism.

The judicial and juridical environment are thus overwhelmingly negative for JQT as for the Scottish system as a whole⁹¹. This might be an inevitable development, imposed by social and economic circumstances and not by lawyers. However, in certain areas, such as that of third party loss, by neglecting Scottish provisions the judiciary disregards practical justice and efficiency. Irrespective of questions of principle, related to the independent character of the Scottish legal system, the availability of a mechanism such as the JQT presents specific advantages which make it preferable. This potential which is discarded in practice is particularly useful for third party pure economic loss cases.

3. Protection for third parties on the basis of delict.

3.1. Introduction.

The central principle in Scots law of delict⁹² which, as Scots law in general, draws more upon principle than upon precedent⁹³ is *culpa* -- fault⁹⁴. There is an obedi-

that virtually all negligent (and possibly all wilful) breaches of contract are actionable in tort as an alternative to contract."(p.21), and this is the case for pure economic loss as well. There is clearly a possibility of a claim in delict while there is a claim in contract in Scots law; obedi- obligations are prior to the voluntary ones and a party to a contract can be held liable in delict to a non-party for what is a breach of contract. See MacQueen *Title* 20, and Thomson "Delictual liability between parties to a contract", SLT 1994 (News) 29-34.

The emphasis on delict is reinforced by the availability of considerable English case law, especially from the House of Lords, on third party loss cases, as well as by the strong drive for uniformity of the relevant solutions. (As will be seen the influence of the English law on the Scottish principles in the area of delict has been devastating.). Pure economic loss, wherein the bulk of third party loss cases falls, is treated under delict.

⁹⁰ The relative literature is limited, bogged down in returning issues such as revocability and there are few suggestions as to the future applications of the mechanism.

⁹¹ See *Independence and Devolution: The Legal Implications for Scotland*, Grant (ed), 1976.

⁹² The Scots law of delict, influenced by Roman and Civilian authority, developed the general principle of *culpa* along with specific delicts. The English law of tort developed categories of torts from procedural forms of action. See for a brief reference Elliot, W.A. "Reparation and the English tort of Negligence", 64 (1952) JR 1-11, and Stewart W.J. *Delict*, 1993. Walker, D.M. in *Delict*, pp.13 et seq, who makes a comprehensive review of the Roman law influences and the indigenous contribution to the Scots law of delict. He underlines that "the Roman law principles are still the main basis of delictual liability" (p.31). Also extensive is the reference in Walker, D.M. "The development of reparation" (1952) 64 JR 101. Wilkinson, A.B. and Forte, A.D. "Pure Economic Loss- A Scottish Perspective 30 (1985) JR, 1-28, at 5-7, notice more accurately that "for Scots law the developed civilian tradition is of more importance than the Roman law of classical and

obligation "on a person to make reparation to another who has sustained harm or loss as a result of the *culpa* or fault of the wrongdoer"⁹⁵. It is reasonable to think that considerable potential exists for third party protection under delict in Scots law as there is no

post-classical antiquity."(p.5). See also MacCormack, G. "*Culpa* in the Scots law of reparation", 1974 JR p.13, and Kamba, W.J. "Concept of duty of care and aquilian liability in Roman Dutch law", 1975 JR 252, where makes interesting comparisons to the English duty of care and *culpa*.

⁹³ This is a basic distinction between Scots law and common law. See any basic textbook Smith *A Short Commerntary of the Laws of Scotland*, 1962, Walker, *Law of Contract*, 7, McBryde *The Law of Contract*, referring to the differences between Scottish and English law. See McMillan 1996 SLT 163, referring to the latest judicial confirmation of the Scottish doctrine in *Saeed v. Waheed*, 1996 SLT (Sh Ct)39, at 44.

⁹⁴ Three are the basic principles of the Scots law of reparation according to Smith: the generality of the right of reparation, the burden of the pursuer to establish fault, the causative link between harm and fault. (Smith *Commerntary* 653.)

⁹⁵ Thomson, *Delictual Liability*, 1. The wrongdoer's act might be intentional or unintentional but careless. The act which causes the harm must be regarded by the law as wrongful (*injuria*). Furthermore, the harm or loss "must arise from an intrusion by the wrongdoer on the right or interest of the victim which is recognised by the law as reparable" (*ibid* p.2). See Smith, *Studies* 102 et seq., refering especially to the English influence on the Scots law of obligations, and Walker, *Delict*, 46-48, who notices that "liability always depends on *culpa*".

Culpa resembles thus the general tort clause of the French Civil Code and the concept of *faute* in particular. (§ 1382 Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.).

fundamental distinction between physical damage and economic loss⁹⁶ and *culpa* is a general clause resembling *faute* in the FCC⁹⁷.

However, the Scottish system of delictual liability has been influenced to a devastating extent by English law. The Scottish system's integrity and consistence are doubtful⁹⁸. This is profoundly the case with unintentional harm⁹⁹. The leading case in this

⁹⁶ Lord Ordinary (Prosser) in *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd* (No 2) 1992 SLT 89 at 96F, noticed "in the law of Scotland there is no fundamental difference between claims arising from physical damage and claims where the damage is purely monetary or economic". (Lord Devlin in *Hedley Byrne & Co Ltd. v. Heller Partners* [1964] AC at 517, characterised the distinction between pure economic loss and damage to person or property as "crude and illogical". In Scots law there is no doctrinal basis for the distinction). On the distinction between physical damage and economic loss see Feldthussen, Bruce *Economic Negligence*, 3rd ed., 1994, 9 et seq. who argues, opposing a contemporary tendency, that there are substantial differences between the two types of loss. Considering them to be similar would pose not only doctrinal but practical questions as well, mainly remoteness problems. His basic conclusion is that the basic rules of negligence as applied in physical damage cannot apply to all other negligence cases, and that economic loss cases share certain characteristics which distinguish them from physical damage cases. Feldthussen is focusing on common law doctrine.

See also Thomson, "Delictual Liability for Pure Economic Loss; Recent Developments", 1995 SLT 139-144, and McBryde, W.W. "The Advantages of Fault", 1975 JR 32. McBryde underlines that under fault, a potentially ever increasing liability is effective from the point of view of deterrence, and the incorporation of moral beliefs, and is flexible with regard to the balancing of interests involved. With the general concept of fault the complex categorisation of delict rules (for different victims for instance) is avoided. See Wilkinson, and Forte, 30 (1985) JR, 24. et seq.

⁹⁷ It is a general clause meaning it does not concern specifically protected interests and is not developed in specifically enumerated delicts as common law systems and German law. *Faute* is a concept containing elements of culpability and wrongfulness (§1382FCC). It distinguishes liability in delict in the French system. In contrast in the German system and those influenced by the latter there is also the requirements of unlawfulness in addition to culpability requirements. (In German law of course the delicts are restrictively enumerated in the legislation.). The Greek and Swiss systems combine a general clause with a requirement of unlawfulness. See under "The case for delict" in Chapter 2.

⁹⁸ See an early reference by Burn Murdoch H. "English Law in Scots Practice-III Tort and Reparation Generally", 20 JR 1908-1909, pp.148-158, Walker, *Delict* 30-31

⁹⁹ According to Smith the four basic English influences on the Scottish for negligent wrongdoing are: the confusion between contractual and delictual liability; the question of the duties of the occupiers of land; the requirement of a violation of a particular duty and the strict liability for dangerous agencies. Smith, *Studies*, 133. With regard to the confusion between contractual and delictual liability, the prime example is that of *Cavalier v. Pope*, [1906] AC 428, followed in Scotland by *Cameron v. Young*, 1908 SC (HL) 7, where the family of a tenant of property was barred from suing the landlord for reparation if they are injured because of his negligent upkeep of the premises. Before the introduction of the concept of a particular duty of care, the degree of care owed by the defender was measured by what would have been reasonable in the circumstances generally. To these influences one should add the frequent reference to English cases, or English legal studies even in areas where the law is supposedly different.

field, (where most third party loss cases belong) in both Scotland and England, is the Scottish case of *Donoghue v. Stevenson*¹⁰⁰, which set the standard of reasonable foresight in order to infer the existence of a duty of care¹⁰¹ and established the neighbourhood principle¹⁰². As far as Scots law is concerned, the decision in *Donoghue* did not break new ground but reiterated the *culpa* doctrine¹⁰³.

However, the decision (to the dismay of Scottish lawyers) seems to have considered negligence as synonymous to *culpa*¹⁰⁴. The latter has ever since been progressively assimilated with the emerging tort of negligence which, in principle, is "not an independent nominate delict"¹⁰⁵ in Scots law. It is a yet unanswered question among academics whether this process has disrupted the logical consistence of the Scots law of delict or not¹⁰⁶ -- regrettably, this seems to be the case. The overall impact of English law could not have been fully realised either in the 1950's or in the 1960's when a revived interest in Scots law was witnessed¹⁰⁷.

3.2. Third party pure economic loss.

Walker, *Delict* 46, notices on the requirement of a violation of a particular duty that it "has now become traditional among Scottish as well as English judges.". See also Stewart, W.T. *Delict*, 2nd ed. 1993, pp.103 at seq.

100 1932 SC (HL) 31. Lord Atkin assessed the common principles between the two systems with regard to the rationale of liability: "The liability for negligence whether you style it as such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay." The legal expression of this moral wrongdoing would be found in the standards of a reasonable man. (p.41). See Ferrari ZEP 1 (1993) 354.

101 The thrust of the question of liability for unintentional harm is the existence of a duty of care which, if violated, the tort\delict of negligence will be fulfilled. However, as follows in the text no nominate delict of negligence is accepted in Scots law.

102 Thomson, *Delictual Liability*, 1994, .54 et seq, Amin S.H. "Extending the Neighbourhood Liability to Third Parties", 1982 SLT (News) p.61.

103 Smith, *Studies* 106-107.

104 It has been vigorously argued that this is not the case. Despite the partial overlap between *culpa* and negligence, *culpa* is more comprehensive, concerning both intentional and unintentional harm. Thomson, *Delictual Liability*, 54. See Smith, *Studies* 116, and Walker, *Delict* 46, for a critique to the assimilation.

105 Walker, *Delict* 44.

106 Thus for instance Elliot points to the fact that with the emergence of the the tort of negligence in Scots law there would be cases when liability could "be imposed concurrently by different rules, as, for example, where the claim sounds in both negligence and nuisance". Elliot, 64 (1952) JR 8.

107 See the bitter account of Willock, Ian D. in, Grant, 1-14.

The Scots law of pure economic loss is, at first sight, hardly distinguishable from the relevant English law¹⁰⁸. In addition to reasonable foreseeability, courts, as a rule, request further evidence to indicate sufficient proximity between the pursuer and the defendant in order to establish a duty of care¹⁰⁹.

Liability usually exists for negligent misstatements provided the pursuer knew that the statement would be used in the manner actually used and that the defendant would rely

108 See Feldthussen, *Economic Negligence*, 6 et seq, on the historical background of economic loss. In Commonwealth [meaning English, Canada, Australia and New Zealand] jurisdictions all negligence claims for economic loss are treated prima facie alike (in contrast to the USA); " ..until 1963 [the *Hedley Byrne v. Heller* decision] it was accurate to say that the Commonwealth courts had refused to recognise virtually any claim for pure economic loss in negligence. ... Until recently, the Commonwealth courts also insisted that actions based on the negligent performance of a service be brought in contract not in tort." Similar was the assumption of liability for shoddy products, while until the 1970's it was held that public authorities could not be sued for nonfeasance. See also another comprehensive work on pure economic loss: Smillie, J. A. "Negligence and Economic Loss", 32 (1982), *UTLJ*, 231-280.

A hallmark in the Scottish case law is the case of *Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd*, 1972 SLT 38, 1971 SC 257, rejecting liability for pure economic loss and thus consolidating the law so far. Lord Migdale' epigrammatic statement is often quoted: "The law of Scotland has for over a hundred years refused to accept that a claim for financial loss which does not arise from damage to the claimant's property can give rise to a legal claim for damages founded on negligence.". In the *Dynamco* the defender's excavator damaged an underground electric cable belonging to the South of Scotland Electricity Board. The damage resulted to a power cut in the pursuer's factory which lasted 15 1/2 hours. The pursuer sought compensation for the profits he lost while the factory was closed. It was the well known case of *Junior Books Ltd v. The Veitchi Co Ltd*, 1982 SLT 492, which heralded a new approach.

Wilkinson, and Forte, 30 (1985) *JR*, 9-11, refer to the case law preceding *Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd*. Thus in *Alan v. Barlay*, (1864) 2 M 873, concerning a claim by an employer for damage sustained as a result of injuries to one of his employees the claim was rejected on grounds of remoteness; liability for secondary loss was not possible. In *Simpson & Co v. Thomson*, (1877) 5 R (HI) 40, the pursuer's claim was rejected for lack of title to sue; only those with a proprietary or possessory title on the chattel injured could sue. the same view was taken in *Reavis v. Clan Line Steamers*, 1925 SLT 386, on a claim by an employer for loss of his employee's services. In conclusion the reasons for rejection of claims for pure economic loss were related to the remoteness of damage and the title to sue or the particular duty of care.

Dynamco Ltd v. Holland and Hamnen and Cubitts (Scotland) Ltd, should be taken into account as one example of what Feldthussen describes "The Utility Cases", being one category where recovery is precluded for "negligent interference with contractual relations between the plaintiff and the victim of physical damage" (in this group of cases the plaintiff has a contract with the party who suffers physical damage. The principle example in English law is *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, [1973] 1 QB 27, [1972] 3 All ER 557 (CA). Feldthussen, *Economic Negligence*, 235.

See also Shearer, Alex C. "Delictual Liability for Pure Economic Loss", 1983 SLT (News) 157.

109 Wilkinson, and Forte, 30 (1985) *JR*, 14-18, and Thomson, *Delictual Liability*, 68, who notes: "This requirement of proximity is ...simply a rationalisation by the courts of why they are, or are not, prepared to extend the parameters of liability in delict."

on the statement, and was likely to suffer loss¹¹⁰. This is the case with American law while in Germany, in similar cases, the contract with protective effects was applied¹¹¹. The basic authority on misstatements is the third party loss case of *Hedley Byrne v. Heller*¹¹². The principle it set has been applied in Scotland in claims against surveyors¹¹³.

110 The question of the imposition of liability might be a matter of policy. In a recent development in *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai* ["The Nicholas"], (1994) 1 Lloyd's Law Reports, 492, CA, the Court of Appeal, reversing a previous decision, rejected a claim of cargo owners against a classification society for negligent advice. The decision of the Queen's Bench ([1992] 2 Lloyd's Law Reports 481 QB) held as a preliminary question of law that the society owed a duty of care to the cargo owners.

111 See under "Examples: Misrepresentation and product liability", in Chapter 4 and the references to Feldthussen's work in the footnotes, and under "Information, expert opinions and reports." in Chapter 2.

112 [1964] AC 465, [1963] 2 All ER 575, HL. See Wilkinson, and Forte, 30 (1985) JR, 11, on the law before *Hedley Byrne* where there was no liability for pure economic loss caused by negligent misstatements. See Feldthussen, *Economic Negligence*, 23 et seq, on the historical background of *Hedley Byrne*. In Commonwealth [meaning English, Canada, Australia and New Zealand] jurisdictions all negligence claims for economic loss are treated *prima facie* alike (in contrast to American law). "Prior to 1963 the Commonwealth courts refused outright to recognize such a cause for action [for negligent misstatement]. The gradual development of the action was precluded effectively by the House of Lords 1899 decision in *Derry v. Peck*, [(1899) 14 App. Cas 337 (HL)]. The plaintiffs had relied upon false statements in a company prospectus to invest in the company and suffered financial loss. "... However, by clear implication *Derry v. Peck* decided that no action would lie in negligence for misrepresentation causing financial harm, and the case was so interpreted in England and in the United States for more than seventy years afterwards." For a while it might had seem that the decision of the Court of Appeal in *Cann v. Wilson*, (1888), 39 Ch. D. 39, established the action in negligent misrepresentation. However: "The decision was quickly overruled by the same court in 1893 in *Le Lievre v. Gould*, - [1893] 1 QB 491 (CA) - , where the court refused to recognize a duty in favour of third parties who had relied on a negligently prepared survey to their financial detriment." (pp.24-25), See Feldthussen *Economic Negligence*, 38-30, of the broader effects of *Hedley Byrne*.

See also Smillie, 32 (1982), UTLJ, 255, footnote 76 on the instances where *Hedley Byrne* has been followed. He notices that " ... It is clear that the reasoning underlying the opinion in *Hedley Byrne* was not limited to negligent statements." (p.257). He notes that most courts have restricted the application of the *Hedley Byrne* principle (p.233).

See the more recent reference by Oughton, 1 (1995) *Contemporary Issues in Law*, 21-42, explaining that the approach in *Hedley Byrne* has not been the only approach to issues of pure economic loss, and defending the concept of voluntary assumption of responsibility against critique. Interesting from the point of view of this work he argues that his analysis is based on the idea that there is a small group of case where it does not matter whether the duty to exercise reasonable care arises in contract or in tort. These cases typically involve the supply of information, advice or services by professional or quasi professional persons under a contract or in circumstances "in which the relationship between the parties is very close after involving some sort of direct dealing between the parties." (at 35).

Before *Hedley Byrne* the leading case in Scotland was *Robinson v. National Bank of Scotland*, 1916 SC (HL) 154. The defenders were held not to be liable for careless information on the pursuer's creditworthiness. The defenders were bankers and they had provided the information to another bank which was the recipient of an application for funding by the pursuer. The relationship between the banks was not such as to impose a duty

The latter were employed by building societies which provided funding to purchasers of buildings. The purchasers/claimants suffered loss due to defects unnoticed at purchase and not reported by the surveyors. Claims by subsequent purchasers were not accepted. Defences based on the surveyors' contracts of employment would be effective if the contracts had come to the purchasers' notice before they entered the sale's contract, and provided they satisfied the reasonableness test of the Unfair Contract Terms Act of 1977¹¹⁴.

to be careful. In *Fortune v. Young*, 1918 SC 1 a cautioner was held liable for financial loss sustained by the pursuer. Although the defender had not addressed his letter of guarantee to the pursuer, he had contemplated that it would be shown to the pursuer in connection to the transaction which had caused loss. See also Walker, *Delict* 899-900.

See *Williams v. Natural Life Health Foods Ltd*, [1996] 1 BCLC 288, Walters 17 (1996) *The Company Lawyer* 247-248 one of the most recent decisions where the court applied the *Hedley Byrne* principles, allegedly at the expense of the principle of separation between the company property and the property of the shareholders.

¹¹³ Amin, S.H. is referring to the leading English case of *Yianni v. Edwin Evans & Sons*, [1981] 3 WLR 843, involving the liability of a surveyor to a third party who suffered financial loss because of the inexact valuation. This was an example of the extension of the neighbourhood principle to a typical situation of professional negligence. "Extending the Neighbourhood Liability to Third Parties", 1982 SLT (News) 62.

¹¹⁴ *Martin v. Bell-Ingram* 1986 SLT 575 dealt with the liability of a firm of surveyors which was instructed by a building society to prepare a valuation survey and report for a dwelling-house. The pursuers had approached the building society in order to obtain a loan to purchase the house. The reports's contents were communicated by phone by the building society to the prospective purchasers. The latter bought the house. When, later, they tried to sell it, a defect of the roof which reduced the building's value came to light. The pursuers claimed the cost of repairs and the loss of profit as the house was sold at a lower than expected value. The sheriff court held that the surveyors were under a duty of care towards the purchasers to bring to the attention of the building society any defects they reasonably should have detected, since they knew that their report would materially affect the purchaser's decision to buy the house. The surveyors appealed against the decision. They did not deny that there was a *prima facie* duty of care but they called upon a disclaimer of liability contained in a written advance of funds sent to the purchasers by the building society, after the purchasers had entered into missives for the purchase of the subjects. The Court of Session held that the surveyors could not rely upon the disclaimer. No disclaimer had been communicated to the purchasers when the surveyors had communicated their report to the building society. The surveyors could not have known that an advance of funds would even be made, or that the purchasers would be aware that the surveyors were performing their duties against the background stipulated.

See the English cases *Smith v. Eric S Bush* and *Harris v. Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 WLR 790, The first of this cases concerned the liability of a firm of surveyors instructed by the building society, to whom the plaintiffs had applied for a mortgage for the purchase of a house, to do a visual survey of the latter. The report failed negligently to suggest repairs. It was suggested that the purchaser should ask independent professional advice. The defendants were not found liable for damages following the collapse of a chimney which they failed to notice that was not supported well. The judge found for the plaintiffs and the Court of Appeals dismissed the defendant's appeal. In the second case the first defendant was the council to which the plaintiff had applied for a mortgage for the purchase of a house. The council decided on the basis of a confidential survey of the second defendant a valuer in their employment, who suggested minor repairs.

However, the liability of solicitors to the beneficiaries of a mistakenly drafted will has not yet been accepted by Scottish courts. This is an exception among the jurisdictions examined here¹¹⁵. In the leading case of *Robertson v. Flemming*¹¹⁶ from 1861 the English judges allegedly did not understand the concept of *culpa*¹¹⁷. The fact is that *Roberston v. Flemming* has been followed by Scottish courts until recently at least¹¹⁸,

The survey was not communicated to the plaintiff but the mortgage was approved on such terms. When, three years later, the plaintiff tried to sell the house a valuer for the council suggested that an independent structural survey should be made. The survey indicated the need for extensive, costly repairs. The judge found for the plaintiffs. The Court of Appeal allowed appeal by the defendants. The court held that in such cases a valuer owes a duty of care to the prospective mortgagor since he presents himself as having the required professional capacity, and knows that possibly the mortgagee will rely on his survey and will not seek other advice. It is the same whether the valuer is the employee of the prospective mortgagee or an independent contractor, and even if his report is confidential. The valuer could disclaim his liability contractually provided the disclaimer conforms with the Unfair Contract Terms Act of 1977.

See Thomson, *Delictual Liability*, 72. See on negligent misrepresentation in Scotland in relation to the Law reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 10, Forte, A. "Negligent Misrepresentations" SLT 1988, 93. Cases as those discussed before could have been decided in German law on the basis of the contract with protective effects. See "Information, expert opinions and reports" in Chapter 2.

115 Advocates are not liable for the conduct of a case in court or any preliminary related work. (See Thomson, *Delictual Liability*, 136 and the references therein.) Evidence to the contrary could be found in Scotland in *Murray v Reily* 1963 SLT (Notes) 49. In this case the claim was by a client of the defender solicitor. The pursuers claimed that he had sustained loss as a result of the negligent manner in which the defender handled an action. The defender failed to inform the client on the fact that the other litigant was not prepared to conduct proof at a set date, and failed to precognose a witness. Lord Johnson allowing proof thought that this was a case of professional negligence, whereby, however, a professional could not be held liable for errors in judgment whether in matters of law or of discretion. His Lordship allowed proof as he was not prepared to make a conclusion as to the discretion the solicitor actually had. In *Kyle v. P&J Stornmouth Darling WS*, 1993 SCLR 18 (affirming 1992 SLT 264), the defender failed to lodge the pursuer's appeal in time and the pursuer lost the opportunity to appeal. The claim was rejected as it could not be proven on the balance of probabilities that the appeal would be successful. (These cases do not concern third party loss.).

116 (1861) 4 Macq 167.

117 Scottish judges began participating in the House of Lords in 1874.

118 In *Weir v. J.M. Hodge* 1990 SLT 266, a husband and wife had purchased heritable property, taking title in joint names and to the survivor of them. The husband died leaving in his settlement a life-rent of the residue of his estate and providing that, on the death of the longer liver of the two of them, his executors were to pay the residue to his nieces and nephew, vesting being postponed until the date of the survivor's death. A former partner of a firm of solicitors advised the wife negligently that the nieces and nephew would become entitled to estate including an one-half share in the heritable property. On this understanding the wife excluded the pursuers from any benefit under her settlements. In fact the special destination in the heritable property had never been evacuated by the husband's settlement, and on his death it had become the absolute property of his wife. The pursuers as residual beneficiaries, were not entitled to any share of the heritable property on the wife's death. It was condoned by the solicitor's firm that the advice of the former

despite strong criticism¹¹⁹ and in contrast to the tendency in England¹²⁰. It is doubtful whether the Scottish courts are likely to change policy in the light of *White v. Jones*¹²¹. It

partner had been negligent. The nieces and nephew turned against the solicitors on the bases of professional negligence. The Lord Ordinary (Weir) rejecting the pursuers argument that the House of Lords authority in *Roberston v. Fleming* ought not to be followed, in the light of the developments in the law of negligence, held that under the latter authority it was clearly established that a professional lawyer employed by one person to do an act for the benefit of another could not be liable in damages to that other for loss of that benefit through negligence, and that in these circumstances the defenders owed no duty of care to the pursuers.

MacDougall v. MacDougall's Executors, 1994 SLT 1178, involved a claim against a solicitor for failing to arrange for a will to be validly executed. Claimant was the person (son) to whom the property of a house was conveyed by will subject to a liferent. At the time of the testatrix's death the title to the house was in the name of an aunt under an uncle's will and would then pass to the son. A dispute arose over a charter of novodamus which the liferentix of the house and her three sisters obtained, and then granted a disposition of the house to a third party. To the beneficiary's attempt to have the charter of novodamus and the disposition reduced, the defenders answered that the testatrix's uncle's will was not valid since witnessing requirements had not been fulfilled. The beneficiary maintained a claim against the solicitor who drafted a void will. Lord Ordinary (Cameron of Lochbroom) held that a solicitor who was careless in arranging execution of a will owed no duty of care to a party whom the testator intended to benefit thereunder and, even if he did, the ambit of that duty would not extend to one who was not an intended beneficiary under that will but a mere successor in title to an intended beneficiary. The decision followed *Roberston v. Fleming* (1861) 4 Macq 167 and *Weir v. J.M. Hodge* 1990 SLT 266.

119 Before *Robertson v. Fleming*, although there was no authority on will beneficiary cases, the tendency was arguably favouring the acceptance of the claims of disappointed beneficiaries against negligent solicitors. (In *Goldie v. McDonald*, 1757 Mor. 3527 the court found a solicitor liable to the widow of his client, in relation to a failure to expedite a confirmation. In *Lang v. Struthers* 1826 4 S 418, 1827, 2 W & S 563, It was noted that "The liability of the agent does not depend on who gives the order, but for whose behoof it is given." In *Goldie v. Goldie*, 1842, 4, D. 1489, some of the judges considered that although the solicitor was in principle liable, he was not in the case in question for reasons of remoteness of damage. See Blaikie J. "Negligent Solicitors and Disappointed Beneficiaries" 1989 SLT pp.321-323.). *Robertson v. Fleming* interrupted this process. Its influence has dominated Scots law ever since. It has been noted that the decision is outdated and that it places unfavourable constraints on the law of Scotland. It was argued that it should not be binding any more because it is incompatible with the development of the law of negligence, exemplified as regards disappointed beneficiaries in *Ross v. Caunters*, [1980] Ch 297, [1979] 3 All ER 580, or that due to the development of the law after *Donoghue* the decision is of little relevance to solicitor's liability even though not expressly overruled. However the truth is that *Robertson v. Fleming* is still accepted as valid authority as the House of Lords has not derogated from the principles it set. In the recent case of *Bolton v. Jameson & Mackay*, 1989, SLT 222, the ex-wife of the defender solicitor's client, turned against the solicitor who remitted the whole of the net free proceeds from the sale of a matrimonial house to his client, although there was a minute agreement before the divorce that the husband would make over to his wife one half of the price received for the sale of the house. The first division of the Court of Session, reversed the decision of the Lord Ordinary, and held that there were no relevant averments capable of demonstrating that the solicitor owed the wife, at the time he remitted the whole of the net free proceeds from the sale to his client, any of the duties on which her action depended.

Blaikie argues that, in Scotland, as the "contract fallacy", the exclusion that is of liability in delict to a third party for the violation of a contractual obligation, has always

is of course not possible from a constitutional point of view to have an English House of Lords overruling a Scottish House of Lords decision¹²². Such a change in the law would require a specific decision to that effect by a Scottish House of Lords. Thus, despite expressed dissatisfaction with the decisions based on *Robertson's* authority, the decision is currently good law in Scotland. Moreover, certain aspects of the reasoning in *White v. Jones*¹²³ could be taken as limiting the effect of the decision to English law alone¹²⁴. In the case of solicitors offering advice, the *Hedley Byrne* principles apply¹²⁵.

been less important than in England, it is possible to say that the Roberston's doctrine is eroded to a greater extent and it might be possible for the courts to try to circumscribe the decision (p.322).

120 *Ross v. Caunters*, [1980] Ch 297, [1979] 3 All ER 580, *White and another v. Jones and others*, [1995] All ER, 691. In the Canadian case *Whittingham v. Crease & Co* (1978) 88 DLR (3d) 353, one year before *Ross v. Caunters*, the agent responsible for the drafting of a will for the plaintiff's father invited the wife of the sole beneficiary, the plaintiff, as a witness. The will was void and the plaintiff had to share in his father intestacy with three brothers and a sister. The solicitor was found liable. By inviting the wife as a witness he impliedly represented that the will would be valid. He could foresee that if the will was void the plaintiff would suffer loss. In the New Zealand case of *Gartside v. Sheffield, Young & Ellis* [1983] NZLR 37, a solicitor delayed by a week to present the will he had prepared to his client for signature. During this week the testatrix died. The Court applied the *Anns* test and held the solicitors liable the prospective will beneficiary. The facts are similar in the Scottish decision *Webster v. Young* (1851)13 D. 752, where the solicitor had delayed for two years. The court doubted whether the pursuer would be able to prove his claim, but allowed the claim. However the decision, in which the averments are mixed averments of negligence and fraud cannot be used as persuasive precedent, and it seems that it has been overruled by *Robertson v. Flemming*.

121 *White and another v. Jones and others*, [1995] All ER, 691. The House of Lords accepted the liability of a solicitor to the disappointed beneficiaries. The solicitor delayed negligently to implement the wishes of the testator (his client) regarding certain changes in his will. The testator died before the plaintiffs were named as beneficiaries.

122 MacQueen 1990 SLT 340, questions whether an English authority such as *Ross v. Caunters* [1980] Ch 297, [1979] 3 All ER 580 is adequate to reverse Scots law.

123 [1995] All ER, 691.

124 Thus the discussion by Lord Browne-Wilkinson of the concept of an assumption of responsibility departs from a reference to the English appeal case *Nocton v. Lord Ashburton* [1914] AC 932, [1914-15] All ER Rep 45.", the significance of which for the law of Scotland is doubtful. His Lordship expressly focuses on the assumption of responsibility from the point of view of the law of England ([1995] All ER, 691 at.716). In the speeches of Lords Goff and Nollan emphasis is placed on the decision in *Ross v. Caunters*, [1980] Ch 297, [1979] 3 All ER 580, as creating a powerful precedent for the case before them. *Ross v. Caunters*, however, did not affect Scots law. The references to *Robertson v. Fleming*, are made with the purpose to expose the previous regime and to indicate the decision's weaknesses. It is doubtful whether this critique can be persuasive to Scottish courts which until now accept the authority of *Robertson v. Fleming*.

125 The situation is different when the solicitor is giving advice to someone who is not a client. Proper *Hedley Byrne* rules can apply in this case. Thus in *Midland Bank v. Cameron, Thom Peterkin and Duncans* 1988 SLT 611. It was held that it was possible to owe a duty not

No liability exists in cases of the so-called secondary economic loss¹²⁶, that is when the economic loss is suffered as a result of personal or property injury to another person¹²⁷. In most of these cases the rejection of liability could not be justified upon lack of

only to his client but also also to a third party who relies on the advice the solicitor gives to him, provided the solicitor assumed responsibility by the offer of advice. This is the case when the solicitor presented himself as having the requisite professional skills and when he could foresee the possibility of the third party being injured. The third party must have relied on the advice. (In this case a bank lent an amount of money to a solicitor's client on the basis of information on the client's financial position supplied by the solicitor. The information was wrong and the money was lost. Lord Jauncey thought that in this case there was nothing more than the passing on of information provided by their clients.). Norrie 1988 SLT, 309-311, 317-320. Blaikie 1989, SLT 317-323. Norrie is making a comprehensive categorisation of different instances of solicitor's liability. He refers to cases involving pure economic loss, such as *Hedley Byrne*, financial advice cases, such as *Midland Bank v. Cameron*, *Thom Peterkin and Duncans*, disappointed beneficiary cases, independent principal cases (where the solicitor steps out of the role of solicitor of one of the parties and undertakes the role of "an independent professional and trusted man", 319).

¹²⁶ Only those who suffered personal injury or are the owners of the damaged property can claim damages. The leading case in this area is *Dynamco v. Holland*, 1971 SC 257, 1972 SLT 38. As a result of damage caused by the defendants' excavator to an underground cable owned by the South of Scotland Electricity Board there was a 15 1/2 hours power cut in the pursuers factory. The pursuer claimed the lost profits. The court held that the defender owed no duty of care to the pursuer for his secondary loss even though the loss was reasonably foreseeable. See Stuart, S.L. "Title to sue in respect of damage to property", 1986 SLT (News) 257-261, on the origins of *Dynamco* (the "Simpson Principle"), Wilkinson, and Forte, 30 (1985) JR, 8-11, and Feldthussen, *Economic Negligence*, 228 et seq. on pure economic loss consequent upon property damage, and 265 on pure economic loss consequent upon personal injury, and the historical account made therein.

¹²⁷ The pursuer might for instance have been linked contractually to the person suffering loss, and the contract cannot be fulfilled or the performance value is reduced. See Stewart, W.J. "Economic Loss from Damage to Others' Property", 1987 SLT (News), 345, and Stuart, 1986 SLT (News) 257-261. See Feldthussen, *Economic Negligence*, 207-208, on "Relational Economic Loss Consequent on Physical Damage Suffered by a Third Party". Courts generally reject claims in these situations for various reasons. Thus they either hold that there no duty of care is owed, or the loss was unforeseeable, or the relationship between pursuer and defender is too remote. These situations, it should be noted, are not usually third party loss cases, (See the leading Canadian decision *Canadian National Railway Co. v. Norsk Pacific Steamship Co., The "Jervis Crown"*, 91 (1992) DLR (4th), 289.).

In Scotland lawful possession is not protected in the absence of a proprietary title. In *Nacap v. Mofat Plant Ltd*, 1987 SLT 221, the pursuer had contracted with the British Gas for the laying of a pipeline owned by the British Gas in the North Sea. The defendants damaged the pipeline and the pursuers were unable to complete the contract in the agreed time. They sued for their economic loss. The court held that the pursuers had no title to sue since they were not owners of the pipeline. The fact that they had lawful possession of the pipeline was not sufficient to give them a title to sue. The same approach was taken by the Privy Council in *Candlewood Navigation Corp'n v. Mitsui OSK Lines Ltd*, (the *Mineral Transporter*), [1986] AC 1, [1985] 2 All ER 935 (appeal from the Supreme Court of New South Wales), where the plaintiffs, charterers of a ship which was damaged by the defendants, sued for the loss they suffered having to pay hire charges while the ship was being repaired. The Privy Council held that the defendants did not owe a duty of care to the plaintiffs for their secondary loss.

proximity¹²⁸. The relevant case law involves third party loss situations¹²⁹ such as that in the leading case *Dynamco v. Holland*¹³⁰, about damage to an electricity cable where loss was caused to the pursuer's factory due to a power failure. Typical third party claims by purchasers of defective products or buildings are rejected¹³¹; the glimpse of hope given by *Anns v. Merton London Borough Council*¹³² was short lived. *Murphy v. Brentwood District*

See Stuart, 1986 SLT (News) 257-261, attacking the acceptance of the claim in *Nacap* in the court of first instance, and arguing that possessory title should be required, a "reasonable contemplation" not being enough. (Stuart writes before the appellate decision.).

128 See Wilkinson, and Forte, 30 (1985) JR, 21, where it is underlined that from the point of view of proximity, when the loss is secondary, "there is no sound basis in principle for distinguishing claims for pure economic loss ... from claims consequent on damage to the pursuer's person or property".

129 One example is that the loss suffered by the head of an orchestra when, after a ship's collision negligently caused by the defender, several members of the orchestra were drowned *Reavis v. Clan Line Steamer*, 1925 SC 725

130 1971 SC 257, 1972 SLT 38. See previous reference. The decision set the principle until *Junior Books v. Veitchi*, 1982 SC (HL) 244, 1982 SLT 492.

131 See Thomson, *Delictual Liability*, 87-88. Interesting is the division of pure economic loss cases to those involving relational and non-relational loss (Thomson, 1995 SLT, 139). The first category includes cases where the defender's conduct might interfere in the relationships of the pursuer to a third party, the second refers mainly to cases of defective products or buildings. Relational economic loss occurs for instance when a person suffers loss of profits from a contract because he followed mistaken advice given to someone else or because the defender did not perform the services as provided in his contract (with someone else). There is generally no liability for non relational loss cases. Non relational is the loss suffered by will beneficiaries for example.

See also the categories of economic loss according to Feldthussen: "Negligent Misrepresentation", "Negligent Performance of a Service", "Negligent Manufacturing of Shoddy Products", "Relational Economic Loss", (consequent upon physical damage to a third party), and "Public Authority's Failure to Confer an Economic Benefit". (Feldthussen, *Economic Negligence*, 2). This division seems complicated. The characterisation of cases might vary, and one case might qualify for more than one categories. In any case the relational loss category as found in Thomson is more useful to keep in mind with respect to third party loss cases. In Thomson's division it is, I think, significant that no distinction is made in advance on the basis of the kind of relationship in the context of which the loss occurred.

An interesting suggestion for the presentation of pure economic loss cases can be found in Wilson, W.A. "Mapping Economic Loss", in *Obligations in Context-Essays in Honour of Professor Walker*, Gamble, Alan J.(ed), 1990, pp.141-150. Different instances of economic loss are analysed in a "geometric" and illuminating manner.

132 [1978] AC 728, [1977] 1 All ER 492 HL. It was held that the defendant local authority whose engineer had approved the designs of the foundations of a building which were later found to be defective owed a duty of care to the owner and was liable to pay damages which could include the cost of repair.

After *Anns* the courts did not generally follow the two-staged test employed in the decision. *Anns* came to be doubted and was finally overruled in *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, which interpreted *Anns* as concerning the liability of local authorities for breach of a statutory duty. See on the gradual erosion of *Anns*

Council¹³³, which overruled *Anns*¹³⁴ is valid law at present in the United Kingdom¹³⁵.

The basic idea in these cases is that there can be no liability for damage to the product or

"Rethinking Negligence", Logie, J.G. 1988 SLT (News), McQueen 1990 SLT 337, and McMillan 1996 SLT 159-160. (The issue will be referred to in the foot note of the following chapter.). 185. See also Oliver, Dawn "Anns v. London Borough of Merton Reconsidered", 33 (1980), CLP, 269, Kinder, R. "Resiling from the Anns principle: the variable nature of proximity in negligence.", 7 (1987) LSt 319, Wallace, Duncan I.N. "Anns Beyond Repair", 107 (1991) LQR 228-248, and "Negligence and Defective Buildings: Confusion Cofounded?", 105 (1989) LQR 46-78, referring to the background on *Anns*, at a time when it was valid authority. See Stanton, K.M. "The Decline of Tort Liability for Professional Negligence", 44 (1991)CLP, 83-110, who refers to "the grand themes stalking the land", namely *Donoghue* and *Hedley Byrne* as updated by Lord Wilberforce in *Anns*, which were set "in the process of demolishing the immunity from liability for pure economic loss caused by negligence", (p.83). The House of Lords however said that all that was a mistake. In *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177, it was thought that *Anns* introduced "an entirely new type of product liability" (The Church Commissioners owned a block of flats built by the main contractors who subcontracted the blaster work. The latter was defective but not a source of danger. The person who leased the flat after construction, turned against the main contractors, among others. It was held that the main contractor and the subcontractor owed no duty of care to the lessee to prevent economic loss caused by the defective plaster.). See further Giles, Marianne and Szyszczak, Erika "Negligence and Defective Buildings: Demolishing the Foundations of *Anns*?", 11 (1991)LSt, 85-102, where it is argued that the most probable foundation of *Anns* is the aim to avert a danger to health and safety. See Smith, J.C. and Burns, P. "*Donoghue v. Stevenson* - the not so golden anniversary", 46 (1983) MLR p.147, where Lord Wilberforce is criticised for his speech in *Anns*, for allegedly ignoring the distinction between misfeasance and non-feasance; between causing harm and failing to prevent harm (pp.160-161).

The *Department of the Environment v. Thomas Bates and Son Ltd.* [1990] 3 WLR 457, involved the liability of builders, who had contracted with the lessees of a building for certain construction works, towards the underlessees who had to pay for remedial works to make good deficient construction and sought the expenses of seeking alternative accommodation for the period of the remedial works. The claim was accepted to the extent it related to the flat roof of a two storey building but not in relation to strengthening the pillars of a tower. The Courts of Appeal and the House of Lords rejected the plaintiff's appeals. The House of Lords held that since the tower block had not been unsafe by reason of the defective construction of the pillars, but the defects of quality simply made the plaintiff's lease less valuable, the loss was purely economic and was not recoverable in tort against the defendants. The builders thus were under no liability for making the building fit for the intended use, if there is no danger to health and safety.

133 [1990] 2 All ER 908. In this case a builder had laid the foundations of a house in accordance with the designs approved by the local authority and the foundations were proved to be defective. The owner who could not afford the cost of repairs sold the house at less than the market value it would cost, had the foundations been sound and sued the local authority for the loss of value. The House of Lords held that *Anns* was wrongly decided, the local authority owed no duty of care in respect of pure economic loss for defective construction of property. The court held that the local authority should not have greater liability than a primary tortfeasor. See Howarth, [1991] *CamLJ* 58, who criticised the new approach: "What is striking about the new orthodoxy, however, is how empty of content it is. It is essentially a negative orthodoxy.", (59-60).

It should be noted that *Murphy v. Brentwood District Council*, as many other cases can be seen under differing perspectives. Blom characterises the case as an example of "Claims by Someone Who Acquired a Defective Building, Against a Party Who Caused the Defect", involving claims of a plaintiff who is not the original owner against the builder or

the building inspector. He justifies the approach in *Murphy*, noticing that common law rejects a warranty for the building, and thus it would be absurd if there is no liability in contract, to have liability in tort against someone more remote. The allegation that the defendant's negligence caused the loss is based on emotive criteria, ignores the facts of the industry and the fact that these losses are usually burden the insurer. (Blom "Fictions and Frictions" at 166.)

Feldthussen on the other hand, examines *Anns* and *Murphy* from the point of view of the liability of the statutory public authorities focusing on the latter's immunity to negligence claims. He argues that "there is probably no area of economic loss law, or even tort law generally, where the Commonwealth jurisdictions differ more than with respect to public authority liability". (Feldthussen, *Economic Negligence*, 274 et seq.)

Smillie treats *Anns* as an example of negligence by public officials. He links however more clearly this type of situations to the process initiated by *Hedley Byrne* including it in the broader category where pure economic loss is not consequent upon physical damage. (Smillie, 32 (1982), UTLJ 260 et seq.)

In any case the situations found in *Murphy* and *Anns* are not usually third party loss situations.

134 See McQueen 1990 SLT 227 and McMillan 1996 SLT 163 on the effect of *Murphy* in Scotland. The latter refers to recent cases where there is evidence of the weakness of the *Murphy* doctrine as far as Scots law is concerned. These cases will be referred to later.

135 As will be discussed in the following chapter the situation is different in other Commonwealth countries and the points made here are provisional only. See Wallace, "No sommersault after *Murphy v. Brentwood District Council*, [1990] 2 All ER 908: New Zealand Follows Canada", 111 (1995) LQR, 285-300, on the effect of *Murphy* in other common law jurisdictions.

Blom thinks that in Australia as in England the doors to claims in situations like *Murphy* are closed. (Blom "Fictions and Frictions" 166). In the words of Feldthussen "The Australian courts recognize a more extensive immunity than that suggested in *Anns*." (276). In the case of *Sutherland Shire Council v. Heyman*, 157 Commonwealth Law Reports, (1984-1985), 424, on a claim by the purchaser of a house against the municipal authority which had authorised the building plans and had inspected the house when it was under construction, the High Court of Australia held that the council was not in breach of any duty it owed to the respondents. Two members of the court thought that there was no evidence that the municipal authority had acted negligently in undertaking its discretionary power of inspection. Three members thought that in the absence of inquiry made by the council or of reliance placed upon it by the respondents, it owed them no relevant duty of care.

Feldthussen notices further that "The courts in New Zealand and Canada purport to accept the *Anns* approach" (from the point of view of the extend of the public authorities' immunity). (Feldthussen, *Economic Negligence*, 276). In *City of Kamloops v. Nielsen et al.* 10 DLR 1984 (4th) 641, claimants were the subsequent purchasers of a house, the construction of which the defendant city failed to prevent although it was aware of the house's defective foundations through its bulding inspectors. (The foundations subsided.) The trial court found for the plaintiff. The Court of Appeal and the Supreme Court of Canada dismissed the city's appeals. The Supreme Court of Canada held that the council had breached the by-law it had passed on the constuction of buildings. The city was obliged to take care in the discharge of its operational duty, not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have contemplated of the plaintiff. The city breached its duty by failing to protect the plaintiff against the builder's negligence. Recovery of economic loss was permitted on the basis of the statute regulating the city's duties. The court however did not find negligence on the part of the city inspectors in their inspection and subsequent actions. The city was liable for failing to enforce a "stop-work" order.

the building itself¹³⁶ but only for damage caused to the other property of the pursuer¹³⁷. *The Aliakmon (Leigh and Sullivan v. Aliakmon Shipping)*¹³⁸ is valid law in Scotland.

It will be argued, however, that the Scots law of third party pure economic loss is not identical to English law. With the exception of will beneficiaries, third parties might (or should) be treated better under the Scots law of delict. More important is the strong element of contractual input in the delictual treatment of third party loss which, interpreted from a Scots law point of view, indicates the plausibility of a contractual solution in the Scottish system. Unfortunately, these arguments largely speculate on what Scots law could and should be like, and thus are inherently uncertain. The development of these thoughts will have to cope with the need to present, briefly, current UK -- largely English -- law, occupying a considerable part of the reference. First, a brief account of the effect of *Caparo* and *Murphy* in Scotland is necessary.

3.3. The effect of *Caparo* and *Murphy* on Scots law.

¹³⁶ Loss or damage to the defective product itself is excluded from the regime of strict liability imposed by Part I of the Consumer Protection Act 1987, s.5(3). In these circumstances the pursuer must seek remedies on the law of contract. Thomson, 1995 SLT 141.

¹³⁷ The House of Lords was not convinced in *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, from the "complex structure" argument, according to which different parts of a complex structure, as a building, can be considered as other property. The foundations could thus be regarded as a separate part of a house and economic loss suffered, by a reduction in the value of the rest of the building for instance, was damage to other property. It was held that the source of damage must be distinctively separate in order to consider there is damage to other property. See Wallace, 107 (1991) LQR 35, on the "Complex Structure Theory". The 'complex structures' theory appeared first in D&F Estates in attempted by Lords Bridges and Oliver to define the rational basis of *Anns*. Arguably liability under this theory can be very wide.

¹³⁸ *Leigh and Sullivan v. Aliakmon Shipping*, 2 [1986] 2 All ER 145, [1986] AC 785. In this case involving carriage of steel coils under a c&f contract, the buyers were not to become owners of the cargo until actual payment. Their claim in delict for the damaged cargo was rejected because they were not owners of the coils at the time of the damage. The case was distinguished from *Junior Books v. Veitchi*, because in the latter the pursuers were owners of the floor when it was carelessly led. See Thomson, *Delictual Liability* 88-89. See Feldthussen, *Economic Negligence*, 253 et seq., on "Transferred loss", where he points out that "The plaintiff's position in these cases can often be usefully compared to that of a property insurer who could recover by subrogation." In the cases of tortious damage to property, on the basis of the "collateral source rule" the owner can recover the full value of the damaged property; the defendant does not benefit from the owner's insurance. The insurer has a right to recover any excess recovery on the basis of his right of subrogation. "The exclusionary rule was applied many years ago to preclude a direct suit against the tortfeasor, and since that time insurance companies have been content to seek recovery by subrogation." (p.253)

The incremental approach in *Caparo Industries v. Dickman*¹³⁹ has already been followed in Scotland, in *Weir v. National Westminster Bank plc*¹⁴⁰ and in *Nordic Oil Reserves v. Berman*¹⁴¹.

The reference to precedents in *Nordic Oil Reserves v. Berman*, resembles, in one view, the approach in *Murphy*¹⁴². The weakness of *Murphy's* rule in Scots law has been

139 [1990] 1 All ER 568. According to the incremental approach liability for pure loss should be imposed by analogy to earlier precedents; that is, in an incremental process. See Morris, G. "Liability of Professional Advisers: *Caparo* and After", 1981 JBL 36, and Martin, Rodyn "Categories of Negligence and Duties of Care: *Caparo* in the House of Lords", 53 MLR 1990, 824-828. Feldthussen observes that *Caparo v. Dickman*, is an example of cases where it is "uncontroversial that the defendant owes a duty to take care in tendering information or advice. ... The plaintiffs, however, were not the employing firm, but third parties who had relied on the audited accounts to their detriment." Similar was the case of *Haig v. Brandford*, [1971] 1 SCR 466, before the Supreme Court of Canada. Feldthussen concludes that "the basic issue in *Caparo* and *Haig* was to whom the defendant's duty extended and for what loss. In *Caparo* and *Haig* the defendant's argument was not as to the very existence of a duty, but as to its extent. In contrast, in *Hedley Byrne* the defendant's argument was that it had tendered information with no legal obligation of care to anyone." (Feldthussen, *Economic Negligence*, 31)

There is no similar example of stated judicial policy such as that of the incremental approach in the other jurisdictions examined here, although apparently the German courts worked in such a manner when developing contractual protection.

140 1994 SLT 1251

141 1993 SLT 1164. Lord Ordinary (Osborne) noted on the scope of a duty of care that "the court must have particular regard to the traditional categorisation of situations in which duties may or may not have been recognised in particular circumstances" (p.1171). However it is not certain that the incremental approach is a part of the law of Scotland. See Thomson, 1995 SLT, 139-140. See also Capper, P. in *Legal Times Supplement* May 1996, 17, arguing that the way forward is through incremental change, from established categories of cases. McMillan, 1996 SLT 163 notes that this approach might not sit so comfortably with Scottish doctrine, where principle is more important than precedent. See the recent *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai* ["The Nicholas"], (1994) 1 Lloyd's Law Reports, p.492, [1994] 3 All ER 686

142 The idea that instead of the two-stage *Anns* test, the imposition of the duty of care should depend upon analogy to precedents, in an incremental approach similar to that promoted in *Murphy*, was expressly accepted (Thomson *Delictual Liability*, 83.). The case was for claims of the owners and lessors of an aircraft against the directors of the lessee company for the charges the owner paid to the Civil Aviation Authority and the British Airports Authority, charges which according to the lease contract burdened the lessee-defender, and which the contract provided the lessor might meet. Lord Ordinary (Osborne) held that in determining the existence and scope of a duty of care, in a claim for economic loss the court had to have regard of the traditional categorisation of situations in which duties might or might not have been recognised in particular circumstances as in *The Aliakmon*, or *Caparo Industries v. Dickman* [1990] 1 All ER 568, cases. The directors would be liable in negligence only under particular circumstances and nothing amounted to these circumstances had been averred by the pursuer, particularly as the latter could have equipped itself with contractual guarantees by the directors of the performance of the company's obligations. See MacQueen 1990 SLT 227 and McMillan 1996 SLT 163 on the effect of *Murphy* in Scotland.

illustrated in recent decisions, even though they follow *Murphy*¹⁴³. In *Armstrong v. Moore*¹⁴⁴ Lord Cameron of Lochbroom held that the local authority had no duty of care beyond its statutory duties. Unlike *Murphy* there was nothing intrinsically defective about the building and the judge argued that he could not find a special relationship between the pursuer and the local authority to justify the establishment of a common law duty of care. Delictual liability was, in principle, not excluded. In *Taylor v. City of Glasgow District Council*,¹⁴⁵ the owners of properties in Glasgow turned against the local authority claiming damages caused by the issuing of completion certificates to an impecunious development company that subsequently sold the properties to the pursuers. The certificates, issued fraudulently by a building control officer, stated wrongly that works had been performed. Lord Johnston accepted the claims, considering that a local authority carrying out statutory duties could be held liable in common law to the persons who may be affected by performance or non-performance of these duties.

There are other doubts over *Murphy's* authority, not all of them related to Scots law. First, a number of issues were left undecided in *Murphy*¹⁴⁶. Moreover, as McMillan notes *Murphy* carried two qualifications. The first is that, if a building's defect remains a potential source of danger to persons or property on neighbouring land or on the highway, the owner could recover from the negligent builder the cost of obviating the danger and of protecting himself from liability to third parties¹⁴⁷. The second qualification is based on

143 See MacQueen 1990 SLT 227 and McMillan 1996 SLT 163 on the effect of *Murphy* in Scotland. The latter notes that there is scope for extending *Junior Books v. Veitchi* [1983] 1 AC 520, in Scotland, something MacQueen is very sceptical about.

144 1996 GWD 14-803. The proprietor of a building in Glasgow sued the the builders of an adjacent building for damage cause from rainwater flowing from an inappropriately positioned gutter pipe. He also sued the local authority because it issued a completion certificate for the work done which amounted to negligence to prevent the damage.

145 1996 GWD 14-804

146 One example was the authority of *Ross v. Caunters*. It is now, after *White v. Jones* obvious that *Ross v. Caunters* is good law. Hogg notes that the decision in *Murphy* had also left open the question of the authority of *Morison Steamship Co. Ltd. v Greystoke Castle* [1947] AC 265, where, although the cargo had not been damaged, the owners of the cargo were held to have a claim against the owners of the colliding ship (which was party to blame for the collision, for general average expenditure incurred. (Hogg, 43 (1994) *IntComLQ*, 116-141. at 121).

147 [1990] 2 All ER 926B by Lord Bridge). The case was taken in *Morse v. Barret* 9 (1992) ConsLJ 58. McMillan 1996 SLT 160.

the fact that their Lordships in *Murphy* failed to reject the 'complex structures' theory according to which different parts of a complex structure, for example a building, can be considered as other property¹⁴⁸. Damages to ancillary equipment could be recoverable under this view. As MacQueen notes¹⁴⁹, the potential of the theory was evidenced in *McLeod v. Scottish Special Housing Association*¹⁵⁰. The theory was seen positively by Lord Coulsfield who thought it plausible to distinguish between the outer skin of a building and an insulation system, subsequently installed, which was not part of the original design. The 'complex structures' concept might be of considerable importance as regards extensions renovation or improvements in a building, something quite common in Scotland. However, the concept was not used in either *Parkhead Housing Associations v Phoenix Preservation Ltd.*¹⁵¹ or *Sutherland v. MacTaggart & Mickel Ltd.*¹⁵² Nonetheless, despite fully justified criticism on the 'complex structures' concept¹⁵³, the potentially greater appeal of the concept in Scotland, in comparison to its appeal in England, is evidence of a more serious discomfort with *Murphy*, and with the current law of pure economic loss in general in Scotland. It would of course be unwelcome to see Scottish courts resort to the 'complex structures' theory in order to award damages for pure economic loss.

3.4. Third party loss: Privity oriented retreat from *Junior Books*.

148 See Wallace, 107 (1991) LQR 35 and the reference in a previous footnote.

149 1990 SLT 340

150 1990 SLT 749. The internal insulation of a SSHA house has been replaced in 1080. *McLeod*, a tenant, bought the house in 1984, and in 1987 it became apparent that the steel cladding of the house was deteriorating because condensation was building up behind the insulation. The claimant argued that the cladding was 'other property'. The claim was rejected on other grounds.

151 1990 SLT 812. The case involved the installation by a subcontractor of an of an allegedly defective damp proof course

152 Glasgow Sheriff Court 14 June 1990, (McQueen 1990 SLT 340). The case involved defective foundations, due to its natural indefinability

153 The theory allegedly lacks coherence allowing possibly recovery in some cases and not in others without clear, substantiated criteria. Wallace 105 (1989) 72. Moreover, the concept might conflict with the strict liability introduced with the Consumer Protection Act 1987. Not surprisingly therefore in *Murphy* Lords Bridge, Oliver, Ackner and Jauncey renounced the theory. (Lords Keith and Brandon were more open to the idea and Lord Mackay expressed no view.).

The decision in *Junior Books v. Veitchi*¹⁵⁴, by far the most interesting in recent times¹⁵⁵, held a building subcontractor liable to the owner for defective but not dangerous flooring.

The court in *Junior Books* took a pragmatic approach in founding a duty of care. Neither the owner's nomination nor reliance were necessary¹⁵⁶; the defender's awareness that his careless behaviour would result to the pursuer suffering economic loss was crucial.

In order to establish proximity¹⁵⁷, the court laid emphasis on the series of interrelated contracts existing at the time of the negligent behaviour, as is often the case with third party loss situations. It was thought that when a series of contracts links pursuer and defender¹⁵⁸ the latter is under a duty towards the pursuer not to be careless in the performance of his contract with another person¹⁵⁹.

154 [1983] 1 AC 520, [1982] 3 All ER 201, [1982] 3 WLR 477 (HL).

155 See Amin 1982 SLT (News) p.61, on the cautiousness *Junior Books* was received with.

156 The fact that the defender was nominated in the contract between the pursuer's architects and the main contractor as well as the pursuer's reliance upon the defender's expertise which was to the defender's knowledge, were treated as mere evidence of the defender's awareness that his careless behaviour would result to the pursuer suffering economic loss. See Wilkinson, and Forte, 30 (1985) *JR*, 14, 18.

157 The eight points Lord Roskill considered as significant in order to establish proximity were; (1) The appellants were nominated sub-contractors. (2) The appellants were specialists in flooring. (3) The appellants knew what products were required by the respondents [*Junior Books*] and the main contractors and specialised in the production of those products. (4) The appellants alone were responsible for the composition and construction of the flooring. (5) The respondents relied on the appellants' skill and experience. (6) The appellants as nominated subcontractors must have known that the respondents relied on their skill and experience. (7) The relationship between the parties was as close as it could be, short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss.", 1982 SC (HL) at 277.

158 A "contractual nexus" in the words of Thomson, *Delictual Liability*, 79.

159 The duty exists when the defender knows the identity of the pursuer and he is a part of the contractual structure as well, and would foreseeably be injured as a result of a chain reaction following the defender's careless performance. As Thomson, 110 (1994) *LQR*, 363: puts it: "What is crucial is that the defender must know that the pursuer is part of the contractual structure and will suffer economic loss as a result of the defender's failure in the performance of his contract with a party in the chain, who, consequently, will render defective performance of his contract with the pursuer, or another party in the chain, who, in turn, will be unable to render proper performance of his contract with the pursuer." (p.362).

The subsequent narrowing down of the scope of *Junior Books*¹⁶⁰ was presented as a reaction to the threat "to turn the tort of negligence loose"¹⁶¹. The courts were at odds with the peculiar interface between contract and delict¹⁶² in *Junior Books*¹⁶³ where

160 In *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, the plaintiffs were the main contractors to build a new palace for a sheikh. The latter's architect stipulated that the defendant's glass would be used in the curtain walling of the building. The subcontractor who undertook the erection of the curtain walling used the defender's glass with great reluctance. The glass proved defective and the sheikh refused to pay the main contractors until the glass was replaced. The main contractors who suffered economic loss turned against the defender. The Court of Appeal found that the defender did not owe a duty of care to the plaintiff, although it was foreseeable that they would suffer loss if the sheikh was not satisfied with the curtain walling, since the plaintiffs had not relied on the defender and were not the ones who nominated the defender.

In *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177, the Church Commissioners owned a block of flats built by the main contractors who subcontracted the plaster work. The latter was defective but not a source of danger. The person who leased the flat after construction, turned against the main contractors, among others. The Court of Appeal reversing the decision of the court of first instance held that the main contractor and the subcontractor owed no duty of care to the lessee to prevent economic loss caused by the defective plaster.

In *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396, the plaintiffs engaged contractors in their premises. The piling work was subcontracted. The plaintiffs however entered a separate agreement with the subcontractors for the exercise of all reasonable skill and care, and to avoid an extension of the completion time by the contractors. The drilling operations caused damages to an adjoining restaurant. Following a dispute on the redesign of the piling works the completion of the works was delayed. The plaintiffs sought the additional expenses they had to pay to the contractors. The official referee found for the plaintiffs, but the Court of Appeal reversed the decision, arguing that there is no general liability in tort for pecuniary loss dissociated from physical damage". See Logie, 1989 JR 5.

The retreat from *Junior Books* was celebrated by some commentators. See Stephenson, I.S. "Goodbye to *Junior Books*", (1988) 138 *New Law Journal*, p.483; "rarely can a House of Lords decision have been explained and extinguished virtually out of existence with such rapidity". Commenting on *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, he underlines Bingham LJ's position that the claims beginning with the sheikh could be pursued down the contractual chain, and dismisses any future usefulness of the *Junior Books*.

161 Stanton, 44 (1991) *CLP*, 85. The common "floodgates" argument was resuscitated. In *Junior Books* Lord Fraser referred to the floodgates argument as a concern in the U.K. and elsewhere and gave the example of the famous American case of *Ultramares Corporation v. Touche* (1931) 174 NE 441, and Cardozo's CJ, apophthegm therein ([1983] 1 AC 520, 532). See Wilkinson, and Forte, 30 (1985) *JR*, 23, referring to the case of *Robertson v. Turnbull*, 1982, SLT 96, which seems to reject the approach taken in *Junior Books*.

162 See Blom "Fictions and Frictions" 143 and Fridman, 93 (1977) *LQR* 422-449.

163 This latter point was successfully criticised by Goff L.J. in *Muirhead v. Industrial Tank Specialities*, [1986] QB 507.

delictual/tortious liability was based on the underlying contracts¹⁶⁴ and the tort was allegedly used to supplement and extend the use of the contract¹⁶⁵.

The reaction of the courts was more specifically motivated by the quest for the certainty that privity could guarantee¹⁶⁶. The trend has thus been described as a

¹⁶⁴ See Brodie "The Analysis of Negligence: Economic Loss and Assuming Responsibility", in *Scots law into the 21st century*, 204-213, at 208 predicting with certainty that *Junior Books* will be overruled "if an opportunity arises" as "there is judicial disquiet on the basis that the decision intrudes on the province of the law of contract".

¹⁶⁵ As Goff L.J. put it "under what principle are contractual terms, not from a contract between the parties, relevant in a claim for negligence". He goes on to consider possible principles among close proximity, reliance on the defender, reliance on the terms of contract with a third party to defeat claims. Proximity he notices is no more than a label to indicate the foreseeability of damage and in *Junior Books* the reference to a very close relationship could not have simply been a reference to proximity. Reliance as used by Lords Roskill and Fraser of Tullybelton could not be taken to mean, as in other instances, reliance on a person's special skills, but reliance on the defenders to install a floor which was not defective. Goff L.J. thinks it is difficult to reconcile the decision in *Junior Books* with that in *Hedley Byrne* which was based on the voluntary assumption of responsibility, as in the *Junior Books* the contract was formulated so as to avoid rendering the defender liable. In his interpretation of *Junior Books* he concludes that the strongest possible basis for the decision's reasoning is that of a very close relationship between the defender and the pursuer. ([1986] QB 507, at 526-528).

The decision in *Junior Books* is attached to the related contracts. The claim cannot be interpreted except in relation to the underlying voluntary arrangements. The damages sought and the quality standards applied were based on the contract to which pursuer and defendant were not parties. Allegedly the decision looks only at those parts of the contract which would justify the outcome; the price for example. The claim was for "quality complains"; however in the speeches the loss of profit and the cost for relaying were mentioned, the latter as part of maintenance costs for the defective floor. Lord Keith took the view that the operation of the pursuer's business at the less profitable level justified his claim for losses. However, the claim included damages for relaying the floor, an estimated cost of £ 206,000 while the value of the subcontract was £17,000. (See Rodger, in Birks, 68.).

The uneasiness in having a contract determine liability in negligence was expressed in a legal environment comparable to that of Scotland in the South African case of *Lillicrap, Wassenaar and Partners v. Pickington Brothers (SA) (PTY) Ltd*, South African Law Reports, 1 (1985), 475, which raised issues of concurrent liability. It was held that a breach of a contractual duty to perform professional work with due diligence was not *per se* a wrongful act for the purposes of Aquilian liability. The examples of a *concursum actionum* in SA law were limited to cases where contractual and Aquilian actions were independently satisfied. Grosskopf, A.J.A. noted that it would be difficult to combine the standards of a *bonus paterfamilias* with that found in the contract in question. He thought that it would be anomalous if *culpa* was governed by what has been agreed in a contract. See Rodger, in Birks 68. See on South African law Neethling, J. et al, and Burchell, J.

It was argued by McQueen 1990 SLT 338-340, if *Junior Books* is to be followed at all an extremely close relationship between the parties is required, which in *Junior Books* was established by the nomination of the subcontractor by the pursuer employer. See as well Fridman, 93 (1977) LQR 436-440, referring to the tort coming to the rescue of contract, and to the scope of the exception clauses.

¹⁶⁶ The uneasiness of the courts is an expression of the desire for limits to the financial exposure of potential injurers and for certainty and predictability in law. As Adams and Brownsword put it, "In the case of certainty, the overriding consideration is, quite simply,

reassessment of the contract against delict/tort¹⁶⁷ or rather a steering of the balance between justice and certainty back towards the latter¹⁶⁸.

The tendency had been deservedly criticised¹⁶⁹. It was emphasised that privity constraints had led the courts to resort to delict/tort for the compensation of those unfairly injured¹⁷⁰. The "floodgates" argument is clearly out of the question in most of the cases which depart from *Junior Books*, for example, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd.*¹⁷¹ and *D&F Estates v. Church Commissioners for England*¹⁷². The results reached were deemed unsatisfactory¹⁷³. The

that contractors should know were they stand. The lines of liability (both contractual and tortious) should be clearly drawn, and contractors should know whether particular provisions in particular contracts are ones upon which they can rely...". Adams, J.N. and Brownsword, R. "Privity and the concept of a network contract", 10 (1990)*LSt*, 26.

¹⁶⁷ In the opinion of Adams and Brownsword, 10 (1990) *LSt*, 26, these decisions signal a sift of the balance to contract and accordingly to privity. The tendency was further developed in attempts to delimit clearly delict/tort from contract

¹⁶⁸ Adams, and Brownsword, 10 (1990)*LSt*, 12-37, at 26. Characterising *Junior Books* as a case where the emphasis was on tort instead of contract, they reflect a more widely supported view, based on the fact that the *Junior Books* decision ignored the constraints of privity. On account of the retreat from *Junior Books*, Stanton thinks that "*Junior Books* threatened to turn the tort of negligence loose as a remedy whenever foreseeable economic loss was suffered." (Stanton, 44 (1991)*CLP*, 85). Stanton explains the retreat from *Junior Books* as a part of a broader socio-economic process, expressed in the field of professional negligence with the emphasis on protecting the professions and resulting to the dominance of doctrine. He argues that the decline of *Junior Books* did neither bring stability of relieve from complexity. However, "for the foreseeable future the balance has shifted towards using contract" (106).

There seems to be no account of such a trend in American law. It might be difficult to really notice a single dominant trend amidst a number of co-existing directions. The fact is that the cases where as a matter of policy liability was rejected, usually, as *Robins Dry Dock* involving destruction of an environmental character and subsequent losses to individuals, concern catastrophic losses. Certainly a retreating trend as in English law is not traceable as regards third party loss. See under "Tort v. Contract: Tort parties and pure economic loss", in Chapter 4, and the conclusion that generally there is compensation in cases involving "triangular configurations", or in "tripartite exchange relationships". See in the footnotes in the same unit for an account of the catastrophic loss cases.

¹⁶⁹ Adams and Brownsword, 10 (1990)*LSt*, 13, Stanton, 44 (1991)*CLP*, 83, Logie, 1989 JR 5.

¹⁷⁰ In circumstances like *Junior Books* or *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, for instance.

¹⁷¹ [1988] 3 WLR 396.

¹⁷² [1988] 2 All ER 992, HL, [1989] AC 177.

¹⁷³ The rationale of these decisions is actually unjustifiable. Thus Logie notices that the decision in *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177, gives rise to the possibility that if someone is physically injured by the negligent work of a builder he can recover damages but if he puts right the defect before he suffers any such damage or injury he can recover nothing for the expenses he made. Provided the decision in *Junior Books* was based on the closeness of the relationship between pursuer and defender, then it is difficult to explain the rationale in *Greater Nottingham Co-*

law has not become clearer or less complex with the retreat from *Junior Books*, nor has the allocation of risks become more effective¹⁷⁴. As noted, it is not enough, after all, that privity is "a model of clarity"¹⁷⁵. It must lead to rules which make sense¹⁷⁶ with respect to their consequences¹⁷⁷.

Junior Books caused no problems from the point of view of Scots law of delict¹⁷⁸ and it was followed in Scotland -- unlike in England¹⁷⁹ -- albeit with uncertain conviction¹⁸⁰. It

operative Society Ltd. v. Cementation Piling and Foundation Ltd, where there was a direct contractual link between the two. (Purchas L.J. noticed the absurdity, [1988] 3 WLR 396, at p.413.).

¹⁷⁴ "all those who believe that whatever the results derived from the law, sophisticated players will negotiate bargains which will reflect an efficient allocation of resources must despair at the current picture resulting from the retreat of tortious professional negligence liability in the construction industry". Stanton, 44 (1991)CLP, 106.

¹⁷⁵ Adams and Brownsword, 10 (1990)LSt, 26.

¹⁷⁶ Thus the rule established in *D&F Estates v. Church Commissioners for England* [1988] 2 All ER 992, HL, [1989] , releasing builders from liability for their negligent acts can hardly make sense in relation to banker's liability for their negligent misstatements as established in *Hedley Byrne*. The rule failed to make the law certain and predictable .

¹⁷⁷ "If the law of the 1970's opened too many doors without sufficient regard to the consequences, the law of the late 1980's and early 1990's may well have shut the doors with a similar disregard", Stanton, 44 (1991)CLP, 107.

¹⁷⁸ As there would be no difficulty to reach the same conclusion in Greek and French law of delict. Recall the three attempts by the French courts to apply contractual solutions in cases of groups of contracts. One of these case involved subcontracting, namely liability for the subcontracting of the production of a film where one of the subcontractors lost the negativesThe Plenary Assembly of the Supreme Court put a, temporary at least, end to this development in a 1991 case involving the liability of a plumber subcontractor in respect of defects in the plumbing to the employer. See Whittaker, 15 (1995) *OxfJLSt* 328-369, at 354-357. French law on the areas immediately involved, a general clause in delict and a contract in favour of third parties is not much different from Scots law. See on the issue of the "groupes de conrats", Witz, C. and Wolter, G. in ZEP, 1 (1993) 592.

¹⁷⁹ McQueen argues that it seems that the decision has never been actually followed in England, referring to evidence from , *Ernst & Whinney v. Willard* 1988 CLJ 292, *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396 and *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177. McQueen 1990 SLT 339.

¹⁸⁰ The point is made by McQueen 1990 SLT 339-340. *Junior Books* was applied in *Norwich Union Life Insurance Society v. Covell Matthews Partnership*, 1987 SLT 452, where the owner of land turned against the architect employed by the tenant, and the main contractor and subcontractors who had undertaken to build a warehouse on his land; and in *Parkhead Housing Association v. Phoenix Preservation Ltd*. 1990 SLT 812 involving the liability of a specialist subcontractor to the employer in a building (renovation) contract for defective damp proof course installed in the pursuer's property. In the former Lord McCluskey thinks that the case is indistinguishable from *Junior Books* and in the latter Lord Proser makes a number of points focusing on the proximity created by the contractual nexus and the validity of *Junior Books*. McQueen contradicts this view with the decision in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, in the first degree, (now 1989 SC 412, 1992 SLT 244), where delictual were excluded from proof. *Junior Books* it was held was a special

was predominantly in the House of Lords that the decision and its potential effects caused uncertainty. It proved more resilient than *Anns*¹⁸¹ as it was not -- surprisingly in some views -- overruled together with the latter¹⁸². It has arguably greater validity in Scots law than in English law, especially if the doubts over *Murphy's* authority are taken into account, particularly those doubts based on Scottish decisions¹⁸³. First the privity motivated retreat from *Junior Books* is, arguably, less effective as far as Scots law is concerned as there are no privity or consideration doctrines in Scots law¹⁸⁴. In any case, the arguments focusing on legal certainty are unsatisfactory, as they do not reflect the situation in many third party pure economic loss cases.

Moreover, as will be discussed, the dependence of tort upon contract in decisions awarding damages, should cause fewer doctrinal problems in Scots law where there is substantially greater interchangeability between delict and contract, especially in third party loss cases¹⁸⁵. Contractual considerations have been taken into account in decisions in delict, and delict has been examined alternatively to JQT¹⁸⁶.

decision with special features of proximity and reliance, while the contractual structure in this case pointed away from any duty of care. As McQueen notes there is no confirmation of the status of *Junior Books* by the House of Lords -- preferably the Scottish House of Lords --, and the situation in Scottish case law is uncertain.

181 In Rodger's view *Junior Books* departed from the *Anns* test, which admittedly placed considerable burden on the defender (Rodger, in Birks, 64-70. Logie thinks however that Lord Roskill applied the *Anns* test (Logie, J. G. "The final demise of Junior Books?", 1989 JR, 6).

182 On the idea that *Junior Books* applied the *Anns* principle. See McQueen 1990 SLT 338. Among others, he raises the point of whether a Scottish authority could be overruled in an English appeal.

183 See the previous reference under "The effect of *Caparo* and *Murphy* on Scots law.". See McQueen 1990 SLT 227, McMillan 1996 SLT 160. The latter notes that there is scope for extending *Junior Books v. Veitchi* [1983] 1 AC 520, in Scotland, something McQueen is very sceptical about.

184 The retreat from *Junior Books* could be related to the privity doctrine of English law. From another point of view, the fact that, *Donoghue v. Stevenson*, and *Junior Books* are not exceptional to Scots law and were easily reached by the courts can be attributed to the absence of a privity doctrine in Scots law.

185 On the issue of interchangeability see under "Suggested reform: Increased contractual input" in Chapter 7.

186 The practical benefits, indeed the need for taking contract into account, have been underlined in other chapters and will be looked into in relation to Scots law. The comment here concerns the doctrinal organisation of Scots law.

Furthermore, evidence from case law on pure economic loss¹⁸⁷ and from the overall position of third parties in the Scottish civil liability system will be provided, indicating that the retreat from *Junior Books* had limited impact on Scots law. Again the purpose is to illustrate a distinguishable tendency, yet not to place a disproportionate weight upon *Junior Books'* authority¹⁸⁸.

¹⁸⁷ See *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244 and *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*, 1992, SLT 89. In the latter case a diver instructed by the pursuers to perform certain diving operations in an oil rig in the North Sea perished. His widow raised an action against the pursuers and certain associated companies in the USA, for their omissions which allegedly had led to the diver's death. The action was settled in the USA. An assignation was granted in favour of the pusuers by a co-defender in the USA action. The pursuers then raised the present claim against the company providing the safety ship, the owner and the manager of the ship which had failed to pick up the diver. The pursuers sued in their own right and as assignees. The Lord Ordinary (Prosser) held that the pursuers had not relevantly averred the existence of a duty of care of the company providing the safety ship towards the diver, as was necessary, and they had not demonstrated the foreseeability by the defenders of the fact that the pursuers and the cedents would have to accept liability towards the diver's widow. The claim could not exist separately from any duty of the defenders to the diver and, that not being the duty averred, the claims in reparations were irrelevant as being derivative and secondary. The action was dismissed. It is interesting that the court thought that the existence of a contractual relationship could create sufficient proximity to lead to delictual liability and that there was no fundamental difference between claims arising from physical damage and claims where the damage was monetary or economic. In *Scott Lithgow v. GEC Electrical Projects Ltd* and in *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)* Lords Clyde and Prosser respectively refused to dismiss as irrelevant the pursuers' averment based on *Junior Books*. Their Lordships went on to interpret the circumstances where a *Junior Books* duty of care would arise. (See Thomson, "A prophet not rejected in his own land", 110 (1994) LQR, 361.).

In *Norwich Union Life Insurance Society v. Covell Matthews Partnership*, 1987 SLT 452, Lord McCluskey followed the basic principles of *Donoghue* and rejected the English decisions trimming the foundations of *Junior Books*. He held that although reliance was important in some cases of pure economic loss, it was not indispensable for the recovery of economic loss. He held that the nomination of the subcontractor in *Junior Books* was not essential to the decision. He sought to establish proximity on the basis of whether the pure economic loss was a foreseeable consequence of the defender's negligence. It is doubtful whether this decision survives later decisions which diminished the effect of *Junior Books*. such as *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396 and *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177. See Logie, 1989 JR 12-15.

See also *North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2)*, 1988 SLT 778, *Parkhead Housing Association v. Phoenix Preservation Ltd*. 1990 SLT 812, *Armstrong v. Moore* 1996 GWD 14-803, and *Taylor v. City of Glasgow District Council*, 1996 GWD 14-804,

¹⁸⁸ See McQueen 1990 SLT 339, stretcing that "the survival thus far of *Junior Books* should not be pressed too far", as "its career as a precedent has been as chequered as that of *Anns*", and as it following in Scots case law is ambivalent.

As will be argued, these factors assessing the validity of *Junior Books* correspond to a doctrinal background that makes enhancing protection for pure economic loss and the expansion of contract, at least, less objectionable in Scotland by comparison to England.

3.5. Third party pure economic loss: Contractual approaches.

Remarkable from the point of view of Scots law is the steady incorporation of concepts, criteria and considerations based on contract, thus creating a contract-like approach in third party pure economic loss.

What brings together *Hedley Byrne*¹⁸⁹ and *Junior Books* in the search to establish proximity is not the pursuer's reliance¹⁹⁰ or the defender's knowledge of this reliance.

¹⁸⁹ See Oughton 1 (1995) *Contemporary Issues in Law* 24-25, noting that *Hedley Byrne* is not the final word on the circumstances where a duty of care is created. Other approaches have been developed, such as the three stage test in *Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd* [1985] 2 AC 210, namely that the loss must be reasonably foreseeable, that there should be a close relationship between the defendant and the plaintiff and that it must be fair and reasonable to impose a duty of care. The test itself indicates the appeal of a *Hedley Byrne/Junior Books* type of situation and of the assumption of responsibility device. Oughton refers to the recent trend of incrementalism as the abandonment of any guiding principles and establishing novel duty situations by analogy to existing ones.

¹⁹⁰ Lords Fraser and Roskill attempted in *Junior Books* to link the decision to *Hedley Byrne* focusing on the pursuer's reliance which is often referred to as the legitimising reason for establishing proximity. Lord Roskill after laying out the 8 factors the decision should take into account, turns to Lord Devlin's speech in *Hedley Byrne*, which focused on the plaintiff's reliance. Wilkinson, and Forte, 30 (1985) *JR*, note in summary that close relationship between the pursuer and the defender, foreseeability of damages and reliance on the defender's skills were treated as elements of proximity by Lords Roskill and Fraser of Tullybelton (14).

In *Murphy v. Brentwood District Council*, [1990] 2 All ER 908 Lord Keith focused on reliance referring to *Pirelli General Cable Works Ltd v. Oscar Faber & Partners*, [1983] 2 WLR 6, a case where the alleged breach of duty constituted a breach of contract as well, and to *Junior Books*; considering thus that both cases fell under the principle initiated in *Hedley Byrne*. Lord Bridge the only other judge in *Murphy*, who referred to the *Junior Books* focused instead on the relationship of proximity existing in this case. This emphasis has been rightly criticised since reliance was not the single most important criterion in *Junior Books*; reliance was actually shown by the architects employed by the pursuers, who are not in the general understanding agents but sub-contractors. Reliance has generally an ambivalent meaning: Goff, L.J. (as he then was) in *Muirhead v. Industrial Tank Specialities Ltd.*, [1985] QB 507, [1985] 3 WLR 993, [1985] 3 All ER 705 (CA), notices the problems reliance might cause and wonders why it is treated as significant and which is its content.

Stapleton thinks that reliance as a legitimising reason to award damages is a slippery concept. If a decision is in favour of a duty, reliance is emphasised upon and if it is against the existence of a duty then reliance is downgraded. In various cases one suffers for the reliance (and not because of the transaction in question). The reasonableness of the reliance is important, although, in Stapleton's view, it gives no convincing reason as to why

These concepts reflect the decision's acknowledgement of a voluntary assumption of responsibility on which a duty of care is based: "The assumption of responsibility is the central question to which, in the ultimate analysis, the proximity test is directed."¹⁹¹ Reliance¹⁹² illustrated the existence of a relationship on which the assumption of responsibility can be based and, in some cases, it activated this assumption¹⁹³. Therefore, it is not true that the voluntary assumption of responsibility is "no more a bright line test for

a duty should be inferred. (Stapleton, Jane "Duty of Care and Economic Loss: A Wider Agenda", 107 (1991) LQR, 283-284.)

It has been noted that reliance may "be an imposition on the person on whom reliance is placed..." or, where reliance is placed gratuitously on someone "...one may hesitate to say that responsibility is assumed in the sense that it will carry with it legal consequences...". It was perhaps to meet difficulties of that kind that in *Hedley Byrne* and *Junior Books* a special or close relationship between the parties, which in these cases approximated to contract, "was desiderated as an essential element of proximity.". (Wilkinson, and Forte, 30 (1985) JR, 16).

As Feldthussen observes "If one takes the foreseeable reliance test seriously, it follows that the prudent expert should either keep silent altogether, or speak after disclaiming liability." (43). The concept, he argues, is inherently ambiguous. Reliance might not be matched by an expectation that the defender will be liable. Moreover, information in particular might be available to a large number of people and it might be difficult to assess to whom the duty is owed. (44-45). Feldthussen, *Economic Negligence*. See as well Rodger, in Birks 66.

It was easy to accept reliance in *Hedley Byrne* or in *Pirelli General Cable Works Ltd v. Oscar Faber & Partners*, [1983] 2 WLR, 6, where the plaintiffs turned in tort against the firm of consulting engineers the plaintiffs had employed to advise on and design an addition to their factory premises, after they had to undergo expenses for the repair of a chimney which was one of these additions. This is not the case with *Junior Books*: As Goff, L.J. observed in *Muirhead v. Industrial Tank Specialities Ltd.*, [1985] QB 507, [1985] 3 WLR 993, [1985] 3 All ER 705 (CA), the voluntary assumption of responsibility on which the decision in *Hedley Byrne* was made could not be easily reconciled with the *Junior Books* where the aims of the contract was to limit liability. The same applies for *Murphy v. Brentwood District Council*, [1990] 2 All ER 908.

See the references in Smillie, 32 (1982), UTLJ 258-259, and Feldthussen, *Economic Negligence*, 18-19, and 132 et seq, for the similarities between cases involving negligent misstatements and those involving negligent provision of services from the point of view of negligence causing pure economic loss. Smillie already before *Junior Books*, had noticed that neither reliance or knowledge of the undertaking, or knowledge of the pursuer by the defender are essential for liability.

¹⁹¹ Wilkinson, and Forte, 30 (1985) JR, 17. The critical question is not on the otherwise attractive concept of reliance but on whether the defender "can be said to have assumed responsibility towards the pursuer." (15)

¹⁹² That is, reliance on the defendant's skills. In the context of pure economic loss something more than general reliance is meant. Wilkinson, and Forte, 30 (1985) JR, 15-16.

¹⁹³ Thus, foreseeable and reasonable reliance is an indication of the voluntary assumption of responsibility. "One can postulate cases, apt to fall within the ambit of liability, in which, while the pursuer is foreseeable as the person likely to suffer loss, the assumption of responsibility by the defender is activated by reliance placed in him by someone other than the pursuer.", Wilkinson, and Forte, 30 (1985) JR, 16.

the duty of care than are the special relationships or reasonable reliance approaches"¹⁹⁴. It represents a contractual analysis in a delict situation which would be at ease with Greek and French laws and is doctrinally compatible with Scots civil liability law¹⁹⁵, at least to a far greater degree than with English law.

The voluntary assumption of responsibility¹⁹⁶ has been the single most important basis in awarding damages for third party¹⁹⁷ pure economic loss¹⁹⁸. It is the basic vehicle

¹⁹⁴ Feldthussen, *Economic Negligence*, 47.

¹⁹⁵ Basically because the Greek, french and Scottish systems emply a general delictual clause and a contract in favour of third parties mechanism. As said in the chapter on Greek law (Chapter 3), contractual solutions are compatible with Greek law (see under "Is the contractual approach advantageous?" in Chapter 3). Recall the temporary application of Contractual solution in cases of third party loss when more contracts are interrelated (groups of contracts). See Whittaker, 15 (1995) *OxflLSt* 328-369, at 354-357.

¹⁹⁶ According to von Bar the concept was first employed by Lord Reid in *Hedley Byrne* [1964] AC 465 at 487. Von Bar criticised *Chandler v. Crane, Christmas and Co* [1951] 2 1 All ER 426 (CA), considering that it was decided wrongly since it was "a typical case of agreeing to assume responsibility". (von Bar, Christian in Markesinis, B.S., 111.).

Lord Browne-Wilkinson, discussing the concept of th assumption of respomsibility in *White v. Jones*, [1995] 1 All ER 691 (HL), notices that the concept "... having been invented by your Lordships' House in *Hedley Byrne*, its genesis is to be found in *Nocton v, Lord Ashburton* [1914] AC 932, [1914-15] All ER Rep 45." (712) where it was held that the defendant solicitor had breached a fiduciary duty owed to the plaintiff who was his client. (There was no need of proof of the solicitor's fraud as the Court of Appeal had requested.). In the words of Viscount Haldane LC "Whether such a duty has been assumed it is a must depend on the relationship of the parties...". Viscount Haldane LC referred to the same point in *Robinson v. National Bank of Scotland Ltd* 1916 SC 154. at 157.

See also Brodie in *Scots law into the 21st century*, 205, who notes on *Hedley Byrne*: "For a number of years *Hedley Byrne* tended to be viewed as a case about negligent misrepresentation only. But of late Lord Goff has indicated that the ratio of *Hedley Byrne* is best regarded as being about assumption of responsibility in general." (Lord Goff made these points in *Spring v. Guardian Assurance*, [1995] 2 AC 296, *Henderson v Merret Syndicates* [1995] 1 AC 145, *White v. Jones* [1995] 2 AC 207.).

¹⁹⁷ Involving usually negligent misstatements and performance of services. Feldthussen, *Economic Negligence*, speaking on negligent misstatements argues that there is no single test to predict when the courts will recognise a duty of care. The "special relationship" argument which is often used is basically a conclusory label. Two approaches dominated Commonwealth case law. One was to ask whether the defendant , under the circumstances had voluntarily assumed responsibility for the information or advice, and the other to ask whether the defendant ought to have known that the plaintiff would reasonably rely on the information or advice. The same facts were relevant in both approaches. (31-32). Reliance however, apart from being a vague concept, is in many cases, especially those involving the provision of services, not necessary for the establishment of liability.

¹⁹⁸ Feldthussen (*Economic Negligence*) identifies three closely related approaches the Canadian courts are following in cases of negligent mistatement, the first focusing on foreseeable and reasonable reliance, the second focusing on voluntary assumption of responsibility, and the third focusing on a special relationship. The latter collapses into either of the first two. The Supreme Court has not find it necessary to choose either of these two. Felsthussen shows his preference for the voluntary assumption approach. He looks

to deliver protection in cases which the courts perceive as involving voluntary relationships¹⁹⁹ similar to contract²⁰⁰ and was not thought of as a mere alternative to other criteria. Notably, the emphasis is on the relationship and not on the approximation to contract²⁰¹. As said, British courts, like their American counterparts, have in fact distinguished three-party situations²⁰².

The voluntary assumption of responsibility provides the more consistent evidence of the use of contract-like considerations in delict²⁰³. The concept, employed initially in

again on voluntary assumption of responsibility when referring to cases involving negligent performance of a service, whether there is a direct (p.134) or an indirect (p.138) undertaking to perform. He notes that with regard to negligent misrepresentation, even if reliance is a reason to recognize a duty the basis of the duty is different; "the reason *why* the law recognizes a duty is not at all the same thing as the *basis* of the duty which it then chooses to recognize". (p.46). Reliance could be simply absent as in the case of the negligent solicitor who drafted a void will (p.143.).

¹⁹⁹ It is due to the nature of the situations in question that the concept bears "as close a relationship to the law of contract as to personal injury negligence law. Feldthussen, *Economic Negligence*, 77. Fethussen speaks for the case of negligent misstatements. However his arguments apply for many cases involving an undertaking the defender was performing, primarily cases of provision of services. He notes as well that in this area the contract-tort distinction is not helpful.

²⁰⁰ This similarity has been duly assessed in *Junior Books* and *Hedley Byrne*.

²⁰¹ "To treat approximation to contract in itself as essential to proximity would be akin to reverting to the much criticised notion that the ambit of delictual liability is, in cases of pure economic loss, bounded by the contractual relationship."; Wilkinson, and Forte, 30 (1985) *JR*, 17.

²⁰² As said, there is usually liability in cases of a so-called "triangular configuration". See Craig, referring to *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), and *International Products Co. v. Erie R. Co.*, (1927), 155 N.E. 662, where the principle of the former was endorsed; a warehouse proprietor had negligently misinterpreted the place of storage so that the plaintiff could not recover on his insurance when the warehouse burned down (Craig 92 *LQR* 197 239). It is also described as "tripartite exchange relationships" (Harris & Veljanovski in *Furmston*, 59) involving that is a voluntary transaction existing before the damage where the class of people likely to suffer injury is limited and predictable. The injured party is often a third party beneficiary. These instances include attorney liability, insurance, franchising or construction.

²⁰³ See also the reference in Jaffey, J.E. "Contract in tort's clothing", 5 (1985) *LSt*, 77 who makes a consistent account of tort cases involving services of poor quality. He notes on solicitor's liability to the intended beneficiary for failure to draft a valid will; "What is that but allowing the beneficiary to sue on the promise made by the solicitors to the testator.. ?" (p.88.) He described *Junior Books* as a case where a third party was allowed to sue on contract "under the aegis of the law of tort", (p.89), and distinguishes the latter case from *Anns* on the ideas that in *Junior Books* the contracts to which the defendant and the plaintiffs are parties are essential for the establishment of a duty of care. In *Anns* liability is independent of the contracts.

See Oughton 1 (1995) *Contemporary Issues in Law* 29-36 for a comprehensive account of the concept, involving the two recent cases in the House of Lords where reference to a test based on voluntary assumption of responsibility was made; *Henderson v. Merret Syndicates*, [1994] 3 *AllER* 506, and *Spring v. Guardian Assurance plc* [1994] 3 *AllER* 129.

negligent misstatement cases, expanded to negligent services with *Junior Books*. This can be explained on the basis of the distinct similarities between the two types of undertaking²⁰⁴. However, *Junior Books* advances the use of the concept, extending it to situations involving subcontracting²⁰⁵, where neither the defendant's consent nor reliance are evident, at least not in the same manner as in negligent misstatement cases²⁰⁶.

Despite criticism²⁰⁷ the use of such contractual considerations as the voluntary assumption of responsibility seems convincing for the cases where the litigants'

²⁰⁴ See for instance the discussion by Feldthussen of a single theory of liability for pure economic loss, examining Smillie's suggestion which is based on the defendant's undertaking. Feldthussen notices that this view works best with negligent misrepresentation, while "it will also explain accurately the recognition of a duty of care in many negligent performance of a service cases." Feldthussen, *Economic Negligence*, 18.

²⁰⁵ Where, it should be recalled, no JQT is accepted. See under "Development and Applications".

²⁰⁶ See Smillie, 32 (1982), UTLJ 258; "I submit that the fundamental principle upon which *Hedley Byrne* is based is not limited to negligent misstatements but extends to negligent performance or of failure to perform undertakings to provide services of a business or professional nature. Further proof of actual knowledge of and reliance ... should not be an invariable requirement of liability."

See under "The Capuzol 22 decision", in Chapter 2, on the progressive relaxation of the intention criteria in the contract with protective effects. Recall the progressive development of §328BGB and §410AK.

²⁰⁷ As said: "Correcting the law of torts by means of rules borrowed from the law of contract is not acceptable". (von Bar, Christian in Markesinis, B.S., 112.) It was thought that the voluntary assumption of responsibility test was vague, subjective and arbitrary, and could not apply to all cases of pure economic loss. It was also underlined that the concept involves the imposition of a duty, best suited for tortious situations and not for undertakings. Lord Roskill in *Caparo v. Dickman*, [1990] 2 AC 605 at 628, noted that the phrase was used to denote the existence of circumstances "in which the law will impose liability". Whittaker commented on the recent case of *Henderson v. Merret Syndicates*, [1995] 2 AC 145, where damages were awarded on a voluntary assumption of responsibility bases, that it was not explained what was so special to consider that the defendants (third parties) had assumed direct responsibility: "the absence of reasons for denying such a direct relationship does not provide a reason for its existence". (Whittaker, S. "Privity of Contract and the Tort of Negligence: Future Directions", 16 (1996) *OxflLSt* 191-230, at 204.).

There seemed to be a difference of opinions in the House of Lords as well. Thus Lord Griffiths in *Smith v. Eric S Bush* [1990] 1 AC 831, noted that "I do not think that voluntary assumption of responsibility is a helpful or realistic test for liability". See the differing opinions of the members of the court in the same case. See as well the criticism by Oliver J. in *Midland Bank Trust Co. v. Hett, Stubbs & Kemp*, [1978] 3 All ER 571, [1979] Ch. 384.

For a comprehensive account of the criticism, see Oughton 1 (1995) *Contemporary Issues in Law*, 29-33, confronting the relative arguments systematically. See also Brodie in *Scots law into the 21st century*, 209, who thinks that for such cases (with a strong relationship to a contract) the key might exactly lie in the evaluation of this contractual matrix.

relationship falls short of a contract²⁰⁸. The voluntary assumption of responsibility test was developed upon objective lines, namely an objective interpretation of the transaction²⁰⁹ even if this contradicts his subjective understanding²¹⁰. Contractual considerations will not necessarily render the defendant liable²¹¹.

The allegation that contractual considerations mask the imposition of a duty that is unsuitable for an undertaking is a doctrinal truism²¹². Liability is in any case imposed. "No one is liable ... because he wishes to be liable but rather because he *ought* to be liable"²¹³. This is evident in cases involving subcontracting where the objective

²⁰⁸ See Lord Devlin in *Hedley Byrne v. Heller* [1964] AC 465, who thinks that a voluntary assumption of responsibility exists in circumstances "in which, but for the absence of consideration there would be a contract" (p.529). Greater care would be required if there was no consideration to distinguish between the relationships which are of a contractual character and those which are not. The question in *Hedley Byrne* was "whether the appellants can set up a claim equivalent to contract and rely on an implied undertaking to accept responsibility." (p.532).

In an example by von Bar, when a service for which remuneration could have been demanded, but was not actually demanded, has been provided, the supplier should be liable as he would have to be under a contract. Remuneration might have not been demanded because usually the supplier obtains a different benefit which is in his view adequate. As von Bar notices "a level of care equivalent to that existing in a contract is expected of persons contacting third parties for the purpose of securing a pecuniary advantage for their own clients and who do so because they feel adequately rewarded under the terms of their relationship to their clients.", von Bar, Christian in Markesinis, 116

²⁰⁹ See the discussion under "The nature of *Drittschadensliquidation*" in Chapter 2, where it is thought that *Drittschadensliquidation* is one of the exceptions where compensation is calculated on the basis of the objective value of the loss (the market value of the worsening of the relative financial position), instead of the subjective value of loss referring to the loss as experienced by the injured party which is usually the basis for calculating compensation. The usual distinction with regard to the calculation of compensation is that between the subjective value of loss ("*subjective Wert*" often described as "*Interesse*"; which is usually equated with the injury suffered) and the objective value ("*objective Wert*" sometimes expressed as "*gemeines Wert*"). Larenz I, 385-389.

²¹⁰ Feldthussen, *Economic Negligence*, 50.

²¹¹ The exact terms and level of his liability would have to be examined in detail; the approach is equitable to the defender.

²¹² As Feldthussen, *Economic Negligence*, 49, footnote 122, observes, it is pure doctrine and perhaps questionable to argue that the imposition of liability is best suited for tortious situations. Physical damage is thus related artificially to pure economic loss cases.

²¹³ Once the basic idea of liability is expressed "it is only of secondary importance whether this principle is expressed using the language of the law of torts or the law of contract." von Bar, Christian in Markesinis, 116. As Oughton puts it "This analysis proceeds on the basis that there is a limited group of cases in which it does not seem to matter whether the duty to exercise reasonable care arises in contract or in tort. Typically such cases will include the supply of information advice or services by a professional or quasi professional person under a contract or in circumstances in which the relationship between the parties is very close often involving the development of some sort of direct dealing...". Oughton 1 (1995) *Contemporary Issues in Law* 35.

interpretation of the undertaking substitutes a true assumption of responsibility that is less likely.

The tendency to employ contractual considerations was criticised because it seems to distort the contract-tort relationship and not because it led to absurd results. The critique has been sufficiently confronted²¹⁴. As discussed, especially in the reference to American

The view taken in this statement is closer to continental systems as they employ a more unified perception of civil liability and consider statute law as the primary source of law. See under "Compensation law and third parties" in Chapter 2. There is liability in contract because it is sanctioned by legislation.

²¹⁴ See Oughton 1 (1995) *Contemporary Issues in Law*, 29-33. Criticism is basically focused on the fact that contractual and delictual liability are brought together. At first it was reasonably argued that the voluntary assumption of responsibility is unclear. In Oughton's view it could either indicate a promise to exercise reasonable care, or that the defendant voluntarily chose to exercise reasonable care or simply that the defendant chose to act in a particular way. Each of the possibilities progressively widens that gap between the areas traditionally governed by tort and contract.

As regards treating the voluntary assumption of responsibility as a promise Oughton sums up and contradicts the points of critique, which emphasise on the idea that the language of the voluntary assumption of responsibility is unsuitable for tortious liability. The argument that the voluntary assumption of responsibility can arise out of a relation of informality where no contractual liability would arise is not exact. The argument that the duty imposed on the defendant might conflict with duties owed to a third party as with holding an advocate liable towards a will beneficiary, ignores the fact that in this case the third party cannot change its mind and anyway, in the example, it is tortious liability the vehicle due to lack of privity in English law. The idea that in situations such as *Junior Books* the structure of the relationships aimed precisely against accruing duties in negligence, is confronted with the argument that such duties in the context of a network contract have been recognised in Scots law (*Middleton v. Douglas* 1991 SLT 726) and that anyway proximity could indeed be established in such a context. The voluntary assumption of responsibility test cannot provide answers to all cases; the argument that it can exist when a duty of care is based in statute does not undermine the concept. The argument that there might be liability if there is a disclaimer is not precise. It involves the case when the disclaimer is unreasonable. In *Hedley Byrne* no duty of care was owed because of a disclaimer, either the defendant did not voluntarily assumed responsibility or reliance was unreasonable. Finally the argument that liability could be owed to someone with whom the defendant has never communicated and people do not make promises to persons they've never met, could be confronted by pointing to the reality of liability for advertisement or of agents for undisclosed principals. In any case the voluntary assumption of responsibility concerns a pocket of cases where some sort of communication is possibly established. *Middleton v. Douglas* 1991 SLT 726, concerned claims by the owner of a house evicted by the local authority in order to have the house demolished, against the property agents and an architectural technician who had acted for them. There were two claims, one in delict in 1984, and one in contract by minute of amendment in 1990. The second claim was rejected as being in violation of the Prescription and Limitation (Scotland) Act 1973. What is to our concern here is the judgment that the alleged delictual duty of the property agents could not arise independently of the contract as there was no relationship averred which involved the giving of advice. It was tantamount to saying that there was a duty to take reasonable care to perform the contract.

law²¹⁵, contract ideas provide the proper context for the rationale of the decision and can lead to more equitable results for the defendant²¹⁶. The trend is reasonable given the nature of third party loss²¹⁷.

Such a trend is easier to justify in the context of the Scottish system than in English law. More accurately, in the former the trend readily has a meaning and doctrinal position which is not extreme and does not require strained legal construction or calling upon principles that would legitimise overturning the prevailing law. Such constructions were employed for overturning privity in English law, for the application of contract instead of delict in certain French decisions, and would have been employed for the application of

215 See under "Benefits from contractual solutions: An improved perspective" in Chapter 4.

216 In general the voluntary assumption of responsibility is not only popular but a reasoned and purposeful approach. (von Bar, Christian in Markesinis, 116.). The concept legitimises decisions on third party loss situations from *Hedley Byrne* to the recent *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506 and *White v. Jones*, [1995] 1 All ER 691 (HL). The conviction of the courts over the concept is evidence of the appeal of the contractual background.

As Feldthussen summarises on negligent misrepresentation, "This approach focuses on the defendant's consensual transfer of information or advice, albeit by an objective test, and leaves ultimate control of legal liability for misinformation with the speaker where justice and commercial efficiency demand to lie". Feldthussen, *Economic Negligence*, 77

Targeted on the objective interpretations of the defender's intentions and expectations, the approach can take into account the professional or special character of the performance involved, the interests (financial or other related) and the transaction's context for instance. It can be fair and economically reasonable from the point of view of the defendant's financial exposure. It seems just to hold liable the party who undertook to perform a service or provide information or advice for example. This party's responsibility should be increased as it possesses special skills or qualifications, and provides information or services in the course of his business, inviting reliance. It is furthermore just to hold such a party responsible as it usually has a financial interest in the transaction in question, or in this kind of transactions where he performs his undertakings.

Smillie thinks that it is economically desirable to distribute the losses and minimise social costs. He argues that in these cases the defenders will usually be providing services or advice professionally, and they can calculate the risk of their negligence and can insure or self-insure against liability, distributing thus the loss. Even if the defenders are not professionals or businesspeople, the pursuers are usually non-commercial persons anyway - usually consumers. These pursuers cannot easily calculate and insure against the risk of loss. This applies especially when the pursuers are small businesses. As far as deterrence is concerned, it is important to hold these defenders liable; otherwise there would be no deterrent effect in transactions where loss is frequently caused negligently. (Smillie, 32 (1982), UTLJ 255.)

217 See under "Suggested reform: Increased contractual input" in Chapter 7 on the need to take account of the contractual context in order to improve the relative solutions.

contractual mechanisms in Greek law²¹⁸. Particular Scots law provisions (absence of privity doctrine, JQT, *pollicitatio*, the broadly worded *culpa*), speak for a less rigid delimitation between contract and delict, a more unified perspective of civil liability. The effect of contract upon delict is not in any sense an oddity in third party loss cases in Scotland, as the decisions in *Scott Lithgow v. GEC Electrical Projects Ltd*²¹⁹ and in the secondary loss case of *North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2)*²²⁰ illustrate. Contract and delict are closer and more likely alternatives in third party loss cases in Scotland than in England. To a considerable extent, Lord Clyde used the same, arguments, rejecting both delict and JQT as the basis of the claim in *Scott Lithgow v. GEC Electrical Projects Ltd*²²¹.

To stress the argument further. the incorporation of contractual considerations in third party loss cases is, in a sense imposed in the Scottish system. Arguably, here private arrangements take priority and contract law is potentially expansive, in a manner similar to American law if not to a greater extent, since the Scots law of delict faces greater constraints in expanding²²². The flexibility of contract law (with a broader definition of

218 See Whittaker, 15 (1995) *OxfJLSt* 328-369, at 354-357, and the arguments under "Is the contractual approach advantageous?" in Chapter 3.

219 1982 SLT 244.

220 1988 SLT 778. Liability for the manufacturer's carelessness was in principle acknowledged, as the second pursuers, lessees of a helicopter, were deemed to be owners in substance, due to the onerous terms of the helicopter lease. They had more than lawful possession. (In *Nacap v. Mofat Plant Ltd*, 1987 SLT 221 it was held that the pursuers who had mere lawful possession of the damaged pipeline had no title to sue.). Under agreement with the helicopters owners, a finance company, the second pursuers undertook to maintain the helicopter, indemnify the finance company in case of damage or destruction of the helicopter, and replace or repair the helicopter. The helicopter was to be flown by the first pursuer a subsidiary company of the second pursuer. The finance company was under no duty to provide replacements for the case the helicopter was not operational. Due a manufacturing fault in the brakes, the helicopter caught fire and was destroyed. The pursuers turned against the helicopter manufacturers (first defenders) and the designers and manufacturers of the brakes (second defenders). The Lord Ordinary (Davidson) accepted the pursuers' title to sue. The claim was rejected, because the fire was not a reasonably foreseeable consequence of the design of the brakes. The pursuers sought to rely upon evidence led by the first defender to establish fault against the other defender. It was held that the pursuers had no averments relative to this evidence. It is doubtful whether the decision survives *Murphy v. Brentwood District Council*, [1990] 2 All ER 908.

221 1982 SLT 244.

222 See "Tort v. Contract: Third party and pure economic loss" and "Improving tort?" in Chapter 4.

contract and the JQT), the emphasis on the realisation of the private will, together with the fading of theoretically the wide ranging *culpa*, evidences this trend. By focusing on a narrow construction of the JQT (which the claimants will often bring forward in support of their claim²²³), the more unified perception of civil liability and the priority of private arrangement, would be ignored, to the detriment of fairness and efficiency in civil liability.

It seems that, not only is the choice of contract as the optimal vehicle for compensation in third party loss not as grave in Scotland as in England, but the private will/contract-based approach is a requirement Scots law sets, before delict can be examined. Contract has the priority in the Scottish system as in American law and, as will be discussed, the Scots law of contract has the potential to treat third party pure economic loss.

3.6. Third party loss in delict: Interpretations.

Different approaches favouring liability for pure economic loss draw a picture which is closer to Scots than to English law. It is thus a widespread view that liability in *Junior Books*²²⁴, does not focus on defective products or buildings²²⁵: Thomson's view that

223 This is the case with *Scott Lithgow v. GEC Electrical Projects Ltd*, 1982 SLT 244.

224 It was alleged that little analysis of general issues took place in *Junior Books*. Feldthussen, *Economic Negligence*, 147; "Instead the majority simply emphasizes the close proximity between the parties and the fact that the defendants knew exactly what was required by the plaintiff and knew that the plaintiff was relying on them to provide it." (p.148).

225 On the latter see Wallace, (1989) 105 LQR, 46 and Holyoak, Jon "Economic Loss in Product and Premises Liability Cases", 1988 *JBL* 139. See as well Shearer, 1983 SLT (News) 157 who examines *Junior Books* from a product liability point of view: "Now [in contrast to the law until then] it will be possible to recover from a negligent manufacturer compensation for financial loss caused by the need to replace a faulty product even if there was no danger to persons or their property", (p.160). Shearer notices however that there was a diversity of opinion and "an apparent inconsistency of approach" in the House of Lords. The judges, in Shearer's view, had succeeded in deepening the doubts as to the recoverability of damages in pure economic loss. See also Feldthussen, *Economic Negligence*, 170 "The Liability of the Non-Privy Manufacturer of a Defective Product": In *Junior Books* "the House seemed to extend the law to allow recovery in negligence even if the defects was not dangerous." (177).

The interpretation of decisions might generally be confusing. See in Giles and Szyszczak 11 (1991)*LSt*, 85-102, on the decision in *Murphy v. Brentwood District Council*, [1990] 2 All ER 908 which interpreted *Anns* as referring to the liability of the Local Authorities for a breach of a statutory duty. For a different perspective see Palmer, Norman "Assignment and Sub-contracting in Building Transactions", 6 (1993) *JCL*, 31.

the defender's duty was to avoid a violation of his contract²²⁶ is similar to MacGrath's²²⁷ observation that pure economic loss is compensated in cases involving negligent performance of an undertaking²²⁸, and to Smillie's or Felthussen's evaluation of *Hedley Byrne*²²⁹.

226 See Thomson, 110 (1994) LQR, 362-363. Thomson's description of the facts in *Junior Books* as involving a contractual nexus in existence at the time of the violation of a duty, applies to other third party pure economic loss cases especially when subcontracting is involved. This is true not only for triangular relationships, where pursuer and defendant are non-parties, contractually linked to same third party, (such are the triangles between owner-contractor-subcontractor, or company advisor-employing company-shareholder) but for cases such as that in a *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177, type of situation, where between the litigants there are more than two intervening contractual relationships.

See the pattern of relationships in *North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2)*, 1988 SLT 778, OH. See also Wilson in Gamble, (ed), 141-150.

227 MacGrath, M. "The Recovery of Pure Economic Loss", 3 (1985) *OxfJLSt*, 350.

228 Walker underlines on the law on interference with a contract that "Only if party knew or should reasonably in the circumstances have known, that the party induced was being induced to act in breach of a subsisting contract" damages should be awarded. Walker *Principles* 922.

In MacGrath's analysis a basic distinction was made between cases involving negligent interference with existing or prospect contractual or other economic relationships of the pursuer where, with certain exceptions, no liability exists, and cases involving negligent performance of an undertaking such as *Hedley Byrne* where liability exists. (The distinction is not absolute or tight however.)

The exception to the first of MacGrath's categories are important however. Such are, the recovery for consequential loss of profits, the recovery by charterers by demise for damage to the chartered vessel, the recovery where the plaintiff is engaged in a joint venture with someone who has suffered property damage.

A distinguished decision which could support the argument to treat *Junior Books* as a case involving negligent interference with a contract is the Australian case of *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"*, (1976-1977) 136 CLR 529. The dredge "Willemstad", in the course of its operations fractured an oil pipeline connecting an oil refinery with an oil terminal. The refinery and the pipeline were owned by a refining company. The terminal was owed by Caltex which, under agreement with the refining company, supplied crude oil to the refinery for processing. The refined product was delivered to the terminal. Caltex was the owner of the oil throughout, but the risk of loss or damage rested with the refiner. The damage to the pipeline was attributable to the negligent navigation of the dredge. The refiner recovered for the physical damage done to both the oil and the pipeline. Caltex sought to recover the expenses incurred in transporting refined oil from the refinery to the terminal while the pipeline could not be used. The High Court of Australia held that Caltex was entitled to recover damages from the dredge and the marine surveyor. The decision is a comprehensive authority from the point of view of the quality of the speeches made. Three of the judges noticed that although the case was for pure economic loss and, as a rule, damages are not recoverable unless consequential upon injury to person or property, in a case where the defendant had knowledge or the means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, damages are recoverable. Another member of the court held that where foreseeable economic loss arises from a physical effect on the plaintiff's property there is no bar to recovery on the ground only that the loss is economic. In MacGrath's view the case seems to stand in the middle of the torts of intentional interference with a contract and that of negligence. There is no knowledge requirement as in the tort of intentional interference. (MacGrath, 3

Whittaker's recent suggestion for the judicial creation of pockets of exception to privity in English law²³⁰; Brodie's acknowledgement of the inevitability of taking account of the contractual matrix²³¹; even Cartwright's²³² suggestions to extend the *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir*

(1985) *OxfJLSt* 358). The judges went through extensive examination of the relative case law, in England, Canada and the USA, and being aware of the practical problems involved tried "to develop a more restrictive formula than foreseeability, yet one that could be applied with certainty". (Feldthussen, *Economic Negligence*, 241.). However the five judges failed to agree as to the principles which should govern recovery for pure economic loss. The approach in *Caltex* was not followed by the Privy Council in *Candlewood Navigation Corpn v. Mitsui OSK Lines Ltd*, (the *Mineral Transporter*), [1986] AC 1, [1985] 2 All ER 935 -- appeal from the Supreme Court of New South Wales. (See in Feldthussen 235 et seq for the related case law.)

The possibility of recovery when the plaintiff is engaged in a joint venture with someone who has suffered property damage might not longer apply. In the Scottish case of *Wimpey Construction (UK) Ltd v. Martin Black And Co (White Ropes) Ltd*, SLT 1982, p. 239, the defenders supplied equipment to Hersent Offshore Ltd which was engaged in a joint venture with Wimpey Construction Ltd and Gem Hersent Ltd for the construction of a tanker terminal on the River Forth. The equipment failed, causing property damage and pure economic loss, the latter due to the delay to the construction programme. The defendant had been negligent in informing Hersent Offshore Ltd on the way the equipment should be used. Hersent Offshore Ltd was awarded compensation for its property damage and the consequential losses. The claim by Wimpey Construction Ltd was rejected as the company had neither a possessory nor a proprietary interest in the damaged equipment. There was no attempt to allow recovery because Wimpey Construction Ltd had a joint venture with Hersent Offshore Ltd, while the consequential damages awarded to the latter did not concern the damage to the joint venture.

Shearer notes that the Lord Ordinary possibly felt bound by *Dynamco Ltd v. Holland and Hammen and Cubitts (Scotland) Ltd*, 1972 SLT 38, 1971 SC 257, when deciding *Wimpey Construction (UK) Ltd v. Martin Black And Co (White Ropes) Ltd*. In the light of the rejection of the appeal in *Junior Books* case Shearer thought that these decisions might no longer be valid law. (Shearer, 1983 SLT (News) 159.)

²²⁹ See Feldthussen, *Economic Negligence*, 17 et seq., discussing a general theory for economic loss. Smillie, writing before *Junior Books*, notices that, in his view, *Hedley Byrne* could support the general principle that "a defendant who undertakes to perform a business or professional service a principal object of which is to protect or advance the plaintiff's economic interests will be liable to the plaintiff for purely economic loss caused by the negligent performance of or failure to perform that service. Smillie, 32 (1982), UTLJ 233. The same author observed on the basis of the relative liability that "The essential requirement is that the defendant knew or ought to have known of the particular economic interest held by the plaintiff, and a principal object of the task he undertook to perform was to protect or advance that economic interest." (259).

²³⁰ Whittaker, 16 (1996) *OxfJLSt* 191-230.

²³¹ See Brodie, in *Scots law in the 21st century*, 209, who notes however that "there is clearly the possibility of a period of uncertainty until there has been greater judicial discourse as to why various networks of relationships should be treated differently."

²³² Cartwright 10 (1996) JCL, 244,

*Robert McAlpine and Sons Ltd*²³³ principle²³⁴ (where the creditor was allowed to claim for the third party loss), and his hope for a recharacterisation of the plaintiff's loss in creditor's claims for third party loss in English law²³⁵; are indicative of the fact that the task of developing a pattern for the protection of third party pure economic loss might be easier in Scots law.

Thomson's suggestion that *Junior Books* represented an extension of the delict of intentional interference with a contract (or other economic relationship), to situations where the interference is unintentional but careless²³⁶ could be rejected for lack of solid

233 [1994] 1 AC 85.

234 Cartwright also refers to the the pending before the House of Lords *Darlington Borough Council v. Wiltshier Northern Ltd.* [1995] 1 WLR 68. His analysis is valid basically for English law, as he focuses on the privity-based principle that damages can be claimed by a party to the contract only. His article is very useful for a discussion of the difficulties caused when a direct third party claim is not recognised

235 As will be seen in the following chapter, Cartwright lays emphasis on the decision in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd*, particularly Lord Griffith's view that he could not accept that the recovery of more than nominal damages by the creditor could be dependent upon his having a proprietary interest on the subject matter of the contract at the time of the breach. The same view was accepted by Steyn LJ in *Darlington Borough Council v. Wiltshier Northern Ltd.* Cartwright argues that this approach could be applicable not only to contracts for the supply of goods and/or the performance of services as in *Linden* and *Darlington*, but also in contracts involving promises to pay money. Cartwright supports his arguments on the possibility for a change in the characterisation and quantification of the creditor's damages in third party loss cases with evidence from *Ruxley v. Forsyth*, [1995] 3 WLR 118, which was not a third party loss case. Cartwright suggests that the plaintiff's loss should be recharacterised so as to accept a general rule that the party is entitled to what he has agreed upon even if a third party would have benefited in economic terms. The two alternatives is first, to allow such claims as a narrow exception to the rule that the plaintiff can only claim damages that are his own as in *Linden*, and, second, Lord Griffith's view to characterise the loss as the plaintiff's. Cartwright 10 (1996) JCL, 244. Cartwright's views concern English law. They offer evidence or how simpler the treatment of third party loss could have been if based in Scottish doctrine.

236 In Thomson's view damage to the pursuer is caused from the chain reaction provoked by this violation as it affected other relationships of the pursuer. The loss occurred due to defective performance of the contract in which the defender was not a party. In the case of *Junior Books* the careless performance by the subcontractor led to the defective performance of the main contractor to the employer.

See Fridman, 93 (1977) LQR 425-427 who supports this extension of the tort of intentional interference with a contract, arguing that from an analytical point of view there should be no such objection.

See under "Introduction" where it is argued that were the injuring behaviour intentional there would be liability in tort/delict in any of the systems discussed. One of the possibilities as regards common law systems would be the tort of intentional interference with a contract. Apparently, however, only a small number of third party loss instances would be treated. As said, as regards the English and the other Commonwealth systems, if the loss is caused intentionally there third party will possibly be awarded

evidence²³⁷. However, the point highlights an attempt to overcome the doctrinal objections to third party loss. The purpose of the suggestions that delict should take account of contract law when based on a "planned transaction"²³⁸, that privity should be abandoned in the case of network contracts²³⁹ (meaning a set of contracts with an overall

compensation, through for example the tort of deceit or the tort of trespass to goods. In any case as can be seen from the diagram and the explanation provided in Tort law by Markesinis and Deakin, 1994, p.19 et seq., the third party will be protected in delict. The same applies for American law. Most likely some tort involving intentional interference with person or property, in the latter case the trespass to land or to chattels for example, will be fulfilled. See Keeton (ed) *Prosser and Keeton on Torts*, 5th edition, 1984, 33 et seq, and 67 et seq. In Scots law as well some of the intentional delicts, whether those affecting person and property, or the economic delicts or fraud, will be fulfilled. See Thomson *Delictual liability*, 11 et seq, 32 et seq.

As will be seen later, if the harm is caused intentionally there is possibly protection on the basis of §826BGB, which imposed compensation for harm caused intentionally and *contra bonos mores*. In the Greek system in the case the loss is caused intentionally not only the basic delictual clause will be fulfilled but, possibly, the special §919AK as well giving the right to compensation for damage caused intentionally and *contra bonos mores* (as §826BGB).

²³⁷ This is demonstrated by MacGrath 3 (1985)*OxfFLSt* 350. He is referring to well established authority to reject the possibility of holding someone liable for negligent interference with a contract: *Cattle v. Stockton Waterworks Co*, (1875) LR 10 QB 453, [1874-80] All ER Rep 220, *Wellen & Co v. Foot and Mouth Disease Research Institute Ltd*, [1966] 1 QB 569, [1965] 3 ALL ER 560. He also refers to U.S.A. cases such as *Robins Dry Dock & Repair Co. v. Flint* (1927), 272 US 303 (2nd Cir) and *Stevenson v. East Ohio Gas Co Ltd*, (1946) 73 NE 2d 200 (p.362).

The arguments employed by Thomson in support of his suggestion could be used to support the extension of the application of a *Junior Books* type of duty of care in similar circumstances but not necessarily to advocate the establishment of a new tort of negligent interference with a contract. Thus the observation that the nexus of the relationships in *Junior Books* is a common feature in many third party pure economic loss cases is not enough to justify his thesis. Similarly the two carefully drafted conditions of liability namely that the contractual nexus should exist before the occurrence of the cause of the damage, (which explains the rejection of the claim in *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177) and that the defendant should have at least potential knowledge of the manner in which the damage is likely to occur. (which explains the decision in *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761.), are again indicating the attachment of the decision to the undertaking, but are not conclusive for treating the *Junior Books* as establishing a new tort. (See in Stepherson, 138 (1988) *New Law Journal*, 483, were *Simaan Contracting Co v. Pilkington Glass Ltd*, is appreciated without a thorough reference to the differences the case had from *Junior Books*.)

²³⁸ Blom "Fictions and Frictions" 159

²³⁹ As defined by Adams, J.N. and Brownsword, R.: "1. A network contract is a contract forming part of a set of contracts. 2. The set of contracts has the following characteristics: (i) there is a principal contract (or, there are a number of principal contracts) within the set giving the set an overall objective; (ii) other contracts (secondary and tertiary contracts, and so on) are entered into, an object of each of which is - directly or indirectly - to further the attainment of this overall objective; and (iii) the network of contractors expands until a sufficiency of contractors are obligated, whether to the parties to the principal contract or

objective²⁴⁰), and that non-parties should be allowed to enforce the contract where the injurer is a party²⁴¹ is similar. This is similar to the idea that in network contracts' situations direct claims by the third parties should be allowed if the defendant's contractual relationship is *transitive*, that is, when there is no alternative remedy for the third party and the latter's contractual relationship is functionally and causally subsumed to the relationship to which the defendant is a party²⁴². The suggestion with regard to the network contracts is similar to that for the application of contract law in cases of *groupes de contrats* (groups of contracts that have the same economic cause and purpose, often the case when subcontracting is involved) in French law²⁴³: where, as in Scots law²⁴⁴, there is no

to other contractor within the set, to attain the overall objective.". Adams and Brownsword, 10 (1990)*LSt*, 27-28.

240 Such relationships are predominantly those involving building or carriage contracts. However credit and commercial financial arrangements are examples of network contracts. (Adams, and Brownsword, 10 (1990)*LSt*, 28)

241 Privity should be swept aside as it cannot accommodate the needs of certainty and justice; the purpose of a "network contract" is to achieve the optimal balance between the two. Adams and Brownsword, 10 (1990)*LSt*, 28.

242 Beyleveld, D. and Brownsword, R. "Privity. Transitivity and Rationality", 54 (1991) *MLR*, 48. The thrust of their suggestions is that privity should be applied in a discriminating fashion in situations of pure economic loss which they characterise as essentially contractual. They argue that contractual relationships could be characterised as transitive or intransitive with varying degrees of transitivity (or intransitivity) possible. "In formal terms. 'a relation *R* is transitive if, from *A R B* and *B R C*, it can be inferred that *A R C*.' (p.51). English law takes the view that relationships between two persons are intransitive. They suggest two principles "which, in our opinion, justify granting a direct remedy against *C* (and concomitantly, *C* 'transitive' defences against *A*)", p.64. The first is the 'breakdown' principle according to which a direct claim should be rejected if the plaintiff has an alternative (contractual) remedy. The decision in *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, was not against such a remedy. Thus, in *Junior Books* where there has been a contractual settlement between the plaintiff and the main contractor the plaintiff had no alternative and the decision rightly allowed the claim. The relationship is transitive only when the plaintiff already has a contractual remedy. There is no abolition of privity therefore. The second principle is that of subsumption. The principle reflects the situation of the 'special relationship' of *Junior Books*. This is because the contracts to which plaintiff and defendant are parties are specially related. "The subcontract is already, so to speak, contained within, or subsumed under, the main contract." (p.67). This subsumption is functional and causal. Functional, because the subcontract draws its purpose from the main contract and causal because the very existence of the subcontract depends upon the existence of the main contract. The plaintiff's performance of the subcontract should be regarded as a component of the performance of the main contract. Thus the contractual structure does not refute a direct claim as is the case with product liability, where this functional and causal link between the different contracts does not exist.

243 Whittaker, S. "Privity of Contract and the Law of Tort: the French Experience", 15 (1995) *OxfJLSt* 328-369, at 354-357. In the course of the 1970s it was supported by some jurists that the traditional interpretations of privity should be abandoned in the cases where certain contracts are inextricably linked and the actions between the members of such groups

distinction between physical damage and pure economic loss, contracts in favour of third parties are recognised and a general delictual clause exists²⁴⁵. (The suggestion was applied in three instances but was rejected by the Supreme Court.) Other commentators, notably

of contracts should be based in contract with the double limit of the defendant's duties in his own contract and the plaintiff's rights in his own. Since 1988 the French courts have applied these ideas in three cases, one involving the subcontracting of the production of a film where one of the subcontractors lost the negatives, another involving the liability of the manufacturers of a tractor for the coupling used by the latter in pulling the plaintiff's aircraft, the third the surrender of the plaintiff's deposited items with another depository who by mistake put them in the rubbish bin. The Plenary Assembly of the Supreme Court put a, temporary at least, end to this development in a 1991 case involving the liability of a plumber subcontractor in respect of defects in the plumbing to the employer. Among other reasons, Whittaker notes the uncertainty of the concept of a 'group of contracts' and the idea that the scheme, coupled with the double limit of liability was too prejudicial for the plaintiffs.

See for an analytical reference on the concept of the *groupes de contrats*, Goris, *The Legal Aspect of SWAPS*, 409 et seq. The theory was first conceived by Teyssié in 1975 in his study *Les groupes de contrats*, Paris L.G.D.J.. This was followed by other important French legal studies devoted to the problem of the "groups of contracts". As Goris notes "Key to this theory was that the economic reality of linked contracts may be attended by the recognition of some sort of legal reality" (412). The *groupes de contrats* were divided by Teyssié into *chaînes de contrats* (chains of contracts) and *ensembles de contrats* (wholes of contracts). The *chaînes de contrats* appear as series of agreements with an identical or (sometimes) partially identical object and which are successively entered into. In the case of the *ensembles de contrats* a single economic objective requires the simultaneous closing and performance of several contracts. They often take the form of a group of contracts between more than two parties, structured in a circular manner around a pivotal figure, the only one contractual linked to all other participants to the group. However, it might be the case that two parties enter more than one contract. Teyssié further divides the *ensembles de contrats* into *ensembles de contrats à dépendance unilatérale* and *ensembles de contrats interdépendants*. In the former case the coordinating objective is pursued by one constituent contract separately: one of the contract is so dominant that the others derive their cause from that contract. In the latter case each contract separate is incapable but also indispensable for the realisation of the common objective. In order for a group of contract to produce particular legal consequences, the most important of which as far as this work is concerned is the right of non parties to rely on a contract to turn against the injuring party, two criteria must be fulfilled: a subjective criterion, that the participants serve a common cause, and an objective criterion, that the counterparty acknowledges that their contracting parties serve this particular common cause. (For further reference see Goris.)

²⁴⁴ Recall in relation to the French case examples that in Scots law there is no JQT in case of subcontracting. In German law one could speculate there could be protection for these cases on the bases of the contract with protective effects, but it is far from certain. See "Contracts for services" and "Contracts for works" in Chapter 2. The last example that involves subdepositing could be dealt with in Greek law under the specific provision of §825(2)AK. The first case, that involving subcontracting, could be dealt on the same basis actually, or even under the provision for transferring a mandate performance, §716(3)AK. In Creek law, delictual protection would be available in these cases. See "Mandators and depositors: §716(3)AK, §825(2)AK" and "Delictual protection" in Chapter 3. In American law there would possibly be protection in delict; duties of care would have been established. Under the beneficiary rule there could be protection in the case of the first example, but there is serious doubt whether there would be protection in the other two cases. See under "Applications" in Chapter 4.

²⁴⁵ Whittaker, 16 (1996) *OxflLSt* 199

McGrath²⁴⁶ and Smillie²⁴⁷, have gone further, identifying as legitimate claimants for pure economic loss those for whose benefit the undertaking was made²⁴⁸.

Apart from the fact that there is no privity doctrine in Scots law, such approaches to case law and the related suggestions are nearer to the Scottish reality of the JQT, the broader definition of enforceable undertakings and of a more unified civil liability²⁴⁹. The comments are thus important for Scots law as they indicate ways that its potential can be interpreted and exploited. Moreover, these suggestions are significant because a discussion for the introduction of a contractual solution for third party loss will naturally refer to JQT and is likely to be modelled on this mechanism²⁵⁰. Similarly, American law draws its examples from the third party beneficiary rule, under which certain third party loss cases have been dealt with²⁵¹.

²⁴⁶ MacGrath, 3 (1985)*OxfJLSt* 372-373.

²⁴⁷ As inferred elsewhere, if the defender undertakes "to perform a business or professional service a principal object of which is to protect or advance the plaintiff's economic interests", will be liable for the pure economic loss resulting from his failure to perform. Smillie, 32 (1982), *UTLJ*233.

Professionals are often the defenders in such cases. "Thus accountants, architects, auctioneers and estate agents, insurance brokers, surveyors and solicitors have all been found liable in negligence to their clients or to third parties. Similarly bailees and carriers, locksmiths, building contractors, local registrars and local authorities have fallen foul of this principle of liability. In this way the principle in *Hedley Byrne* can be reconciled with the decisions in *Ross v. Caunters* and *Junior Books*". MacGrath, 3 (1985)*OxfJLSt* 367-368. Exceptions to liability are tailored to include professional immunities for instance. A weak point in McGrath's argument is that there is no liability for non-feasance

²⁴⁸ See on the class of beneficiaries MacGrath, 3 (1985)*OxfJLSt* 369. He considers that the best test to identify whether a claimant is entitled to damages was used by Justice Cardozo in *Glanser v. Shepard*, (1922) 233 NY 236, 135 NE 275 (CA), who examined whether the benefit of the claimant was the "end and aim" of the undertaking.

²⁴⁹ See the previous reference to Oughton's approach to voluntary assumption of liability where it is noted that contractual liability might exist for informal relationships as well or when no personal contract between the parties in the litigation has taken place. He concludes that there is a small number of cases where it does not matter whether liability is in contract or in tort. 1 (1995) *Contemporary Issues in Law* 29-36. See the specific reference to the acceptance of duties in negligence in the context of a network contract in Scots law (*Middleton v. Douglas* 1991 SLT 726), despite the alleged incompatibility of the voluntary assumption of responsibility concept to cases such as *Junior Books* where the structure of the contractual relationships aims at obstructing the emergence of duties in delict.

²⁵⁰ Recall that the German mechanisms for the protection of third parties, at an initial stage at least, were based on the contract in favour of third parties.

²⁵¹ See under "Tort v. Contract: Third parties and pure economic loss", in Chapter 4. In German law as well neither of the contractual mechanisms was eventually based on §328BGB due to the constraints posed by intention requirements. Courts did not label

Both lines of argument for third party loss found in this context, the narrowing down of *Junior Books* to cases of negligent interference with a contract and the expansion of the contract, entail what is a basic hypothesis of this work: The treatment of pure economic loss should be fragmented²⁵². The expansion of contract, irrespectively of the form it might take, is seemingly a point of agreement. Thomson's carefully drafted conditions of liability, namely that the contractual nexus should exist before the occurrence of the cause of the damage, and that the defendant should have at least potential knowledge of the manner in which the damage is likely to occur, would naturally apply on the basis of JQT. The JQT would facilitate, moreover, the proof of the defendant's *locus standi*²⁵³ possibly limiting his exposure. As said discussing the voluntary assumption of responsibility, the separate treatment of three-party relationships, has taken place in Commonwealth and Scots laws -- albeit not to the same extent as in American law²⁵⁴, one possible reason being that there is no contract in favour of third parties in English law that influences the Scottish and the other Commonwealth systems.

3.7. Third party loss in the Scots law of delict: In favour of the third party²⁵⁵.

doctrinally their solution and used §328BGB as evidence of the tendency in favour of third parties. See the two units titled "Theoretical considerations" in Chapter 2.

²⁵² See the relative references to American law. See Rabin 37 (1985) *StanfLR* 1513-1538 and Beyleveld and Brownsword, 54 (1991) *MLR*, 48

²⁵³ The existence of a contractual nexus is evidence of the claimant's interest. Thus ideas such as that expressed in *Murphy v. Brentwood District Council*, [1990] 2 All ER 908 for instance that even if the damage in *Anns* had been physical, the claimant should have no claim as he had no interest in the property at the time of the injury, will be avoided.

²⁵⁴ As said, there is usually liability in cases of a so-called "triangular configuration". (Craig, referring to *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), and *International Products Co. v. Erie R. Co.*, (1927), 155 N.E. 662, where the principle of the former was endorsed; a warehouse proprietor had negligently misinterpreted the place of storage so that the plaintiff could not recover on his insurance when the warehouse burned down (Craig 92 LQR 197 239).). They are also called "tripartite exchange relationships" (Harris & Veljanovski in *Furmston*, 59), involving that is a voluntary transaction existing before the damage where the class of people likely to suffer injury is limited and predictable.

²⁵⁵ This reference comes somewhat late in the chapter. This is due to the need to present existing law without confusing the points made with immediate references to the Scots law of delict. The arguments referring to Scots law are in any case developing progressively throughout the chapter alongside the inevitable references to UK and English law.

Contrary to views which limit *Junior Books* to its bare facts, it is fair to argue that in Scotland the decision continues the tradition of *Hedley Byrne*, indicating a potential to compensate third party primary loss²⁵⁶. The effect of the decision on cases of secondary loss is unclear, although it has been argued that it should not be irrelevant²⁵⁷. If, on the other hand, the impact of *Junior Books* on secondary loss cases is doubted, this could be taken to indicate that in the narrower area of primary loss where delictual liability is attached to a contractual nexus, *Junior Books* is a strong authority. This is especially the case since *Junior Books* involves claims against a subcontractor²⁵⁸; JQT is not applied against subcontractors.

The influence of the decision in *Junior Books* is evident²⁵⁹ in *Norwich Union Life Insurance Society v. Covell Matthews Partnership*²⁶⁰, *Scott Lithgow v. GEC Electrical*

256 "A better view is that *Junior Books* is to be seen as deciding the general lines of liability for all cases of primary loss. As such, it stands in the tradition of, and carries forward, the process commenced in *Hedley Byrne*.", Wilkinson, and Forte, 30 (1985) *JR*, 25.

257 Third party loss cases do not usually involve secondary loss cases as in the latter instances the loss probably does not originate from a voluntary relationship. Wilkinson and Forte reject the idea to consider *Junior Books* as irrelevant as far as cases of secondary economic loss are concerned. The speeches in the decision seems to make no distinction between primary and secondary economic loss. Primary economic loss cases are discussed along with secondary loss ones. There is doubt over the authority of *Dynamco Ltd v. Holland and Hammen and Cubitts (Scotland) Ltd*, 1972 SLT 38, 1971 SC 257, and *Spartan Steel & Alloys Ltd v. Martin*, [1973] QB 27, both cases of secondary economic loss. Secondary economic loss cases are frequently more compelling as far as liability is concerned than primary loss ones. There is no examination of proximity in secondary loss cases (as in primary economic loss cases); foreseeability should be a sufficient test for the former. Moreover *Junior Books* took a liberal view of foreseeability and proximity. The question which yet has to be to be answered convincingly is that of the floodgates argument. Wilkinson, and Forte, 30 (1985) *JR*, 25-26.

258 As seen in other jurisdictions, there is certain difficulty in allowing contract based compensation in such cases. See under "Contracts for works" in Chapter 2, and "Claims of the owner against the subcontractor" in Chapter 4. The results from third party contractual claims against the subcontractors are at best mixed and the idea seems to be to accept such claims only well there is no other means for protection. In American law at least there seems to be delictual protection in many of these cases.

259 See also *Armstrong v. Moore* 1996 GWD 14-803, *Taylor v. City of Glasgow District Council*, 1996 GWD 14-804, and *Middleton v. Douglas* 1991 SLT 726. However. MacQueen's assessment that "the survival thus far of *Junior Books* should not be pressed too far". is generally correct. He notes that "its [*Junior Books*'] career as a precedent has been as chequered as that of *Anns*", and as its following in Scots case law is ambivalent. MacQueen 1990 SLT 339

260 1987 SLT 452. The owners of land entered into a lease with a company tenant wherein the tenant undertook to have a warehouse build on the site. The construction specifications were not followed and the roof leaked causing loss to the owners as heritable proprietors in respect of repair works and loss of rental income. The owners turned against

*Projects Ltd*²⁶¹ and the more recent *Parkhead Housing Association v. Phoenix Preservation Ltd*²⁶². All were cases of third party loss. The first involved claims by the owner of land against the architects, the main contractor and the subcontractor of a warehouse who were employed by the tenant. The second involved a claim by the Ministry of Defence against the subcontractors and sub-subcontractors of a vessel²⁶³. The third case concerned the liability of a specialist subcontractor in a building (renovation) contract for defective damp

the architect employed by the tenant (first defender) whose study of the warehouse was incorporated in the lease, the main contractor (second defender) and against the subcontractors (third and fourth defenders), arguing that they owed to the pursuers the same duties *ex delicto* that they owed the tenant *ex contractu*. The Lord Ordinary (McCluskey) held that the action against the defenders was relevant, because the architect, main contractor and subcontractor can owe a duty *ex delicto* to the ultimate owner of the heritage. Proof before answer was allowed. As said before it is doubtful whether this decision survives *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396, and *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177. See Logie, 1989 JR 12-15.

²⁶¹ 1982 SLT 244. The Ministry of Defence were employers under a contract between them and a company of shipbuilders for the construction of a vessel. The shipbuilders subcontracted the design and manufacturing of certain parts of the vessel to subcontractors, who subcontracted a part of the works. Alleged defects in the wiring of the surveillance and propulsion systems arose and the ministry and the shipbuilders sought damages in delict and contract respectively against the subcontractors and the sub-subcontractors (three of whom lodged defences). The ministry argued that it had a *jus quasitum tertio* from the contract between the shipbuilders and the subcontractors by reason of it being referred to in that contract and the contract being a subcontract for the advancement of their interests in the vessel being built. With regard to the JQT the defenders argued that the ministry had not relevantly averred any such *jus* and that in any case the ministry's claim was limited to seek performance or damages for non-performance but it could not refer to damages for defective performance. Lord Clyde held on the JQT, that while a mere interest of the third party to the performance would not suffice as an intention to create a *jus* to the third party's benefit was required, the averment that the third party was named in the subcontract was enough to plead a relevant case. He found no reason why a *tertius* should not be entitled to sue for damages, provided this was the intention of the parties. The intention could be implied. The actions against the sub-subcontractors were dismissed. Proof before answer was allowed against the subcontractors for the pursuer's contractual claim. (The case was finally settled out of court.). Lord Clyde made a comprehensive review of *Junior Books* and its legacy.

²⁶² 1990 SLT 812.

²⁶³ Lord Clyde considered whether the existence of a succession of contracts linking pursuer and defender is a necessary requirement to accept close proximity and therefore a duty of care and thought that the existence of a series of contracts is only evidence to infer proximity. (252L.). Most important was that in *Junior Books* the existence of a contractual nexus did not prevent the acceptance of a duty of care in delict.

proof course installed in the pursuer's property. The decisions followed *Junior Books'* pragmatic approach in establishing proximity²⁶⁴ and accepted the claims.

*Comex Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*²⁶⁵ is a less obvious example involving third parties. The pursuers were assignees of co-defenders in an earlier litigation. Their cedent had a contract of indemnity with the defender in the current action. In their capacity as assignees they had a direct contractual relation with the defender. The decision on whether the defender owed the purchasers a duty of care was answered on the basis of the defender's contract with the cedent. In order to establish a sufficient degree of proximity the court examined the contractual arrangement in which the pursuer was not an original party²⁶⁶. The claim was accepted.

These decisions support the suggestion that third parties' claims in delict fare better in Scotland than in England²⁶⁷. However, the significance of this tendency is difficult to assess as it is also difficult to stress the authority of *Junior Books*²⁶⁸. It is

²⁶⁴ The decisions dismissed defences on the fact that the loss was purely economic. As in *Junior Books*, the nomination of the pursuer in the subcontract, and the reliance shown to the subcontractor's skills were treated as evidence but not necessary requirement of proximity. In Lord Clyde's view in *Scott Lithgow v. GEC Electrical Projects Ltd*, the nomination of the subcontractor in the main contract is "an important element when it exists" 251K, but not a necessary factor to accept the existence of a duty of care. In *Norwich Union Life Insurance Society v. Covell Matthews Partnership*, 1987 SLT 452, Lord McCluskey followed the basic principles of *Donoghue* and rejected English decisions trimming the foundations of *Junior Books*. He held that reliance was important in some cases of pure economic loss, but it was not indispensable for the recovery of economic loss. He held that the nomination of the subcontractor in *Junior Books* was not essential to the decision and sought to establish proximity on the basis of whether the pure economic loss was a foreseeable consequence of the defender's negligence. In *Parkhead Housing Association v. Phoenix Preservation Ltd*, it was noted that it was possible even if the loss was purely economic that the owners establish a sufficient nexus between them and the subcontractors so that the court will decide it is fair and reasonable that that the subcontractors owe a duty of care to the owners. The decision laid emphasis on the fact that *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177 did not overrule *Junior Books*.

²⁶⁵ 1992 SLT 89. In this case too defences based on the character of the loss as purely economic were dismissed.

²⁶⁶ Assignment is one of the typical means through which a non-party enters a contractual relationship. In English law, assignment was inferred as a means to evade privity. See Dowrick, F.E. "A Jus Quaesitum Tertio by way of contract in English law", 19 (1956) *MLR* 375-393, 386.

²⁶⁷ One could further refer to *North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2)*, 1988 SLT 778.

²⁶⁸ See McQueen 1990 SLT 38-340 and the previous reference to the status of *Junior Books*.

unlikely, for instance that, *Norwich Union Life Insurance Society v. Covell Matthews Partnership*²⁶⁹ survives later decisions. Its rationale does not reflect a conscious examination of the overall character of the Scots law of obligations. The considerations of concurrent liability in contract and delict²⁷⁰ in certain decisions referred to above were made with the purpose of distinguishing clearly between the two and giving priority to delict²⁷¹ when no contract exists²⁷².

On the other hand, the latter decision's aims regarding the civil liability structure do not alter the dynamic in favour of third parties²⁷³. Moreover, the similarity of the arguments in treating both the delictual and the contractual basis in *Scott Lithgow v. GEC Electrical Projects Ltd*²⁷⁴ illustrates, logically and in terms of the legal discourse (by focusing on the beneficiary claims), the resemblance of these 'delict' situations to contract and not vice-versa and the priority and potential of the contract view. To that, one can add that the JQT was not excluded as a possible basis of the decision. The fact that the

²⁶⁹ 1987 SLT 452. Such decisions are *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396, and *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177. See Logie, 1989 JR 12-15.

²⁷⁰ Both *Comex Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*, and *Scott Lithgow v. GEC Electrical Projects Ltd*, considered the issue of concurrent liability which is often raised in third party loss situations

²⁷¹ The decision aimed at exactly what is not the case with Scots law, meaning a more favourable treatment of third parties in comparison to English law, and creates a negative attitude towards contractual protection. See later "The balance between contract and delict" for a consideration of related issues.

²⁷² It was thought in *Scott Lithgow v. GEC Electrical Projects Ltd*, 1982 SLT 244, that when there is a contractual relationship between the parties to a dispute then contractual remedies should take priority. By contrast it is reasonable to say that when there is no such contractual relationship a delictual claim should be available provided foreseeability of loss and proximity were fulfilled. Lord Clyde refers in his analysis to the treatment of cases where pursuer and defendants were in privity. The case of *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd*. [1986] 1 AC 80, [1985] 3WLR 317, [1985] 2 All ER 947 (PC), was taken into account. In this case involving the liability of three banks to their client company for paying a number of forged cheques and debiting them to the company's account, the Privy Council reversing the decision of the Court of Appeal of Hong Kong, held that, on the basis of the contractual relationship the company was not in breach of any express or implied duty and the banks did not have any authority to pay the forged cheques and debit the company's account. *Per curiam* the courts remarked that although delictual liability between parties to the same contract cannot be excluded, it is correct in principle and necessary for the avoidance of confusion in law to adhere to the contractual liability.

²⁷³ From a precedent point of view, the decision's aim would hardly have effect.

²⁷⁴ 1982 SLT 244

voluntary assumption of responsibility could have easily been used in each of the cases referred to, should lead to the conclusion that the application of the JQT or of some other form of contractual protection for third parties could depend upon a more 'generous' interpretation of the relevant provisions in Scots law, especially of the intention requirements in the JQT. Acknowledging the importance of the contractual element is a first step towards discussing the application of contractual solutions.

3.8. Recent developments.

In a period when pure economic loss law is again becoming less certain²⁷⁵, the decisions of the House of Lords in *Henderson v. Merrett Syndicates Ltd*²⁷⁶ and *White v. Jones*²⁷⁷ are important for third party loss as they awarded compensation in delict on contract-based considerations²⁷⁸. *White v. Jones* involved the liability of a solicitor who

²⁷⁵ The new developments follow a period of relative stability where the relative claims were usually rejected. See the examples of *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, and *Caparo Industries v. Dickman* [1990] 1 All ER 568, and the incremental approach in the latter, followed in Scotland. See also *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai* ["*The Nicholas*"], (1994) 1 Lloyd's Law Reports, p.492, CA, (Thomson, 1995 SLT ,140). The incremental approach linking the decisions of present cases to previous ones and trying to find analogies is likely to narrow the possibilities for accepting claims for pure economic loss. An attempt in *The Nicholas* to equate the criteria for accepting a duty of care in pure economic loss and physical damage, requiring proximity in addition to foreseeability in a physical damage case, should be attributed to the fact that the loss in this case was of an economic nature. (The allocation of risks was based on an internationally agreed set of rules.). In *Comex v. Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*, 1992, SLT 89, where any doctrinal distinction between physical damage and pure economic loss is dismissed, it is noted that in pure economic loss cases it is more difficult to establish proximity. One is led to imply that the establishment of proximity is necessary for cases involving physical damage as well. This would constitute a serious change in law.

See Capper, P. in *Legal Times Supplement*, May 1996, 17, arguing that the incremental approach is the way forward with pure economic loss. McMillan notes that the approach might sit less comfortably with Scots law where emphasis is upon principle and not precedent. McMillan 1996 SLT 163.

²⁷⁶ [1994] 3 All ER 506, [1994] 3 WLR 761. See Thomson, 1995 SLT 141 whose presentation of the facts is adopted, and O'Dair, Richard and Halson, Roger "Tort" in 48 (1995) *CLP*, Part I, Annual Review, 33-72.

²⁷⁷ *White and another v. Jones and others*, [1995] All ER, 691, [1995] 2 WLR 187.

²⁷⁸ It might seem that a somewhat disproportionately extensive reference is made to these recent developments. However these cases, which have already been commented upon substantially, are important from the point of view of English and Scottish law as well, as potentially indicative of a shift in law towards greater protection for third party pure economic loss. The reference to these cases here precedes that in the following chapter on Commonwealth law. Whittaker on the basis of these two cases speaks of recovery of pure

failed to make the changes his client requested in his will before his client's death, to the detriment of the intended beneficiaries. *Henderson v. Merrett Syndicates Ltd* concerned the delictual liability of Lloyd's members agents and managing agents of syndicates towards names²⁷⁹. The managing agents were not employed by the names as were the member agents, but by the latter²⁸⁰. (One could further refer to *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*²⁸¹, which created an exception to the rule "that a claim for a breach of contract can compensate only the plaintiff's own losses", *Darlington Borough Council v. Wiltshier Northern Ltd.*²⁸², which took the principle a step beyond the facts in *Linden*, but these cases are more narrowly attached to English law considerations.)

economic loss in negligence "undergoing something of a revival", Whittaker 16 (1996)*OxfJLSt* 203

279 The facts are a little complicated. Lloyd's names (members of the Merrett, Gooda Walker and Feltrim syndicates) turned against the firms which were the managing agents of their syndicates. The names had signed agreements with an underwriting agent who had to place them with a syndicate. The underwriting agents were either "managing agents" who themselves run the syndicates with which the principals were placed, or "member's agents" who placed their principals with syndicates run by others or "combined agents" who run syndicates themselves but placed some clients elsewhere. Where an underwriting agent placed a client with a syndicate run by some other firm, the agent signed a sub-agency contract with the managing agent of that syndicate. The name was then an "indirect name" not in contractual relations with the managing agent of a syndicate of which he was a member. In the case of "direct names" the underwriting agent run the syndicate (under provisions in the contract of agency) and there was a direct contractual relationship with the name both as a member and as principal. (See Hedley, 54 (1995)*CamLJ* , 27-28, presenting the facts in a simpler manner.)

280 The agents were authorised under contract by the names with the exclusive right to undertake rights and reinsure on the names' behalf. The members agents would perform the task themselves or delegate them to managing agents, who were sub-agents, under a sub-agency contract. The names in the latter case were indirect names. There were claims against both the members' agents and the managing agents. The contractual claims against the members' agents were time barred: The limitation period which in contractual claims runs from the time of the breach had expired. The limitation period in delict begins to run when the delict is completed, when the loss has been suffered that is.

281 [1994] 1 AC 85. As Cartwright 10 (1996) JCL, 244, notes "...Linden Gardens represents the House of Lords' determination that there should be a useful remedy available against the building contractor even though the person who suffered loss on the facts (the new owner of the property) had no direct claim against him." (247). The right of action remained in the original owner as there was an effective prohibition on assignment. The original owner was allowed to sue for the new owner's loss.

282 [1995] 1 WLR 68. Darlington Council wished to built a new recreational centre, but under the rules on local authority borrowing it could not undertake financing. A construction company entered into two contracts with a financing company to build a recreational centre for the Council which owned the site. The financing company assigned to the Council all rights and causes of action against the builders to which the company was entitled under

Lord Goff's speeches in *Henderson* and *White*, emphasising the significance of practical justice²⁸³, were pivotal²⁸⁴. As in other recent cases²⁸⁵, the voluntary assumption

the contracts. In an action by the Council for breach of contract the judge held on a preliminary issue that the Council as assignee was not entitled to claim damages other than nominal damages. On appeal by the Council, the Court of Appeal held that since the building contracts to the knowledge of both parties were entered into for the benefit of the Council and it was foreseeable that damage caused by a breach of a contract would cause loss to the Council, the latter as an assignee could claim substantial damages for the loss caused by the breaches of the contracts and the damages should be assessed on the normal basis as if the Council had been the employer of the contracts.

The Appeal Committee of the House of Lords had granted leave to appeal but the case was settled out of court, depriving the House of an opportunity to review basic principles of law. See Cartwright 10 (1996) JCL, 244, discussing the issue of the third party loss and suggesting that the House of Lords "appears to be hesitant but generally receptive to a reconsideration of this area of law." (245).

²⁸³ In *White v. Jones*, Lord Goff underlined the reasons why judges and academic writers thought "that a duty of care should be owed by the testator's solicitor to the disappointed beneficiary" (1995] All ER, 691, at 702). Thus he highlights the "extraordinary fact" that if a duty is not recognised, the only persons who might have a valid claim have suffered no loss and the only person who has suffered loss has no claim. He notices the degree of the injustice in a society one of the central legacies of which is the right of the individual citizens to leave their assets to whom they please, a right which can be of great importance to individual citizens. Moreover, he thinks "that the solicitor's profession cannot complain if such a liability may be imposed upon its members" (702). Considerations over the role of solicitor's in society reinforce the argument that the availability of a direct claim is a matter of justice. Lord Goff wonders finally "whether it is possible to give effect in law to the strong impulse for practical justice" (703). It is clear that he approves of such a judicial policy.

²⁸⁴ In *White v. Jones* Lord Goff made a comprehensive review of the relevant German mechanisms, and considered the application of the theory of "transferred loss" in English law, or making available to the disappointed beneficiary "the benefit of the contractual rights ... of the testator or his estate agent"[1995] All ER, 691, at 708.

In *Henderson v. Merrett Syndicates Ltd*, Lord Goff sought to infer a broader principle from the case law. His opinion was unanimously accepted. In the words of one commentator his approach was elaborate but with "awe inspiring simplicity" when reduced to its essentials (Hedley, 54 (1995) *CamLJ*, 28). Lord Goff referred especially to *Hedley Byrne* and to the recent *Spring v. Guardian Assurance plc*, [1994] 3 All ER 129, [1994] 3 WLR 354.

²⁸⁵ *Spring v. Guardian Assurance plc*, [1994] 3 All ER 129, [1994] 3 WLR 354, concerned the liability of the plaintiff's former employer who in a reference described the plaintiff as dishonest and lacking integrity and thus prevented him from continuing his career in life insurance. The trial judge found the reference's content to be untrue, but rejected all heads of the claim for malicious falsehood, defamation and negligence. The question before the House of Lords was whether the defendants could be found liable for negligence. The House of Lords found the defendant liable. The court dismissed the arguments of the defendants that a finding for the plaintiff would undermine the torts of malicious falsehood and defamation, and eventually would be against the public interest with respect to the unrestricted expression of opinion in references. O'Dair argues that the rejection of the latter arguments was unconvincing. (O'Dair and Halson 48 (1995) *CLP*, Part I, Annual Review, 40-45.). See as well Allen, Thomas "Liability for references" *Spring v. Guardian Assurance*, 57 *MLR* 1994, pp.111-116. See as well Demopoulos, A. "Misleading references and Qualified Privilege", 104 (1988) *LQR*, 191-195, and Weir, Tony "The Case of the Careless Referee", 52 (1993) *CamLJ*, 376-379, who argues on the Court of Appeal decision on

of liability was the basis of both decisions²⁸⁶; in some views, it was extended in *White v. Jones*²⁸⁷. However, by implication it can be argued that the House of Lords in the latter

Spring v. Guardian Assurance plc, that the court should have not dismissed the claim, and that the issue in question was that the former employee was rendered unemployable.

On *Smith v. Eric S Bush; Harris v. Wyre Forrest District Council*, [1990] 1 AC 831, see Felthussen who notices that this was an example of a category of cases, most of which involve nonfeasance and where it is generally difficult "to infer a voluntary undertaking or promise by the defendant, even by the objective test" (p.160). The courts refuse to recognise a general duty to take affirmative action to protect the financial interests of a party, even though it was reasonably foreseeable that this party (the pursuer) would rely on the defendant to do so. The fact that the requirement is for affirmative action on behalf of the defendant is a basic reason for this position of the courts. They are reluctant to recognize general duties to rescue from foreseeable personal injury, or to take affirmative action in respect of other physical damages. Usually, Felthussen notes, the courts recognize such duties when the parties were in a serious pre-existing business relationship. (Felthussen, *Economic Negligence*, 159 et seq.).

In *Weir v. National Westminster Bank plc*, SLT 1994, 1251, the pursuer, a solicitor, held an account with the defender, in his own name but on behalf of a client under a power of attorney and as the sole signatory of the account. A pursuer's employee, a cashier, forged a check which the bank processed through the account. The solicitor sued the bank for a violation of its duty of care to inform him of the forgery. As a result of the bank's behaviour the cashier was able to commit further frauds. The Inner House held that a bank did not owe a duty to inform a customer who was a signatory to an account other than his own, that a forged cheque has been presented. However such a duty was owed to a person who was the sole signatory of an account and acted as agent of a disclosed principal under power of attorney. It could thus be argued that the bank assumed responsibility towards the pursuer accepting him as an agent of a disclosed principal and the sole signatory of the account. The bank is thus responsible for the same reason it would be responsible towards a customer, namely because it presents itself as having the relative professional qualifications and experience thereby assuming responsibility over the account.

Smith v. Eric S Bush; Harris v. Wyre Forrest District Council [1990] 1 AC 831 and *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, as far as management agents are concerned, involve third party loss situations.

286 The voluntary assumption of responsibility for the economic interests of the pursuer was the basis of liability for member's agents and managing agents. Thus it was said that a duty of care should be accepted when the defendant voluntarily assumes responsibility, for the economic interests of the pursuer, knowing that the pursuer will rely on him. Lord Goff, after observing that "all their Lordships spoke in terms of one party having assumed or undertaken responsibility towards the other", he thought on *Hedley Byrne* that "the principle extends the provision of information and advice to include the provision of other services", and that this was an objective to be applied if the situation was "equivalent to contract", (*Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 520-521). No special intentional element was requested for the voluntary assumption of responsibility.

Henderson v. Merrett Syndicates Ltd is especially applicable in cases of negligence by professional or quasi professional persons, and for the provision of services. In Lord Goff's words: "The principle has been expressly applied to a number of different categories of persons who perform services of a professional or quasi professional nature..". He gives the examples of bankers, surveyors, valuers, accountants, and, with respect to the case in question, insurance brokers (pp.521-522). Lord Goff thought that if responsibility was assumed "with respect to certain services" there is no reason why he should not be held liable for other services in respect of economic loss which flows from the negligent performance of those services (p.521.).

case did indeed abide with privity and disapproved of the wish expressed by Steyn LJ in the Court of Appeal, that a contractual solution would have been preferable to the tort of negligence²⁸⁸.

More significant for the purposes of this work is *Henderson v. Merrett Syndicates Ltd*, mainly because it involves subcontracting but also because it has a clearer rationale²⁸⁹. There is no doubt, as with *White v. Jones*²⁹⁰, about its applicability in Scots law, although, technically, is not a binding authority since it is a decision of the English House of Lords.

Managing agents assumed responsibility as they "held themselves out as possessing special experience which they knew would be relied upon by the names" (p.522). Lord Goff observed that since 1964 it had been accepted that an insurance broker owes a duty of care in negligence to his client whether the broker is bound by a contract or not. The brokers owe a duty of care to the persons whom they knew were to become assignees of the policy as well. His Lordship thought that there was no reason why this liability should not apply in the case of managing agents, as this was a classic example of a case where the *Hedley Byrne* principle applied: "there is in my opinion plainly an assumption of responsibility in the relevant sense by the managing agents towards the names in their syndicates.". The names, as the managing agents well knew, placed implicit reliance on that [the managing agents'] expertise in that they gave authority to the managing agents."

Lord Browne-Wilkinson wondered whether the managing agents owed the names a fiduciary duty to act with reasonable skill. This duty would be equivalent to the duty of care. Lord Browne-Wilkinson rejected however such a fiduciary duty. Heydon, J.D. "The Negligent Fiduciary" 111 (1995) LQR, 1-8, examines this possibility and argues that the equity-based fiduciary duty and the negligence rule are different, and that, depending on the terms of limitation, the plaintiff might have an advantage in suing in equity and not in law. The fiduciary duty approach might be advantageous for the defendant with regard to contribution between joint wrongdoers.

See the reference in a previous footnote on the role of Lord Goff on the basis of the decision in *White v. Jones*.

287 Lords Browne-Wilkinson and Nolan held that view. This expansion was based on the analogy to the established categories of cases where a duty of the solicitor to a disappointed beneficiary is recognised. The assessment of the assumption of responsibility seems to vary in the different speeches. Thus Lords Browne-Wilkinson and Nolan are purely delict oriented in contrast to Lord Goff. Lord Nolan's reference to *Henderson v. Merrett Syndicates Ltd* could raise questions as he notes that these insurance contracts are usually made with the head of a family and it would be absurd to deny that a duty of care is owed to the other members, as if there is a form of agency/representation (1995] All ER, 691, at 712). Lord Browne-Wilkinson's analysis of the concept of the assumption of responsibility is thorough and possibly reflects the most popular view among judges. He traces the assumption of responsibility concept back to *Nocton v. Lord Ashburton* [1914] AC 932, [1914-15] All ER Rep 45, and has a clear view of civil law focusing on the form of the special relationship which can give rise to the relative duty and noting that the law in the area is changing and a duty might be recognised in new instances.

288 [1995] 2 AC 207, 236-237. See Whittaker 16 (1996) *OxfJLS* 191.

289 There is no ambivalence as in *White v. Jones* between the speeches.

290 See previous reference. It is arguable that the decision is valid for English law basically.

Moreover, in Scots law the JQT is generally accepted in insurance contracts²⁹¹. Delictual liability in *Henderson v. Merrett Syndicates Ltd* was based on a new general duty of care, independent of the contractual liability from the sub-agency²⁹². The liability of the managing agents could be reduced or excluded on the basis of their agency (employment) contracts²⁹³.

Critics reacted to the acceptance of concurrent liability in tort and contract²⁹⁴. *Hedley Byrne* liability, it was argued, could not extend to all instances involving the

291 See "Development and Applications".

292 An argument by the counsel for the managing agents that there was no responsibility to the names as liability had been assumed contractually towards the members' agents was rejected as unsound: "The fact that the managing agents assumed responsibility in respect of the same activities to another party under a sub-agency is not inconsistent to holding they have assumed responsibility with respect to the same activity to the indirect names". [1994] 3 AllER 506, 533-534. Responsibility could in principle be assumed voluntarily towards two different people. Lord Goff admits however that when two claims with the same objective, namely compensation of indirect names are possible, the concurrent duties of care might cause problems in the event of insolvency of the managing agents or the members' agents, while questions of contribution might arise as well.

293 This point is inferred from the argument that the liability of the members' agents in delict would not be accepted to the extent it would be inconsistent with the underlying contracts. (Such a possibility did not apply in this case.). The delictual liability of the member's agents was determined by the scope of the underlying contract. The decision dealt at considerable length with the question of concurrent liability in contract and delict which is important with regard to members' agents. (Reference was made to the French and the German approaches.) Lord Goff examined further the issue of the impact of the underlying contract on a claim in delict. In a statement which is important for third party loss he thought that, as to the members' agents, only if contractual liability is inconsistent with delictual liability, the latter, based on a new general duty of care arising independently of the contract, would be excluded. (If no inconsistency exists the plaintiff can choose.). Lord Browne-Wilkinson observed that the nature and scope of the contractual relationship determine the scope of the responsibility assumed and can exclude any such assumption. The parties could exclude or limit delictual liability provided this argument conforms with the reasonableness requirement of the Unfair Contract Terms Act 1977.

Lord Goff observed that there was little available material in English law on the impact of the contractual context on delictual liability. This material, judicial treatment or academic consideration originated from the last half of the 20th century. He referred to *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] 1 AC 80, [1985] 3WLR 317, [1985] 2 All ER 947 (PC), which redirected common law towards the recognition of concurrent remedies in contract and tort, and in fact it was a move away from contractual solutions.

See also Thomson, 1995 SLT 143

294 Lord Goff argued that the fact that the parties signed a contract should not be taken as meaning that the plaintiffs agreed to forego their tortious remedies. It was pointed out on the other hand, that tort remedies should not be available in any case. A more in depth research into the rationale of the 1986 Latent Damage Act would be required in order to acknowledge the rationale for excluding contractual claims. It was generally resented that the plaintiff might be choosing the tort remedy in order to benefit from its advantageous position. O'Dair and Halson 48 (1995) *CLP*, Part I, Annual Review 36-37.

provision of services in the light of opposite authority, for example in construction works²⁹⁵. The concept of a voluntary assumption of responsibility is vague and erroneous; a misnomer to mask preconceived views²⁹⁶. Since Lord Goff found that the member's agents undertook contractual responsibility for any negligent act of their managing agents, acknowledging direct liability for the managing agents is contradictory to his Lordship's findings²⁹⁷. The decision allegedly left the law untidy, needing more than one case for this fundamental "inversion of contract to become the orthodox approach"²⁹⁸.

Lord Goff's might have neglected a detailed discussion of the decision's consequences²⁹⁹, but his views are well reasoned. Despite the shortcomings of his approach³⁰⁰ he is basically correct in focusing on the underlying contracts, identifying an element of "mutuality between the parties"³⁰¹. Allowing a direct claim against the managing agents is legally sound (the members' undertaking does not exclude the managing agents' liability to the names) and effective for the claimants protection³⁰².

²⁹⁵ Thus the decision is allegedly at odds with itself. O'Dair and Halson 48 (1995) *CLP*, Part I, Annual Review 37.

²⁹⁶ The existence of a background of contractual arrangements cannot alone be conclusive of the assumption of liability. Lord Goff allegedly does not provide sufficient guidelines as to when a duty is in fact owed, if his only explanation is that of the assumption of responsibility. The dependence upon the contractual doctrines was "a recipe for confusion". O'Dair and Halson 48 (1995) *CLP*, Part I, Annual Review 38.

²⁹⁷ O'Dair and Halson 48 (1995) *CLP*, Part I, Annual Review 38. Lord Goff held that this case is exceptional and the decision would not possibly be the same in the case of a building subcontractor.

²⁹⁸ As Hedley, 54 (1995) *CamLJ*, 30.

²⁹⁹ He did not consider for instance whether the indirect names can use tort to recover damages from the managing agents on the possible bankruptcy of their underwriting (members') agents. Hedley, 54 (1995) *CamLJ*, 29.

³⁰⁰ As regards cases where services are provided, for instance, he refers to a number of authorities to dispell the idea that a voluntary assumption of responsibility is not a helpful concept. (This is the view taken in *Caparo Industries v. Dickman* [1990] 1 All ER 568, and *Smith v. Eric S Bush*; [1990] 1 AC 831.). Lord Goff refers to the speeches in *Hedley Byrne*, and to the speech by Lord Oliver of Aylmerton in *Caparo*, in order to support his argument. He also recalls the speech by Oliver J., (then), in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp* [1978] 3 All ER 571 at 595, on the professional liability of solicitors. In any case he does not aim at prescribing the future applications of the mechanism, but concentrates on the particular case before him.

³⁰¹ Mutuality is evidenced by the requirement of an assumption of responsibility and reliance on that assumption. Mutuality is an expression of the nexus of relationships and evidence of the voluntary basis of liability. Thomson, 1995 SLT 142.

³⁰² See the discussion on whether advocates' liability for drafting a will should be treated on the basis of Drittschadensliquidation on the contract with protective effects in German law, under "Borderline cases" in Chapter 2. The availability of a direct claim is a

The decisions are important from a Scots law point of view because, by confirming the possibility of delict based on contract, they underline once more the significance of contractual considerations. Any similar trend in Scots law would stand on a firmer basis. It is too early to see whether these decisions could become a starting point of a move away from *Caparo* and *Murphy*.

In February 1996, the Privy Council upheld a New Zealand³⁰³ decision accepting the liability of a local authority to the proprietor of a building for negligent inspection of the building's foundations. The decision followed *Anns* and rejected *Murphy*, and justifiably should draw the interest of Scottish lawyers for the prospects of Scots law distancing itself from the impact of English law. However, it is too early to assess the effects of this decision, although as a development it is certainly positive for Scots law. The decision was based on the assumption that the situation in New Zealand was different from that in England and that the New Zealand judges were better positioned to know this situation and to respond accordingly. This is not the case with the Scottish economy or society. It would require considerable effort to pursue such a differentiation on the basis of the difference in the legal system and any such approach would be unconvincing.

3.9. Subcontractor's liability.

From a Scots law perspective the critique on *Henderson v. Merrett Syndicates Ltd* arguing for the rejection of the legitimacy of a claim in tort at the time the third party has a contractual claim against his contracting party³⁰⁴ is significant. In this view, liability in

strong argument in favour of the latter. The injured party might run the risk of the member agent being insolvent were they to have to sue the member agents.

³⁰³ *Invercargill v. Hamlin* [1996] 2WLR 367 ([1994] 3 NZLR 513, 11 (1995) *ConLJ* 286). The decision and generally the situation in Commonwealth legal systems will be discussed in the following chapter.

³⁰⁴ Thus the decision in *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, is mistaken, because the issue is essentially for the contractual liability of management agents to members' agents. There is no room for tortious liability. In a recent development, the Court of Appeal in *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai* ["The Nicholas"], (1994) 1 Lloyd's LR p.492, CA, reversing a previous decision rejected a claim of cargo owners against a classification society for negligent advice. The decision of the Queen's Bench ([1992] 2 Lloyd'sLR 481 QB) held as a preliminary question of law that the society owed a duty of care to the cargo owners. An appeal was made by the third defenders NKK. The court held that foreseeability of

both *Hedley Byrne* and *Henderson v. Merrett Syndicates Ltd* is only contractual rather than delictual³⁰⁵ and no direct claim by a third party should be allowed. The argument is important for Scots law because it seems that on the basis of *culpa* the third party pure economic loss could be compensated. Interestingly, similar arguments have been used against applying the JQT (or delict) in cases involving subcontracting, which amounts to the suggestion that there is no need for protection³⁰⁶. As will be seen, the decision in *Henderson*, accepting a claim in delict although the plaintiff seemed to have or to have been able to arrange for contractual protection, is in line with the law in Australia and Canada³⁰⁷.

The rejection of the JQT is based on the idea that in organising their relationships, the parties involved in the transaction intended to isolate one from another and not to let a

damage was not enough to establish a duty of care. It noticed that the Hague-Visby rules which applied in this case were referring to the relationship between shippers and shipowners, and that if the plaintiff's arguments were accepted, then a duty identical to those provided for in the Hague-Visby Rules would be imposed on the defendant, without the protection provided for the latter in the Hague-Visby Rules. The relationship between the cargo owners could not support the existence of a duty of care. The case however might be limited to its own facts. The fact that tort and contract are interwoven in such cases is indeed acknowledged. See Feldthussen, who considers the reversed decision from 1992 as justified, basically on the idea that the imposition of liability is efficient as the defender is best placed to avoid the harm. (Feldthussen, *Economic Negligence*, 154).

"*The Nicholas*", follows *Mariola Marine Corporation v. Lloyd's Register of Shipping ("The Morning Watch")*, [1990] 1 Lloyd'sLR 547 (QC), concerning the liability of a classification society which had carried out a special survey of a yacht for the owners, towards the purchasers of the yacht. The court held that the classification society did not owe a duty of care to the plaintiffs as to decide otherwise would amount to a substantial advance in the law of negligence. The court held that the surveyor was not negligent in any case.

These decisions could be compared with *Trident Const.Ltd. v. W.L. Warthrop & Associates Ltd.*, [1979] 6 WWR 481, where a contractor and an engineer had different contracts with a city. A bid by the contractor for a project was based on an inaccurate study of the engineer. The latter was liable towards the contractor, although in his bid the contractor seemed to have exculpated the city from liability from any inaccuracy of the study. The engineer could not take advantage of that clause.

³⁰⁵ O'Dairand Halson 48 (1995)CLP, Part I, Annual Review, 39-40.

³⁰⁶ Meaning that there is protection and only small adjustments to existing arrangements need to be made, as is the case in Greek law for instance, where it was argued that there is no gap in law as regards third party loss. See "Critique on the delictual option. Contract v. delict", in Chapter 3.

³⁰⁷ The tendency began in Canada with the decision in *Central Trust Co. v. Rafuse*, (1986) 31 DLR (4th) 521. See *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited*, [1995] 1 SCR 85, 11 (1995) ConsLJ (Burr, Franklin, Ramsey, eds) 306, and in Australia *Burnie Port Authority v. Genaral Jones*, 1994) 179 CLR 520 and *Bryan v. Maloney*,, HCA March 23, 1995, 11 (1995) 11 ConsLJ 273. *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited* is, was exceptionally based on *Junior Books*, See in the following chapter for more details.

non party bring a claim on the contract³⁰⁸. However, liability could be based on the particular arrangements in the transaction; it could, for instance, be accepted when the terms of the main contract and the subcontracts do not differ³⁰⁹.

Regarding delictual liability³¹⁰, provided that an adequate contractual remedy exists³¹¹, "the case in favour of a direct action against the subcontractor is not

³⁰⁸ No intention to benefit or to create an enforceable right for a third party could be inferred. Lord Clyde in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244., dealt with the pursuer's arguments that he was entitled to compensation on the basis of JQT (Scott Lithgow Ltd. and the Lord Advocate were the claimants, the latter representing the ministry of defence), and brought the focus on the content of the relevant contract. He thought that it was genuinely difficult to fulfil the requirements of JQT namely that there should be intention to benefit and that the benefit should not be incidental.

³⁰⁹ In the leading case of *Blumer & Co v. Scott & Sons* from 1874 (1874 1 R 379) it was thought that since the main contract and the subcontract were wholly different there was no JQT. (See in previous footnote for details.) In an action by the shipbuilders and the purchaser of the vessel against the engineers for damages sustained by them severally due to the defender's delay in supplying the engines, it was held that the purchaser had no claim against the defenders. The purchaser was not a party to the contract for the supply of the engines and the terms of the contract were not such as to confer on him a *jus quasitum tertio*. The Lord President noticed with respect to JQT, that according to the main contract (for the provision of ships' engines) the engines had to be to the satisfaction of the beneficiary (pursuer), while according to the subcontract they had to be to the satisfaction of the main contractor (shipbuilder). No intention to benefit could be implied as the main contract was different from the subcontract.

Lord Clyde observed in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, that in *Blumer* the pursuer was not nominated in the contract yet this was not an important reason for rejecting the claim. The decision concentrated on the content of the relative contracts. Lord Clyde thought that no answer can generally be given without examining the facts of a particular case; one subcontractor might for instance be liable but not another. He left the matter to inquiry. (There is no information as to the terms of the contracts in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, where the first defendants supplied the third defendants who supplied the pursuer.).

One could refer to the *Aberdeen Harbour Board v. Heating Enterprises (Aberdeen)*, 1990 SLT 416. Due to negligence of the employees of the subcontractor's subcontractor, a fire broke out causing extensive damages to the building. The defender subcontractor claimed the benefit of the indemnity the tenant had offered to the contractor. The decision referred to established case law on Standard Forms of Building Contracts which placed the risk of fire of the employer (main contractor), and held that the latter's immunity was extended to the subcontractor causing fire if the contract and subcontract contained similar terms. (In the particular case the subcontractor, an outsider to the indemnity agreement, claimed that the employer was burdened with covering his liability. An Extra Division rejected his claim to an indemnity.).

³¹⁰ A direct delictual claim would in most cases disrupt the choice made by the participants to this transaction on the structure of their relationships and obligations. See Blom "Fictions and Frictions" 141 et seq. on the rejection of *Junior Books*. The subcontracts are usually considered as incompatible to the main contract in the sense that the responsibility prescribed in the former differs from that undertaken under the latter.

³¹¹ Subcontractors are liable in contract to the main contractors who are in turn liable to e.g. the owners of a project, employers, clients, etc.

compelling"³¹². Subcontracting should be an indication that the participants were not contemplating the subcontractor's liability for non dangerous defects to anyone else other than the main contractor³¹³. The owner, employer, client of the contractor should have no reasonable expectation of being entitled to sue the subcontractor³¹⁴. Moreover, a direct claim would overturn the chosen manner of separation of the project's works, services etc. and subvert the financial planning of the pursuer and defendant as well as the planning of their insurers³¹⁵. Privity in such circumstances seems to guarantee predictability and clarity³¹⁶. This is especially the case for commercial transactions³¹⁷. The argument could go further to suggest that liability should be rejected when a direct claim could have been avoided by a different contractual arrangement³¹⁸.

³¹² Feldthussen, *Economic Negligence*, 149. he also argues that the deterrence effect of a direct claim might be minimal

³¹³ See Brodie, in *Scots law in the 21st century*, 209 quoting Lord Goff from *Henderson v. Merret Syndicates*, [1995] 2 AC 145 at 196, noting that "there is generally no assumption of responsibility by the subcontractor or supplier direct to the building owner, the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility."

³¹⁴ If parties who work so close are not contractually related then neither is relying on the other being responsible if the contracts are not fulfilled. Blom "Fictions and Frictions" 163.

³¹⁵ In deciding such cases, it has been argued, it is important to promote future planning and continuity, often to the expense of holding a party liable. Blom "Fictions and Frictions" 162.

³¹⁶ Thus the rejection of a direct delictual claim in cases involving subcontractors can be justified on the basis of decisions limiting the scope of *Junior Books* at least as far as English law is concerned. See again the *Department of the Environment v. Thomas Bates and Son Ltd.* [1990] 3 WLR 457, [1990] 2 All ER 943 (HL), where the House of Lords held that since the tower block had not been unsafe by reason of the defective construction of the pillars, but the defects of quality simply made the plaintiff's lease less valuable, the loss was purely economic and was not recoverable in tort against the defendants. The builders thus were under no liability for making the building fit for the intended use, if there is no danger to health and safety. In certain appellate decisions however a direct claim was allowed after inferring the existence of a contract. Blom "Fictions and Frictions" 164.

Blom thinks that the *Department of the Environment v. Thomas Bates and Son Ltd.* "decided in the clearest terms that after *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, a duty of care in negligence will not be found if the only loss is purely economic loss attributable to the lower value of a building or a lease resulting from the defective design, materials or workmanship in construction.". He underlined that "if [privity] is to be sidestepped to achieve a fairer result, it is crucial that the rule permitting the circumvention be clear as well."

³¹⁷ "This 'you made your bed now lie in it' approach, though it can appear cold has a great deal of force at least in commercial settings.", Blom "Fictions and Frictions" 163.

³¹⁸ For example an agreement with the potentially negligent party, the arrangement by the defendant to receive contractual protection from a third person, such as a vendor, non

The rejection of direct claims seems well founded as it recalls upon the need to give priority to private arrangements, as does the JQT or the contractual solutions to third party loss. However, since a direct third party claim might be compatible with the structure of the relationships³¹⁹, as can be seen in case law³²⁰, an outright exclusion of direct claims seems at least dubious. Looking, for instance, at the American experience, it is the beneficiary rule that is objected to, not protection altogether³²¹. It could be rightly pointed out that in such subcontracting cases liability in negligence has been accepted, at least in Scotland³²².

bidder, aiming at shifting the risk of damage. Blom "Fictions and Frictions" 163. In his view what the House of Lords did by retreating from *Junior Books* was to bring home "the inconsistency between the direct action in tort and the clear abstention from direct relations in contract". In some cases, he argued, it was more than abstention as in the *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396, where the subcontractor and the owner were related contractually. He gives the example of *Pacific Associates Inc and another v. Baxter and others*, [1989] 2 All ER 159 CA, [1990] 1 QB 993, where the action was in negligence in the face of exemption clauses in the contract of the main contractor. The claimant was the successful tenderer of dredging and reclamation works in Dubai, against the engineer appointed by the employer to supervise the works. The information provided at the tender stage was inaccurate, the works were costlier and thus the plaintiff suffered loss. The Court of Appeal held that the engineer had no duty of care coterminous with the contractor's rights against the employer.

³¹⁹ The different contracts in such a transaction should be compared in order to infer whether a direct claim is compatible with the expectations of the parties to the dispute. Lord Goff thought that with regard to the liability of managing agents *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, was an "unusual case". With regard to cases involving a chain of contract it has been noticed that a "direct claim of action is better explained on the grounds of convenience said to justify collapsing the chain of obligations into one". Accepting liability is possible when subcontracts have the same terms with the main contract or with other subcontracts: "Provided the relevant obligation breached in the subcontract is identical to the obligation specified in the main contract, there is little harm in recognising the direct suit". (Feldthussen, *Economic Negligence*, 149.)

³²⁰ The question is related to the policy of the courts, namely whether it will be pro-plaintiff. The 1970's academic literature on the subject was clearly pro-plaintiff, ignored the desirability of restraints, and did not consider the alternatives to tort. The recent conservative approach is not necessarily, as Stapleton notices, a crude attempt to cut overall size of liability. Courts are again becoming cautious about imposing liability for non-feasance towards third parties. Delictual claims might be aiming at the "deep-pocketed" of the tortfeasors. This is fine when their co-responsibility is similar, but this is frequently not the case. Thus Lord Goff in *Smith v. Eric S Bush*; [1990] 1 AC 831, excluded liability "for pure omissions" in one of the "most unequivocal modern statements of the principle". (Stapleton 111 (1995) LQR, 314).

³²¹ See under "Claims of the owner against the subcontractor" in Chapter 4. As Ellen Eisenberg notes that there is protection on other bases than the beneficiary rule, usually in negligence (57 (1982) *NYULR* 1403).

³²² *Middleton v. Douglas* 1991 SLT 726. See the reference to the approach in Scotland in Oughton 1 (1995) *Contemporary Issues in Law* 31. It is an example of the fact that in such cases involving a network of contracts proximity relationships are likely to be created and

A contractual claim, on the other hand, might be disadvantageous to the third party (if, for instance, his contracting party is insolvent) while the possibility of an alternative arrangement might be unrealistic. A direct claim is likely to lead to a cheaper³²³ resolution of the disputes without unnecessary transfers of property³²⁴. Arguments based on equity and economy would support the availability of a direct claim³²⁵.

Moreover, the bargaining power of the participants should be reviewed in order to assess whether it was actually possible for the parties to act differently³²⁶. By considering the possibility of alternative protection³²⁷ as a reason to exclude a third party claim,

liability in negligence, on the basis of voluntary assumption of liability, is possible. See also *Parkhead Housing Associations v Phoenix Preservation Ltd*. 1990 SLT 812, involving the installation by a subcontractor of an allegedly defective damp proof course, *Norwich Union Life Insurance Society v. Covell Matthews Partnership*, 1987 SLT 452 and *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244. In the latter it was acknowledged that, in principle, liability is possible

323 It is doubtful whether the resolution of the disputes is going to be speedier.

324 Following a series of contractual claims.

325 As is argued for American law, the beneficiary rule can be applied when there is no other effective way for the protection of the owner, as when the defect in the subcontractor's work is discovered after the prime contractor has been paid and has become insolvent. See under "Claims of the owner against the subcontractor" in Chapter 4. The need for protection was the strongest motive for the development of the contractual mechanisms in Germany.

326 Stapleton argues that the law should focus not only on what the plaintiff bothered to do but also on what he could have done to protect itself. Plaintiffs should be treated accordingly; they are not likely to be protected if they had secured contractual protection. If the contract provides narrower protection than tort and this can be attributed to the parties' understanding of the distribution of risks, then tort should not be allowed to override this limit. Stapleton notices that in *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, both direct and indirect names had the same difficulties in bargaining around contractual structures; thus the intervention of tort law would not encourage free-riding.) She underlines however that these considerations should not be confused with the privity fallacy. The question here is not that the defender might be "facing more obligations than it undertook in its contracts (the privity fallacy) but to consider the position the plaintiff was in and, *prima facie* to reserve the protection of tort to those who could not themselves have secured the relevant protection". (pp.322-323). (However the possibility of duplicate protection should be taken into account. In *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, this could be the case with regard to the names.) (Stapleton 11 (1995) LQR 322-324.).

327 Stapleton notices that the task with regard to liability to peripheral parties is to create principles to contain negligence liability. From the point of view of deterrence, she suggests that non causally important defendants should be shielded of liability at the duty stage. (The plaintiffs would have chosen the wrong person to sue.). As regards causally important parties, the duty should be denied if the plaintiff had adequate opportunities to deter the defendant, whether dealing directly with him or indirectly, dealing with a

emphasis is laid on what the third party could have done instead of what he chose to do, and thus illustrates, in one view, that privity cannot be "the appropriate organising principle" in a case where neither tort nor contract "is in doctrinal dominance"³²⁸. The suggestion against direct claims is therefore of little relevance to Scots law, where privity is not accepted.

It seems that a contract-based direct claim in subcontracting cases cannot be written off so easily³²⁹, if its advantages (especially the clearer perspective of the situation, including the parties' future planning and insurance considerations³³⁰), are taken into account. This is especially the case for Scots law where the model of the JQT exists and has been discussed as an alternative to delict in the Scottish liability system³³¹. As will be discussed, contractual solutions are a foreseeable possibility for Scots law, in a manner similar to American law³³².

4. The case for contractual solutions.

4.1. Introduction.

To begin it is noted that no separate third party loss problem is acknowledged in Scots (and English) law. In both jurisdictions the problem is one of pure economic loss and the law is uncertain; there could be either lack of protection for those injured or difficulty in

third party in a way that the loss will come to rest on the defendant. (Stapleton 11 (1995) LQR 341-342).

³²⁸ The law creates a protective duty of care rather than merely to enforce agreements. Stapleton 11 (1995) LQR 343.

³²⁹ The situation is different in product liability cases which will be briefly discussed later on.

³³⁰ As with many instances in modern transactions the dispute might quite likely be between insurers. There is substantial academic concern focusing on the insurance implications of civil liability. See under "Economic efficiency" in Chapter 4, for an indication of the relative accounts.

³³¹ Principally in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244.

³³² However, the JQT has not been employed in order to treat cases of third party loss to the same extent as the third party beneficiary rule in American. See under "Applications" in Chapter 4.

limiting the level of damages in an equitable manner. However, as observed, compensation has been awarded in many three-party, 'tripartite' or 'triangular', relationships³³³.

Admittedly a Scottish lawyer, taking a Scots law point of view, might have a different perception of third party loss than an English counterpart. In Scotland it would at least be easier to establish liability on the basis of the broader principle of *culpa*³³⁴ and in the absence of a doctrinal distinction between physical damage and economic loss. However, Scots case law is hardly distinguishable from English law³³⁵. As said, a realistic account of Scots law should take into account that English law influence has weakened the development of the Scots law potential³³⁶.

As noted above, a basic hypothesis in this work is that pure economic loss is not a homogeneous category of cases, from the point of view of their legal and social (commercial for instance) significance; no single formula can accommodate pure economic loss claims³³⁷. Such a unified view is attached to delictual reasoning, ignores the contractual element and,

³³³ See before under "Third party pure economic loss: Contractual approaches". See also Craig 92 LQR 197 239 and Harris & Veljanovski in Furmston, 59. See under "Tort v. Contract: Tort parties and pure economic loss", in Chapter 4.

³³⁴ Thus neither *Donoghue* nor *Junior Books* could be regarded important or exceptional respectively in Scots law as they have been thought to be in English law. From the point of view of the Scottish system they stand (especially *Donoghue*) as expressions of the basic delictual liability principle in Scots law. Restraining liability for pure economic loss would then seem a question of developing the proper guidelines in the context of the *culpa* principle; of formulating *culpa* adequately.

³³⁵ The practical effects of the differing Scottish doctrines are insignificant. As will be discussed later the effect of the English law in the area of delict has been devastating.

³³⁶ The work of certain Scottish lawyers alone might not offer an accurate description of the situation as it is being influenced by their aspirations for the Scottish system. The failure of the Scots law to exploit *culpa* or JQT for the treatment of third party loss, is, to a considerable extent at least, attributable to English influences. These can take the form of adopting mechanisms and concepts which have been developed primarily in England, such as trust or the tort of negligence. It is convenient and certainly less controversial for Scottish courts to follow established practices and developed case law offering ready answers. The very decision in *Roberston v. Fleming*, for instance, was attributed by Smith to the failure of the judges of the (exclusively English then) House of Lords, to understand the concept of *culpa*. See Smith, *Studies* 102 et seq.

³³⁷ See again Feldthussen, *Economic Negligence*, 16 et seq, on the advantages and disadvantages of a general theory, and on the situations until *Hedley Byrne.*, as well as on the historical background of pure economic loss cases, where the basic approach in the Commonwealth was to treat pure economic loss as a single category of cases (23 et seq). See also Rabin 37 (1985) *StanfLR* 1513-1538 and Beyleveld and Brownsword, 54 (1991) *MLR*, 48

in effect, restricts reparation for third party loss. This is especially the case for third party loss.

4.2. Purpose of discussion.

The rationale behind this discussion of contract-based protection for third parties is to suggest a solution to an existing legal discrepancy or, at least, to initiate a broader consideration of the problem from the Scots law perspective. There is no implied attempt to artificially engineer a revitalisation of the Scottish legal tradition as an end in itself³³⁸. Neither is the purpose to motivate a preferable legal treatment in a manner competitive to English law.

The reform discussed here concerns only one aspect of civil liability. It can hardly herald some broader consideration of traditional Scottish principles. The danger in asserting a legal tradition for political reasons has been experienced in Quebec, South Africa and in Ireland after the 1920's, where modern needs and contemporary developments were ignored for the purpose of preserving a juristic culture³³⁹.

The idea behind examining the Scots law potential is that the latter can offer comprehensive and equitable solutions removing the uncertainty for part at least of pure economic loss cases. The judicial tendency to preserve legal uniformity in the United Kingdom, which has (among other things) tied Scots law to English approaches, especially in commercial cases, should not hinder the development of preferable solutions. As will be discussed, apart from being fairer, the contractual approach presents specific practical advantages. It could appeal, for instance, not only to lawyers but to business people as well.

³³⁸ Such an idea would be particularly absurd today when the influence of English law is becoming greater. The view is unjustified in terms of the historical background of a single economy and the strong tendency for unified treatment in commercial, at least, cases amounting in practice to subduing the Scottish legal differences.

³³⁹ See McCall Smith, in Grant (ed), 153, at 154-155. In Quebec the urge to preserve the civilian tradition from the impact of the common law influence led to considerable areas of law receiving scant attention. The attempt in South Africa to cultivate the native jurisprudential roots, turning away from the mainstream of the common law influence, led to a situation where many issues a modern legal system faces were treated in a context of "slavishly historically oriented approach to the law". Finally Ireland after the 1920's turned its back on its natural sources of influence (continental Europe and Britain). As a result in certain areas of law Ireland was one of the most backwards jurisdictions of Europe.

Moreover, initiating the examination of the contractual view could lead to a greater awareness of the overall potential of the Scots law and, it is hoped, advance self-consciousness and determination for the development of the Scottish legal system.

Unfortunately the line of relative arguments will linger somewhat repetitively on particular aspects distinguishing the Scottish system, i.e. aspects related to its civil law roots³⁴⁰. These elements serve both as the initiative and justification for the speculation regarding contract-based developments in the Scottish system. They also serve as vehicles for the developments suggested, which is actually the way the beneficiary rule is treated in American law³⁴¹. This dual function of the Scottish system's distinctive elements explains the repetition; for each of the functions, the emphasis differs³⁴². The repetition is more evident regarding the central feature of the JQT. It is basic to the position of third parties in contract; its handling by the courts epitomises the fundamental illnesses of the Scottish system; it is referred in conjunction with important third party pure economic loss cases in delict (where the same judicial reluctance is displayed); and is the most likely model for contractual solutions to the third party pure economic loss problem. The mechanism is a basic aspect of the civil law inheritance of the Scottish system and, linked to the applicability of unilateral promises and the greater interchangeability between contract and delict, explains the choice for contract³⁴³. The approach resembles that to

³⁴⁰ See under "Similarities between the systems" in Chapter 7. Unintentionally this study spots similarities between the other systems and German law as evidence of the formers' potential to develop contractual approaches. As will be discussed these similarities often amount to no more than reconfirming that the systems discussed belong to Western legal culture. For Scots law however the civil law inheritance is considerably important with regard to the potential for developing contractual solutions or expanding the application of contract law in general. It is not only the JQT, but the enforceability of unilateral promises and the greater interchangeability between contract and delict that create an environment amenable to venture in expanding contract.

³⁴¹ Meaning as evidence to justify the discussion of contractual solutions and means/model to achieve these solutions.

³⁴² Moreover, there is always the need to stress the differences from the dominant English law in order to explain and justify the drive for alternative solutions whether contractual or not.

³⁴³ See later "Revitalising *culpa*?".

American law³⁴⁴. It is hoped that this repetitive emphasis on Scots law doctrines will not give the impression of a circuitry of arguments.

4.3. A question for the judiciary.

Contractual solutions would have to be introduced in case law³⁴⁵ despite the difficulties involved in this process³⁴⁶. The Scottish courts, in principle the guardians of the Scottish legal tradition, would have to embark upon law-making away from established practice³⁴⁷.

The courts would, first, have to acknowledge that there is a problem involving third parties in Scots law³⁴⁸. They should note that distinct groups of situations of third party loss³⁴⁹ are identifiable from a Scottish perspective and can be treated in delict differently from English law, on the basis of their strong contractual element. The courts

³⁴⁴ See "Tort v. Contract: Third parties and pure economic loss", in Chapter 4, discussing the priority of contract in American law.

³⁴⁵ One would have to exclude legislation as a possibility. Legislation designed for Scotland has proven slow and inefficient in regarding to respond to the actual needs. "If one looks at certain areas of law that are ill-equipped to deal with modern problems ... it is quite clear that in the absence of legislation, creative law making on the part of the courts is the only way of providing protection which the law should provide.". McCall Smith, in Grant (ed), 158. Moreover even if a contract in favour of third parties were to be introduced in the U.K., as the Law Commission seems to suggest in its Consultation Paper No. 121, *Privity of Contract: Contracts for the Benefit of Third Parties*, London HMSO 1991, this, on the one hand will not possibly be made in the form of a general clause while, on the other, it will not likely be extended enough to perform the function prescribed here as an alternative claim for certain economic loss cases.

³⁴⁶ Case law is usually slow to develop and it is rarely expressed in broadly applicable statements, but is articulated in a piecemeal manner. Were a reform to be introduced the courts would have to contrive to distinguish emerging cases from previous ones. It is furthermore difficult to ascertain the *ratio decidendi* in order to promote a continuation of a judicial tendency. Most of all, however, the courts are generally hesitant to embark upon what they could see as the work of the legislature. See McCall Smith, in Grant (ed), 158.

³⁴⁷ See Cardozo, B. *The Nature of the Judicial Process*, 1949, who notices that "there is nothing revolutionary or even novel about judicial law making", p.116, and Friedman, Wolfgang "Limits of Judicial Lawmaking and Prospective Overruling", 29 (1966) MLR 593.

The possibility of introducing a presumption of liability should not be confused with the question here. Actually the establishment of a contractual model of liability along somewhat steady lines would as an effect create such a presumption.

³⁴⁸ This starting point is comparable to courts acknowledging a *lacuna* in the law which they purport to cover in civil law jurisdictions. See Banakas, 70, referring to the "genuine legal necessity" the courts have to provide for in the French and German systems.

³⁴⁹ Those cases where the injuring behaviour consists of a violation of a contract the injurer has with another party and have been presented as those involving a contractual nexus, or those concerning relational loss

would have to explore the possibility of a plausible and preferable alternative to delict-based decisions on pure economic loss and be convinced that, by developing Scottish principles, this solution is attainable³⁵⁰. In sum this alternative amounts to bold judicial law-making -- bold since there is a clear tendency to treat the relative situations on the basis of delict and to interpret JQT in a conservative manner and because it would involve distancing the approach in Scotland from the prevalent view in U.K. law .

Indeed, such a daring spirit would be unusual for the Scottish courts and it certainly goes further than the recent decision to allow a restitution claim on the basis of an error of law³⁵¹. This task is not comparable to that of the French courts to infer the existence of a contractual relationship in numerous cases, or to the expansion by the German courts of the application of contract law to third party situations³⁵². The task of the Scottish courts is more arduous because they depart from a more disadvantaged position than the judiciary in those systems: not only do they have little to refer to from their own tradition³⁵³, they are also offered a less objectionable, even if not fully satisfactory, law and body of precedent.

350 In Cardozo's terminology the courts would be applying the "method of sociology", which is an expression of the principle of social justice, motivating new law, new solutions to existing problems. Cardozo distinguishes the method of philosophy (involving the tendency of a principle to expand itself to the limits of its logic), and the method of history (involving the tendency of a principle to confine itself within the limits of its history). (Cardozo, B. *The Nature of the Judicial Process*, 51-66.) A contract-based solution in Scots law will depart from existing mechanisms. However the changes in attitude it would require, and the change of approach it would introduce (contract instead of delict), as well as its significance for the Scottish civil law system as a whole are evidence of the fact that in essence whole new law would be introduced.

Cardozo thinks that the judges should consider the influences a legislator receives and act in a similar manner. (p.113.).

351 *Morgan Guaranty Trust Co of New York v. Lothian Regional Council*, 1995 SLT p.299.

352 See generally Banakas.

353 A contract in favour of third parties exists in both the German and French system as well.

Moreover, they can resort to few supportive academic writings³⁵⁴, often not related to the Scottish system³⁵⁵.

Given these points the situation sounds less optimistic. However, there are some positive signs in the attitudes of the Scottish courts. The recent breakthrough approach to restitution is one example. One could add that *Junior Books* has been followed in Scotland and it has influenced case law. Even, the -- unconvincing -- concept of 'complex' structures might have a stronger appeal in Scotland than in England and might regrettably be used by the courts to get around the constraints imposed on them by the current law³⁵⁶. A tendency in the last ten years to limit liability in delict³⁵⁷ and the related worries over the award of excessive damages could also be pointed out. One could further refer to the views in favour of expanding JQT³⁵⁸.

4.4. Advantages.

The advantages contractual solutions could offer have largely been mentioned in previous chapters, especially that on American law³⁵⁹. Thus, under contract, awarding

³⁵⁴ See McCall Smith, in Grant (ed), 159 who notes that an alternative to judicial law making would be "the attribution to the modern juristic writing of the sort of doctrinal authority accorded to jurists in civilian jurisdictions". Recall the importance of academic contributions for the development of the contract with protective effects. Larenz named the mechanism, His work and that of Gernhuber's referred to in decisions. See under "The Capuzol 22 decision", and "Special features" in Chapter 2.

³⁵⁵ See the literature on American law, especially the works Eisenberd, M. and Rabin. See also Lord Goff's references to the German mechanisms in *Henderson v. Merret Syndicates*, *White v. Jones*, *The Aliakmon*, and the works of Markesinis and Fleming (some of which concern American law as well).

³⁵⁶ See under "Third party loss: Privity oriented retreat from *Junior Books*", and "The effect of *Caparo* and *Murphy* on Scots law". See particularly MacQueen 1990 SLT 227 and McMillan 1996 SLT 163.

³⁵⁷ Interview with Professor Black 28/4/1995.

³⁵⁸ See the Memorandum No:38 SLC, and other academic work referred to before.

³⁵⁹ Useful for the purposes of this reference, albeit not exactly our subject, is Swanton "Concurrent liability in Tort and Contract: The problem of defining the Limits", 10 (1996) JCL 21-52. Arguing for the possibility of concurrent liability, for the possibility of tortious liability for a contractual breach, which seems more likely now than before in common law, suggesting that the supposed differences between the two forms of liability are not as great as they seem to be: There is no sweeping distinction between misfeasance -- covered by tort -- and nonfeasance -- covered by contract -- in those cases where concurrent liability is accepted (34-35) and the rules on the measure of damages are in general terms the same -- any supposed ban on expectation damages in tort should not have survived *Hedley Burns* (35) -- however, there is doubt as regards the failure to make gains or if the wrongs are

damages might be easier, as the unintentional character of the defendant's conduct is not an obstacle in a contractual setting where liability is strict. The litigants' interests are balanced more fairly than under delict as the defender is protected from extensive financial exposure, his liability being controlled according to the content and financial dimension of the transaction³⁶⁰. More importantly, it will be possible to consider taking account of

considered different under each form of liability (36-37). Swanton supports equalising their effects when they overlap. See under "Contract and delict -- Advantages of contract" in Chapter 2 on German law.

³⁶⁰ A contract-based approach will be equitable for the defender: The standards of liability will be based on the transaction. ("Being able to calculate and, if necessary, limit your risks is the essence of a contract", Blom "Fictions and Frictions" 157.) Damages on the basis of the intended use of the performance (and not on the class of potential plaintiffs), would effectively limit liability within the financial dimension of the transaction. Swanton notes that the argument that tort liability is more generous seems less convincing once concurrent liability has been recognised. The distinction between compensation for damage foreseen and contemplated (in tort) and compensation for loss that fell for reasonable foresight and/or contemplation (in contract), is not substantial while policy considerations can be taken into account in under either heading of liability. Swanton 10 (1996) JCL 43

See Feldthussen, *Economic Negligence*, 92 et seq on "Controlling potentially indeterminate loss". He discusses the meaning of the known quotation of Cardozo in *Ultrameres v. Touche*, (1931) 255 NY 170, 174 NE 441. He thinks that the limitation of liability on the basis of the class of potential plaintiffs was unfortunate and unnecessary; the limitation on the basis of the use of the information is enough. An approach based on the "end and aim" (*Glanzer*) of the provision of information would effectively contain liability. It is obvious that a contractual solution might be moving to that direction. See also Fridman, 93 (1977) LQR 431, who notices, referring in the decision of the House of Lords in *Koufos v. C. Czarnikow Ltd. ("The Heron II")*, [1969] 1 AC 350, that the measurement of damages might differ between contract and tort.

In public utilities' cases for instance there is no risk of following the "more traditional physical damage negligence law principles" (Feldthussen 150), thus rendering the defender liable for all foreseeable loss (the exclusion clauses will not be valid.). See Feldthussen, *Economic Negligence*, 150, and the references therein. See also the analysis by Smillie, 32 (1982), UTLJ, 243, on the justification of *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, [1973] 1 QB 27, [1972] 3 All ER 557 (CA). There was no problem of indeterminate liability and as the plaintiff already had a claim for physical damage, denial of the claim in respect of the pure economic loss represented no saving of administrative costs. In such type of damage (power cut) a large number of commercial users may suffer loss. Each claim might be for a small amount, but the total might be in excess of the contractor's liability insurance cover and beyond any reserved fund be might have predicted to accumulate. Potential defendants might include non commercial people (a motorist with no third party insurance for instance). In contrast a potential plaintiff can readily predict the loss a power cut might cause, and can prevent it by installing power generators or by arranging for insurance for example.

In cases where additional duties (of information for instance) might be imposed upon the defender, the restriction of liability might be possible on the basis of justice and good faith.

Even though under contract there is no possibility for an apportionment of fault (Blom "Fictions and Frictions" 147), a claim for losses to which the pursuer has contributed will possibly be rejected to the extent of this contribution as reasonably unpredictable.

contractual defences³⁶¹, including clauses excluding or limiting liability. However, compensation for physical discomfort consequent to an injuring event, somehow equivalent to mental distress that is compensated exclusively in delict, cannot be contractually excluded³⁶². The issue of exclusion clauses under a clear delict-contract division is especially complex, involving the interpretation of what the contractual exclusion concerns (tortious negligence or only faultless breaches of (contractual) liability³⁶³) and/or the juridical nature of the exclusion clauses ("shields" to claims or delimitations of substantive obligations³⁶⁴). Many of these complications would be eased under a contract-based scheme on the model of JQT. Finally, pro-plaintiff approaches have focused on delict, as fostering an allocation of risks that benefits the injuring party³⁶⁵, but delict is definitely a less accurate means to tackle the complexity of the promisor's defences.

³⁶¹ The fairer and predictable balancing of interests is evident on the treatment of defences, despite the uncertainty surrounding the issue in either JQT or delict. The relative discussion on JQT, although not well founded in case law, indicates that contract law is better equipped to treat equitably the defences in such a context. See Swanton 10 (1996) JCL 42 suggesting that with concurrent liability the apportionment legislation should apply irrespectively of how damages are calculated, yet thinking that in an action in tort the defence of contributory negligence for the breach of a strict contractual duty should not be accepted. General equity considerations could be relied upon to play this balancing role. See also Brodie, in *Scots law in the 21st century*, 206, who noted that in the cases where assumption of responsibility is found there was no question of indeterminacy, one of the major problems in pure economic loss.

³⁶² See Swanton 10 (1996) JCL 44, who expresses some doubts as regards the effect of policy considerations.

³⁶³ Swanton 10 (1996) JCL 45. On the other hand confining the plaintiff to a claim in tort "would be a limitation on the range of circumstances in which liability for the negligence of others is recognised, since the tort rules are narrower than the contract rules in this regard."

³⁶⁴ Swanton 10 (1996) JCL 46.

³⁶⁵ See McMillan 1996 SLT 164, discussing the allocation of risks in contract and tort and noting that "it has never been easy for the practising solicitor to state with certainty what the law is or may be in this area". He argues that a strictly contractual or a strictly delictual approach to recoverability are at the opposite ends of the political spectrum the former favouring libertarianism the latter a form of collectivism. Murphy's "Empire spawned the collateral warranty industry" and the approach "may be favoured by those who prefer a strictly contractual analysis". Apparently the analysis for contractual liability of a scheme based on JQT would favour the award of damages in cases which are meant to be treated by the expansion of delict. The choice for the award of damages might come before the selection of a vehicle for liability. McMillan notes that it is for the Scottish courts to make the crucial choice for the means of the allocation of risks -- meaning delict or contract. It could be accurate to say that the choice to award damages might precede the choice of a vehicle.

Contractual solutions could be preferred by business people who justifiably dislike uncertainty in law and excessive civil liability burdens³⁶⁶. Lawyers would also appreciate contract as an effective, equity-oriented, and flexible mechanism.

It is true that the contractual limitation period is likely to be shorter as is the case in German, Greek and American law³⁶⁷. However, this disadvantage for the pursuer is outweighed by the overall equitable approach. It makes sense from a social and economic point of view to have such differences resolved soon³⁶⁸.

It is uncertain whether under delict the flexibility of the contractual approach is possible. There is, most likely, considerable difficulty in adjusting the treatment in delict under equity principles, especially good faith which is possibly valid, in one view at least³⁶⁹, in Scots law, as these principles have not been developed as effectively as, for instance, the principle of good faith in German law.

With contractual solutions the courts will be possibly better informed on the facts of the cases, especially their context and implications for transactions and issues such as insurance considerations. They will have the opportunity to take these factors into account when deciding on claims³⁷⁰.

³⁶⁶ I owe credit for that point to Professor Black, who made a relevant comment in a fruitful discussion I had with him on the 28th of April 1995.

³⁶⁷ In all these systems limitation period in delict is advantageous for the plaintiff (third party). See "Contract and delict -- Advantages of contract" in Chapter 2, "Is the contractual approach advantageous?" in Chapter 3, and "Limitation period", in Chapter 4,

³⁶⁸ Thus social tensions are alleviated, the judicial expenses are lower, the reparation costs can be prescribed more accurately. Eventually there is a motive and therefore pressure on the parties to reach a compromise. Swanton notes that the limitation period might be longer in tort, and suggests that legislation is required to equalise the situation in the case of concurrent liability especially as regards the point of commencement. Swanton 10 (1996) JCL 42.

³⁶⁹ As inferred by Smith's works. It is doubtful whether this is the prevalent view.

³⁷⁰ The courts, deciding on the basis of the contract, will know more about the relationship so as to be in a position to respond adequately to the specific needs. They will find it easier to examine the economic aspects as well as the purpose and significance of insurance agreements, for instance, can be better understood by focusing on private arrangements. Insurance considerations can thus be adjusted to particular circumstances each time, in contrast to applying abstract models of preferable insurance policies (first party insurance instead of third party insurance). See also "Economic efficiency" in Chapter 4 on American law.

However, reference to the advantages cannot be complete without reference to the argument that *culpa* is largely defunct. Delict, it will be argued, is not a viable option.

4.5. Allowing third party claims -- Critique.

Two criticisms regarding the availability of a claim to third parties can be discussed in an attempt to draw attention to contract law and particularly to the potential for contractual approaches to third party pure economic loss in Scots law.

First, one could argue that since risks in most of the transactions involving third party loss are acceptable (and usually fall upon insurers), and reasonable reliance is not expected in the context of, for instance, commercial transactions, a claim in delict should be rejected because it is rejected by contract law³⁷¹.

³⁷¹ These arguments against the availability of a claim in situations where delict and contract seem to overlap (as in third party loss cases), are based on the idea that in certain cases, since no contractual remedy is available then it would be absurd to contemplate a delictual one. Contract law that should have priority in serving transactions' needs. Many of the relevant cases involve concurrent liability and not third party loss situations. As Blom states "The damage results from the way the plaintiff had arranged his affairs. It is generally sensible to adhere to a rule denying recovery because, first, it is generally simpler and more predictable than a rule allowing recovery if 'proximity' and 'neighbourhood' can be found; and, second, it imposes no great hardship because there is nothing to stop the parties in the future from making contractual provisions for the risk in question". Blom "Fictions and Frictions" 173.

Arguments pointing to the defender's fault are considered emotive and certainly inappropriate in a setting of commercial transactions where the relative risks are acceptable and the burden covered by an insurer.

On the basis of an agreed allocation of risks the decisions in "*The Aliakmon*" (*Leigh and Sullivan v. Aliakmon Shipping*, [1986] 2 All ER 145, [1986] AC 785), and *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, viewed through contract (instead of tort) lenses are justified. Blom thought that in *The Aliakmon* the pursuer should have made different provisions in the contract of sale. Cases like *Henderson v. Merret Syndicates*, and *White v. Jones* according to these views would be considered as essentially contractual.

It was absurd for instance to seek compensation in tort in the Canadian case of *V.K.Mason Construction Ltd. v. Bank of Nova Scotia et al.*, 16 (1985) DLR (4th) 598, once it was thought that the defender's bank letter to the pursuer giving assurance of finance, was not a letter of guarantee, and thus the bank had no contractual liability. *Caparo Industries v. Dickman* [1990] 1 All ER 568 and *Smith v. Eric S Bush*, [1990] 1 AC 831 are justified because no reasonable people could have contemplated that the defender would be liable. In *Caparo*, which dealt with a claim of a company which took over another company against the auditors of the target company, the claim was rejected on grounds of lack of proximity and for fear of opening the floodgates. The question to be asked according to the views discussed here is whether the purchaser in *Caparo* had reasonable expectations that the auditor gave the assurance as if the pursuer had employed them. These expectations could be defined by a contract and *Caparo Industries* should have contracted for this purpose. What is questioned here is whether reasonable reliance should be expected in such

The argument holds little validity for Scots law. It contradicts the function and principles of Scots private law where the priority of individual will is paramount, as unilateral promises can be binding (*pollicitatio* and JQT), and where the potential exists to extend further the contractual effects (on JQT), provided there is a weakening of intention requirements. This potential indicates plausibly that the legitimacy of a direct claim could, first, be attempted in Scots law on the basis of the contract. The advantages of a contractual view, (the clearer understanding of circumstances and of the transactions' setting they offer) make more evident the reasonableness of compensation. A broad interpretation of the beneficiary definition in the JQT, for instance, could give valuable insights into the legitimacy of certain, but not all, direct claims. The application of the American third party beneficiary rule in third party loss situations illustrates JQT's potential³⁷².

Another point, also developed for claims in delict, would concern potentially extended liability. The contentious character of the issue of a direct third party claim,

commercial transactions. The definition of the reasonable expectations cannot be made on contractual standards alone. The law should employ less strict standards of promise as in the case of *Smith v. Eric S Bush* [1990] 1 AC 831. (Blom "Fictions and Frictions" 169,179.)

The position against a direct claim departs from an assumption of untrustworthiness which is said to be the rule in commercial transactions. This is not the way law operates however. Reliance is an important element of social and commercial life alike. Law as a normative system is protecting this reliance. The promotion of trust in relationships is a basic purpose of a coherent contract law.

The contractual view can be considered in relation to the exceptions to the rule excluding liability from damage to third party property. These exceptions (see Smillie, 32 (1982), UTLJ 244 et seq., and MacGrath, 3 (1985)*OxfJLSt* 364.), not all of which are third party loss cases, involve situations where the plaintiff was burdened with the risk of loss either under the terms of contract with the owner, or even without a possessory or proprietary interest in the property in question. The first category involves cases of recovery by charterers by demise for damage to the chartered vessel for instance. Another example is the case of *Robins Dry Dock & Repair Co. v. Flint* (1927), 272 US 303 (2nd Cir). In the second category, the owner will suffer no loss while the pursuers loss will be purely economic. The only English case Smillie cites is *Margarine Union G.m.d.H. v. Cambay Prince Steamship Co.* [1969] 1 QB 219, concerning goods damaged in transit after the risk, but before the property, in the goods passed to the buyer. This is the situation with *Leigh and Sullivan v. Aliakmon Shipping*, 2 [1986] 2 All ER 145, [1986] AC 785. The contractual view can be useful and credible in either type of situation.

Taking the contractual perspective into account it might be possible to foster generally accepted models to facilitate decisions. On the basis of a contractual analysis it is easier to acknowledge, who is in a better position to distribute the loss in these circumstances.

³⁷² See "Areas of application" in Chapter 4.

instead of a contractual claim against one's contracting party, is more evident in situations where the services or statements of the defender concern a large number of potential third party claimants. These are the cases of an auditor's report reaching shareholders or of advocates' advising solicitors on legal issues which concern many of the solicitors' clients, who might have actually asked for the advice.

Thus, for instance, rejecting the availability of a direct claim seems logical for the case of the auditors' liability towards investors, on the basis of fairness³⁷³ and economic rationality³⁷⁴. However, it is not obvious in the case of an advocate who might offer advice on a specifically defined, limited issue, or for an auditor who prepares a report concerning a small number of shareholders³⁷⁵. It is difficult to see the difference in principle from the case where the advocate offers advice for a particular client of a solicitor, especially since the legal question can be specifically defined. In the latter cases it is difficult to argue for the rejection of a direct claim for reasons of unfairness, or of the claimant's bad faith³⁷⁶, especially in instances of advocate liability. As will be established later, good faith is a blunt instrument for exercising a leverage in these claims, at least regarding Scots and English laws³⁷⁷.

On the basis of social and economic concerns that claims will, arguably be accepted if the benefits they entail, not only for the participants but also for the social whole (for

³⁷³ It is clear that the pursuer - defender link is not sufficiently individualised. The auditor is shielded from direct claims on a good faith interpretation of his employment contract. A direct claim should be rejected as being against good faith; an investor could not in most cases have reasonably expected that the negligent auditor would be personally liable to him. The fairness and good faith are in the last extent defined by the relative market practices and the needs served by the work of auditors. It would be impractical and certainly detrimental professionally to hold the auditor directly liable. This would have negative effects to the auditing function which is essential to economic activity.

³⁷⁴ The auditor would not possibly be in a position to meet these demands. Investing after all entails risks.

³⁷⁵ See under "Examples: Misrepresentation and product liability" in Chapter 4. In misrepresentation cases the criterion used to contain compensation is the number of potential claimants instead of the more sensible reference to the use of the information, opinion etc. in question.

³⁷⁶ The claim is possibly in good faith. There is no question thus over the reasonableness of the undertaking in this case. These borderline cases emerge when the liability of a professional offering services of considerable social importance having special duties of truth, is at question.

³⁷⁷ Unlike, for instance, German or Greek law.

instance, for the economy), outweigh the disadvantages they might impose. A direct claim might be reasonably excluded if the benefits it involves for the third parties and the social whole, (cheaper settling of disputes, reducing litigation, reducing unnecessary property transfers), are outweighed by the handicaps inflicted on the activity in question and the effects this might cause. It is in the broader social interest to avoid rendering certain important economic and social functions uncertain or unaffordably costly as this would effect the related services.

A direct third party claim will thus be available only when the interests of the third parties and those of the society as a whole coincide. A third party claim, as any legal action, makes sense when it serves some social purpose as well (compensating losses) without contradicting broader concerns. Judging from the JQT, in order to award damages for third party loss, a strong element of some individualised, specific link between the defendant and the pursuer must exist³⁷⁸, derived in the last extent from an objective³⁷⁹ interpretation of the undertaking in question. Arguably, from a contractual viewpoint, the specific aspects of each case will be more clearly highlighted to allow less space for a somewhat mechanical exclusion of liability when this would seem unfairly extended³⁸⁰.

Contract will not lead to excessive exposure. Third party loss situations do not by definition involve indeterminate liability. For example, regarding product liability, the plain question would involve avoiding remedies in contract against the seller³⁸¹ and allowing a direct claim against the manufacturer. The answer could be that the rejection of a direct claim in delict is persuasively based on justice and economic rationality and

³⁷⁸ In *Hedley Byrne* and *Junior Books* for instance, the victims of the breach of contract were clearly predictable.

³⁷⁹ Based on the socially prevailing understanding

³⁸⁰ One could further contemplate that, in the situations where, due to the nature of the undertaking in question (of an advocate or a doctor for example), an exclusion clause would seem to contradict good faith in the majority of cases, this might not be so when the undertaking concerns a larger number of cases with special individual character. Since the advice is of a general character and, in the case of a legal opinion for instance, there can be considerable variation between individual cases, such an exclusion clause would not run against good faith.

³⁸¹ If the seller is bankrupt, however, this action will not possibly lead to the consumer's satisfaction.

relative arguments apply for any contract-based view³⁸². Product liability will not be dealt with in this study. Thanks to the more comprehensive perspective offered by contract³⁸³, it would seem that a direct contractual claim is beyond the parties' intentions or expectations, beyond the market trends and beyond contemplation in the related statute law³⁸⁴. In sum, contractual solutions do not increase the risk for extended liability and provide an efficient means to award compensation.

5. Legal basis for contractual solutions.

5.1. Introduction.

³⁸² Fethussen makes a remarkable account of the situation (Feldthussen, *Economic Negligence*, 194-205). Referring to commercial buyers at first, one set of arguments would point at the extensive legislative involvement in the particular area. This fact does not necessarily exclude a direct claim; however, it might lead to the creation of a presumption that a statutory remedy is available. Even if potential pursuers are not fully satisfied with this solution, (and privity is not likely to be an obstacle in their seeking reparation), litigation will possibly not be the choice of rational consumers or manufacturers.

Furthermore not all manufacturers are in complete control over the terms of the sale, and, even if they can provide for the allocation of risks to the sellers for instance, or for the exclusion of their liability by the sellers' agreement, it should not concern the courts. The fact is that the stated goal of a direct tort suit is achieved in most cases by sales law.

Moreover the deterrence effect of a direct suit is likely to be minimal. Claims for non dangerous products are ultimately quality complaints. (Under traditional sales law there would be no liability.) Quality complaints, are complicated. The expected standard are the result of the buyer's bargaining with the seller. As in the case with sophisticated products, the manufacturer might not know what is a better product in different circumstances. Quality control can be effected by the parties to a contract. The possibility of a direct suit might encourage the employment of disclaimers.

The availability of a direct claim is unlikely to promote a more effective loss distribution. Not only the manufacturer but the user as well can predict and take measures to prevent the loss. The loss is associated with the user's business, not the manufacturers'. "This type of economic loss is knowable, controllable and insurable at lower costs by the user than by the remote manufacturer."(Feldthussen, p.201).

The convenience of a direct claim is further diminished in the light of the complexity of the possible disclaimers' problem. The manufacturer can exclude liability for himself and can benefit from the seller's disclaimers. "The purchaser should not be permitted to impose a greater obligation on the manufacturer than that which it assumed in its bargain" Feldthussen, p.202.

The situation is again complicated with regard to claims by consumers (non commercial buyers). The possibility of an adequate statutory remedy is stronger in this case. One could argue for the just cause to protect the weaker consumer. However, question of disclaimers, economic policy issues (as the effect of a flood of such claims), and the apparent differentiation of the law between real property and chattel markets provide an unclear picture which cannot be dealt with in this study.

³⁸³ A contract-based approach can focus on the participants expectations -- something valuable in product liability questions -- as well as to the overall pattern of the transaction.

³⁸⁴ An objective interpretation of the facts would lead to neither acknowledging a voluntary assumption of responsibility nor to the acceptance of a situation resembling JQT.

There is an identifiable predisposition in favour of third parties in Scots case law, stronger than in English law. Evidence can be drawn from the treatment of *Junior Books*, from Lord Clyde's speech in *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*³⁸⁵ and the decision in *North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2)*³⁸⁶. These situations involved third party loss claims and the common element was a network of interrelated private arrangements. The latter were relied upon for the evaluation of the participant's conduct and the justification of liability. In addition to this evidence from the law of delict, the overall position of the third parties in Scottish private law should be taken into account, especially the JQT, and the law of assignation. In the cases referred to above and in *Comex v. Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*³⁸⁷ and *Norwich Union Life Insurance Society v. Covell Matthews Partnership*³⁸⁸, the Scottish courts took due account of the contractual background of the delictual claims.

It is possible to say that such tendencies are discernible in English law as well³⁸⁹, for example, in decisions of the House of Lords focusing on the voluntary assumption of responsibility³⁹⁰. In Scots law the attitude is not so much clearer as doctrinally justifiable (if not imposed) in a more comprehensive, objectionless manner. The examples from case law should be related to Scottish doctrine; the absence of privity or consideration doctrines, the JQT, the *pollicitatio*, the broad character of *culpa*, the absence of a fundamental distinction between physical damage and economic loss, the more unified civil liability. Further support can be found in the relative academic work (including works on English law)³⁹¹.

385 1989 SC 412, 1992 SLT 244.

386 1988 SLT 778. One could add of *Comex v. Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2)*, 1992, SLT 89, or JQT cases.

387 1992, SLT 89.

388 1987 SLT 452.

389 Or for all common law jurisdictions, See under "Tort v. Contract: Tort parties and pure economic loss", in Chapter 4, and the conclusion that generally there is compensation in cases involving "triangular configurations", or in "tripartite exchange relationships" in American law.

390 *Henderson v. Merrett Syndicates Ltd* [1994] 3 All ER 506, being the most recent example.

391 Smith might not be an undisputed authority but is an indispensable source of academic writing. Recall the Memorandum No:38 SLC, the work of MacQueen, (*Title*), and the works of MacGrath, 3 (1985)*OxfJLSt* 350), Adams and Brownsword, 10 (1990)*LSt*, 26, focusing on common law, and McMillan 1996 SLT 159. See "Third party loss in delict:

The incorporation of contractual elements in delict is doctrinally justifiable in Scots law terms. There is, or there should be a doctrinally distinct treatment of third party loss in Scots law.

The contract law alternative to delictual treatment would be modelled on JQT, without copying the mechanism. JQT could become applicable to private arrangements which might not be, strictly speaking, contracts. The requirement of an intention to benefit would have to be modified since a mechanism with a strict intention requirement cannot be effectively applied in third party pure economic loss cases -- the suggestion for contractual solutions is usually rejected on the basis of the unsuitability of the intentional elements associated with the contract³⁹². It should be sufficient for the application of contract law that the third party's interests be affected³⁹³ and that this have been reasonably predictable when planning the private agreement. No implication opposing a direct claim should be inferable from the private arrangement. The nexus of the relationships and thus the concern/interest of the third party must be in existence at the time of the injuring event in order to avoid claims not justified on the basis of the parties' contemplation³⁹⁴. Finally, the treatment of defences should be based on the JQT approach; a defendant should be liable for what he could have reasonably foreseen or voluntarily undertaken at the time of the injuring behaviour.

Interpretations". See also Rabin 37 (1985) *StanfLR* 1513-1538, suggesting the differentiated treatment of pure economic loss cases.

³⁹² See Whittaker 16 (1996)*OxfJLS* 198. He presents the contract for the benefit of third parties as the basic contractual alternative. It should be easy to understand from the arguments so far that a straightforward application of the JQT is out of the question. The mechanism is used as a model. Apart from the inapplicability of the contract due to intention requirements Whittaker consider that contract cannot cover cases where more than one contracts intervene between the parties. This is not necessarily the case with a model as the discussion on the cases involving subcontracting should have indicated, while of course cases of product liability would clearly not be treated on the basis of contract.

³⁹³ Which is not the case with JQT. See MacQueen, *Title* 18. See *Finie v. Glasgow and South Western Railway Co*, (1857) 20 D (HL) 2.

³⁹⁴ See Thomson's interpretation of *Junior Books* and his subsequent explanation of decisions rejecting liability for pure economic loss (*Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177).

The JQT model is preferable to that of *pollicitatio*. On the one hand, it engulfs³⁹⁵ the essentials of *pollicitatio*³⁹⁶ and, on the other, it reflects better the complex interrelated arrangements found in this type of situation and can employ a more consistent pattern for dealing with the defender's disclaimers.

A reasonable question would refer to the way this modified version of JQT is likely to be established in case law³⁹⁷. The aim of this section is to give the arguments for a contractual model -- the precise form of which cannot be accurately described in advance. The justification for "expanding" the JQT, if this is the process for reaching a contractual model, will be sought on the basis of the same arguments which will be used to indicate that the Scottish legal system has the potential for contractual solutions in third party loss situations. These two questions, extending the JQT and extending the application of contract law (in an area supposedly covered by delict) are, for the purposes of third party loss, essentially one. Answering the latter will provide the rationale for the former.

In terms of judicial practice, a contractual model is likely to be derived by analogy to the JQT mechanism³⁹⁸. The analogy was not discussed in American law because the beneficiary rule has already been applied to third party loss cases and is more flexible than the JQT. This analogy can be justified on the basis of the situations of third party loss which were referred to before and which are compatible to the JQT situations, for example *Scott Lithgow v. GEC Electrical Projects Ltd*³⁹⁹. It is important that contractual liability has not been excluded. Once liability, whether in contract or delict, is possible, contract law can be applied by analogy to JQT. Analogy is discussed here as a method to construe a

³⁹⁵ According to the prevailing opinion, the JQT is explained doctrinally on the basis of *pollicitatio*. It is a form of *pollicitatio*.

³⁹⁶ See the reference to the debate on the theoretical bases of the JQT.

³⁹⁷ See Walker, *The Scottish Legal System*, "The making of new law.", 555.

³⁹⁸ The incremental approach which is strongly based on analogy has been accepted in certain Scottish cases. Thus the incremental approach was followed in *Weir v. National Westminster Bank plc* 1994 SLT 1251, and in *Nordic Oil Reserves v. Berman*, 1993 SLT 1164. However the approach hardly allows the development of the law in novel directions. McMillan argues that the incremental approach might be less easily applicable in Scots law where the tendency is towards principle rather than precedent. McMillan 1996 SLT 163.

³⁹⁹ 1982 SLT 244.

contractual model. Later the focus will be on analogy as a legitimate form of law-making⁴⁰⁰. Liability is possible if, on the basis of the parties' contemplation, reparation seems fair and reasonable for the protection of the injured party and the just balance of the interests involved. Liability in these cases will, or should have been, in the contemplation of the participants, and contractual liability will be certainly preferred by the defendant who is likely to be better protected this way (and by the pursuer if he finds it easier to assess his claim)⁴⁰¹.

Arguably, the courts can refer to a "voluntary assumption of responsibility"⁴⁰² on the basis of contract as well, although the concept is associated with liability in delict. From a contractual point of view the expression would not be tautologous (and thus meaningless) since it ignores the complex private arrangements' setting and the contractual behaviour and seems to be linked, implicitly, to an intentional approach which is clearly not the rule⁴⁰³. The criterion, focused on some hypothetical assumption of responsibility, seems artificial especially if compared to the behaviour and context in question: Someone would be liable in contract not because he assumed responsibility but because he violated the contract. Hoping that this line of argument is not nit-picking with regard to judicial policy⁴⁰⁴, a straightforward contractual model is logically and doctrinally plausible for Scots law. It is at least more consistent than the "voluntary assumption of responsibility" and is preferable in practice as it connotes the advantages of a JQT-based mechanism. A

⁴⁰⁰ Having question over legitimate law making coming at a later stage might seem peculiar. The model however is hypothetical. On the basis of this hypothesis the authority of the courts will be judged.

⁴⁰¹ Liability is imposed in these cases as well but on the basis of an objective interpretation.

⁴⁰² The latter, expressly or not, has been used to justify the award of damages in most pure economic loss cases involving a contractual nexus

In this case the courts would do what Cardozo describes as "the old forms remain, but they are filled with a new content.". (Cardozo, B. *The Nature of the Judicial Process*, 101)

⁴⁰³ Intention requirements will always plague any such solution, as they render unsuitable the application of JQT, or §328BGB, or §410AK. The application of the "voluntary assumption of responsibility" concept would seem little different than applying the provisions mentioned before. Recall that if there is intention to injure there will be possibly delictual protection for the injured parties.

⁴⁰⁴ Recall the discussion on the German judiciary's attitude, where it was argued that the courts were not concerned with labelling the contractual solutions doctrinally, but were concerned with offering practical solutions.

contract-based view is generally simpler and consistent in its outcome⁴⁰⁵ and does not employ somewhat vague concepts such as proximity.

The examination of the potential of Scots law to extend contractual protection will not, however, assess the actual possibility of the legal system to adopt new approaches. A number of other factors affect the dynamic of the Scottish system in taking a bold step such as the one in question. These are not only legal but also political and economic factors. The sovereign and independent character of the Scottish system and the need to guarantee the smooth operation of the UK economy are such issues. The relative historical background, it is well known, is one of progressive assimilation to English law⁴⁰⁶, although the last ten to fifteen years have witnessed a resurgence in optimism for the survival and development of the Scottish system (which has yet to be evidenced in more tangible results than a change in the psychological climate). Positive developments such as that of the Privy Council, which upheld a New Zealand decision that rejected *Murphy*, should not be overstretched. The privy Council justified its decision on the difference in circumstances between England and New Zealand⁴⁰⁷. In any case, one of the purposes of the discussion is to initiate a re-appraisal on the prospects of the Scots law of obligations. Nevertheless, the discussion is not, irrelevant to English law as it could indicate alternative approaches to the current treatment in delict⁴⁰⁸.

Pure economic loss law cannot, it has been noted, be expressed under a single formula⁴⁰⁹. Accordingly, the variety of pure economic loss cases does not justify a uniform treatment. The suggested model will deal with a small part of pure economic loss, the third

⁴⁰⁵ Both the voluntary assumption of responsibility and the contract-based model start from observing the similarity of the situations in question to contractual arrangements. The contractual solution is not dependent upon vague concepts such as proximity.

⁴⁰⁶ See *Independence and Devolution: The Legal Implications for Scotland*, Grant (ed), 1976, and the articles therein.

⁴⁰⁷ *Invercargill v. Hamlin* [1996] 2WLR 367 ([1994] 3 NZLR 513, 11 (1995) *ConLJ* 286). See McMillan's enthusiastic account of this and a recent Canada decision also following *Anns* and rejecting *Murphy* (*Winnipeg Condominium Corporation No 36 v. Bird Construction Co Ltd*, [1995] SCR 85). McMillan 1996 SLT 159-164.

⁴⁰⁸ The discussion is particularly useful in the light of the Consultation Paper No. 121, LC 1991, which suggested the adoption of a contract in favour of third parties in English law.

⁴⁰⁹ Thomson, 1995 SLT 139.

party loss, where it is easier to assess common elements in order to tackle the problem in a uniform manner⁴¹⁰.

5.2. Scots law doctrines.

Scots law is, arguably, distinguished by a more powerful drive to give priority to private arrangements than in England. This drive is evidenced in the JQT, *pollicitatio* and the treatment of third party loss cases in courts⁴¹¹. This priority could justify preference for a contract model in third party loss situations, as is the case in American law⁴¹².

To this drive towards private arrangements one should add a potential for taking into account the position of third parties. The JQT, *pollicitatio* and the liberal Scots law of assignation evidence this potential⁴¹³. Arguably, in Scots law there should be a justifiably distinct treatment of third party loss situations whereby contractual considerations⁴¹⁴ are naturally accepted if not doctrinally encouraged. This distinct treatment could be explained in normative terms as well.

Following the inclination of Scots law towards principle rather than precedent⁴¹⁵, one can contend that the structural characteristics discussed here could exercise greater influence on the development of the Scottish system. Moreover, one could suggest that the priority given to contractual solutions could easily be expressed as an overall principle as

410 As said, similar was the suggestion for the third party beneficiary in American law. See Rabin 37 (1985) *StanfLR* 1513-1538.

411 *Norwich Union Life Insurance Society v. Covell Matthews Partnership*, 1987 SLT 452, *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244.

412 See "Tort v. Contract: Third parties and pure economic loss" in Chapter 4.

413 See in MacQueen *Title*, the reference to assignation.

414 Different descriptions could suffice to describe this tendency, for example that it involves a contractual nexus or relational loss.

415 Scots law, in contrast to English law is more inclined to principle than precedent. See any basic textbook on Scots law. See the speeches of the Law Lords in *Junior Books* which emphasised upon this feature of Scots law. The legal method Walker prescribes where judges are meant to classify the factual situation before them into legal concepts and categories, resembles this tendency. Walker, *The Scottish Legal System*, 492. McCall Smith notes that "For the Scots lawyer the problem must be one of determining the existence and identity of these principles".

In civil law jurisdictions, principles rather than precedent are instrumental in guiding the courts. See McCall Smith, in Grant (ed), 153, at 159, commenting on the civil law approaches to precedent.

Scots law has a tendency to form general principles judging from *culpa* and *pollicitatio*⁴¹⁶. The tendency is stronger than in English law at least. Thus the formation of a general guideline for third party pure economic loss cases could be more convincing than an incremental approach relying heavily on precedent⁴¹⁷.

As mentioned, a delictual view would not suffice to express third party loss without analogies from contract. These analogies are inevitably drawn from the JQT and its definition of the parties' and the beneficiary's legal position, especially their entitlements. Under this view, the reliance by Scottish courts on trust for third party beneficiary claims seems to be of dubious necessity⁴¹⁸.

There is, considerably greater scope to expand the Scots law of contract as contract is defined in Scotland in looser, more open terms than in England, making the enforcement of promises easier⁴¹⁹. This argument is justified by the absence of consideration⁴²⁰ and privity doctrines, as well as by the enforceability of unilateral declarations of will (*pollicitatio*). The upgraded, in relation to England, position of individual intent (because of the upgraded role of the declaration of intent) makes the expansion of contractual liability to third party loss plausible once there is an acknowledged need to give emphasis to a private agreement.

Due to the absence of consideration and privity doctrines, Scots law is not hindered doctrinally from accepting liability in delict between parties to a contract⁴²¹. It should not, furthermore, be hindered from choosing the most equitable solution when contract and delict

416 As arguably civil law systems do.

417 See the argument on the incremental approach being less suitable for Scots law as the latter lays emphasis on principle in McMillan 1996 SLT 163.

418 Scots law should not need to resort to trust to the same extent as English law in order to protect third parties. Unfortunately, as said before, the approach to the JQT has been constrained by the use of trust.

419 See McBryde, "Scots and English Contract Laws", in Birks, vol.2, 144-155.

420 The absence of the doctrine of consideration is evident from the decision in *Morton's Trustees v. Aged Christian Friend Society of Scotland*, (1899) 2 F 82, which is based on JQT. This claim would have failed in England. In Scotland as long as an undertaking is seriously intended there is no need for consideration in order to create an enforceable right.

421 See Wilkinson, and Forte, 30 (1985) JR, 24-28, See also Swanton 10 (1996) JCL 21.

seem to overlap⁴²² -- the borderline between contract and delict being less rigid in the Scottish system by comparison to the English system. The relationship between the two forms of liability should not be burdened by the doctrinal austerity which seems to haunt English law. This relationship could indeed be complementary as at least potentially a greater degree of interchangeability exists. (However, the treatment of concurrent liability does not seem to differ significantly between the two jurisdictions⁴²³.)

Moreover, while the absence of consideration should make easier the acceptance of a direct claim⁴²⁴, the absence of privity facilitates the substitution of contract for delict, provided the direct⁴²⁵ contract-based claim is preferable.

It is questionable whether Scots law is more decisively determined by equity considerations than English law⁴²⁶. The fact that there has been no distinction between law and equity in Scotland has historical value and little practical effect. In any case, equity is "a valid and inexhaustible source of Scots law". A reference to equitable solutions would reinforce the argument in favour of contract, keeping the defender's financial exposure and the burden on professional and economic activities under control⁴²⁷.

⁴²² See Cardozo, *The Nature of the Judicial Process*, 99-100, referring to the erosion of precedent on the basis of the practical convenience of the new approach. Cardozo offers the example of a beneficiary's right: "We get a striking illustration of the force of logical consistency, then of its gradual breaking down before the demands of practical convenience in isolated or exceptional instances, and finally of the generative force of the exceptions as a new stock, in the cases that deal with the right of a beneficiary to recover on a contract. ... Gradually the exceptions broadened till today they have left little of the rule. ... Rules derived from a process of logical deduction from pre-established conceptions of contract and obligations have broken down before the slow and steady and erosive action of utility and justice."

⁴²³ See Thomson, 1994, SLT (News) 29-34.

⁴²⁴ One could recall the commentators' reaction to the outdated doctrine of consideration for the unnecessary burden it places on English law. See a comprehensive account in Flannigan, 103 (1987) LQR 564-593.

⁴²⁵ Not that is claims by the creditor for or on behalf of the third party as in *Drittschadensliquidation*.

⁴²⁶ An example of a more equitable understanding of contractual relationships can be found in the Scottish principle of the law of sale of goods according to which it is implied in the contract of sale that the goods shall be fit for the purpose for which they are sold in the light of the fair understanding of the parties. At the time this doctrine was already part of Scots law, by the end of the 19th century at least, no such principle applied in the English law. See "Some points of deference between English and Scottish Law", Lovat - Fraser, J.A., 10 (1894) LQR 341.

⁴²⁷ Recall the role of equity provisions (especially §242BGB) in German law solutions, and the importance attributed to their contribution to the delictual solutions in the Greek

It is more of a question than an argument whether good faith, which in some views is a general principle of Scots law, enjoys a more significant status in the latter than in English law⁴²⁸. If true, it is doubtful whether it makes a difference since, for instance, equity is a principle of English law. The practical implications of good faith with regard to third party protection are uncertain⁴²⁹. Could, for instance, liability be based on a violation of good faith? In any case, good faith and the ideal of justice, which is also a source of Scots law⁴³⁰, should add momentum to the argument for more equitable approaches and should contribute towards accepting a contract-based solution as the proper context for third party loss.

In sum, the special position of third parties in Scottish private law, in contrast to English law, can be seen in a number of the former's doctrines which reflect its civil law roots. Similar arguments can be inferred from the overall structure of civil liability.

5.3. The balance between contract and delict.

A more general observation on Scots law's potential to adopt a contractual solution, focusing again on a comparison with English law, refers to the relationship between contract and delict as the main pillars of civil liability⁴³¹.

The contract-delict balance could be looked at in the civil and common law systems respectively. The balance favours of delict in the latter and contract in the former. In Germany third party loss was treated by expanding the application of contract law while

system. (See "Delict's potential" in Chapter 3.). See also calls for upgrading the role of good faith in American law, Farnsworth in Beatson and Friedman *Good Faith and Fault in Contract Law*, 153-170.

428 This is the impression one gets from Smith's writings, for instance. It is doubtful whether the view prevails. See McBryde in Birks, 144-155.

429 In American law for instance good faith can possibly operate defensively leading to rejection of ill-faithed or totally unsubstantiated third party claims. See Farnsworth in Beatson and Friedman 153-170

430 Walker, *The Scottish Legal System*, 461.

431 See the argument on American law that contract is meant to take priority if there is an element of a voluntary arrangement. See "Tort v. Contract: Third parties and pure economic loss" in Chapter 4.

in France, although a general delictual provision was available, the judiciary inferred the existence of a contractual relationship and applied contract law in numerous instances⁴³².

Across legal systems the approach to delict shows fundamental similarities⁴³³. It seems that the distinction between the two legal families in the area of the law of obligations⁴³⁴, is defined to a large extent by the provisions on contract and, subsequently, by the role of contract in relation to delict. This is especially the case with the position of third parties. For instance, English and traditional common law, in contrast to civil law systems, do not provide for a contract in favour of third parties. Although the differences between the English and Scottish systems in contract law are still substantial, there are far fewer differences in the law of delict⁴³⁵. The Scots law of contract preserves substantial features of its civil law character⁴³⁶. This is not the case with the law of delict on which the effect of English law has been devastating.

The Scots law of delict has been undermined and fragmented by the assimilation of *culpa* to the tort of negligence and by the introduction of the particular duty requirement. Even though many decisions today can be explained on the basis of *culpa*, this is due to the broad content of the latter and does not reflect the way in which courts reach their

⁴³² See in the recent reference "Privity of Contract and the Law of Tort: The French Experience", Whittaker, S. (1995) 15 *OxJLSt*, 327-370, for the situation in the French law. See the reference to the interrupted tendency to drop the requirements of the relativity of obligations (the civilian correspondent of the privity doctrine) for the cases where a group of contracts, which a common overall purpose exists.

⁴³³ "If we leave the history and attend the practicalities of the law of tort, we quickly see that underneath the doctrinal variations the groups and types of case which appear problematical owing to the exigencies of actual life are much the same in all the legal orders under consideration, even if they are dealt with in different portions of the legal system and even, occasionally with divergent results." Zweigert & Kötz 662.

⁴³⁴ If not in private law as a whole.

⁴³⁵ See the work of Smith, *Studies*, and McBryde, *The Law of Contract in Scotland*.

⁴³⁶ *Pollicitatio*, JQT, absence of privity and consideration. See also Edward, in Markesinis *The Gradual Convergence*, 263, who notes that the contribution of Roman law to Scots law is concentrated in private law. As has been mentioned the law of delict has been influenced to a devastating extent by English law.

decisions⁴³⁷. The reasons for this development are historical and socio-economic⁴³⁸. The law of delict is related to the intervention of the state (the advance of the welfare state) and focuses on the imposition of duties. The law of delict/tort has developed mainly in the last two centuries and it has taken a more definite form in the 20th century⁴³⁹. The Scots law of delict was greatly influenced by English law during that period without significant resistance. As the Scottish system operates in a single state entity and economic area and shares in practice the same supreme civil court with its English counterpart, the differences were weeded out, allowing for the greater uniformity that is a prerequisite, as Scottish courts saw it, of a stable and predictable business environment. This assimilation is more complete in delict because of the latter's relation to basic social evaluations (on the protected interests and wrongfulness) which, it is felt, should be homogeneous throughout the UK society. The courts feel secure following the extensive English practice in evaluating wrongful behaviour⁴⁴⁰. On the other hand, the historical background of Scots law of contract and the fact that, from a legal point of view, variations in transactions' customs, practices etc. are, up to a point, acceptable, contributed to the preservation of a higher degree of distinctiveness in contract law. Here, at least, this distinctiveness did not disrupt commercial practices, or cross-borders commerce.

The differences between the two systems with regard to the relation between contract and delict/tort are evident, in principle at least, in the treatment of concurrent liability⁴⁴¹. Thus, delictual liability for a breach of contract should be accepted more

⁴³⁷ The absence, for instance, of differentiation between physical damage and pure economic loss in Scots law has little practical effect. The Scottish courts as their English counterparts emphasise proximity, and are thus entangled in the same methodological approach.

⁴³⁸ For a comprehensive account see Atiyah, P.S. *The Rise and Fall of the Freedom of Contract*, 1979.

⁴³⁹ The development of the tort of negligence holds a central position to this evolution.

⁴⁴⁰ See Cardozo, B. *The Nature of the Judicial Process* 1949, p.142, discussing "Adherence to Precedent. The Subconscious Element in Judicial Process" where he notes "I say, therefore that in the vast majority of cases the retrospective effect of judge made law is felt either to involve no hardship or only such hardship as is inevitable where no rule has been declared."

⁴⁴¹ As said, the treatment of concurrent liability does not differ significantly between Scotland and England. See Thomson 1994 SLT (News) 29-34.

easily in Scotland than in England, on the broadly defined *culpa* and on the more unified concept of civil liability in the former. For the same reasons and also due to the JQT and *pollicitatio*, concurrent liability is more plausible in Scotland than in England. A contractual claim should, in principle, take priority even if the delictual claim might be advantageous from the point of view of the pursuer⁴⁴².

The basic tendency in case law is to deal with pure economic loss cases in delict. However the JQT has been considered as an alternative basis (in *Scott Lithgow v. GEC Electrical Projects Ltd*⁴⁴³). Thus, when pure economic loss occurs in the context of a voluntary transaction, the fact that no direct contractual link exists between the parties does not exclude contractual liability. Moreover, the significance of the contractual context is evidenced by the reference to contractual considerations even when the decision is based in delict. In third party loss, the Scots law of civil liability seems to be inclined to contract-based approaches.

The balance between contract and delict is not static. The truth is that the Scots private law, supposedly mixed, is more a common law than a civil law system⁴⁴⁴, judging from the actual evidence and despite the justifiable optimism of the last decade about the future of Scots law. This fact will not change with a shift to contract law in third party loss. However, the contract law provisions related to third parties, are special, specifically targeting third party situations -- pure economic loss, usually. These situations could be treated on a contract basis, provided courts and lawyers are willing to assess their specific character. *Culpa*, although broad enough to accommodate a variety of cases, is less well tailored to third party loss.

5.4. Revitalising *culpa*.

⁴⁴² This seems to be the implication made by Thomson, 1994, SLT (News) 29-34, who, after referring to the unfortunate demise of *Junior Books* which "has not blossomed among the tares and thistles of the English law of torts." (p.30), notes that the decision seems to have had greater impact in Scotland.

⁴⁴³ 1982 SLT 244.

⁴⁴⁴ McCall Smith, in Grant (ed), 157. See Edward in Markesinis *The Gradual Convergence*, 264, who argues that "for most practical purposes, the Scottish legal system belongs firmly within the common-law family...".

It would seem simpler, at first sight, to apply delict in third party loss cases albeit under the proper understanding of *culpa*. The latter is a general liability clause applicable to cases of intentional and unintentional harm, which could cover third party pure economic loss like the general clause of the French Code Civil (or the Greek and Swiss civil clauses)⁴⁴⁵ as, in addition, there is no significant doctrinal differentiation between physical damage and pure economic loss in Scots law.

However, were *culpa* to apply, the special position of third parties in the Scottish system, the priority of contractual arrangements and the potential of contract law to expand would be ignored. Moreover, the suggestion to apply *culpa* is based on the assumption that *culpa* can stand up to its doctrinal content; regrettably however, it cannot. The shackles of assimilation to English law have made *culpa* terminally defunct. Taking into account the nature of the law of delict, and the cautiousness of the courts in upsetting economic life, it seems unlikely that any elevation of *culpa* to its proper dimension is plausible⁴⁴⁶.

Nevertheless, even if *culpa* were revived to emerge in its proper dimensions it is doubtful whether it would lead to the protection of the claimants in cases like *Junior Books* or *Murphy*. A large part of the English law-inspired doctrine⁴⁴⁷ and case law⁴⁴⁸ would have to be rejected in order to establish for *culpa* a somewhat comparable status to that of the respective provisions of the French Code Civil. That seems impracticable, especially as it would bear repercussions far beyond pure economic loss. Actually, from the point of view of common law, the very flexibility of the tort of negligence has, in effect, obstructed the

445 Banakas 44-50.

446 In contrast, it is not impossible to expect solutions in tort in American law judging from the daringness of American courts and from the fact that there is already compensation in tort in many instances. As said however the progress is likely to be slow as liability in tort is bogged down by persisting worries over allowing a far too extended liability, tort by nature seems to be lacking effective mechanisms to contain this expansion, while liability in tort is formed rather for physical damage than pure economic loss. See "Improving tort?" in Chapter 4.

447 The Scots law of delict incorporates basic inputs from the English law, such as that of a particular duty of care in the liability for careless behaviour, which are by now instrumental to the Scottish approach.

448 Frequently referred to as authority for Scots law as well.

development of liability for pure economic loss, as the courts possibly felt reluctant to expand this liability⁴⁴⁹.

A scheme of liability on the basis of *culpa* is likely to remain unstable due to the reluctance of the Scottish courts to resort to *culpa*, and due to the absence of a plausible pattern for limiting damages, or generally for more equitable results⁴⁵⁰ (unlike a contract-based model). The courts will not likely become readier to award damages under a revived *culpa*. It could be recalled for example, that the occasional reminder in case law of the absence of a doctrinal distinction between economic loss and physical damage in Scots law has not led the courts to differentiate from the prevailing English approach and it seems improbable that they would do so.

The argument for the revitalisation of *culpa* brings forward the suggestion to treat the decision in *Junior Books* as establishing a delict of negligent interference with a contract. Such a suggestion is unlikely to succeed against well-entrenched law⁴⁵¹. The suggestion, in effect, belittles the very meaning of a leading decision and weakens its consequences. It is profoundly significant that it was not the interference with a contract that mattered, but the overall structure of the relationships in question. Furthermore, the expansion of the law of delict is not necessarily desirable.

Finally, as is clear from the fact that neither Scottish courts nor Scottish lawyers think in terms of *culpa*, the logical continuity of the Scots law of delict has been broken in an irreparable manner. It is a lesser task for the Scottish courts to introduce a contractual

⁴⁴⁹ Whittaker 16 (1996) *OxfJLSt* 204. "While the courts could have developed appropriate 'pockets of liability', the tort of negligence does not poses a suitable taxonomy of situations on which the courts in order to distinguish those cases in which liability should be imposed and those where it should not. Its flexibility and generality of approach has turned out to be a disadvantage".

⁴⁵⁰ The potential of *culpa* for more equitable results is at best uncertain, in the absence of some tangible evidence. It is difficult to contemplate on such evidence. It is doubtful for instance whether evidence from Roman law,(the Aquilian action), or from modern examples of a Roman-Dutch system such as that of South Africa, for example, which is more easily comparable to the Scottish system, would be significant for Scots law. See Brodie, in *Scots law in the 21st century*, 205, who refers to the South African approach to apply the Aquilian action, and considers that resort to Roman law will not make things easier for Scottish jurists on the issue, due, basically to the problems of indeterminacy and the risk for unlimited liability in pure economic loss. However Brodie refers only to the delict option.

⁴⁵¹ See the relative authorities in MacGrath, 3 (1985)*OxfJLSt* 350.

solution for third party loss than to expand *culpa* to these situations and, as with Greek courts improving delict, this is the most credible policy option.

5.5. Law making by analogy.

Encroaching upon issues of both substantive law and permissible judicial creativity, it is reasonable to contemplate whether Scottish courts can legitimately employ the means of analogy for the purposes of introducing a new approach that contrasts with existing practice. The argument for analogy involves an implied comparison between two (hypothetical) alternatives, contract and delict. Contract law is the preferable solution⁴⁵².

The application of a modified JQT would seem to be little different from the contract-like concepts, such as the voluntary assumption of responsibility, on the basis of which damages are usually awarded in delict. This is especially the case for negligent misstatements and for negligent services. The proposed model of liability is broadly formulated, without a strict intention to benefit requirement, and could apply in third party loss instances whether their basis in delict would be *culpa* or negligence⁴⁵³.

Noting the resemblance between the reasoning of decisions in delict that rely heavily on the contractual background, and the JQT⁴⁵⁴, it is reasonable to suggest that these cases are perceived as essentially contractual. Evidence for that is found in the different criteria that have been used to justify the decisions (such as reliance) and, mostly, in the concept of a voluntary assumption of responsibility. The related theoretical

⁴⁵² The judges would be willing to avoid the confusing state of the law of delict on pure economic loss. However, this is not enough to make analogy acceptable as a method of construing the desired solution.

⁴⁵³ In practice there would be little difference with either in the sense that they would both be looking into wrongfulness, that would involve *injuria* in *culpa* (Thomson *Delictual Liability*, 1) or the violation of a duty of care in negligence. In both cases the decision should logically take account of the contractual background.

⁴⁵⁴ See *Scott Lithgow Ltd. v. GEC Electrical Projects Ltd*, 1989 SC 412, 1992 SLT 244, where similar arguments are used to reject either JQT and delict as the basis of the decisions.

approaches, focusing on the defender's undertaking and/or advocating the rejection of privity (in English law), could be mentioned as well⁴⁵⁵.

The similarity of the reasoning of a JQT-based model to that of the decisions allowing reparation for third party loss can provide the basis of two arguments. First, in the Scots law the analogy is possible and easy to justify⁴⁵⁶ on grounds of doctrine and rationale. Secondly, the proposed mechanism does not in essence constitute an unprecedented departure from the existing approach. It rather constitutes an improvement towards greater consistency, in the particular instance, of civil liability and is not comparable to, say, an overhaul of the privity doctrine as has been suggested for English law⁴⁵⁷.

Under these considerations it is reasonable to suggest that the Scottish courts could introduce a contract-based solution by analogy⁴⁵⁸, provided this operation does not exceed the limits of their creativity.

5.6. Permissible judicial authority.

A basic question with regard to reform, would be whether the Scottish courts would be acting within their authority were they to introduce contractual solutions.

It has been argued that the doctrine of *stare decisis* is, in principle at least, less significant in Scots law than it is in English law⁴⁵⁹. Thus the Scottish courts are, in

⁴⁵⁵ Especially Adams and Brownsword, 10 (1990)*LSt*, 12-37, MacGrath, 3 (1985)*OxfJLSt* 350. See the Consultation Paper No. 121, LC 1991, where after a comprehensive review of privity and consideration, the Commission suggests the legislative adoption of a contract for the benefit of third parties in English law.

⁴⁵⁶ Many of the negligent misstatement cases could have easily been dealt with on the basis of JQT.

⁴⁵⁷ Whittaker 16 (1996) *OxfJLSt* 215. The courts would actually be undertaking considerable initiative in developing new exceptions to privity and exercising substantial discretion.

⁴⁵⁸ The argument here is for the development of a new mechanism, a general scheme that could accommodate certain pure economic loss cases. It is not the same with the incremental approach which lays emphasis on the precedent and on the established categories of cases where damages for pure economic loss are awarded and which is a conservative approach likely to stifle the development of pure economic loss. As has been said Scots law is by nature less inclined to an incremental development of the law. McMillan 1996 SLT 159.

⁴⁵⁹ See Walker, *The Scottish Legal System*, 434 et seq, "Evaluation of precedents", Gardner, Alan J. *Judicial Precedent in Scots Law*, 1936, and Smith, *The Doctrines of Judicial Precedent in Scots Law*, 1952.

principle, not bound in the same manner as their English counterparts by their superior courts' decisions⁴⁶⁰. This is due to the historical origins⁴⁶¹ of *stare decisis* in Scotland and, to a considerable extent, due to the collegiate operation of the Court of Session⁴⁶². Finality, in particular, is not as fundamental a purpose⁴⁶³ of the *stare decisis* as in England.

The differences between the precedent doctrines could be interpreted as enabling the rejection of the existing approach to third party loss in Scottish cases. As it has already been mentioned, the contractual background of the third party loss decisions differentiates, from the point of view of Scottish doctrine, the legal significance of the facts. Scottish courts can thus avoid the undesired precedent of the priority for delict (or diminish its effect) claiming rightly that there is a difference in (the perception of) the facts⁴⁶⁴.

As Gardner notices "...it is neither possible nor desirable to attempt to formulate a definite and concise statement of the exact nature limits and scope of that doctrine in each of these [Scotland and England] countries". (93).

According to Walker "In matters of commercial law it is particularly desirable that there should be uniformity of decision in common law jurisdictions." (*The Scottish Legal System*, 435).

See Banakas, 69 et seq. on a comparison of the law-making power of the courts in England, France and Germany.

⁴⁶⁰ Gardner notices that "it cannot be accepted as a general statement that [in Scotland] every court is bound by the decisions of all courts superior to itself". (The exception is the Sheriff courts. It is doubtful whether the decisions of one of the divisions of the Inner House are binding on the other. It is also doubtful whether the Inner House is bound by the decisions of one of its divisions, or whether one of its divisions is absolutely bound by its prior decision. Gardner, 94.

⁴⁶¹ In the early times the Scots law of *stare decisis* was more like the relative French law. Furthermore as the precedents were few, "recourse has more often been made to legal principles in Scotland than in England." (Gardner 89).

⁴⁶² Smith, *Judicial Precedent* 19; "The collegiate basis of the Court of Seccion has not only enabled it to submit difficult questions of law as they arise to seven or fourteen judges, but it also empowered the Court to set aside previous decisions which seem undesirable as precedents unless these decisions have been pronounced by the House of Lords or (possibly) by the whole Court of Seccion".

⁴⁶³ "In Scotland ... there is indeed authority for the view that even when - or indeed because - a court is final it may accept the duty ... to review its own previous decisions if convinced that they are wrong. ". Smith, *Judicial Precedent*, 33. (Smith accounts consistency, finality and certainty of law, as the main purposes of the doctrine of precedent.)

Walker notices that "on the whole, the advantages of consistency certainty and predictability of the law justify in large measure the existence of the rule of *stare decisis*" (Walker, *The Scottish Legal System*, 452).

⁴⁶⁴ The Scottish courts do not resort to elaborate distinctions on the facts of a case in order to avoid the application of a binding precedent as often as English courts. When a distinction on the facts is made in a Scottish court, it is a polite way to refuse to follow the decision. Smith, *Judicial Precedent* 33.

It has also been noted that the Scottish courts are bound by the Scottish House of Lords only. The argument that in certain situations decisions of the English or the Irish House are binding upon Scottish courts is not supported by any authority⁴⁶⁵. Thus the most valid authority at present is *Junior Books*, which as far as Scots law is concerned could lay down a general principle⁴⁶⁶ -- any direct challenge would raise the issue "of whether a Scottish authority could be overruled in an English appeal"⁴⁶⁷. This is a complicated constitutional issue⁴⁶⁸, which is not examined here, but even if the argument is sound, its effect is doubtful. The impact of House of Lords decisions, subtle, indirect and informal as it might be, is still strong. Encouraging examples from case law such as that of the Privy Council upholding a decision opposite to current English law⁴⁶⁹ should be matched by a more decisive approach of Scottish courts towards, among others, the *stare decisis* in Scots law.

The hypothetical introduction of a contract-based approach would not, however, exceed the limits of judicial law-making by launching a new legal mechanism or introducing reform implying "basic institutional adjustment"⁴⁷⁰. The reform would draw upon existing provisions. It is doubtful whether new legislation would really have been needed for such a change. However, as a matter of policy, one cannot exclude that new legislation might be

⁴⁶⁵ This argument is made by McMillan 1996 SLT 162, referring to a number of examples supporting the argument that "any English case however persuasive it may be, would not be of binding effect". Gardner supports that decisions of the English or the Irish House could be binding upon Scottish courts in certain situations.

⁴⁶⁶ See previously under "Third party loss in delict: Interpretations", the suggestion that *Junior Books* should be considered as establishing a tort/delict of unintentional but careless interference with a contract, which was rejected from the point of view of Scots law.

⁴⁶⁷ McQueen 1990 SLT 338, referring to the effect of *Ross v. Caunters*.

⁴⁶⁸ On the question of the capacity of the House of Lords to overrule Scottish authority see Maher, G. "Scots law and the 1966 Practice Statement", 1981 SLT (News) 181.

⁴⁶⁹ *Invercargill v. Hamlin* [1996] 2WLR 367, *The Times* 15 February ([1994] 3 NZLR 513, 11 (1995) *ConLJ* 286).

⁴⁷⁰ Friedman, 29 (1966) MLR 593, at 598. He notes that the distinction between institutional change and adjustment of liabilities is simplistic. In many borderline cases, for instance, the courts initiated basic institutional changes, leaving to the administration and other courts their precise definition.

the preferable way forward⁴⁷¹. Moreover, the reform seems less grave than attempting to enhance equity principles to achieve contract (JQT) based results in delict.

These arguments might give a false impression. The differences in doctrine have had little practical effect on the policy of the Scottish courts⁴⁷². They would feel insecure to embark upon such an attempt as they have never given signs of a willingness to depart from well-established practice especially on pure economic loss by relying, for example, on the fact that there is in principle no distinction between physical damage and economic loss in Scots law. They can be content with either the precedents reducing the scope of *Junior Books*, or with the decision in *Henderson v. Merrett Syndicates Ltd*⁴⁷³. Even if the treatment of pure economic loss is felt to be problematic, Scottish courts are unlikely to feel sufficiently self-confident to introduce contractual solutions⁴⁷⁴. On the other hand, as previously argued, there are definitively positive signs from case law. These include basically the doubts inferred regarding *Murphy's* authority and the effect of *Junior Books* (even if the latter should not be stressed too far as, after all, the case had caused no problems in the Scottish courts in the first place).

It is difficult to foresee the reaction of the House of Lords to an introduction of a contract-based solution by the Scottish courts, as the emphasis would be on Scottish principles. This reaction will depend to a great extent, on the form such an attempt will take. Thus, the scheme of voluntary assumption of responsibility might be employed along with an interpretation of, for instance, *Junior Books* on the same lines. It might not be easy for the House of Lords to reject a decision based on sound Scottish doctrine; after all, *Junior*

471 See the comments on the Consultation Paper No. 121, LC 1991. See Kincaid, Peter "The UK Law Commission's Privity Proposals and Contract Theory", 8 (1994) JCL, 51-66, Beale, Hugh "Privity of Contract: Judicial and Legislative Reform", 9 (1995) JCL 102-124, Degeling, Simone "A Consideration of the UK Law Commission's Consultation Paper, 'Privity of Contract' " 6 (1993) JCL, 177-188, Beatson, Jack "Reforming the law of Contract for the Benefit of Third Parties: A second bite of the cherry", 45 (1992) CLP 1-28.

472 "...in the present day it has become [the method of judicial precedent] so similar to the English method that little distinction can be made". Gardner 89.

473 1994] 3 All ER 506.

474 See under "Judicial considerations" in Chapter 6, on Commonwealth laws, where it is argued that the idea that abandoning privity is a matter for the legislature alone is so deeply entrenched that judicially motivated reform is unlikely.

Books has not been expressly overruled yet. The position of the supreme civil court will indeed be delicate; it is not impossible, however, for a contractual approach to be upheld. A positive sign, regarding the possibility of the House of Lords upholding such Scottish decisions, comes from the recent decision of the Privy Council. It upheld a New Zealand decision (*Invercargill City Council v. Hamlin*⁴⁷⁵) awarding damages in delict for pure economic loss against the established law in England, on the consideration that the situation in New Zealand was or it was perceived to be different by the New Zealand judges who were best positioned to make such an assessment. The socio-economic situation in Scotland is not significantly different than that in England. (Possibly differences, relevant to this study exist, such as the increasing proportion of repair works in the construction industry but they do not change the overall picture.) It would seem far-fetched to consider that Scottish courts could claim that the situation is perceived in a different manner, or that the legal approach is different, which could amount to the same argument. It would be interesting to see the reaction of the House of Lords to such emphasis laid on Scottish doctrine; however, this Privy Council decision can do little to motivate a change of course in Scots case law. The Privy Council decision was not unexpected⁴⁷⁶ and it is known that the law on pure economic loss in major Commonwealth jurisdictions is different from the law in England. Arguably, however, the fact that major Commonwealth jurisdictions have distanced themselves from English law can be a useful example of a pragmatic approach for the Scottish courts and evidence of the weakness of the English position.

The courts could, instead of promoting a straightforward new approach, resort to the alternative of declaratory judgments or express strongly their displeasure with the current situation⁴⁷⁷. The courts would be impliedly expressing their reluctance to deal with

⁴⁷⁵ [1994] 3 NZLR 513, 11 (1995) *ConLJ* 286 (Burr, Franklin, Ramsey, eds), [1996] 2 WLR 367, *The Times* 15 February. Further reference is included in the following chapter.

⁴⁷⁶ See Wallace 112 (1996) LQR 369. It could be argued that the Privy Council continued earlier policy. The court had rejected the appeal against *Brown v. Heathcote City Council*, [1987] 1 NZLR 720. However in 1987 *Anns* was still valid law.

⁴⁷⁷ Friedman, 29 (1966) MLR 605. The Scottish courts have expressed the wish for reform when dealing with cases involving the liability of solicitors to disappointed beneficiaries. However they felt obliged to follow *Roberston v. Fleming*. (1861) 4 Macq 167. See *MacDougall v. MacDougall's Executors*, 1994 SLT 1178, and *Weir v. J.M. Hodge* 1990 SLT 266

the issue in question, possibly because they feel it is not a matter falling within their mandate or discretionary power⁴⁷⁸. This is an indirect manner to stimulate, at least, the debate on the subject. However, if the issue of reform arises, the courts would have to play a more pivotal role than expressing reform-oriented opinions. The reaction of the academic writers, for instance, to these alternative approaches would, most likely, not be uniform and will be difficult to take account of. Any legislative response embracing some of the courts' worries is unlikely⁴⁷⁹.

Finally, one could contemplate that Scottish judges can choose the best of both worlds from Scots and English laws. It is hard to see how this would be done without having decisions masqueraded as based in delict in order to avert criticism and without endangering the realisation of the advantages in the contractual approaches. In any case, knowledge of both systems can be useful.

5.7. Promoting contractual solution.

The examination of the prospects for accepting a contractual solution⁴⁸⁰ in third party loss cases, would have to take into account more factors than the daring attitude of the courts. One could speak of the need to create the proper environment for judicial action; thus not only the judiciary but also lawyers and business people need to be convinced of the advantages of a contract-based view and of the feasibility of its introduction. This is basically the case for all the systems discussed in this work, but more so for Scots law, considering the business world's reaction to suggestions to expand the JQT by the SLC⁴⁸¹, and the distinctiveness of the Scottish system in general.

As far as lawyers are concerned, it is possible that practitioners would not welcome a change in the law that would further distance Scots from English law and is likely to

⁴⁷⁸ If for instance they think it is a decision for the legislature to make, or an issue on which the Law Commission is working on.

⁴⁷⁹ As Friedman, 29 (1966) MLR 601, notices, there is frequently a give and take between courts and the legislature in initiating and elaborating reforms.

⁴⁸⁰ As said before this is not the case of the application of a contract in favour of third parties as it seems to be the impression of certain authors. Whittaker 16 (1996) *OxfJLS* 198.

⁴⁸¹ As recalled by Professor Black in relation to the preparation of Memorandum No:38 SLC. (Interview 28/4/1995).

undermine the business climate. Academic lawyers might have a different view, on the basis of the merits of the contractual solution, and in some cases motivated by a covert or not, 'legal nationalism'⁴⁸². This divide weakens the momentum for independent improvement of Scots law.

Business persons would not be happy with a change in the law in some parts of the UK only⁴⁸³, considering that they are not concerned with the law as long as it does not cause them problems⁴⁸⁴. However, the law of third party pure economic loss might well create problems for business persons. First, the law is uncertain and even improvements of the delictual approach are unlikely to lead to a more stable picture⁴⁸⁵. Business persons would have to arrange for the protection of their interests allocating expenses and effort in advance (for extensive negotiations, insurance etc.) especially in complex transactions⁴⁸⁶. Most business persons would lack such resources⁴⁸⁷.

As discussed before, a contractual solution enabling a more efficient balancing of interests has advantages which the participants in transactions could appreciate, as it

⁴⁸² See Watson, A. *Society and Legal Change*, 1977, on "Legal Transplants" 98 et seq., discussing the national pride as a factor determining the origins of the borrowing made by legal systems. He quotes T.B. Smith, then Scottish Law Commissioner, strongly underlying the differences between the Scots and English law, and explicitly disapproving of the former receiving the influence of the latter. Instead he opts for influences by civil law systems. Watson reports the angry reaction of Professor Wilkinson to the suggestion by the Council of the Law Society of Scotland, reported in *The Scotsman* in August 16 1974, in favour of the assimilation of Scots law to the law of England, in a letter to the newspaper. Professor Wilkinson lays emphasis on the origins and distinctiveness of the Scottish legal culture to dispel any idea for assimilation. In a reply the then Secretary of the Law Society of Scotland, R.P. Laurie, supports the Society's view on the basis of the benefit for the community, and on the idea that business interests are strongly in favour of assimilation. He emphasises that the position in favour of assimilation is supported by practitioners who are involved in the operation of the law, and in contrast to academic lawyers "have to justify the law to their clients" (104).

⁴⁸³ In the words of Professor Black, the Scottish system is an annoyance for businessmen (interview 28/4/1995.).

⁴⁸⁴ Interview with Professor MacQueen 28/4/1995.

⁴⁸⁵ Certain participants (subcontractors for instance) might either find themselves without sufficient remedy for damages, or without a protective limitation of liability for the injury they caused.

⁴⁸⁶ Such as those involving a series of interrelated contracts. The standard forms which are often in use might not cover successfully all possible circumstance or might be redundant disadvantageous for one of the parties and therefore not applicable.

⁴⁸⁷ In many cases the risk for economic loss lies with small companies often as a result of their inferior bargaining position.

might lead to speedier decisions or urge the parties to an extra-judicial set-off. Any attempt to persuade business people would have to be presented in the appropriate manner, to make evident the reasons making a contract based view preferable⁴⁸⁸.

The purpose of this review was to motivate the self-confidence of Scottish lawyers, especially judges, to recognise and exploit the dormant potential of Scots law. Persuading the judiciary is important for any prospective change in law, especially a significant one in terms of doctrine and judicial policy, (and this is the case with the improvement of the law in all the the jurisdictions discussed).

In support of contractual solutions, the work of the Scottish Law Commission from 1977, and the recent consultation paper from the Law Commission suggesting the adoption of a contract in favour of third parties in English law⁴⁸⁹, should also be mentioned as, it is hoped, indicating newer emerging trends. A codification of Scots law by legislation could reinforce its distinctiveness, the awareness of its status, and ideas such as those supported here.

The prospects for reform are, admittedly, gloomy given both hard facts and developments in Scots law made in the 1970's. However, the picture is not complete in the sense that it fails to highlight the different psychological climate of the last ten to fifteen years⁴⁹⁰. The fading away of the Scots law as a separate system and the assimilation to English law, thought possible in the 1970's, have never materialised and seem improbable now. To the eyes of many Scottish lawyers, Scots law currently has a better chance of independent development. Crucial for the improvement of the climate was the impact of the application of the European Communities' legal system. Some harmonisation of the

⁴⁸⁸ The reaction of business people to the suggestions at the Scottish Law Commission of 1979, for the expansion of JQT were negative. A basic reason was that the advantages of the suggested course of action had not been emphasised adequately and in the proper manner. Interview with Professor Black, 28/4/1995.

⁴⁸⁹ Consultation Paper No. 121, LC 1991.

⁴⁹⁰ I am indebted for this comment to my supervisor Professor Murray who certainly is in the best position to give an assessment of the prevailing optimism in the Scottish legal world. Edward is a proponent of the view that Scottish lawyers which by training are more comparative lawyers than English or other European lawyers are better accustomed to the reality of the European Community legal system. Edward in Markesinis *The Gradual Convergence*, 263.

commercial laws was achieved that does not involve, regarding Scots law, the imposition of English law-tailored rules. More importantly, the European Communities' legal system is, considering the legal systems of the member states, more civil law oriented. In this context, the Scottish system is not an appendix to a dominant English system but part of the mainstream. Here, it is English law that is the exception. The position of the Scottish system, which is a peculiar mix of common law and civil law in a small jurisdiction in both size and legal production with no independent legislature or separate supreme civil court, is more secured in the larger European context. Scottish lawyers recognise in the other members' legal approaches familiar attitudes and acknowledge lasting bonds. In this context the Scottish system is not only better protected from the omnipotent English influence but also better positioned for future developments.

In the same period of time the Scottish Law Commission has been elevated to a central actor of the Scottish legal system. With its ability to take Parliamentary time, it can ensure that undesirable assimilation to English law or harmful intrusions into the Scottish system can be avoided. This constitutional fact reinforces the optimism for the future of the Scottish system.

In the wake of an increased political awareness in Scotland it is possible to foresee the eventual establishment of a Scottish Parliament. Although nothing is yet known with certainty on the powers of such a body, on matters of Scots law, and if commerce is not adversely affected, a Scottish Parliament could possibly be given authority to elaborate and develop the Scottish legal tradition. Such a prospect should justifiably add to the reasons for optimism.

Admittedly, there is little hard evidence to justify this optimism⁴⁹¹, with the exception of the fact that the Scottish system is better entrenched to resist English influence, especially if the latter is extreme. However the intangible positive climate might prove to be of considerable importance, a significant factor in a process of change.

⁴⁹¹ See Edward in Markesinis *The Gradual Convergence*, 263, who is cautious about making assessments on the Scottish system's future and rather concentrates on the position of the Scottish lawyers.

Such a process, in which other, non legal, factors are central, cannot be discussed here. However, emphasis should be laid, as is the case with the introduction of contractual solutions in third party loss, on the study of the Scottish system and on the built-up of self-confidence that could motivate reform.

Finally, it is difficult to avoid contemplating the evolution of Scots law, had there been a Scottish legislative body and supreme civil court⁴⁹². The fact is that among the other mixed systems in the world today the Scottish is in a disadvantaged position⁴⁹³. The attitude of the Scottish judiciary (and of the Scottish lawyers as a whole) leaves little hope for any significant reform⁴⁹⁴. It is to be hoped that a limited differentiation, such as the one supported here, is not implausible.

5.8. Conclusion.

Through its resistance to assimilation, Scottish contract law, which to a considerable extent gives Scots law its character as a mixed system, has preserved⁴⁹⁵, a greater potential than delict for independent and autonomous development. This potential is reflected in mechanisms such as the JQT which have remained operative, even in a conservative manner, in contrast to *culpa*. The JQT provides the optimal ground for a contractual solution to the third party loss question. This solution is not an expression of a parochial attitude to resort to older principles, but a modern and convincing approach in the

⁴⁹² Scots civil law seems thus closer to the French. Their relationship goes back in time. Roman law was introduced in Scotland via France usually, while prominent French lawyers especially Pothier have exercised considerable influence in the 18th century. See Smith, "The Influence of the 'Auld Alliance' with France on the Law of Scotland" in *Studies* 28

⁴⁹³ Thus South Africa is an independent state, as Sri Lanka, while in the State of Louisiana in the USA, and in the Province of Quebec in Canada there are a separate legislatures and academic communities vigorously promoting the civilian tradition. See McCall Smith, in Grant (ed), 154, on the condition of the Scots law in the 20th century; "It is hardly surprising of course that Scots law has struck a defensive position during the 20th century. At the time when other legal systems were undergoing rapid transformation to equip themselves with the demands of modern conditions, Scots law suffered from conservative courts, inadequate legislation and a paucity of academic commentary and criticism."

⁴⁹⁴ See Brodie, in *Scots law in the 21st century*, 205 who is considering briefly returning to the civil law roots of Scots law, to Roman law principles in particular, but as regards delict only.

⁴⁹⁵ Evidenced in the persistence -- in contrast to *culpa* -- of *pollicitatio* and JQT.

limited sphere where it is applicable⁴⁹⁶. The model suggested for third party loss is one based on the JQT without the requirements of an intention to benefit but with particular concern for the content of the transaction in question.

The idea that a contract-based approach is inconsistent with established practice in pure economic loss cases is mistaken. The practice to focus on delict has not led to a successful treatment of the problem, as can be seen from the situation in English law. The special contract-based treatment of a number of economic loss cases can be justified on plain reason and doctrinal evidence⁴⁹⁷. An alternative solution for some pure economic loss cases could be accepted, provided it is well founded in doctrine, logically consistent and makes sense from an economic point of view.

⁴⁹⁶ See the Consultation Paper No. 121, LC 1991.

⁴⁹⁷ The uniform approach to cases of pure economic loss is a reason for the problems created in deciding such cases.

Chapter 6: A brief overview of recent developments in Commonwealth jurisdictions.

1. Introduction.

The reference to Commonwealth jurisdictions will involve England, Canada, Australia and New Zealand. Common law¹ in these countries, especially in England, is nearest to traditional orthodoxy with privity (through its offspring the third party rule²) and consideration doctrines obstructing protection for third parties in tort or contract. The treatment of third party loss is not identical in these jurisdictions. The most restrictive as far as third party loss is concerned is the law in England.

There are extensive studies on third party loss questions in the Commonwealth and little could be added by this review, which is a brief outline that aims at presenting recent developments, worth mentioning from the point of view of this study.

Third party loss in Commonwealth systems has been, up to a point, examined in the chapter on Scots law³. Privity and consideration will be looked into only to the extent needed for the account of recent developments. The review will inevitably combine the examination of third party pure economic loss and third party beneficiary claims⁴ that are

¹ See Harris, J.W. "The Privy Council and the Common Law", 106 (1990) LQR 574, describing common law as a highly elusive conception. He suggests that it comprises five elements: (a) written sources; (b) fundamental norms; (c) concepts; (d) policy; and (e) norm-creating judicial authority. The latter element implies an inherent *de jure* power to adapt received doctrine to meet changed social conditions.

In the other Commonwealth jurisdiction English law is basically followed. See on Caribbean tort law, *Tort, Text Cases and Materials*, by Rodilinye, Gilbert, London, 1995, especially pp.130-141, on pure economic loss. See also Tan, Carol "Pure Economic loss in Malaysia: Following English law by Default?", 44 (1995) IntCLQ, 192. The reference to Canadian law does not include the law of Quebec, which is a mixed common law-civil law jurisdiction, but the Canadian common law only.

² As the Law Commission put it the third party rule involves "that aspect of the privity rule which prevents a third party from suing on a contract to which he is not a party" (*Privity of Contract: Contracts for the Benefit of Third Parties*, Consultation Paper No121, London, HMSO, 1991, p.7). See also Beatson, J. "Reforming the Law of Contract for the Benefit of Third Parties: A second bite of the Cherry", 1992, 45 CLP, p.2.

³ The cases and the sources referred in the Scottish chapter are important for this examination of Commonwealth law. However, the sources referred to in this chapter are rather focused on the recent developments and to the overall emerging divergencies between the Commonwealth systems.

⁴ This is a contemporary issue at least for England and Canada, as can be seen for the recent work of the LC Consultation Paper No121, London, HMSO, 1991) and the work of the

related as both may refer to similar situations, both are obstructed by privity, and a third party beneficiary claim will likely be the model for a contractual solution to third party loss.

2. Pure economic loss and third party beneficiary claims.

2.1. Third party pure economic loss.

The broader picture of case law on third party pure economic loss⁵ is one of uncertainty and confusion⁶. Certain decisions reject the relative claims, focusing on privity and employing a narrow interpretation of the neighbourhood principle⁷ while others award damages on the basis of the third party's reliance and on a broad interpretation of the neighbourhood principle⁸.

With the exception of compensation for negligent misstatements⁹, the momentum in England is towards rejecting the claims¹⁰ and it was best expressed in *Murphy v. Brentwood*

1987 Ontario Law Reform Commission. See Beatson, 45 (1992), *CLP*, 19. Third party beneficiary claims are provided for in Contracts (Privity) Act 1982 of New Zealand, in Insurance Contracts Act 1984, s.48, of Australia, in Queensland Property Law Act 1974, s.55, and in Western Australia Property Law Act 1959, s.11 (2) and (3).

⁵ See Markesinis 103 (1987) *LQR* 354, and Feldthussen, *Economic Negligence*, for a comprehensive account and the general description of pure economic loss in the Scottish chapter.

⁶ See the recent reviews by Beyleveld and Brownsword, 54 (1991) *MLR* 48-71, Fleming, 5 (1993) *Canterbury LR*, 269-279, Markesinis and Deakin, 55 (1992) *MLR* 619-646, Hogson, J. "Hedley Byrne - A New Sacred Cow?", 4 (1995) *Nottingham LJ.*, 1-25.

⁷ Established in *Donoghue v. Stevenson*. 1932 SC (HL) 31, on the basis of the famous passage by Lord Atkin "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour..." (44). A duty of care arises 'when it is reasonably foreseeable by the defender that a person on the position of the pursuer would be affected by the defender's acts or omissions', Thomson *Delictual liability*, 59. Markesinis and Deakin note that Lord Atkin's approach remains controversial not least because there was no distinction made as regards liability for physical injury and liability for pure economic loss. Nevertheless the 'neighbourhood principle', at best a guide-line but not a formula that can be mechanically applied, marks the beginnings of modern tort law. See Markesinis and Deakin *Tort Law*, 1994, pp.66-72.

⁸ Beyleveld and Brownsword, 54 (1991) *MLR* 54.

⁹ As initiated in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465. See also Oughton, 1 (1995) *Contemporary Issues in Law*, 21-42, on the issue of liability for negligent misstatements, where it is noted that Hedley Byrne is not the final word on the circumstances a duty of care is owed; indeed it is rather authority on the circumstances in which such a duty is not owed for reasons of public policy. He underlines the fact that there are other approaches to economic loss caused by negligent advice or negligently performed services, and goes on to give an account of the latter, which include the recent incrementalism or focusing on the voluntary assumption of responsibility (23-26). For the

*District Council*¹¹ and *Caparo, Industries plc. v. Dickman*¹² the former marking a shift from *Anns v. Merton London Borough Council*¹³ after 13 years¹⁴. *Murphy* leaves some issues in doubt. It is clear, however, that it excludes liability for the defective structure of a

broader picture in common law see under "Examples: Misrepresentation and product liability", in Chapter 4, and the points made by Feldthussen in the footnotes, basically that in the majority of cases the restriction of liability is based on the criterion of the number of potential claimants and not on the possible, permissible according to the contract use of the information, opinion etc.

¹⁰ See from the Scottish chapter the process of narrowing down *Junior Books*. Compensation was rejected in a number of important decisions, *Simaan General Contracting Co. v. Pilkington Glass Ltd.*, [1988] 1 All ER 791 (CA), and *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177.

¹¹ [1990] 2 All ER 908. From the point of view of construction cases *Murphy* abolished the liability of local authorities, following *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177, that abolished the liability of private defendants. Wallace, D.I.N. "No Somersault after *Murphy*: New Zealand follows Canada", 111 (1995) LQR 285-300, at 300.

¹² [1990] All ER 1 568 (HL). There is in principle compensation for negligent misstatements. See a recent article by McBride and Hughes who identify a triangle of cases, *Hedley Byrne, Smith v. Bush*, and *Caparo, Industries plc. v. Dickman*, where the *Hedley Byrne* principle liability was firmly established. (McBride, N. and Hughes, A. "Hedley Byrne in the House of Lords: An Interpretation", 15 (1995) *LSt*, 376.). See also Oughton, 1 (1995) *Contemporary Issues in Law*, 21-42.

¹³ [1978] AC 728. As Harris notices (Harris, J.W. "Murphy makes it Eight - Overruling comes to Negligence", 11 (1991) *OxfJLSt* 416-430.), *Murphy* was the eighth case where the House of Lords exercised its power, assumed in its Practice Statement of 1966, to overrule its own decisions. Harris discusses the critique against *Anns* in the speeches in *Murphy* and gives a comprehensive account of the changes introduced by the latter. The thrust of the opposition to *Anns*, concerned the liability of builders for defects resulting to a present or imminent danger to the health and safety of the occupiers. The mixed reaction to *Anns* in other commonwealth jurisdictions was noted in *Murphy*. See in the chapter on Scots law on the reaction to *Anns* and the comments on its overruling, especially Wallace, 107(1991) LQR 228-248, AND 105 (1989) LQR 46-78, Smith and Burns 46 (1983) MLR 147, Kinder 7 (1987) LSt 319.

¹⁴ See MacQueen 44 (1990) SLT 337-338, on the progressive stages where the principle in *Anns* was eroded. At first in *Pirelli General Cable Works v. Oscar Faber* [1983] 2 AC 1 the House demanded that the building must have manifested physical symptoms of the defect. Later in *Peabody Donation Fund v. Sir Lindsay Parkison* [1985] AC 210, where the liability of local authorities was curtailed; the local authority was released from liability for reasonably foreseeable damages, as the latter where not covered by the policy of the authorising statute. *Anns* was subjected to fierce criticism *Curran v. Northern Ireland Housing Association* [1987] AC 718, emphasising on the nature of the statutory duty in question, and giving approval to the High Court of Australia decision on *Council of Shire of Sutherland v. Heyman* (1985) 157 CLR 424, which, on facts similar to *Anns*, rejected the claim on the idea that the statutory authority of the local authority did not cover such a duty of care. Finally in *D&F Estates v. Church Commissioners for England* [1989] AC 177, opposite to what was contemplated in *Anns* the builders were released from liability and *Anns* was fiercely criticised. See on the issue of the erosion of *Anns* McMillan 1996 SLT 159-160.

product¹⁵. The current situation in pure economic loss has been strongly criticised, not only from the point of view of the particular injustices it leads to, but also with regard to its broader effects on the law of negligence¹⁶.

The recent decisions in *Henderson v. Merret Syndicates Ltd*¹⁷ and *White v. Jones*¹⁸ that confirm the appeal of the voluntary assumption of responsibility concept¹⁹, are rather moderate improvements of the overall picture, involving less controversial situations where the offer of a benefit to a third party is obvious and the need to compensate third parties was evident²⁰. The decision in *White v Jones* in particular, illustrates that *Murphy* did not overrule *Ross v. Caunters*²¹; the liability of solicitors is possibly extended with *White v. Jones*²². In any case, it is too early to decide whether these decisions represent a

¹⁵ These doubts have been referred to in the chapter on Scots law. Hogg, writing before *White v. Jones*, wonders whether the House of Lords would recognise the authority of *Ross v. Caunters*. She notes that the decision in *Murphy* had also left open the question of the authority of *Morison Steamship Co. Ltd. v Greystoke Castle* [1947] AC 265, where, although the cargo had not been damaged, the owners of the cargo were held to have a claim against the owners of the colliding ship (which was party to blame for the collision, for general average expenditure incurred. (Hogg, Karen "Negligence and Economic Loss in England, Australia, Canada and New Zealand", 43 (1994) *IntComLQ*, 116-141. at 121). McMillan notes that the decision in *Murphy* was under two qualifications. The first that if a building's defect remains a potential source of danger to persons or property on neighbouring land or on the highway, the owner could recover from the negligent builder the cost of obviating the danger and protecting himself from liability to third parties. ([1990] 2 All ER 926B by Lord Bridge). The case was taken in *Morse v. Barret* 9 (1992) Con LJ 58. The second qualification stems from the fact that the House of Lords in *Murphy* failed to reject the complex structures theory. Damages to ancillary equipment could be recoverable the latter being an ambiguous concept. McMillan 1996 SLT 160.

¹⁶ See especially Howarth, David "Negligence after *Murphy*: Time to re-think", (1991) *CamLJ*, 58-99, and Harris, 11 (1991) *OxfJLSt* 416-430.

¹⁷ [1994] 3 WLR 761.

¹⁸ [1995] 2 WLR 187.

¹⁹ See the reference to the concept in the chapter on Scots law. See Hogson, 4 (1995) *Nottingham LJ*, 10-12, making a review of the concept of the voluntary assumption of responsibility which emerged in *Nocton v. Lord Ashburton* [1914] AC 932, and was established in *Hedley Byrne*. See also the reference to the concept in the speeches in *Henderson v. Merret Syndicates Ltd*, and the discussion on the expansion of the *Hedley Byrne* principle in McBride and Hughes 15 (1995) *LSt*, 376. See also Oughton, 1 (1995) *Contemporary Issues in Law*, 21-42.

²⁰ Having in mind *Murphy*, Whittaker speaks fairly of a revival as regards recovery in pure economic loss cases. Whittaker 16 (1996) *OxfJLSt* 203.

²¹ [1980] Ch. 297

²² On *White v. Jones*, see Fleming, J. "The Solicitor and the Disappointed Beneficiary", 109 (1993) *LQR* 344-349, (on the appellate decision), and Weir, T. "A *Damnosa Hereditas*?" 111 (1995) *LQR* 357-362. The latter thinks that the problem with depriving a will beneficiary from his benefits is not "tort or contract" but rather "obligations or succession". The solution, he argues, should come from the law of wills. He

turning point in case law. One could further refer to *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*²³, which created an exception to the rule "that a claim for a breach of contract can compensate the plaintiff's own losses"²⁴; *Darlington Borough Council v. Wiltshier Northern Ltd.*²⁵, which took the principle a step outside the facts in *Linden*; and the recent *Williams v. Natural Life Health Foods Ltd*²⁶. In the latter case the court applied the *Hedley Byrne* principles, allegedly at the expense of the principle of separation between the company property and the property of the shareholders²⁷.

The situation is different in the other Commonwealth jurisdictions²⁸. It is more likely that third party loss will be compensated there than it is in England. *Murphy* is

suggests the extension of Inheritance (Provision for Family and Dependants) Act 1975, so as to allow intended beneficiaries as well as deprived dependants to claim against the estate, notwithstanding the will.

²³ [1994] 1 AC 85. As Cartwright 10 (1996) JCL, 244, notes "...Linden Gardens represents the House of Lords' determination that there should be a useful remedy available against the building contractor even though the person who suffered loss on the facts (the new owner of the property) had no direct claim against him." (247). The right of action remained in the original owner as there was an effective prohibition on assignment. The original owner was allowed to sue for the new owner's loss.

²⁴ Cartwright 10 (1996) JCL, 244.

²⁵ [1995] 1 WLR 68. Darlington Council wished to build a new recreational centre, but under the rules on local authority borrowing it could not undertake financing. A construction company entered into two contracts with a financing company to build a recreational centre for the Council which owned the site. The financing company assigned to the Council all rights and causes of action against the builders to which the company was entitled under the contracts. In an action by the Council for breach of contract the judge held on a preliminary issue that the Council as assignee was not entitled to claim damages other than nominal damages. On appeal by the Council, the Court of Appeal held that since the building contracts to the knowledge of both parties were entered into for the benefit of the Council and it was foreseeable that damage caused by a breach of a contract would cause loss to the Council, the latter as an assignee could claim substantial damages for the loss caused by the breaches of the contracts and the damages should be assessed on the normal basis as if the Council had been the employer of the contracts.

The Appeal Committee of the House of Lords had granted leave to appeal but the case was settled out of court, depriving the House of an opportunity to review basic principles of law. See Cartwright 10 (1996) JCL, 244, discussing the issue of the third party loss and suggesting that the House of Lords "appears to be hesitant but generally receptive to a reconsideration of this area of law." (245).

²⁶ [1996] 1 BCLC 288, Walters 17 (1996) *The Company Lawyer* 247-248.

²⁷ See Walters 17 (1996) *The Company Lawyer* 247-248

²⁸ See Hogg, 43 (1994) *IntComLQ*, 116-141, who notes epigrammatically "Compared to other Commonwealth jurisdictions, the English law relating to economic loss appears to be virtually stagnant." (117). Swanton, 10 (1996) JCL 33, notes that the scope of liability for pure economic in England is narrower than in Australia.

rejected²⁹ in these countries while *Anns* remains valid law, with the exception of the liability of public defendants in Australia³⁰.

In Canada³¹, *Ritvow Marine Ltd. v. Washington Iron Works*³², the landmark decision establishing a manufacturer's duty to warn about potentially dangerous defects, which influenced considerably Lord Wilberforce's judgment in *Anns*³³, has never been overruled³⁴. Indeed it was followed in leading decisions such as *Kamloops (City) v. Nielsen*³⁵ and *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*³⁶. In the

29 See Wallace 111 (1995) LQR 285-300

30 However, with regard to private defendants, the law in Australia is following *Anns* model. See later in the text and Wallace, D.I.N. "Murphy Rejected: Three Commonwealth Landmarks", 11 (1995) *ConsLJ*, 249-254.

31 On the situation in Canadian law see Hogg, 43 (1994) *IntComLQ*, 134 et seq.

32 [1974] 40 DLR (3rd) 530. The loss suffered by the plaintiffs, charterers by demise of a barge against sthe manufacturers of cranes fitted on the barge, which had to stop operations when, following an accident crack were discovered in the mountings of both its crains, was recoverable exceptionally because this was the busiest season of the year and the loss could have been avoided by a warning of the defect enabling repairs in time, by the manufacturers who knew of the defect. In principle the manufacturer is not liable to a non contracting party for damage for the cost of repair of the article itself or loss which would have been sustained in any event as a result of the need for repairs.

33 Fleming, "Employer's Tort in a Contractual Matrix: New Approaches in Canada" 13 (1993) *OxfJLSt*, 430.

34 Feldthussen, *Economic Negligence*, 166.

35 [1984] 10 DLR (4th) 641. In this case claimants were the subsequent purchasers of a house, the construction of which the defendant city failed to prevent although it was aware of the house's defective foundations through its building inspectors. The Supreme Court imposed a private law duty on the defendant to exercise reasonable care in determining whether it would enforce a stop-work order. Feldthussen argues that in this decision the court indicated "at least the desire to reconsider the issue, if not an outright preference for the dissent [in *Ritvow Maritime Ltd v. Washington Iron Works*]" (*Economic Negligence*, 179). As MacQueen notes, the House of Lords embarking on its critique on *Anns*, in the sequence of case leading to *Murphy* referred to supportive case such as *Shire of Sutherland v. Heyman* (1985) 157 CLR 424 from the High Court of Australia or *D&F Estates v. Church Commissioners for England* [1989] AC 177, but not to decisions following *Anns* such as *Kamloops (City) v. Nielsen*. MacQueen 44 (1990) 338.

36 [1992] 91 DLR (4th) 289 (Supreme Court), [1990] 65 DLR (4th) 321 (Federal Court of Appeal). The defendants were the owners of the tug which, navigated negligently by its captain, damaged a bridge spanning over the Vancouver river owned by the Department of Public Works of Canada. As a result the plaintiff, who accounted for 86% of the use of the bridge, had to re-route traffic, incurring considerable expense. The plaintiff by agreement with Public Works Canada provided certain maintainance services for the bridge. The trial judge held the defendants liable for the loss claimes and an appeal to the Federal Court of Appeal was dismissed. The Supreme Court dismissed a further appeal. The majority hed the defendants liable. According to three judges, in addition to negligence and foreseeable loss, there was also sufficient proximity between the act and the loss. Stevenson J. focused on the fact that the defendants could foresee that a specific individual, as distinct from a class of people would suffer loss. According to the dissenting two judges, there should generally be no liability for contractual relational pure economic loss. loss that is suffered

latter case, both majority and minority opinions criticised *Murphy* and expressed their preference for *Anns*. In a recent development, in *London Drugs v. Kuehne & Nagel International Ltd.*³⁷ the Supreme Court extended the protection of a contractor's liability limitation clauses to the contractor's employees, at the expense of privity, in a decision with potentially far reaching effects³⁸ which now seems to be settled law. The same result was reached in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*³⁹ that involved

as a result of damage caused by the defendant to someone else's property. Contrary to the opinion of the majority, they held that the plaintiff and Public Works Canada were not engaged in a common adventure. They thought that, as between the parties to the dispute the plaintiff was in a better position to predict and bear the loss. The claim was accepted. See on the case Feldthussen, B. and Palmer, J. "Economic Loss and the Supreme Court of Canada: an Economic Critique of Norsk and Bird Construction", 74 (1995) *CanBarRev* 425-445, and Markesinis, "Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views" 109 (1993) *LQR*, 5-12. McLaughlin J. and Stevenson J. noted that the decision in *Ritvow Maritime Ltd v. Washington Iron Works*, had been criticised.

³⁷ [1992] 3 SCR 299. A transformer was delivered to a warehouse company for storage under a standard form contract including a clause limiting the warehouseman's liability on any one package to C\$40. Two employees of the warehouse company tried to remove the transformer using two forklift vehicles contrary to safe practice. The transformer toppled over and causing extensive damages. The trial judge found the employees personally liable for the full amount of damages and limited the company's liability to C\$40. The Court of Appeal reduced the employees liability to C\$40. The appellants appealed this decision to the Supreme Court and the respondent employees cross-appealed arguing that they should be completely free from liability.

See the comments on the case in Fleming, 13 (1993) *OxfJLSt*, 430-439, Baer, M. G. in 72 (1993) *CanBarRev*, 385-402, and Swan, J. "Privity of Contract and Third Party Beneficiaries: the Selective Use of Precedent, 4 (1991) *JCL*, 129-134, and Blom, 70 (1991) *CanBarRev*, 156-174, [the latter two on the British Columbia Court of Appeal decision, (1990), 70 *DLR* (4th) 51, which led to the same result albeit on a different legal basis.

³⁸ In one view the decision created a limited JQT (Fleming, 13 (1993) *OxfJLSt*, 437). See in the same article a reference to past cases on employees tort that did not all speak with one voice. Thus the earliest, *Elder Dempster & Co v. Paterson, Zochonis*, [1924] AC 522, established, according to one view, the vicarious immunity of the charterer for damage to cargo. In *Adler v. Dickson* [1955] 1 KB 158, Lord Denning, requested assent of the injured party to the extension of the exemption clause to the employees, assent which should be expressed or inferred by necessary implication. *Elder Dempster & Co v. Paterson, Zochonis*, was later interpreted as resting on the ground of a bailee having accepted the goods under the terms of the bill of lading. The idea of vicarious immunity was abandoned. In *NZ Shipping Co v. Satterthwaite (The Eurymedon)* [1975] AC 154, the exception clauses in charterparties were extended to intermediate carriers, stevedores or other third parties who were expressly included if it could be inferred that the carrier contracted also as agent for the others. This precedent was followed elsewhere in the Commonwealth. In American law express intent to extent the benefit to third parties is sufficient and the pretence of agency is not required. *The Eurymedon* technique was not available in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, because the employees were not expressly mentioned in relation to the \$40 per package limitation.

³⁹ [1993] 3 SCR 206, 107 *DLR* (4th) 169. A leave to appeal was granted on July 1992, while *London Drugs v. Kuehne & Nagel International Ltd*, was still under consideration. In the place of the individuals claiming protection of a limitation of liability clause as third

similar facts. However, the reasoning in the latter case casts doubts on the doctrinal consistency of the Supreme Court's view⁴⁰.

Third parties fare better in New Zealand (in relation to England), where liability for economic loss is widest in scope compared to other Commonwealth jurisdictions⁴¹. *Murphy* was rejected outright in *Hamlin v. Bruce Stirling Ltd*⁴². *Anns* receives a favourable treatment⁴³; the Court of Appeal has expanded its application to other cases of economic

party beneficiaries, as in *London Drugs v. Kuehne & Nagel International Ltd*, there were both the firm and individuals. Edgeworth Construction Ltd., tendered successfully on a project to build a section of highway in the Revelstoke area. N.D. Lea & Associates had designed the project and prepared the plan and specifications under contract with the Ministry of Highways. The latter incorporated those plans in a contracts with Edgeworth Construction Ltd., along with a clause disclaiming responsibility for errors in the plans. Edgeworth Construction Ltd. did not proceed against the ministry mainly because it wanted to do business with the ministry, (it would be difficult of course to sustain such a claim). McLauchlin J, speaking for the majority, held that the firm did owe a duty of care to the plaintiff on the basis of the liability for negligent misstatements as expressed in *Hedley Byrne*. The individual engineers escaped liability. The fact that each of them affixed his seal to the design documents was not enough to establish a duty of care. See Siebrasse, Norman "Third Party Beneficiaries in the Supreme Court: Categorisation and the Interpretation of Ambiguous Contracts", 45 (1995) *UTLJ*, 47-76.

⁴⁰ The decision was brief and seemed to be motivated by the intention to protect the individual employees. The distinction between the firm and the employees was no made explicit. The decision seems to be nearer the suggestion made by La Forest J, in *London Drugs v. Kuehne & Nagel International Ltd*. for the acceptance of a presumption of immunity in favour of individual employees. As Siebrasse puts it, the decision is explained as an attempt to determine (and impose) the optimal contract terms, from an economic analysis point of view. Siebrasse, 45 (1995) *UTLJ*, 47-76.

⁴¹ Hogg, 43 (1994) *IntComLQ*, 127 et seq.

⁴² [1993] 1 NZLR 374 (HC). In this case, where the first crack to the foundation appeared 2 years after completion of the building and the claim was filled 18 years after completion, it was held that the limitation period started only in the last year when the plaintiff had to seek specialist advice. The decision focused on the public authority, the Council whose building inspector had approved the foundations, and not on the builder who was insolvent. The court thought that even if there could be no precise measure of damage, a reasonable sum should be awarded to the plaintiff. Feldthussen, *Economic Negligence*, 180 fn 50.

⁴³ It was first accepted in *Bowen v. Paramount Builders* ([1977] 1 NZLR 394) which involved a private defendant. As commented on the case of defective products "The courts in New Zealand began with the 'imminent risk' requirement, but seem to have now dispensed with this and to allow recovery in negligence for even non-dangerous structural defects" (Feldthussen, *Economic Negligence*, 180).

The Court of Appeal persisted on the use of the two-stage approach in *Anns* after accepting it in *Scott Group v. McFarlane*, [1978] 1 NZLR 553, in a manner that shows its approach to economic loss to be clearly different from the approach taken in the House of Lords and in the High Court of Australia, (Hogg, 43 (1994) *IntComLQ*, 128). The Court of Appeal had not felt bound by the limitations of liability according to previous decisions, as the High Court of Australia did. It used the *Anns* doctrine to get around those limitations. In fact, the *Anns* approach was preferred even for cases falling in the realm of the *Hedley Byrne* principle.

loss⁴⁴. As in Canada, damages are awarded against public defendants that are careless in carrying out their statutory functions. Thus public authorities were held liable for approving poor quality weather boards, gutter and drains (*Stieller v. Porirua City Council*⁴⁵), for failing to advise on the possibility of flooding (*Brown v. Heathcote City Council*⁴⁶), and even for loss of value from permitting the erection of a building obstructing the view from the claimant's house (*Craig v East Coast Bays City Council*⁴⁷). In a thoroughly researched judgment by Greig J. in *Lester v. White*⁴⁸, the court held that a builder was liable in tort for economic loss to a subsequent purchaser and declined to follow *D&F Estates Ltd v. Church Commissioners for England*⁴⁹ or *Murphy*.

Australian courts which initially rejected *Anns*⁵⁰ (and where *Anns* is still rejected, in principle, as far as the liability of public authorities is concerned), have extended the protection of third parties substantially. Pure economic loss is not considered as a separate category of liability, but is treated as part of the law of negligence⁵¹. The decisions in

44 The *Anns* doctrine has been applied across the board as a single theory of negligence liability, as a basis for the imposition of a duty of care in "all types of economic loss cases" (Hogg, 43 (1994) *IntComLQ*, 129).

45 [1986] 1 NZLR 84

46 [1987] 1 NZLR 70, Privy Council [1987] 1 NZLR 720.

47 [1986] 1 NZLR 99.

48 [1992] 2 NZLR 483

49 [1989] AC 177.

50 In *Sutherland Shire Council v. Heyman*, [1985] 60 ALR 1, 59 ALJR 564 (HC), (Harris, 11 (1991) *OxfJLSt* 424), as it appears from the opinion of the majority. The decision was cited with approval by three Law Lords in *Caparo Industries plc v. Dickman*, namely Lords Roskill, Oliver and Bridge, [1990] 2 AC 605, respectively at 628, 633, and 618). The High Court rejected *Anns* as the House of Lords would do later in *Murphy*. (See Hogg, 43 (1994) *IntComLQ*, 117 and 125.).

Wallace thinks it was the analysis in *Sutherland Shire Council v. Heyman*, which prompted the House of Lords judges to distinguish *Anns* as not applying to private defendants such as builders or architects, but only to public authorities as defendants. Two of the judgments in the decision of the High Court were expressly cited and approved in *Murphy*. Wallace 111 (1995) *LQR* 285-286 and 299.

51 See Trindade, Francis, "Towards an Australian Law of Torts", 23 (1993) *UWALR* 74, especially pp.78-87, 'Negligence: proximity and duty of care'. See also Hogg, 43 (1994) *IntComLQ*, 122, who notices that in contrast to the House of Lords, the High Court applies a single theory approach to negligence liability. "The High Court of Australia does not see economic loss cases as forming a separate category of liability but as part of the general law of negligence". This single theory of negligence is derived from Lord Atkin's neighbourhood principle.

*Caltex Oil (Aust.) Pty. Ltd. v. The Dredge 'Willemstad'*⁵² and *Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd.*⁵³ could not possibly have been reached in other Commonwealth jurisdictions. Australian courts held, before *White v. Jones*, that a solicitor/custodian of a will has a duty to inform the executor of a will of the testator's death, extending the solicitor's duties⁵⁴.

52 (1976) 136 CLR 529 (HC Aust.). The dredge fractured an oil pipeline connecting a refinery with an oil terminal. The plaintiff, owners of the terminal sought compensation for the additional expenses it incurred having to transport oil to the refinery with tankers. The court awarded damages. Three members of the court rejected the traditional exclusionary rule. The decision to award damages was unanimous. See also Feldthussen, *Economic Negligence*, 240

53 (1988) 62 *Australian Law Journal Reports* 508. A company, operating a limestone crushing plant, took out in respect of that operation a policy of insurance with the appellant. The policy was expressed meant to extend to that company, all subsidiary, associated and related companies, all contractors, subcontractors and suppliers. The respondent, principal contractor of the plant, was held liable for injuries sustained by one of its subcontractors at the plant. The appellant declined to indemnify the respondent under the policy, on the grounds that he was not a party to the contract and had provided no consideration. The Supreme Court of the New South Wales and (on appeal) the Court of Appeal held that the respondent could compel the appellants to indemnify it. (The respondent was not permitted to raise an alternative case based on trust.). The High Court, with a majority of four (out of seven) held that the appeal should be dismissed because it was established that the intention of the contracting parties was that the third party should benefit from performance of the contract. The court thought that the common law rule as to privity operated unsatisfactorily and unjustly in this case, especially in the light of the changes in the law by the Insurance Contracts Act (1984) of Australia and other pieces of legislation, and, in any event the common law rule had stood for a little more than a century and had attracted much criticism. Caudron suggested that a promisor who had accepted agreed consideration for the promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled.

Since the High Court allowed the third party beneficiary of the insurance contract (intended to be indemnified from liability) a right to sue the promisor (the insurer's promise was not made to the plaintiff nor had the latter provide consideration), the decision is usually presented as an example of third party beneficiary claims being accepted. See the fierce critique by Kincaid, P. in "Third Parties: Rationalising a Right to Sue", (1989) *CamLJ*, 243-270, and "The Trident Insurance Case: Death of Contract?" 2 (1989-1990) *JCL* 160-169 See also Reynolds, F.M.B. "Privity of Contract, the Boundaries of Categories and the Limits of Judicial Function", 105 (1989) *LQR* 1, A.T.S. & F.M.B.R. "Third Party Rights on Insurance Contracts - *Trident General Insurance Co. Ltd v. McNiece Bros. Pty. Ltd.*", [1987] *LMCLQ* 258-259.

54 *Hawkins v. Clayton*, (1988) 78 ALR 69 (HC). As Hogg notices, the decision of the High Court shows how the proximity concept can be used to extend liability for economic loss. It is an example of the divergence between the English and the Australian courts from the point of view of developing novel categories of liability for economic loss, something which Australian courts have promoted on the basis of proximity. (Hogg, 43 (1994) *IntComLQ*, 126).

See also Fleming, 109 (1993) *LQR*, 348. The liability of solicitors to third parties is narrowly construed. The solicitor's duties do not include a duty of care towards the opponent of his client in litigation (*Gran Gelato Ltd. v. Richliff (Group) Ltd.* [1992] Ch. 560), nor to the buyer when the seller is acting for the seller of land (*Al-Kandari v. J.R. Brown & Co.*,

Most recently, in three construction cases in these jurisdictions *Anns* was reconfirmed against *Murphy*: In *Invercargill City Council v. Hamlin*⁵⁵ in New Zealand on the liability of a local authority for the negligent inspection of a building's foundation by one of its inspectors (now upheld by the Privy Council⁵⁶), in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited*⁵⁷ in Canada on a claim of subsequent purchasers against contractors for inadequately fixed cladding, and in *Bryan v. Maloney*⁵⁸ in

[1988] QB 665). A solicitor was found not liable to a prospective beneficiary under a will regarding collateral lifetime dispositions which could prejudice his interest (*Clarke v. Bruce Lance & Co.*, [1988] 1 WLR 881). As Feldthussen noted, even the narrowest interpretation of *Ross v. Caunters* [1980] Ch. 297, regarding the liability of a solicitor to a frustrated beneficiary for a negligently drawn will, was not approved unanimously elsewhere in the Commonwealth. (See Feldthussen, *Economic Negligence*, 143, fn70.)

⁵⁵ [1994] 3 NZLR 513, 11 (1995) *ConsLJ* 286 (Burr, Franklin, Ramsey, eds). Wallace, notes that the decision confirmed the liability of private defendants for the repair costs or reduced value of defective work, (following *Bowen v. Paramount Builders*,) but failed to consider "that the special New Zealand climate of reliance on housing control by local authorities given as the basis of their judgments against the Invercargill City Council could hardly apply to private defendants...", (Wallace, 11 (1995) *ConsLJ*, 249-254, at 250). This comment will be dealt with at a later stage. See also Fleming, J. "Once More: Tort Liability for Structural Defects", 111 (1995) *LQR* 362-366 and *McMillan* 44 (1990) 162.

Wallace underlines that the decision in *Invercargill City Council v. Hamlin*, was preceded by a thoroughly researched judgment by Greig J. in *Lester v. White* [1992] 2 NZLR 483, who held that a builder was liable in tort for economic loss to a subsequent purchaser, and declined to follow *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177, or *Murphy*. See Wallace 111 (1995) *LQR*, 287-288, on the relationship between *Anns* and *Invercargill City Council v. Hamlin*. The analysis of *Anns* in the latter laid emphasis on the idea that it is not limited to cases involving physical damages only.

The decision followed *Kamloops (City) v. Nielsen* [1984] 10 DLR (4th) 461, and refused to follow *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners* [1983] 2 AC 1, and *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177.

⁵⁶ *The Times*, February 15 1996. See in previous reference to the special situation in New Zealand, especially *McMillan* 44 (1990) 162, who is enthusiastic about the potential prospects opened for Scots law from this decision as regards distancing itself from English law.

⁵⁷ [1995] 1 SCR 85, 11 (1995) *ConsLJ* (Burr, Franklin, Ramsey, eds) 306. See Feldthussen and Palmer, 74 (1995) *CanBarRev* 425-445. The Supreme Court reversed the decision of the Manitoba Court of Appeal which had relied heavily on *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177. The Supreme Court refused to follow the latter case on the grounds that in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Co.*, negligence posed "a real and substantive danger" to the occupants of the building. The court left open the question for liability in tort for non-dangerous defects. (See Feldthussen, *Economic Negligence*, 180, fn47 on the appellate decision.)

⁵⁸ HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 273 (Burr, Franklin, Ramsey, eds). Bryan built a house for Maloney's predecessor in title. After Maloney purchased the house cracks began to appear in the walls, caused from the fact that the footings were inadequate to withstand the seasonal changes in clay soil. Maloney turned against Bryan in negligence. She succeeded both at first instance and before the Full Court of the Supreme Court of Tasmania. Bryan appealed to the High Court of Australia. The High Court held dismissing the appeal holding that the relationship between builder and subsequent owner

Australia, on a claim by the third owners of a building against the original builders, the courts held in favour of the third parties⁵⁹.

The Privy Council, upholding⁶⁰ *Invercargill City Council v. Hamlin*, acknowledged that the law of negligence on pure economic loss "is especially unsuited for the imposition of a single monolithic solution" and that "[t]he common law adapted itself to the differing circumstances of the countries in which it had taken root.". It further acknowledged that New Zealand judges were better positioned to decide on the questions the case posed than the Board of the Privy Council, irrespective of whether the circumstances in New Zealand and England were in fact so very different: "What mattered was the perception."⁶¹ As McMillan notes "In New Zealand owners traditionally rely on local authorities not to allow unstable houses to be built in breach of bylaws, at least partly because it is virtually unknown in New Zealand for a surveyor's report to be obtained. New Zealand judges were in a much better position to decide on the expectations of their own society."⁶²

Three important points were made in relation to *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited*. First, that *D&F Estates v. Church Commissioners for England*⁶³ relied upon a mutually exclusive distinction between liability in tort and liability in contract, which is no longer sustainable in Canadian law.

with respect to the economic loss of repairing the defect is marked by the assumption of responsibility and known reliance commonly present in such cases, where a relationship of proximity exists. In normal circumstances a builder undertakes to erect a house with adequate footings to last for a period which is likely to be owed by subsequent owners, who will have less opportunity to inspect the house than the first owner. See the comment by Miller, Duncan "Builder's negligence liability to subsequent purchaser - *Bryan v. Maloney*", [1995] LMCLQ 326-331.

⁵⁹ See Wallace, 11 (1995) *ConsLJ*, 249-254.

⁶⁰ It could be argued that the Privy Council continued earlier policy. The court had rejected the appeal against *Brown v. Heathcote City Council*, [1987] 1 NZLR 720. However in 1987 *Anns* was still valid law.

⁶¹ *The Times*, February 15 1996, [1996] 2 WLR 367. It was noted though that "It was regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle.". The Privy Council laid emphasis on the fact that *Pirelli General Gable Works Ltd. v. Oscar Faber and Partners*, [1983] 2 AC 1, was not valid law in New Zealand, and on a succession of cases in New Zealand in the past 20 years. In these cases it was decided that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws. The Privy Council did not give an opinion on whether *Pirelli* was valid in England. See Wallace, 112 (1996) LQR 369.

⁶² McMillan 1996 SLT 162.

⁶³ [1989] AC 177.

Secondly, both *Murphy* and *D&F Estates* relied on a broad exclusionary rule against recovery of pure economic loss in tort. The Supreme Court of Canada followed *Hedley Byrne*, rejecting the broad exclusionary rule and stating its preference for *Anns*. Thirdly, policy considerations led towards allowing recovery. As was underlined by LaForest J., if the defendant was released from liability the decision would be encouraging reckless behaviour. The contractor would not be liable simply because the property on which he did the works had changed hands. Imposing liability provided a significant incentive for builders to make all works safe and fit for the purpose⁶⁴.

The latter decision should be further distinguished because it confirms the view of the Supreme Court of Canada⁶⁵ that the existence of a contract, on which the plaintiff might have a claim for the loss, does not preclude the possibility of a duty of care in tort, owed to the plaintiff by a non-party. The approach is repeated in Australia in *Burnie Port Authority v. General Jones*⁶⁶ and *Bryan v. Maloney*,⁶⁷ and in England in *Henderson v. Merrett Syndicates*⁶⁸. *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited* is, regarding the award of damages in tort despite the fact that the claimant had a contractual claim, exceptionally based on *Junior Books*. As said, the latter's scope has suffered a serious setback and, in one view, the decision has survived only because it was meant to be limited to its facts⁶⁹.

*Bryan v. Maloney*⁷⁰, was reached against substantial authority to the contrary and applied authority that has been considered redundant⁷¹. Rejecting *Murphy* and *D&F Estates* the three judges of the majority of four noted: "Their Lordships' view in that regard seems to us, however, to have rested upon a narrower view of the scope of the modern law of negligence and a more rigid compartmentalisation of contract and tort than is acceptable

64 McMillan 1996 SLT 161.

65 The tendency began with the decision in *Central Trust Co. v. Rafuse*, (1986) 31 DLR (4th) 521.

66 (1994) 179 CLR 520.

67 HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 273.

68 [1994] 3 WLR 761.

69 Miller, [1995] LMCLQ, 328.

70 HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 273.

71 Miller, [1995] LMCLQ, 326.

under the law of this country."⁷². Toohey J. who held a different opinion than the rest of the majority, stressed that the incremental approach did not provide an answer in this case. The decision focused on a proximity criterion additional to negligence, and on the reasonable foreseeability of the loss⁷³ that, as will be discussed, is a basic vehicle for incorporating policy considerations in the jurisprudence of the High Court.

2.1.1. Conclusion.

No short description of the Commonwealth law on third party pure economic loss will highlight the differences between the jurisdictions adequately⁷⁴. It is not the purpose of this work to examine different categorisations of pure economic loss, but it would suffice to argue that with regard to the so-called relational loss -- arising from harm to another person⁷⁵, where most third party loss cases belong, although the starting point in English law is that of an exclusionary rule, this is not so in the other Commonwealth jurisdictions. The principle there seems to be that damages for pure economic loss will be awarded. Presumably, damages are awarded in cases that do not differ qualitatively from the instances where liability for pure economic loss is possible elsewhere in common law, as for instance, in 'tripartite' relationships⁷⁶.

⁷² (1995) 128ALR 171.

⁷³ The decision was based on the foreseeability of the loss, the reliance shown by the owner upon the builder and the assumption of responsibility by the latter which was not affected by the lapse of time between construction and the purchase by the plaintiff. The structure in question was recognised as having indefinite use. The loss would foreseeably occur at the time the inadequacy of the footings becomes manifest.

⁷⁴ See for a comprehensive reference Hogg, 43 (1994) *IntComLQ*, 116, especially pp.130 et seq, comparing the approach of the High Court of Australia and that of the Court of Appeal in New Zealand, in addition to the comparison of each court's approach to that of the House of Lords.

⁷⁵ Markesinis, B.S. refers to relational loss as loss arising from damage to another person's property. (109 (1993)LQR, 7). Similarly Feldthussen speaks of loss consequent on physical damage to a third party, (*Economic Negligence*, 2, 207).

⁷⁶ As said, in American law, there is usually liability in cases of a so-called "triangular configuration". Craig, referring to *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), and *International Products Co. v. Erie R. Co.* (1927), 155 N.E. 662, where the principle of the former was endorsed; a warehouse proprietor had negligently misinterpreted the place of storage so that the plaintiff could not recover on his insurance when the warehouse burned down (Craig 92 LQR 197 239). They are also described as "tripartite exchange relationships" (Harris & Veljanovski in Furmston, 59.) involving that is a voluntary transaction existing before the damage where the class of people likely to

There is confusion over the state of the law in all jurisdictions⁷⁷; the law is unsettled whether it involves an exclusionary rule or not⁷⁸. In one view, only in the case of "transferred loss" -- when the harm is placed upon the plaintiff by contract with the third party it is well established that damages are awarded⁷⁹, or, extending the idea of

suffer injury is limited and predictable. See under "Tort v. Contract: Third party and pure economic loss" in Chapter 4, and "Third party loss: Privity oriented retreat from Junior Books" and "Third party loss in the Scots law of delict: In favour of the third party" Chapter 5.

⁷⁷ Feldthussen notices for instance on the law of Canada, that although *Rivtow Marine v. Washington Iron Works*, [1974] SCR 1189, has never been overruled, and if followed by recent appellate decisions uncritically, because of a "continuing series of obiter dicta in the Supreme Court itself, the law in Canada remains uncertain". (p.178). There was a three-three split in the decision in the *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289, between the majority (judgment given by McLauchlin J.) and the minority (judgment given by La Forest J.), the fourth judge of the majority using a different legal reasoning. Feldthussen comments on relational economic loss that "as a direct result of that decision the law in Canada is virtually impossible to state" (*Economic Negligence*, 209).

See also the comments on *Edgeworth Construction Ltd. v. N.D. Lea & Associates* by Siebrasse. He argues that the (brief) decision could better be explained from the point of view of the imposition of what the court thinks are the optimal contract terms and it resembles the view that there should be a presumed immunity in favour of the employees, expressed by La Forest J in *London Drugs Ltd v. Kuehne & Nagel International Ltd.* (Siebrasse, 45 (1995) *UTLJ*, 47-48.)

Hogg is referring to recent comments on the case law of the New Zealand Court of Appeal, according to which, in recent decisions, the court was not limited to the requirement of foreseeability of harm from the first stage of the *Anns* test, but has added a requirement of proximity as well. The court has not defined the content of this requirement. It is doubtful whether there is really a change of policy by the Court of Appeal. There is certainly some confusion as to the precise state of the law. (Hogg, 43 (1994) *IntComLQ*, 130 et seq.).

Wallace for example thinks that the language in *Invercargill City Council v. Hamlin* [1994] 3 NZLR 513. *The Times*, February 15 1996, [1996] 2 WLR 367, is very close to the decision in *Bryan v. Maloney* HCA (March) 23 1995, 11 (1995) *ConsLJ* 273, but notes that on the outstanding problem, for the construction industry, defining, that is, the defects for which damages might be awarded in those jurisdictions, the Privy Council decision "does not offer assistance". Wallace 112 (1996) *LQR* 374.

⁷⁸ Feldthussen, *Economic Negligence* and Feldthussen and Palmer, 74 (1995) *CanBarRev* 425-445. The reference to the exclusionary rule includes American law as well.

⁷⁹ Feldthussen, *Economic Negligence*, 211 et seq. offers arguments in support of the exclusionary rule in the case of relational economic loss, on the bases, among others, of the difference between physical damage and economic loss, on the fact that there is no built-in limiting factor as regards liability in the case of pure economic loss, and it is possible that the defendant will be unable to make all payments (including those for insurance), and finally on the basis of practical convenience. The exclusionary rule is not absolute. As regards the cases where recovery is allowed, Feldthussen identifies certain categories. A common one is that of "transferred loss", where the third party allocates the risk of damage to its property to the plaintiff by contract (pp.253-259). The category includes carriage cases. One variant is that when there is damage to public resources and the state cannot legally impose liability. A second category is that of "joint venture" cases, where the plaintiffs share the same venture in the damaged property, as does the owner. Claims by ship charterers and by commercial fishermen who participate in share-the-catch

"transferred loss", when the plaintiff has no other adequate means for protection⁸⁰. One reason for this uncertainty is the herding of all pure economic loss cases together. Another reason is the impact of English law where no contract in favour of third parties is accepted.

It would be simpler to notice the greater assertiveness of the courts in Canada, Australia and New Zealand towards protecting third parties. The increasing literature on the special problems posed when a case in tort is based on a contractual transaction to which the plaintiff is not a party⁸¹ could be recalled as evidence of the dissatisfaction with the law, a dissatisfaction expressed up to a point in case law.

2.2. Third party beneficiary claims.

In a manner similar to pure economic loss, there are decisions for and against enforcing a third party beneficiary rule⁸². A number of recent decisions in England have not contradicted privity outright but have mitigated its effects⁸³. The courts have developed

agreements with the owner, are generally accepted. In the opinion of La Forest J. *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289, was a "joint venture" case. In the cases of "transferred loss" the award of damages is justified, since the injured party has no other effective means for protection, and therefore it involves true social costs. Feldthussen and Palmer, 74 (1995) *CanBarRev* 442.

⁸⁰ See Fleming, 109 (1993) LQR, 344-349, (on the appellate decision), and Weir, T. "A *Damnosa Hereditas*?" (1995) 111 LQR 357-362. See in Chapter 2. The need for protection for the third parties was the most crucial motive in the development of the German contractual mechanisms, See "Transfer of damage -- The criterion of risk".

⁸¹ See Beyleveld, and Brownsword, 54 (1991) MLR 48-71, Fleming, 5 (1993) *Canterbury LR*, 269-279, MacGrath, 3 (1985) *OxfJLSt*, 350, the work of Markesinis, and the sources referred to in the chapter on Scots law.

⁸² Swan, 4 (1991) *JCL*, 129-134, p.130, gives a brief outline of the contradicting decisions. Leading cases for the traditional view are for instance *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd*, [1915] AC 847 (HL), *Scruttons Ltd v. Midland Silicones Ltd*, [1962] AC 446, and *Vanderpitte v. Preferred Accident Insurance Corp of New York*, [1933] AC 70 (PC). Opposite are the *Les Affêteurs Réunis SA v Leopold Walford (London) Ltd*, [1919] AC 801 (HL) and *McEvoy v. Belfast Banking Co Ltd*, [1935] AC 24 (HL). Similar is the situation in Canada and Australia. The examples Swan is offering from these jurisdictions make evident the intrinsic overlap between third party loss and third party beneficiary principle. As Swan notes the traditional cases cannot be reconciled with the opposite examples. See also Andrews 8 (1988) *LSt* 14, for an extensive account of the current law of third party beneficiary claims. He states in the introduction: "On closer examination English law has withheld not one but two rights from the third party: first, he cannot sue the promisor directly; secondly, he cannot compel the promisee B to sue A [the promisor] on C's behalf. The famous statement that English law knows no *ius quasitum tertio* is in fact shorthand for this double proposition."

⁸³ Beale, H. "Privity of Contract: Judicial and Legislative Reform", 9 (1995) *JCL* 102-124, at 104. One example as regards the measure of damages recovered by a third party

various ways to satisfy third party beneficiaries⁸⁴. However, the third party rule has generally proven durable to judicial change despite the inconvenience⁸⁵ it causes⁸⁶.

beneficiary is the decision of the House of Lords in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd*, [1994] 1 AC 85. Both cases involved building contracts where the standard form of the contract forbade any assignment of a right under the contract without the contractor's consent. In the first case the lessee of a part of a building had contracted in 1975 with the defendants for the removal of blue asbestos. The second defendant subcontracted the work to the first defendant. Asbestos was discovered after the removal works. In 1985 the lessee contracted with the third defendants for the same purpose. The lessee assigned his leasehold interests to the plaintiff, and submitted a writ on 3/7/1985 seeking damages. In January 1987 he assigned to the plaintiff the right of action as pleaded and rights incidental to leasehold interests. The second defendant was not asked for and did not consent to the assignment. Subsequently more asbestos was found and additional works at the plaintiff's expense had to be carried out. The Court of Appeal reversing the previous decision held that the assignment was effective and that the plaintiff could recover. The House of Lords thought that because it was to the knowledge of the parties that the building might be occupied or purchased by third parties, the damage to the latter was foreseeable. The first plaintiff was entitled to enforce contractual rights on behalf of those third parties who would suffer losses from the building's defects. The first defendant was awarded substantial damages.

Another case is that of the Court of Appeal decision in *Marc Rich and Co AG v. Bishop Rock Marine Co Ltd.*, [1994] 3 All ER 686. This was a claim by the cargo owners of a ship that sunk, against the classification society a surveyor of which recommended that the ship could continue her voyage, after temporary repairs were made. The Court of Appeal said that there is no distinction in law between liability for physical damage and that for pure economic loss. The requirements would be the same; the surveyors would be under a duty of care towards the defendants if the loss had been foreseeable and it was just and reasonable to place the surveyors under a duty of care. Provided the cargo had been loaded under a bill of lading incorporating the Hague-Visby Rules which place the burden on the ship owner, it would not be just and reasonable to hold the surveyors liable in the same manner as ship owners under the Hague-Visby Rules but without the exceptions from and limitation of liability provided for in those rules. Furthermore, as there were no dealings between the classification society and the cargo owners there was no relationship which could justify a duty of care by the classification society.

One more example is the Privy Council decision in *The Pioneer Container*, [1994] 2 AC 324, (from the Court of Appeal of Hong Kong) where a sub-bailee was not allowed to set up the terms of the sub-bailment against the original bailor. Two groups of plaintiffs had engaged carriers under a bill of lading enabling the latter to subcontract the carriage. The carriage was subcontracted. The subcontract contained a clause providing for the exclusive jurisdiction of Taiwanese courts on claims against the subcontractors. Following a collision the ship and cargo were lost. An action in rem against a sister ship was submitted in Hong Kong. The Privy Council held that when goods are sub-bailed with the owners' consent, the sub-bailee was obliged as the bailee. The owner could sue directly. The clauses for exclusive jurisdiction would be valid only if the owners had expressly or impliedly consented to them.

⁸⁴ The courts in some cases inferred a collateral contract between the beneficiary and the promisor (*Urquhart Lindsay & Co. Ltd v. Eastern Bank Ltd.* [1922] 1 KB 318) or discovered an agency in which the beneficiary was the principal and the promisee his agent (*Scruttons Ltd. v. Midland Silicones Ltd.* [1962] AC 446, *The Eurymedon* [1975] AC 154) or invoked the trust principle in favour of the third party beneficiary. Furthermore contractual rights could be assigned while the concept of specific performance could be extended to protect third party beneficiaries (*Beswick v. Beswick* [1968 AC 58]). See Dowrick, F.E. "A Jus Quaesitum Tertio by way of contract in English law", 19 (1956) *MLR* 375-393, 386. These devices were more often than not legal fictions. In any case these

The (English) Law Commission, in a 1991 Consultation Paper⁸⁷ suggested the abolition of privity in the case of third parties which are intended beneficiaries of contracts⁸⁸. This is the second attempt to allow third party beneficiary claims on a contract in this century⁸⁹. A double intention test is set by the Law Commission as a prerequisite for

techniques were inherently limited. Thus contracts for the performance of personal service and those requiring constant supervision are not specifically enforceable, the promisee can be considered to be contracting as agent or trustee of the third party only if the latter is ascertained at the time of the contract, and when the collateral contract is a unilateral contract there will be problems if the loss occurs before completion of performance or when performance is never completed as until then there is no contract. Beatson, 45 (1992), *CLP*, 6-8.

⁸⁵ The LC examined briefly the case against the third party rule: "First, the rule prevents effect being given to the intentions of the parties and has caused difficulties in practice. Secondly, the rule had led to unnecessary complexity and uncertainty in the law in view of the number of common law and statutory exceptions to it. The technical hurdles which must be overcome if one is to circumvent the rule by drafting also lead to uncertainty since it will often be possible to raise plausible arguments that some requirement has not been satisfied. This uncertainty is commercially inconvenient and may lead to inefficient duplication of insurance cover. The combination of the denial of rights to the third party and rule that the promisee when suing can only recover for his own loss, and not that of another, may also lead to injustice. Finally, the justifications of the rule are unconvincing." (Consultation Paper No121, 65).

As will be discussed this denial of the third party right is linked to the traditional doctrine's request that consideration must originate from the promisee/plaintiff. The LC and most commentators have made clear that while consideration concerns which promises may be enforce, privity concerns who will enforce those promises. Privity has been systematically undermined by academic commentators.

See also Degeling, S. "A consideration of the UK Commission's Consultation Paper 'Privity of Contract'", 6 (1993) *JCL* 177-188, p.178, Beatson, 45 (1992), *CLP*, 4-5. See also Flannigan, R. "Privity - The End of an Era (Error)", 103 (1987) *LQR* 564-593, and the LC, Consultation Paper No 121, 65 et seq.

⁸⁶ Beatson, J., discussing why the third party rule has proven so durable focuses on the nature of the rule and especially on the judges perception of their ability "to abrogate the rule without leaving open major issues of policy, which it may not be appropriate for courts to decide.". To this one could add the legislative intervention in favour of third parties in specific instances which reduced the need for reform (Beatson, 45 (1992), *CLP*, 10).

⁸⁷ LC, Consultation Paper No 121.

⁸⁸ The final report on the issue was meant to be issued by the end of 1995. There were delays to the project caused by staff shortages. See (1993) LC, No 210, para 2.8, (1994) LC No 223, para 2.16, and (1995) LC No 232, para 2.7.

⁸⁹ The first attempt was in 1937. The Law Revision Committee, chaired by the then Master of the Rolls, Lord Wright published its Sixth Interim Report, "Statute of Frauds and the Doctrine of Consideration" (Cmd. 5549). The Committee along with a wide range of radical suggestions, proposed the recognition of the right of a third party to enforce a contract which by its express terms purports to confer a benefit directly on him (para. 41-8). Despite the widespread support for many of the Committee's recommendations and in contrast to all its other reports, the Sixth Interim Report, failed to be implemented. This was due to lack of parliamentary time because, among other reasons, of urgent legislative needs relating to defence and Treasury. Following delays in preparing the draft of a Bill in 1937 and 1938, the reforms never got a starting date. The issue was raised again in 1949 with

accepting a claim⁹⁰; namely that the parties intended to benefit the third party and that they intended to allow the third party to enforce this benefit with a direct claim against the promisor⁹¹. The Commission argued, in defence of these suggestions, that they enable the realisation of the parties' intentions, in line with the prevailing will theory⁹². The Commission does not deny the fact that privity is abandoned. However, it swiftly notes, that consideration is provided by the promisee⁹³. Although many issues are left open by the Commission, one being the question of defences⁹⁴, as a whole the Consultation Paper is thorough and balanced⁹⁵.

a parliamentary question, and in 1950 in a meeting of the Society of the Public Teachers of Law with the Lord Chancellor. These deliberations evidence the reluctance towards reforming consideration and the third party rule. See for more details Beatson, 45 (1992), *CLP*, 10-15.

Two of the judges in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.*, (1988) 62 *Australian Law Journal Reports* 508, Mason CJ, Wilson J, referred with approval to the criticism of the privity doctrine in the Law Revision Committee's report from 1937. (1988) 80 ALR 574, at 579-580.

⁹⁰ The double intention test was criticised as offering little certainty especially when the contract is silent or ambiguous on the parties' intentions. This is especially true for modes of transactions which are not as well tailored to third party beneficiary situations such as carriage or insurance contracts. Beatson, 45 (1992), *CLP*, 26.

⁹¹ The suggested model is not different than say §328BGB. A basic controversy in continental systems was whether a direct claim was provided for the third party beneficiary. In German theory the contracts which allowed the third party a direct right were named as 'real' contracts in favour of third parties. See under "Real contracts in favour of third parties" in Chapter 2.

⁹² See LC, Consultation Paper No 121, 65 et seq., at 71. The continental contracts in favour of third parties and JQT are based on the same basis

⁹³ LC, Consultation Paper No 121, 9 et seq, and 65 et seq. "The Case for Reform". Degeling, 6 (1993) *JCL* 180, Kincaid, 8 (1994) *JCL* 59, Tettenborn, A.M. "Privity of Contract: The Law Commission's Proposals" [1992] *LMCLQ*, 182-186.

⁹⁴ The LC thought of two possible situations as regards the identification of the third party beneficiary; when the third party is in existence, and when he is not in existence or ascertained at the time of the contract. The Commission was uncertain about the second situation and invited submissions.

The Commission suggested provisionally that the promisor be entitled to raise against the third party the usual defences, set off and counterclaim that he would have against the promisee. (This is the view taken in §334BGB and §414AK, §882II of the Austrian Civil Code and §1413 of the Italian Civil Code. See also under "Promisor's defences" in Chapter 4, on American law, where the approach is possibly the same.) However the Commission is undecided as to whether the set off and counterclaim against the third party should include other issues arising between the promisor and promisee which subsist beyond the contract, instead of being limited to issues arising from the contract between the promisor and promisee.

The Commission was also undecided, on whether, in the absence of an agreement between the parties and the third party, acceptance, adoption or material reliance should be required before modification is prevented, whether this position of the third party

In order to overcome the constraints of the traditional doctrine, statutory provisions for third party beneficiary claims were introduced in Australia and in New Zealand⁹⁶.

3. Is English law isolated?

The information provided in the previous units creates the impression that there is a widening rift between England and the rest of the Commonwealth on pure economic loss and, more specifically, on the protection available for third party loss. English law has become more restrictive since *Hedley Byrne & Co. v Heller & Partners Ltd*⁹⁷, reversing subsequent progressive decisions. In the Commonwealth, to the contrary, courts have avoided the impact of *Murphy*, cautious of the consequences from overruling *Anns*⁹⁸, and have expanded the protection for third party loss⁹⁹.

should be known to the parties or the promisee or the latter should have anticipated it, and whether modification should be allowed if the contract permits it where the third party, irrespectively of acceptance etc. knows or should have known that the contract permits modification.

The Commission was undecided on what should the law be when the promisor has made his performance to the promisee and then the third party seeks enforcement of the contract.

The Commission made provisional recommendations for the cases where the promisor's performance is designed to discharge an existing obligation of the promisee to the third party (that he should be able to claim against both), and that the exceptions to the law (trusts, property for instance) be maintained. (LC, Consultation Paper No 121, 132 et seq., "Summary of the Provisional Recommendations for Reform on which we invite comment").

It seems that the LC was undecided on a considerable array of issues. Arguably, the model suggested was well thought of in its basic lines, and it is reasonable to believe that many of the issues raised would be resolved by case law which would be likely to develop a stable jurisprudence on these issues.

⁹⁵ Worth noticing is the extensive review of the privity doctrine and of a considerable number of foreign systems, by the LC.

⁹⁶ As said before third party beneficiary claims are provided for in Contracts (Privity) Act 1982 of New Zealand, in Insurance Contracts Act 1984, s.48, of Australia, in Queensland Property Law Act 1974, s.55, and in Western Australia Property Law Act 1959, s.11 (2) and (3). In Israel as well recent legislation allowed third party contract beneficiary claims. See Kötz, (1990) *Tel Aviv University Studies in Law*, 195.

⁹⁷ [1964] AC 465.

⁹⁸ See Markesinis: "Those of us who criticise the recent attempts to restrict the impetus given to the law of torts by *Anns* do so not out of 'closet imperialism' but because we are concerned that tort law should continue its traditional function of protecting vital interests from wrongful interference". He goes on to note that economic interest should not always be ranked as having a lower value than physical or property interests, and that it is not true that economic interests can be efficiently protected through contract law alone. (Markesinis and Deakin, 55 (1992) MLR 640).

The rejection of *Murphy* is crucial to the direction of the law of negligence as can be seen from the critique against *Anns* in the former decision. As Harris explained in detail,

It is difficult to evaluate the momentum of differentiation from English law. The jurisdictions discussed do not present a uniform approach¹⁰⁰. Certain similarities between all three or two of them do exist. Thus both *Murphy* and *D&F Estates* are possibly rejected in all three jurisdictions¹⁰¹. Public authorities are generally held liable for loss caused from the violation of their statutory duties in New Zealand and Canada (*Anns* is valid law). The Supreme Court of Canada and the High Court of Australia would not reject a claim in tort if the plaintiff has a contractual claim¹⁰². In the High Court of Australia and in the New Zealand Court of Appeal, pure economic loss does not form a separate category of liability but is treated "as part of the general law of negligence"¹⁰³. However, in order to

Murphy represents the victory of doctrine against consistency-in-justice in *Anns*. Thus *Anns* (and *Dutton* which also awarded damages for pure economic loss) were said to have constituted unacceptable judicial legislation, although the House of lords in *Murphy* itself altered the rules binding lower courts. More importantly it was alleged that these decisions misapplied the duty of care concept and extended its scope, affecting the very nature of negligence. As Harris indicated, it was not a matter of the scope of the duty of care but of the scope of liability. The emphasis on the duty of care stresses the thrust of the doctrinal criticism, the award of damages for pure economic loss. The consistency-in-justice argument in *Anns* is described by the arguments that because the defendant would be liable had he caused physical harm he ought to be liable for the cost of preventing the injury. This, admittedly a "jump" in liability rules, was difficult to accept because it involved what the courts understood as allowing recovery in negligence for defects belonging to the terrain of contract. The most serious criticism on *Anns* was that it led to the conflation of tortious and contractual liability, imposing on the manufacturers an indefinitely transmissible warranty of quality, which subsists only between contracting parties. (Harris, 11 (1991) *OxfJLSt*, 425-427).

It was also thought that the loss in *Anns* was considered, improperly, property loss, so as to avoid the doctrinal obstacle that pure economic loss is not in principle compensated in contract, Fleming, J. "Property Damage - Economic Loss: A Comparative View", 105 (1989) *LQR* 508, "Requiem for *Anns*", 106, (1990) *LQR* 525-530. See also Markesinis and Deakin 55 (1992) *MLR*, 633-634.

⁹⁹ In *Architects, Planners & Engineers v. Ocean Front Pte*, [1996] 1 *SLR* 113, the Singaporean Court of Appeal decided not to follow *Murphy*. As Wallace puts it "It seems to leave England, on the cases so far in a minority of one in abolishing the *Anns* liability.". Wallace 112 (1996) 375.

¹⁰⁰ See Hogg, 43 (1994) *IntComLQ*, 116.

¹⁰¹ See *Lester v. White* [1992] 2 *NZLR* 483, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited*, [1995] 1 *SCR* 85, 11 (1995) *ConsLJ* (Burr, Franklin, Ramsey, eds) 306, and *Bryan v. Maloney*, HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 273 (Burr, Franklin, Ramsey, eds).

¹⁰² See *Central Trust Co. v. Rafuse*, (1986) 31 *DLR* (4th) 521, *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited*. and in Australia *Burnie Port Authority v. General Jones* (1994) 179 *CLR* 520, and *Bryan v. Maloney*, As said this view was recently confirmed in England with *Herderson v. Merrett Syndicates*. [1994] 3 *WLR* 761.

¹⁰³ Hogg, 43 (1994) *IntComLQ*, 130. This point was made before in relation of Australian law.

assess the direction of the relative judicial policies, longer term tendencies, the creation of a body of precedents and a credible account of judicial opinions would be required¹⁰⁴. Such information is not available at this stage (and is generally difficult to infer from a case-by-case development). Any evaluation is made more difficult by the fact that changes are likely to be gradual and subtle and as it is necessary to review not only what is the current law but also to discuss future development¹⁰⁵. What is important is that the Privy Council acknowledged the need for common law to be differentiated according to the circumstances in each jurisdiction and upheld the validity of *Invercargill City Council v. Hamlin*¹⁰⁶. (Canada and Australia, it should be recalled, are no longer subject to the jurisdiction of the Privy Council¹⁰⁷.)

Evaluations of case law are often focused on the specific instances making it difficult to assess the overall momentum. The Canadian Supreme Court in *Winnipeg*

104 New Zealand is an exception, to a certain extent of course: "Perhaps one of the most important consequences of the New Zealand approach, in practical terms, is that it is the only Commonwealth jurisdiction where there is a substantial body of decisions establishing liability for economic loss which can only be described in terms of a 'miscellany' of cases." Hogg, 43 (1994) *IntComLQ*, 133.

105 Hogson, 4 (1995) *Nottingham LJ.*, 14, argues that the impatience with the rule in England and the wish for legislative intervention were evident from the speeches in *White v. Jones*. The voiced dissatisfaction with the current state of the law entailed the implied threat, in his view, that the courts would have to embark in reforming the law in case no action was taken. The decision in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *StMartins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*, [1994] 1 AC 85, are evidence, in Hogson's view, of the willingness of the courts to react to the injustices and inconveniences caused by the present rule.

106 [1994] 3 NZLR 513, 11 (1995) *ConsLJ* 286. See on the decision of the Privy Council *The Times* February 15 1996.

107 As Fleming noted before the decision of the Privy Council on *Invercargill City Council v. Hamlin*, *The Times* 15 February 1996 "the Privy Council will be put in the unenviable position of having to choose between the solid phalanx of the Commonwealth and solidarity with its, in the main, former colleagues in the House of Lords." Fleming, 111 (1995) *LQR* 362.

On the Privy Council see the recent article by Harris, 106 (1990) *LQR* 574, discussing the possibility of each jurisdiction to vary in its solutions to particular problems adjusting to the specific social needs, and the duty of the Privy Council to respect such differentiations in common law. Wallace, before the Privy Council decision spoke of the special climate of reliance on housing control by local authorities in New Zealand, which, he stressed, does hardly apply in the case of private defenders as the present case. (Wallace, 11 (1995) *ConsLJ* 250) See also Wallace 111 (1995) *LQR* 285-300. Arguably the Privy Council's decision is constructive as regards the development of common law especially outside England. It is tactful in a sense as it thinks that the consideration of the New Zealand judges that the situation in New Zealand is different from England is valid in its face.

*Condominium Corporation No. 36 v. Bird Construction Company Limited*¹⁰⁸ and the High Court of Australia in *Bryan v. Malone*¹⁰⁹, for instance, stressed the fact that their decisions derive from the relationship between the late owner and occupier of residential property. What remains unanswered is whether owners/occupiers of other (non residential) property would enjoy the same protection¹¹⁰. Wallace, by bringing together *Invercargill City Council v. Hamlin*¹¹¹ and *Bryan v. Maloney*¹¹², in the sense that both decisions indicate "a situation of perceived or notional reliance underpinning as essentially policy-driven liability"¹¹³, could be underestimating their scope and potential.

Moreover, many important Commonwealth decisions allowing third party claims are made by marginal majorities. The four judges of the majority opinion in *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge 'Willemstad'*¹¹⁴ did not agree on the decision's governing principles¹¹⁵. In *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd*¹¹⁶ and in the *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*¹¹⁷ the decisions were made by majorities of three¹¹⁸. A majority of six agreeing on the result in *London Drugs Ltd*

108 [1995] 1 SCR 85, 11 (1995) ConsLJ 306.

109 HCA March, 11 (1995) ConsL, 249-254.

110 Wallace, 11 (1995) ConsLJ, 253. Another example of the fragmented picture is that public defendants carrying out statutory functions who appear to be in a different position from private defendant. In the Commonwealth countries, especially in New Zealand, "they have found themselves liable for approving poor quality weather boards, gutter and drain.- *Stieller v. Porirua C.C.* [1986] 1 NZLR 84, for failing to advice on the possibility of flooding, -- *Brown v. Heathcote CC* [1987] 1 NZLR 70, Privy Council [1987] 1 NZLR 720, and even for loss of value for permitting obstructions of a view --*Craig v East Coast Bays CC* [1986] 1 NZLR 99.

111 [1994] 3 NZLR 513. *The Times*, February 15 1996, [1996] 2 WLR 367

112 HCA (March) 23 1995, 11 (1995) ConsLJ 273.

113 Wallace 112 (1996) LQR 374.

114 (1976) 136 CLR 529 (HC Aust.). Only three members of the court explicitly rejected the exclusionary rule. All the judges accepted the claim for the award of damages.

115 The judges who analysed thoroughly leading English cases as well as Canadian and American law, were aware of the practical problems of the issue and tried to develop "a more restrictive limiting formula than foreseeability". (Feldthussen, *Economic Negligence*, 242). The fact that they failed to agree is an indication of the complexity of the problem.

116 (1988) 62 *Australian Law Journal* 508.

117 [1991] 91 DLR (4th) 321.

118 See the fierce critique by Kincaid, P. "The Trident Insurance Case: Death of Contract", (1989-1990) 2 JCL 160-169. The majority of four was divided. Mason CJ, Wilson J, and Toohey J "clearly prepared to waive the requirements of privity and consideration in the case of an intended third-party beneficiary and, it would seem to allow him to sue on a contract." (160). The three judges realise the radical character of their departure from

*v. Kuehne & Nagel International Ltd*¹¹⁹ is exceptional, yet four judges only agreed on the legal basis of the decision¹²⁰, which suggests the relaxation of privity¹²¹. The latter

existing law. Mason CJ and Wilson J. saw no virtue in using the trust as an indirect way to give a cause of action. Based upon the principle of the contractual intention of the parties to benefit the third party, in combination with a small element of detrimental reliance, the majority of three allowed a direct right in contract to the third party. Caudron J supports the majority in finding for the plaintiff, not, however, on the basis of contract, but on the basis of unjust enrichment, which in Kincaid's view is a more radical departure from doctrine than the previous one. The minority judges, regarded privity as a fundamental idea which could afford no exceptions. Parliament only could abandon principle. Any solution should be found outside contract; the two main possibilities being trust and estoppel. They favoured finding an intention necessary for a trust. In Kincaid's view they were ready to allow a claim on the promise, but doubtful whether they would allow one on the contract.

In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289, the majority was split as well, between the views of McLauchlin J, L'Heureux-Dubé J and Cory J, on the one hand, and the opinion of Stevenson J on the other. McLauchlin J speaking for the other two Justices, seems to have added a proximity requirement to Lord Wilberforce's test in *Anns*. Once there was negligence, foreseeable loss and sufficient proximity between the negligent behaviour and the loss liability should follow unless "pragmatic" considerations dictate the opposite result. Stevenson J based his judgment on a variation of an opinion in *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"*, (1976-1977) 136 CLR 529, (by Mason J and Gibbs J) that the defendant should be liable because he knew or ought to have known that a specific individual was likely to suffer loss. The opinion in *Caltex* however was not unanimous and the approach Stevenson J opted for had been rightfully criticised. Moreover Stevenson J undermines the credibility of the majority's view by expressing disapproval of the proximity test. As Markesinis notes the case "has not left us with a clear ratio decidendi." (p.8). (Markesinis, B.S. "Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views" (1993) 109 LQR 5-12).

¹¹⁹ [1992] 3 SCR 299. (Fleming, 13 (1993) OxfJLSt, 430-439, and Baer, 72 (1993) *CanBarRev*, 385-402 comment on that decision).

See also Swan 4 (1991) *JCL*, 129-134, Blom, 70 (1991) *CanBarRev*, 156-174, and Swadling, W.J. "Privity, Tort and Contract: Exempting the Careless Employee" 4 (1991) *JCL* 208-230, commenting on the British Columbia Court of Appeal decision, (1990), 70 DLR (4th) 51, which led to the same result albeit on a different legal basis.

¹²⁰ The decision was split in three ways. The principal judgment, delivered by Iacobucci J, with the consent of L'Heureux-Dubé, Sopinka and Cory JJ, adopted a 'contract' approach. They thought incontestable that the employees owed a duty of care to the plaintiff - owner of the damaged transformer, but, adopting a contract analysis, held that the employees should obtain the benefit of the contractual limitation of liability at the expense of privity. Privity should be relaxed once it could be implied that the limitation clause was aiming at protecting the employees.

La Forest J examined whether the employees has actually a duty of care to their employer's customer. He examined in detail the policy considerations surrounding the issue, noticing the special situation of economic loss associated with planned transactions and contractual expectations. La Forest J thought that the policy concerns could better be met without holding the employees personally liable. The duties of the employer and employees could be different or similar according to the expectations of the parties. La Forest reinforces his views on the basis of reasonable reliance, meaning the reliance on the employee to provide compensation.

McLauchlin J held that the circumstances gave rise to a tort duty of care owed by the employees to the plaintiff but that duty was limited. She based her view on the notion

decision, along with that in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*¹²² confirms the "independence and inventiveness of thought" of the Supreme Court of Canada in the field of civil liability¹²³; however, as said, their legal bases differ. For both decisions, however, it was alleged that "the nature of the defendant was more important"¹²⁴: the individual employees were absolved while the firm was held

of the voluntary assumption of responsibility, focusing on the contracting parties' expectations.

The majority of four to one in the British Columbia Court of Appeal (the court sat unusually as a panel of five) was split as well. Lambert J.A. analysed the defendant's relationship with the plaintiff as contractual. As with the Himalaya clause in *New Zealand Shipping Co. V. AM Satterthwaite & Co. Ltd.*, [1975] AC 154, the plaintiff was bound by a separate contract not to sue the employees for more than the clause allows. The other three judges based their view that the employee's liability was limited at the levels of the contractual clause on tort, albeit each with a different explanation. Hinkson J.A. found the key in the notion of 'proximity' or 'neighbourhood', thinking that there no such close and direct relationship of proximity as to give right to a duty of care by the employees. Wallace regarded the expectations based on the contract as a critical factor, and thought that the evidence did not support that the plaintiff relied on the employees without limitation in contrast to his expectations with regard to the employer's obligations. McEachern C.J.B.C. thought that the owner's expectations were the key. *London Drugs* had accepted an allocation of risk "that could only be given its proper effect by holding that it applied to the employee's liability as well as the employer's"(Blom, 70 (1991) *CanBarRev*, 166).

La Forest J opinion is the most radical of the views expressed in the Supreme Court as he advocates vicarious immunity for the employees as a "contractual vicarious immunity", for cases where tort liability depends upon a contractual setting. However, he is not attempting to infer a general rule. As Fleming notices, the employee's immunity is the rule in Germany (through case law) and in Sweden. In Australia, Commonwealth legislation, reversed case law and abrogated a right of subrogation against employees under general liability policies. This provisions were complemented by statutes in New South Wales, South Australia and the Northern Territory, that entitled the employee's to an indemnity from their employers, except in case of 'serious and wilful misconduct'. La Forest J cites the statutes: Insurance Contracts Act 1984 (Commonwealth) s.66, Employees Liability Act 1991 (New South Wales) s.3, Wrongs Act 1935 (South Australia) and Law Reform (Miscellaneous Provisions) Act (Northern Territory) s.22. Fleming, 13 (1993) *OxfJLSt*, 437.

121 For five judges(McLauchlin J. and the four judges of the majority) "the major issue concerned the articulation of very general principles of contract and tort". (Siebrasse, 45 (1995) *UTLJ*, 50.)

122 [1993] 3 SCR 206, 107 DLR (4th) 169.

123 Fleming, 13 (1993) *OxfJLSt*, 435

124 Siebrasse, 45 (1995) *UTLJ*, 52. This is the view expressed by La Forest J, in *London Drugs Ltd v. Kuehne & Nagel International Ltd*. Siebrasse's argument is based on the observation that, if the opinions expressed in the latter decision, with the exception of the suggestion by La Forest J, were to be treated as expressing a general rule, this would logically require the same treatment of both the firm and the individual employees in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*. He recalls that the majority opinion was presented as no more that a conclusion drawn from the specific facts of the case, definitely not establishing some sort of a general presumption.

liable¹²⁵. This allegation implies the existence of underlying policy purposes in the Supreme Court decisions¹²⁶ which were served at the expense of the consistency of contractual interpretation as it does not seem plausible to distinguish between the employees and the firm¹²⁷. It seems that, as interpretation has often to deal with ambiguous terms where literal construction is unsuitable, the judges, having to balance between dubious evidence to one direction and what they see as the optimal allocation of the risk, are eventually imposing their views. This is what they did in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*¹²⁸. However, this self-confidence of the courts, even against (weak in this case) evidence from the relationship, and the existence of concealed policy criteria, undermine the decisions' credibility.

Furthermore, the opinions of the judges range from specific corrective suggestions to arguments which bear broader implications for tort law¹²⁹. The varying interpretations of the judges' views add to the confusion¹³⁰.

125 Siebrasse, 45 (1995) *UTLJ*, 52.

126 It was clearly admitted by McLaughlin who spoke for the majority in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, abandoning her own minority opinion in *London Drugs Ltd v. Kuehne & Nagel International Ltd*. As Siebrasse observes, she abandons her previously held opinion, not because she was outvoted in the latter case but because the criteria she referred to therein, namely the voluntary assumption of responsibility, would lead to the exclusion of the firm's liability as well. Siebrasse, 45 (1995) *UTLJ*, 55. The individual employees "were in exactly the same position, with respect to the test set out in *Hedley Byrne* [which was applied in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*], as was the firm" (*ibid.* 56).

127 "Both relaxation of privity and the voluntary assumption of risk would operate to exculpate both the individual engineers and the firm or neither". Siebrasse, 45 (1995) *UTLJ*, 56.

128 "... in the case of third party beneficiary contracts, if the court is of the view that under the optimal contract between all the parties the third party would be liable, it will be more likely to interpret an ambiguous exculpatory clause as not to apply to the third party. ...Conversely, if the court is of the view that the defendant should not be liable, the court will be more likely to interpret the limitation of liability to apply to the defendant". Siebrasse, 45 (1995) *UTLJ*, 62.

129 See for instance Kincaid's interpretation of the judgments in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.* Mason CJ, Wilson J, and Toohey J allowed the plaintiff to sue on a contract, despite lack of privity or consideration. Caudron J allowed the claim on the basis of unjust enrichment. She made clear that the right of the third party is not a right on the contract. See seems to agree with the minority opinion, that, due to the privity doctrine, a cause of action outside contract should be found. Privity was to be confined in the only area where it operates properly, that is rights and obligations having their source in contract. However, focusing her judgment on unjust enrichment, which, in the case of a third party contract, is based on the idea of executed consideration, she suggests a monumental change in common law terms. The injustice has nothing to do with the plaintiff

The impact of particular decisions beyond their jurisdictions is doubtful. It has been argued, for instance, that the decision in *London Drugs Ltd v. Kuehne & Nagel International Ltd* is valid for Canada only¹³¹. The importance of the decision is doubted as "most of the reasons and justifications for the privity rule had little application to a case like the present"¹³².

The discussion of the techniques employed by the decisions offers an inconclusive picture. Lord Wilberforce's two-stage test, employed in *Anns*, has been abandoned in

third party but it is based on the defendant's wrongdoing. Thus instead of being 'plaintiff-oriented' as the civil side of the common law is, her model is 'defendant-oriented', more like the criminal law approach. Thus in Kincaid's view, if the three judges' majority view is radical, Caudron's Judgment is revolutionary. In the same decision the minority judges were ready to allow the third party claim on the defendant's promise, but, possibly, not on the contract.

Recall that the most radical view in *London Drugs Ltd v. Kuehne & Nagel International Ltd* was that of La Forest J. See the variety of opinions expressed on this case in both the Court of Appeal and the Supreme Court.

¹³⁰ See the references to the cases in previous footnotes. However the overall picture of the law would be incomplete without these interpretations.

¹³¹ See Swadling, 4 (1991) *JCL* 208-230 noticing certain special characteristics of the Court of Appeal decision, (1990), 70 *DLR* (4th) 51. One problem with the judgment by Hinkson JA and McEachern CJBC is that they employed the two-stage Lord Wilberforce's test which is not followed in England or Australia. The test had been endorsed in previous Canadian case law. Moreover, McEachern CJBC relied on *Junior Books*, which at the time of the decision had already been discredited to a considerable extent. More importantly, there seems to be a connection with the peculiarly Canadian test for the existence of a duty of care that Wilson J introduced in *Kamloops (City) v. Neilsen*, (1984) 10 *DLR* (4th) 641, placing emphasis on the assumption of responsibility and reliance. Such is the basis of the approach in Hinkson JA. Reliance, however, is indeed an uncertain basis and, moreover, is not easy to attach to voluntary assumption of responsibility in most cases as the decision in *Murphy* indicated.

McEachern CJBC noted that in Canada, in the sphere of employees' liability a unique jurisprudence might be developing. This view could be based the Supreme Court's case law. At the time it had refused to follow *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson Ltd*, [1985] AC 210 (in *Rothfield v. Manolagos*, (1989) 63 *DLR* (4th) 449). *Kamloops (City) v. Neilsen*, which is valid law in Canada is at odds with *Murphy*. Another example of a differing Canadian approach is that on constructive trust. If a separate jurisprudence is indeed developing in the area of employee's liability, this offers further evidence of a gap between the law in other Commonwealth countries and the Law of England. However, if the jurisprudence has a distinct Canadian character it will have little effect on the situation elsewhere in the Commonwealth.

¹³² "There was an identity of interest between the employer and the employee as far as the performance of the employer's contractual obligation was concerned. It would be absurd to defeat the contractual allocation of risk to let the latter [the person contracting with the employer] get around the clause by suing the defendants in tort." Fleming, 13 (1993) *OxfJLSt*, 433

Australia and in England¹³³, but was applied in certain Canadian decisions¹³⁴ and seems to apply in New Zealand¹³⁵, although it was argued that in the Court of Appeal's recent decisions, it is not only foreseeability of harm from the first stage of the *Anns* test that was required; proximity was required as well¹³⁶. The High Court of Australia has advanced a requirement of proximity, in addition to negligence and foreseeability of the loss¹³⁷. The High Court sees the proximity requirement as a "unifying concept which brings together what were, hitherto, considered to be separate areas of liability for negligence such as liability for economic loss, omissions, occupier's liability and the liability of public authorities."¹³⁸ An added proximity requirement was applied in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* by the majority. Such requirements could be set

133 Trindade, 23 (1993) *UWALR* 86

134 In the Court of Appeal decision on *London Drugs* (1990), 70 DLR (4th) 51, for instance, by Hinkson JA and McEachern CJBC. See Swadling (1991) 4 JCL 208-230. The test had been endorsed in previous Canadian case law.

135 Since, that is, it was accepted in *Scott Group v. McFarlane*, [1978] 1 NZLR 553, Hogg, 43 (1994) *IntComLQ*, 128.

136 Todd in *The Law of Torts in New Zealand* (1991), reported by Hogg, 43 (1994) *IntComLQ*, 131. It is doubtful whether there is really a change of policy by the Court of Appeal. There is certainly some confusion as to the precise state of the law. This, however, is not possibly the case. The Court of Appeal has relied on the *Anns* test even at the expense of the *Hedley Byrne* principle. The first stage of the test has sometimes been applied as no more than a foreseeability of harm test (*Scott Group v. McFarlane*, [1978] 1 NZLR 553, *Takaro Properties v. Rowling* [1986] NZLR 22. In other occasion other factors were relied upon (*Allied Finance v. Haddow & Co.* [1983] NZLR 22, *Meates v. Attorney General* [1983] NZLR 308,) but there were cases where the first stage of the test was satisfied even at the absence of additional determining factors such as a relationship of reliance between the parties (*Gartside v. Sheffield Young and Ellis*, [1983] NZLR 37). A confusing statement by Richardson J. in *First City Corporation v. Downsvieview Nominees*, [1990] 3 NZLR 265, that the first stage test was not a simple question of foreseeability of harm is possibly misleading as to the stage of the law. See Hogg, 43 (1994) *IntComLQ*, 130 et seq.

137 See Trindade, 23 (1993) *UWALR* 79 et seq.. This new structure of negligence as Trindade describes it was first applied in a judgment by Deane J. in *Jaenck v. Coffey*, (1984) 155 CLR 549, 578-611, a case of nervous shock suffered by a wife present at the aftermath of an accident involving her husband. It was accepted by the High Court in *San Sebastian Pty Ltd. v. Minister Administering the Environmental Planning & Assessment Act 1979*, (1986) 162 CLR 340.

138 Hogg, 43 (1994) *IntComLQ*, 123. Thus the same criteria determine the existence of a duty of care in pure economic loss and in physical damage cases. See also Swanton, 10 (1996) JCL 27. As Hogg notices, on *Hawkins v. Clayton*, (1988) 78 ALR 69 (HC), the decision of the High Court shows how the proximity concept can be used to extend liability for economic loss. It is an example where the criterion of proximity was used to justify the development of novel categories of liability for pure economic loss (Hogg, 43 (1994) *IntComLQ*, 126).

parallel to the requirement in *Caparo*¹³⁹ that it should be "fair and reasonable" to impose a duty of care and to the three-stage test suggested by Lord Keith in *Murphy*¹⁴⁰. The criticism on the vagueness of the proximity criterion in Australia and England seems to be well reasoned¹⁴¹. The fact is that these criteria serve as vehicles for the application of policy considerations whether towards accepting or towards rejecting claims¹⁴²; in English law, for example, in *Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai*¹⁴³ 'proximity' was used with the clear purpose to explain the rejection of the claim¹⁴⁴. The special criteria and tests are apparently less useful to the comparison. The inconclusiveness of the evaluation of judicial methods makes any assessment of the content and extend of the divergence from English law doubtful.

It seems, finally, that Commonwealth judicial policies in favour of third parties are fragile as fragile was proven to be the precedent set by *Anns*, reversed with a surprising seven to none votes in *Murphy*¹⁴⁵. English law in particular has always been exported and has received little or no influence from foreign systems¹⁴⁶. Commonwealth jurisprudence on

139 [1990] 2 AC 617-618.

140 As said in the previous chapter, a proximity criterion was placed between foreseeability and the policy reasons for rejecting liability that formed the two stages of the *Anns* test. The test was employed in *Hill v. Chief Constable of West Yorkshire*, [1989] AC 53, Feldthussen, B. *Economic Negligence*, 1994, p.180 fn47.

141 As Oliver J observed in *Murphy* proximity "is an expression with persistently defies definition", [1991] 1 AC 398, at 487. Howarth describes proximity as a vague normative concept presented as factual being "at best off the point at worst arbitrary" (Howarth, (1991) Cambridge LJ, 72). In *San Sebastian Pty Ltd. v. Minister Administering the Environmental Planning & Assessment Act 1979*, (1986) 162 CLR 340 and subsequent decisions Brennan J., reacted to the concept, which described as "a Delphic criterion" (*Hawkins v. Clayton*, (1988) 164 CLR 539, 555-556). In *Bryan v. Maloney*, 11 (1995) ConsLJ, 306 he noted that "[U]nless proximity has an ascertainable meaning, it cannot provide a working criterion of liability". The test was extensively explained by Deane J. in *Sutherland Shire Council v. Heyman*, 157 CLR, (1984-1985), 424.

142 Proximity tests were applied in *Sutherland Shire Council v. Heyman*, 157 CLR, (1984-1985), 424 and in *Bryan v. Maloney* HCA March 23, 1995, 11 (1995) 11 ConsLJ 273.

143 ["The Nicholas"], (1994) 1 Lloyd's LR 492, CA, [1994] 3 All ER 686.

144 See the critique on the use of proximity in ["The Nicholas"], (1994) 1 Lloyd's LR 492, CA, [1994] 3 All ER 686, Tan 112 (1996) LQR 209. He argues that the courts could have reached the same result in a number of other ways without having to resort to such an uncertain criterion.

145 The decision is in a sense the expression of a generational change in the House of Lords. All the Law Lords who sat in *Anns* retired during the 1980's. Howarth, (1991) *CamLJ*, 59.

146 See Beatson, J. and Friedman, D. "From 'Classical' to Modern Contract Law", in *Good Faith and Contract Law*, Beatson and Friedman, eds, 1995, 3 et seq.

third party loss will not likely set an example to English decisions. It would be unfortunate, if no significant change of the law of third party loss is possible in those jurisdictions, without English law¹⁴⁷, and this might be the case, at least, in the near future. It is unlikely that the tendencies in the rest of the Commonwealth could be reinforced, for instance, under the appeal of American law¹⁴⁸. As said, it is doubtful, despite relevant enthusiastic suggestions¹⁴⁹, whether the differentiation of the law in other Commonwealth states could encourage Scottish courts to alter their position on third party loss¹⁵⁰ and change the law in part of the U.K., giving a powerful example to English lawyers. Such an attempt would possibly be tackled by the House of Lords' policy to treat Scots law of pure economic loss as identical to English law¹⁵¹.

In conclusion, the existence of a progressively widening gap between English law and the law in the other Commonwealth countries cannot be denied¹⁵² and has been

147 Swadling discussing the question of relaxing privity notes that "...until English law recognises a *jus quaesitum tertio* we should not perhaps be overly critical of decisions like *London Drugs*, and instead resign ourselves to the fact that in a court bound by the privity rule the ends occasionally justify the means." (Swadling, 4 (1991) *JCL* 229). The statement evidences by implication the influence English law is likely to exercise on the development of other Commonwealth systems.

148 The latter has not been influential in any significant manner so far. See however the exception to the exclusionary rule on pure economic loss for the case of damage to a "joint venture" ("where the value of use of the damaged property is shared between the property owner and the relational loss plaintiff"). This category of exceptions has mainly been developed in the USA, in relation to claims by, among others, commercial fishermen, ship charterers by demise (to recover loss of use damages), and cargo owners (to recover general average contributions). McLauchlin J in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289, argued that the case was one involving a joint venture. Feldthussen, *Economic Negligence*, 244.

149 See McMillan 1996 SLT 159, and the references in the chapter on Scots law.

150 Along with arguments focusing on the availability of a JQT in Scots law, or on the fact that *Junior Books*, which has never been expressly overruled, is a valid precedent in Scotland, to a greater at least extent than it is in England. See the discussion under "Permissible judicial authority" in Chapter 5.

151 See the reference to the assimilation of culpa to the tort of negligence, in principle not a nominate delict in Scots law, which started with the decision in *Donoghue v. Stevenson*, 1932 SC (HL) 31. See in "Protection for third parties on the basis of delict -- Introduction" in Chapter 5.

152 See for a brief consideration of future developments Hogg, 43 (1994) *IntComLQ*, 138-141.

sanctioned by the Privy Council¹⁵³. However, not only is it hard to foresee the repercussions of this phenomenon, but it is also difficult to describe it accurately¹⁵⁴.

4. Judicial considerations.

There has been justified dissatisfaction with the present state of the law on third party loss in England. The overall picture of uncertainty and confusion, the object of convincing criticism¹⁵⁵, persists even after the "bright line" exclusionary rule in *Murphy*¹⁵⁶.

The judiciary and especially the House of Lords, have rightly been blamed for this situation¹⁵⁷. As said, this "is not the confusion that arises from a lively struggle between opposing points of view, but instead it is the dispiriting confusion of people who do not know what to do"¹⁵⁸. The courts' treatment of pure economic loss is constrained by doctrinal prejudice¹⁵⁹. The courts ignore the merits of the individual cases. Decisions in favour of

153 *The Times*, February 15 1996.

154 It does for instance bring those other Commonwealth systems closer to American law in doctrinal terms, as with the erosion of privity and the establishment of contracts in favour of third parties. The fact is however that the shift is not so much in doctrine but in the display of a practical, equity oriented spirit by Commonwealth courts, bringing case law closer to the American example.

155 The rationale of many decisions is unclear, and unconvincing. The floodgates argument, for instance is usually invoked although it is often markedly off the point. The courts remained bogged down to distinctions between negligent misstatements and negligent acts, or between misfeasance and non-feasance, or even between physical damage and pure economic loss, which, in most cases are not justified on legal or economic arguments. (See Lorenz, W. and Markesinis, B. "Solicitor's Liability Towards Third Parties: Back Into the Troubled Waters of the Contract/Tort Divide", 56 (1993), *MLR* 558. Feldthussen, however, justifies the difference of treatment between physical damage and economic loss. -Economic Negligence, 9 et seq -).

156 "... the uncertainties of the *Anns* decision are removed and replaced by those created by *Murphy*...", Markesinis and Deakin, 55 (1992) *MLR* 642.

157 See Howarth, (1991) *CamLJ*, 61, and Markesinis and Deakin, 55 (1992) *MLR*, 640. See also McBride and Hughes 15 (1995) *LSt*, 376, on the extent the development of the law of pure economic loss can be explained on the basis of the *Hedley Byrne* principle.

158 Howarth, (1991) *CamLJ*, 61.

159 "... namely; that compensation for economic loss will open the floodgates of litigation, that proper economic analysis militates against recovery of such losses and that on the eve of the 21st century economic interests are still of lesser significance to the law than wrongful interferences with limp and tactile forms of property." Markesinis and Deakin, 55 (1992) *MLR*, 640

In *Murphy*, the doctrinal considerations (mainly that liability for pure economic loss which belonged to the domain of the contract), outweighed the consistency-in-justice argument of *Anns*. Harris speculates that the consistency of the *Anns* decision could have

third parties are often weak authorities based on varying opinions¹⁶⁰. The courts generally ignore economic or insurance considerations and empirical data, which could make the picture clearer¹⁶¹, as well as academic work which could provide the feedback on the way previous decisions were received, inform on foreign law and suggest alternative solutions¹⁶². Foreign law and comparative views do not, as a rule, attract the attention of the courts¹⁶³. Moreover, the speeches, especially in the House of Lords, are increasingly

been countermanded on the basis of the 'floodgates' argument, (which is not substantiated), and on the idea that a "brightline" rule, against liability would be preferable to the difficulties which might arise as regards evidence on whether the defect was latent, for instance. Such arguments were not advanced in *Murphy* however. (Harris, 11 (1991) *OxfJLSt*, 422-423)

Siebrasse, discussing *London Drugs Ltd v. Kuehne & Nagel International Ltd* and *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, is noting that any interpretative exercise depends not only on the language of the contract in question for instance but also on the interpreter's presuppositions. Thus the courts' views might be crucial for decisions in third party loss cases. (Siebrasse, 45 (1995) *UTLJ*, 62).

¹⁶⁰ See the reference to the divided Commonwealth decisions allowing third party claims. There was considerable disagreement between the judgments in *White v. Jones*. Thus although all the members of the House agreed that the case was not covered by existing authority, Lord Browne-Wilkinson thought that he could discern in *Hedley Byrne* a principle which could cover *White v. Jones*. Lords Keith and Mustill were of the contrary opinion. Lords Goff and Browne-Wilkinson reached the same result but their approaches are very different. Lord Goff sees the result as applying to the specific case only, as almost creating a "specialist pocket of tort law" in the words of Lord Mustill, as did Nicholls V-C in the court below. Lord Browne-Wilkinson saw the result as an instance of a general principle, for cases where someone undertakes a task which might benefit a third person. See Weir, 111 (1995) *LQR* 357-362.

¹⁶¹ Markesinis and Deakin, 55 (1992) *MLR* 622 et seq. Exceptionally in *Murphy* and *Caparo Industries plc v. Dickman*, arguments over insurance were openly discussed. At the Court of Appeal, in *Caparo Industries plc v. Dickman*, Lord Justice Bingham thought that the defendant's argument that it had been extremely difficult to obtain professional indemnity cover, was hard to assess in the absence of evidence. Insurance considerations were raised in *Murphy*. Lord Keith noted that the plaintiff's insurance company had settled most of his claim and was bringing the action with him. If the plaintiff can insure more cheaply, it is an argument in favour of the non-liability rule, to let the first party insurance meet the costs with no liability and no subrogation right. See also Feldthussen and Palmer, 74 (1995) *CanBarRev* 425-445, and Cohen, D. "The economics of *Canadian National Railway v. Norsk Pacific Steamship (The Jervis Crown)*", 45 (1995) *UTLJ*, 143.

¹⁶² Markesinis and Deakin, 55 (1992) *MLR* 643-644, and Fleming, 109 (1993) *LQR*, 348-349.

¹⁶³ There seems to be little information on the situation of the law in non common law countries. Lord Goff's reference to the German mechanisms for the protections of third parties, in *The Aliakmon, Henderson v. Merret Syndicates Ltd* and *White v. Jones*, are an exception. Noticeably there was extensive reference to foreign law in *Caltex Oil (Aust.) Pty. Ltd. v. The Dredge 'Willemstad'* and *Canadian National Railway (The Jervis Crown)*. In the latter, Markesinis noted, 32 writers from 7 different countries and 62 decisions from 5 different jurisdictions were referred to, more than any other common law decision he knows about. Markesinis, B.S. "Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views" (1993) 109 *LQR* 11.

lengthy, overloaded with citations from previous decisions, selected usually in order to justify the rejection of the claims¹⁶⁴.

The vague concepts the courts employed in dealing with pure economic loss, for example proximity and justice¹⁶⁵, that allegedly conceal policy considerations¹⁶⁶, enabled judicial control on the development of the law and relative freedom from precedents¹⁶⁷. Lord Wilberforce's two-stage test, that, despite criticism, is still occasionally employed¹⁶⁸, is more straightforward than the three-stage test developed by Lord Keith in *Murphy* where the policy criteria are partially covered under the blanket of proximity¹⁶⁹, the latter given an aura of factual quality, enhancing the possibility of judicial arbitrariness.

¹⁶⁴ Markesinis and Deakin, 55 (1992) MLR 642-643.

¹⁶⁵ As the examination of the duty of care as "just and reasonable" by Lord Keith in *Murphy*, the need for "practical justice" underlined by Lord Goff in *White v. Jones*, and the requirement that the statement should be just, fair and reasonable to impose a duty of care by Lords Oliver and Bridge in *Caparo Industries plc v. Dickman* [1990] 1 All ER 568 at 585-587. See also *Kinder 7* (1987) LSt 319.

¹⁶⁶ Siebrasse notes that McLauchlin J. did not use the voluntary assumption of risk concept in *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, although it had been the basis of her opinion in *London Drugs Ltd v. Kuehne & Nagel International Ltd* because it would lead to an unwanted conclusion. Thus the use of the concept in the latter case seems to have been "no more than a convenient means of reaching the appropriate result in that particular case". (Siebrasse, 45 (1995) UTLJ, 67).

¹⁶⁷ Markesinis and Deakin note on the uncertainty of the law; "... which is enhanced not reduced by the notions of justness, fairness and reasonableness which much guide our judges to decide if there is a duty. We know that these terms ... are shorthand expressions for policy." As they suggested, it would have been more honest and consistent were the courts to discuss openly the policy criteria they employ. (Markesinis and Deakin, 55 (1992) MLR 642).

See Feldthussen, *Economic Negligence*, 222-227 on the exceptions to the exclusionary rule, and Howarth, (1991) *CamLJ*, 81-84, on the fact that judicial policies are concealed behind the abstract concepts used.

The courts' insecurity could furthermore lead to ill justified decisions. It was argued in *Murphy* that the allocation of risks was statutorily based. The decisions ignored contrary statutory evidence. Howarth, (1991) *CamLJ*, 63.

¹⁶⁸ Markesinis and Deakin, 55 (1992) MLR 641-642. See *Kinder 7* (1987) LSt 319.

As said the test is regularly employed in New Zealand and occasionally in Canada. Most recently, in Canada, the test was employed in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 91 DLR (4th) 289, by McLauchlin J, and in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, by McEachern CJBC in the Court of Appeal.

¹⁶⁹ In the three stage test, a proximity criterion was introduced between foreseeability and the policy reasons for rejecting liability in Lord Wilberforce's test. Proximity, a vague normative concept presented as factual is "at best off the point at worst arbitrary" (Howarth, (1991) *CamLJ*, 72). The test was employed in *Hill v. Chief Constable of West Yorkshire*, [1989] AC 53, a case involving physical damage, where again the claim was

The courts seem, after all, to ignore the significance and consequences of their policies. The emphasis on the exclusionary rule in England has allegedly wider negative repercussions for tort. The "emptiness"¹⁷⁰ of the rule in *Murphy*, has cast doubts on the usefulness of the tort of negligence. The function of the duty of care concept, it was said, becomes dubious as the normative value the concept supposedly represents has been left to judicial discretion¹⁷¹. According to another view, the "formal" rationality¹⁷², of the doctrinal, privity-based considerations, is not supported by overwhelming arguments against the "substantive" rationality of consistency and social justice in decisions like *Anns* and *Junior Books*.

The attitude of the courts stems from their own uncertainty. As can be seen from the reversal of *Anns* and the weathering down of *Junior Books*, the courts felt uncomfortable with the nature and extent of their decisions' consequences, and resorted to restrictive policies¹⁷³. The same happened, at a smaller scale, with the reversal of the tendency to disconnect the assumption of responsibility from an element of voluntariness¹⁷⁴; a tendency which, in one view at least, was introduced in *Smith v. Bush*¹⁷⁵. It is uncertainty that

rejected. It is unfortunate that proximity seems to enjoy an even more central position in Canadian case law. Feldthussen, *Economic Negligence*, 180 fn47.

¹⁷⁰ Howarth, (1991) *CamLJ*, 59.

¹⁷¹ Howarth, (1991) *CamLJ*, 83-84.

¹⁷² Harris, referring to *Murphy* in comparison to *Anns*, describes the distinction between them that concerns different conceptions of legal reasoning, in terms of the Weberian division between substantive and formal rationality as hallmarks of the Western legal conceptualisation. The former's reasoning is in accordance with the propositions that would have the best moral, social, and economic consequences. The latter is either "logically formal", subsuming legal provisions to few over-arching propositions, or "casuistic" reasoning by analogy, from one instance to another. These are ideal types, elements of each can be found for instance in different decisions. *Murphy* is an example of logically formal rationality. (Harris, 11 (1991) *OxfJLSt*, 428-429) See previous references on the *Anns* criticism in *Murphy*.

¹⁷³ The exclusionary rule is, in the opinion of many commentators, the most prudent starting point to deal with pure economic loss. (Feldthussen, *Economic Negligence*). This however does not change the defensive attitude of the courts, evident in their reluctance to make statements of a broader validity. English courts as well are not satisfied with a blanket exclusionary rule as can be seen from the speeches in *White v. Jones*.

¹⁷⁴ Allen, D. "Hedley Byrne Revalued", 105 (1989) *LQR*, 511-516. By discounting 'voluntariness' as an element of the assumption of responsibility the court had expanded the approach in *Hedley Byrne*. Allen notes that voluntariness was often a fiction. However the concept of a voluntary assumption of responsibility was used again in *Simaan General Contracting Co. v. Pilkington Glass Ltd.*, [1988] 1 All ER 791 (CA).

¹⁷⁵ [1990] 1 AC 831, [1989] 2 All ER 514 (HL).

makes the Supreme Court of Canada conceal its policy reasons for protecting employees. As the Supreme Court imposed its own views in filling the contractual gaps, even if the result is fair, the parties will find it difficult to contract against the courts' predisposition¹⁷⁶.

The retreat to more restrictive policies in English law, offers a better insight to the courts' uncertainty in dealing with pure economic loss. This reversal cannot be attributed only, or to a significant extent, to the pro-market, pro-professionals contemporary political and economic climate, prevalent in the last two decades¹⁷⁷. Definitely there should be some connection, but the overall political and economic climate cannot be such a decisive factor: There are always counter tendencies, and the socially sensitive policies to protect weaker parties, usually the third ones, form longer lasting trends in the courts' approach¹⁷⁸. The courts, in such a climate, which is now being reversed, might more likely had taken up a protective role, led by equity considerations as did courts in other jurisdictions where third parties enjoy better protection, most notably in Germany¹⁷⁹.

¹⁷⁶ Siebrasse, 45 (1995) *UTLJ*, 54 et seq. She notices the aggressive attitude of the court and the confidence it displayed in interpreting the contracts in question. She underlines that "the greater the confidence a court has in its own judgment, the more difficult it will be to contract in a manner contrary to that judgment." (p.73). This statement poses the issue of balance between certainty and flexibility in the law of third party beneficiary contracts, as bargaining and alternative arrangements are, in principle at least, possible.

¹⁷⁷ *Murphy*, as Howarth puts it was "pro-defendant emblematic of an era of self-help and *laissez faire*." (Howarth, (1991) *CamLJ*, 65.). Decisions in favour of professionals, for instance, typical defendants in pure economic loss cases where interpreted as belonging to this pro-market climate associated with the Thatcher governments.

¹⁷⁸ Fleming, discussed the issue of the unavailability of alternative remedies as a precondition (sufficient or not) for the award of liability. The argument for excluding liability when the plaintiff could have contracted for the protection of his interests (first launched by Lord Brandon in *Leigh & Sullivan Ltd v. Aliakmon Shipping Co.* [1986 Ac 785, 819) expressed the private market ideology of the 80's. Tort law represents "historically and functionally a counterclaim of public policy". *Donoghue v. Stevenson* reflects "the triumph of social policy (tort) over private ordering (contract)". Fleming concluded "Despite occasional, temporary retreats such as we have been witnessing the recent years in England) that has been the momentum of change in modern law, not the direction signalled by Lord Brandon". Fleming, 5 (1993) *Canterbury LR*, 278

¹⁷⁹ See under "Contractual input" and "Judicial assertiveness" in Chapter 7 on the equity criteria which weighted heavily upon the German courts' development of the contractual mechanisms. See also the discussion fo the employment of the third aparty beneficiary rule as an auxiliary or pivotal means of protection instead of private rights of action, in cases of government contracts in American law and most notably in welfare cases. See "Government contracts: Third party beneficiary rule and private rights of action", in Chapter 4.

Another reason behind restrictive judicial approaches is the fear that the courts might be flooded with claims if compensation is awarded more easily. The possibility of a vast increase in the number of claims is described as an expression of the progressive Americanisation of English (or generally Commonwealth) law. However, the fear of opening the floodgates to large numbers of claims, which is often unsubstantiated, was raised in cases that were indeed not typical of the possibility of a large number of claims, revealing a deeper drive towards the exclusionary rule¹⁸⁰. As was argued, the very flexibility of the tort of negligence operated against the expansion of liability for pure economic loss¹⁸¹. The 'floodgates' arguments is unconvincing.

This retreat to restrictive policies, presented as a (genuine) move towards greater predictability¹⁸², reflects the insecurity of the courts over their own role and authority. The courts seems to think that were they to allow pure economic loss claims they might be treading beyond their legitimate power¹⁸³. The reform of privity and consideration, which are salient features of the common law legal culture, belongs, from the point of view of the

180 The fear for a flooding with claims was raised repeatedly in *Caparo Industries plc v. Dickman*. However this case is indeed not typical of a floodgates situation as there are no large numbers of potential plaintiffs. The plaintiff bought out the other shareholders and concentrated the loss to himself. He held more than 90 per cent of the company's shares. See Markesinis and Deakin, 55 (1992) MLR, 625. Moreover in most third party loss cases, in typical circumstances where the loss can logically be placed in the context of a contractual violation and be linked with expectations over a contract, there is not usually a possibility for a far too extended liability. As the experience from German law could indicate the restriction of the defendant's exposure could be based on causality basically though an account of foreseeability. That of course took place in contract law as in German law the option of delictual liability was not available. However, causality should not be drastically different under delict. See also Brodie in *Scots law into the 21st century*, 212, who having argued that behind the concept of assumption of responsibility, foreseeability might be the crucial factor, asks why foreseeability "should not be allowed to play the role of prima facie test of liability", considering however that policy factors can outweigh the results of the foreseeability test.

181 Whittaker 16 (1996) *OxfJLSt* 204. The courts feltt apparently insecure with the potential this flexibility involved.

182 This is a reasonable reaction in the light of uncertainty over pure economic loss, which however is due to the policy of the courts. Harris, 11 (1991) *OxfJLSt*, 429

183 See Harris discussing the issue of "formal" rationality, which in *Murphy* led to the exclusionary rule: "The historical explanation for its emergence may be, as Weber argued, internal and guild-based. But it has been taken over in the service of the conceptions of the separations of powers and of democratic accountability". (Harris, 11 (1991) *OxfJLSt*, 429).

courts, to the exclusive domain of the legislature¹⁸⁴. Irrespective of the validity of this view, it does seem deeply entrenched in judicial attitudes, as is the perception that pure economic loss should be dealt with on the basis of contract only¹⁸⁵. The courts' idea of a lack of judicial authority is obvious in *D&F Estates Ltd v. Church Commissioners for England*¹⁸⁶ and in *White v Jones*¹⁸⁷. The incremental approach in *Caparo Industries plc v. Dickman* has the same effect. The same applies for the possibility to infer a contract between the defendant and the plaintiff¹⁸⁸. The tendency is more obvious when the case involves public or municipal authorities such as *Murphy*¹⁸⁹ as the decision could affect public expenditure,

184 See also the comparison between the approach in the House of Lords and that in the High Court of Australia, on pure economic loss in Hogg, 43 (1994) *IntComLQ*, 127. "At the very heart of the divergence lie different perceptions of the law relating to economic loss. The High Court considers the law relating to economic loss to be dynamic and developing. ... The House of Lords does not consider it appropriate for common law courts to establish liability in novel areas. Such matters are better left to the legislature. The House of Lords also has been concerned to ensure that the common law relating to liability for economic loss does not encroach on traditional areas of contract law."

185 Apparently this is not the point of view of American courts. See "Tort v. Contract: Third parties and pure economic loss", in Chapter 4.

186 [1989] AC 177, [1988] 2 All ER 992 (HL). Lord Bridge made that explicit commenting on a New Zealand case: "...it is a dangerous course for the common law lawyer to embark upon the adoption of novel policies which it sees as an instrument of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations.". ([1989] AC 177,210). See Markesinis and Deakin, 55 (1992) *MLR*, 639

187 Hogson, 4 (1995) *Nottingham LJ.*, 14.

188 Whittaker described this inferring of implied terms as a basic technique of common law courts in regulating contractual relationships. Apparently pure economic loss cases were not deemed to be contractual. Fleming has noticed the poor record of the common law courts as regards inferring implied terms at least as far as pure economic loss is concerned. Looking at both Whittaker's it becomes profound that the tendency of the common law courts towards inferring implied agreements is negligible in comparison to the record of the French courts. Whittaker 16 (1995) *OxfJLSt* 214 ("The typical common law technique for the regulation of contractual relationships remains the implied term.") and 15 (1995) *OxfJLSt* 328-369, Fleming, 105, (1989) *LQR* 508. In contrast French courts prove themselves particularly ready to infer the existence of a contract. Banakas 72 et seq.

189 Another example is *Hill v. Chief Constable of West Yorkshire*, [1989] AC 53, a case involving physical damage. The personal representative of the last victim of a serial murderer known as the Yorkshire Ripper brought a suit against the Police for carelessly failing to apprehend the murderer. The House of Lords dealt with a preliminary point of law. Lord Keith applied his three-stage test and decided in favour of the Police on the basis of "proximity" claiming that the general rule is against liability as can be seen by the narrow exception in the *Home Office v. Dorset Yacht Co. Ltd*, [1970] AC 1004. He does not explain the general rule and, to add to the confusion, he lays a number of policy reasons which in effect amount to the arguments favouring an immunity of the police or public authorities in general. Howarth refers to other examples of public immunities such as those statutorily offered to trade unions and trade unionists with the Trade Dispute Act 1906 and its successors. Howarth, (1991) *CamLJ*, 82-83, 94.

and related policy decisions¹⁹⁰. This judicial attitude must have been accentuated by the usual scarcity of adequate information on the broader picture available to the judges¹⁹¹. Nonetheless, the courts do not seem to be sensitive to academic critique, one reason being definitely their considerable workload.

The courts are insecure of their role and power, but not fully convinced of lack of authority as their reaction in specific cases illustrates. For example, there is liability for negligent misstatements, solicitors are liable for the drafting of wills, and *Junior Books* is narrowed down but not overruled¹⁹². Insecurity drives the courts to be secretive about their policy reasons, while not admitting outright lack of authority and not refusing to tackle a case¹⁹³. The judicial disapproval of the state of the law in *White v. Jones*, was interpreted as an implicit warning that the courts will eventually have to develop initiatives¹⁹⁴.

In conclusion, it makes sense to describe the courts' confusion as one "of people who do not know what to do"¹⁹⁵. The basic reason for the uncertainty in the law is deeply ingrained in judicial mentality. Judicial reluctance has reinforced the case for legislative

190 The implication is that the action of the courts will affect public expenditure and planning and, accordingly might affect the policy of the responsible authorities, leading them to impose additional taxation or alter the allocation of public funds for example. Affecting policy is beyond the legitimate authority of the courts.

191 Howarth summarises on the attitude of the courts in cases relating to public expenditure: "But the conventional view in England at least as long as the present constitutional arrangements survive, is that judges, either because they are not sufficiently competent, or because they are insufficiently informed, or because they lack democratic authority, or because they do not want to land themselves in a political controversy that they would come out of badly, should leave decisions that have major implications for the level and allocation of public expenditure to other people". (Howarth, (1991) *CamLJ*, 95).

192 See Feldthussen, *Economic Negligence*, (211, and 253-259) on the categories of exception to the exclusionary rule for relational economic loss claims. The most convincing exception is that of "transferred loss" (*The Aliakmon* case). Important in this category of cases is the fact that the claimant has no other adequate means of protection. From that point of view the recent *White v. Jones* is similar to these cases. The fact that the plaintiff had no other means of effective protection must have influences the decision of the House of Lords.

193 This is arguably a usual aspect of judicial approaches. In German law the courts ventured into developing contractual mechanisms without focusing on their doctrinal character but also without discussing their own authority to develop such solutions. See under "Judicial assertiveness" in Chapter 2.

194 Hogson, 4 (1995) *Nottingham LJ.*, 14.

195 Howarth, (1991) *CamLJ*, 61.

reform. It is interesting to see whether the restrictive approach is justified on the basis of traditional doctrine in the first place.

5. In support of traditional doctrine.

Although the case for reforming the law of contract to allow claims by third party beneficiaries and the question of compensating pure economic loss suffered by third parties are not usually linked by commentators¹⁹⁶, the reactions to either are similar. These reactions are centred on privity and consideration, their significance for the consistency and integrity of common law, and their social and economic function¹⁹⁷. The traditional doctrinal view has been examined by the Law Commission which looked thoroughly into the relative literature¹⁹⁸. Little can be added to its comments.

It has been alleged¹⁹⁹ that the Law Commission's proposals and decisions like *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd*²⁰⁰ are inconsistent with the promise basis of liability in common law and constitute radical, unsubstantiated departures from the prevailing bargain theory and the indispensable pillars of privity and

¹⁹⁶ The discussion on third party beneficiary claims is usually focused on the abandonment of privity. The question of pure economic loss is more complicated and the available case law more bewildering.

¹⁹⁷ Kincaid is an ardent supporter of the traditional doctrine in either third party beneficiary claims or on pure economic loss. His views are typical of the traditional orthodoxy. He presents more comprehensively than other commentators his understanding of the notional and theoretical concepts on which the common is based, in their historical development. See Kincaid (1989) *CamLJ*, 243-270, "2 (1989-1990) *JCL* 160-169, and "The UK Law Commission's proposals and Contract Theory", 8 (1994) *JCL* 51-66. See Atiyah, P. *The Rise and Fall of the Freedom of Contract*, 1979, 167 et seq. "The fair exchange", 412 et seq, and "The effects of Contracts on Third Parties", on the historical origins and social function of the privity and consideration doctrines.

¹⁹⁸ LC, Consultation Paper No 121, §§, 2.5, 2.6, pp.9 et seq., and Part IV 'The Case for Reform', pp.65 et seq.

¹⁹⁹ The most ardent proponent of the traditional doctrines is Kincaid. The majority of commentators seem to agree with the Law Commission's suggestions and the exclusionary rule in pure economic loss has been generally criticised. As Kincaid himself seems to admit he is in the minority as regards the views of privity among New Zealand's or Australia's academics (Kincaid (1989) *CamLJ*, 258). See the view expressed by Newman, R. "The Doctrine of Privity of Contract: The Common Law and the Contracts (privity) Act 1982", (1983) *Auckland ULRev*, 339-360, and Samuels, G. "Contracts for the Benefit of Third Parties", (1968) 8 *UWALR*, 378.

²⁰⁰ (1988) 62 *Australian Law Reports* 508.

consideration²⁰¹. The initial reaction to such arguments that repeat traditional doctrines in an axiomatic manner, is that the views they profess are outdated and have been the object of justified, devastating critique²⁰². This doctrinal understanding of the third party rule (and privity in general), as being fundamental for the common law perception of contract, is

²⁰¹ Kincaid, 2 (1989-1990) *JCL* 169, and 8 (1994) *JCL* 51-66. As Kincaid puts it, in the second article, a promise creates a moral right and duty which is in personam. The purpose of contract law is to distinguish between enforceable and unenforceable promises. Consideration is the criterion which the plaintiff must satisfy to turn his moral right to a legal one. "By definition the right created by the making of the a promise is created in the promisee, since it is in him that trust is engendered by the promisor's binding of his conscience. To put it simply, privity is a fundamental part of promissory right and duty. To abandon privity in the enforcement of a 'contract' is to abandon promise as the theoretical basis of contract". (p.55). He admits that two separate issues of policy are raised by the doctrines of privity and consideration, "but they are inextricably linked in the concept of contract as enforceable promises".

See Andrews presenting the basic arguments in support of the rejection of a JQT in English law. Treitel, Andrews writes, identifies three arguments in support of this rejection. The first concerns consideration (only a person privy to the provision of consideration can sue), the second concerns mutuality (it would be unjust to allow the third party sue the promisor if the promisor cannot reciprocally sue the third party), the third, arising from the question of recognising the establishment of a trust in favour of a third party, is based on the idea that by allowing a third party claim the promisor and promisee would be deprived of the means to qualify (vary) their relationship. Andrews 8 (1988) *LSt* 16-18.

The LC answered convincingly to such arguments. It noted that the argument that a third party should have no claim on a contract because contracts are personal affairs, "itself requires justification" (p.68). The idea that contracts involve an element of consent and the third party had not consented, ignores the fact that the purpose for requiring consent is the protection of the private autonomy of the parties. The intentions of the parties are that a third party should be benefited. "Indeed, wider Community interests in security are undermined when a bargain is disregarded" (LC, Consultation Paper No 121, 68).

One of the final arguments by Kincaid is that while the object of the civil law is that it is concerned with self interest a rule allowing third party beneficiaries to enforce promises made for their benefit is altruistic and therefore not compatible with the overall purpose of civil law. (Kincaid (1989) *CamLJ* , 265). This argument seems to ignore the essential justice and social policy criteria.

²⁰² See Flannigan, 103 (1987) *LQR* 564 and the comments made by the LC, Consultation Paper No 121, 65 et seq.).

See also Andrews 8 (1988) *LSt* 14, who emphasises on *Scruttons v. Midland Silicones* [1962] *AC* 446, which denied that a third party acquires an immunity right, arguing that it was an unjustified extension of the privity doctrine. He focuses on the distinction between primary and secondary obligations from a contract (the latter when the contract is breached or terminated) and tertiary rights (remedies), to argue that the distinction is sound and that the third party acquires primary rights under the contract as otherwise the promisor's undertaking will be empty of content in those cases where the breach causes the promisee no personal loss. The decision in *Beswick v. Beswick* [1968] *AC* 58, where specific performance was granted to the claimant/third party must have been based upon the view that the third party had a primary right. (Yet the decision was conservative in that the promisee was not allowed to claim damages on behalf of the beneficiary. (Andrews 15, 28-29, 33-34).

historically suspect and logically doubtful²⁰³. Moreover, the question is begged when it is argued that only the party who provides consideration can be the (third party beneficiary) plaintiff²⁰⁴. It has been promptly suggested by theoreticians²⁰⁵ and by the Law Commission²⁰⁶ that while consideration determines which promises are enforceable,

203 Beatson refers to the illuminating discussion on privity in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd* (1988) 62 *Australian Law Journal Reports* 508. Commenting on the views of the minority judges on privity he notes "...the premise that the [privity] rule flows from our very conception of contract is historically suspect, given its late arrival in English law. If its fundamentality flows from Anson's analysis it is also logically suspect since he appeared to treat the question of according contractual rights to third parties as on all fours with the question of imposing contractual burdens on them." Beatson, 45 (1992), CLP, 16. See Andrews 8 (1988) LSt 14, critique on *Scruttons v. Midland Silicones* [1962] AC 446, which he thinks is unacceptable and should be overruled; "The only rationalisation of *Midland Silicones* is that it rest upon the contract being entirely personal to the parties and being incapable of benefiting a third party, whether positively or negatively but this is a mere *petitio principii*. Indeed their Lordships took the words of *Tweddle v. Atkinson* quite literally and decided that they were binding." (18). See under "Third party beneficiary rule" in Chapter 4, on the historical background of privity and of American law in particular.

See LC, Consultation Paper No 121, Part IV "The Case for Reform" p.65, et seq. with a comprehensive examination of academic opinion.

See Kincaid's historical reference to the establishment of privity. He recalls the attempts by the then Chief Justice of the King's Bench (from 1756 to 1788), Lord Mansfield, a Scot, possibly influenced by the civilian tradition of Scots law, to impose a model where a promise would be enforceable because the promisor had expressed serious intent and had bound his conscience. He recalls the attempts between the 1940's and the 1960's by Lord Denning in various judicial capacities to reopen Lord Mansfield's campaign, opting for a model where consideration would be any good reason why a promise should be enforced, similar to the *causa* of the civilian systems. The very existence of such tendencies, the recent attempts by Lord Denning, the relatively recent crystallisation of the traditional doctrine of privity and consideration spell doubts about the solidity of the doctrines. (See Kincaid (1989) *CamLJ*, 246-247.). See also Flannigan, 103 (1987) *LQR* 564.

204 Beale, 9 (1995) *JCL* 115. Kincaid, 8 (1994) *JCL* 55.

205 See the discussion by Degeling, who makes a short review of academic opinion. (Degeling, 6 (1993) *JCL*, 183 et seq). See also the comment in Beyleveld and Brownsword, 54 (1991) *MLR* 61 et seq. He discusses specifically the dissent of Lord Brandon in *Junior Books*, which is based on the idea that if privity is lifted for the plaintiff this would be unfair towards the defendant who will not be able to rely on defences from the subcontract. The answer would be to lift the constraints of privity for either plaintiff or defendant. The authors refer to Atiyah who commented on *Junior Books*, alleging an illegitimate evasion of privity transferring the risk of the defective floor to the defendants (*An Introduction to the Law of Contract*, 1989, p.397). If, in the interest of fairness, the subcontractors should be able to raise defences on the basis of the subcontract, if privity could be legitimately lifted for the benefit of the subcontractors, then it makes sense to discuss whether it is legitimate to have privity lifted in other occasions as well.

206 As said before the references to academic opinion are extensive and thorough. The LC refers, among others, to the work of Collins, Treitel, Furmston, Ellinger, (1963) 26 *MLR* 396, Wylie, (1966) 17 *NILQ*, 351, Samuels, (1968) 8 *WALR* 378, and Flannigan, 103 (1987) *LQR* 564. (LC, Consultation Paper No 121, 65 et seq.).

privity determines who may enforce the promise²⁰⁷, yet, according to traditional orthodoxy, privity and consideration are inextricably linked²⁰⁸. There is no case, therefore, of a third party beneficiary obtaining something for nothing²⁰⁹. The third party will have no stronger right than a plaintiff under seal, or a party having provided nominal consideration²¹⁰. (It is useful to recall that the establishment of privity and the rejection of a JQT for English law were related to the availability of consideration from the promisee, rather than with the requirement that the plaintiff should have been a party to the contract²¹¹. Thus consideration, rather than privity, might be at the heart of the issue²¹².)

²⁰⁷ Kincaid underlines that the function of consideration is not to select those promises the law will require a person to fulfil, but "to decide if a sufficient link exists between breach and damage to justify the plaintiff promisee seeking relief against the promisor", (Kincaid (1989) *CamLJ*, 265).

²⁰⁸ In Kincaid's words "The Commission seeks to separate privity from consideration with the object of showing that abandoning the privity rule will not affect the consideration rule." In his view the concepts are inextricably linked. Privity relates to the question of who can enforce a promise (and not a contract as the Commission puts it). "The answer is the person to whom it was made, *provided* he paid consideration.". Because consideration is a notion which qualifies a promisee as plaintiff, "it is only necessary to look for consideration" (p.55)

Kincaid's 'inextricable' linking of the concepts seems uncertain. He admits that consideration is not absolute, since a promisee can show that a promise made to him was made under seal. He then goes on to agree with the LC that it is incorrect to say that 'only a person who supplies consideration can properly be treated as a party'. What is contended in his view is that a person who shows he has provided consideration has proved he is a party. "Consideration is sufficient to show privity but not necessary. It would be correct to invert the quoted statement and say 'only a party can supply consideration' "(p.56). This passage can then be combined with the conclusive statement that 'consideration must move from the plaintiff, not the promisee.'"(p.56) This is an awkward line of thoughts, presupposing the outcome, or urging the deduction of the desired outcome. (Kincaid, 8 (1994) *JCL* 51).

It is not within the ambitions of this work to examine the relationship between privity and consideration. It should however be plausibly argued that possibly, privity is a product of the consideration doctrine, or rather of the aim of restricting the range of people who could sue on the contract. This idea is reinforced by the historical development of privity. See Flannigan, 103 (1987) *LQR* 564-593, and Dowrick, 19 (1956) *MLR* 375-393.

²⁰⁹ See, among others Beyleveld and Brownsword, 54 (1991) *MLR* 61. The promise will have been bought by the promisee's consideration or, as in a *Junior Books* situation the third party will have actually provided consideration. (The plaintiffs in *Junior Books* had already settled a contractual claim against the main contractors which barred them from coming back against the main contractors. Subsequently they found that the settlement was inadequate.)

²¹⁰ Beale, 9 (1995) *JCL*, 113. Moreover, the idea that, as far as the third party beneficiary is concerned, there is no promise but a mere expression of intention is exaggerated; there is certainly more than a mere statement. (Beale, 115.).

²¹¹ See Dowrick, 19 (1956) *MLR* 375-393, explaining, what is a basic truth about privity, namely that the leading decisions establishing the privity doctrine were rather

The arguments that by awarding damages for third party loss the focus is on the defendant's duty instead of the plaintiff's right as is the principle in common law²¹³, and that by allowing a third party beneficiary claim, the right of the plaintiff is artificially separated from the duty of the defendant²¹⁴, are based on the outdated view of consideration as inextricably linked to privity and are thus doubtful²¹⁵. The emphasis in decisions awarding damages for third party loss is actually on the plaintiff's expectations²¹⁶. Moreover, the argument that the decision in *Trident General Insurance Co.*

focused on consideration. Consideration was the common element on judges speeches in *Tweddle v. Atkinson* (1861) 1 B & S 393; 121 ER 762, and *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd*, [1915] AC 847.

Kincaid notes "a plaintiff can never satisfy the consideration requirement *vis-à-vis* the promise in question without at the same time showing privity". That is why the fundamental cases establishing privity, *Tweddle v. Atkinson* and *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd*, "thought of as privity case, were decided on consideration." Kincaid, 8 (1994) *JCL* 55.

212 See Brodie in *Scots law into the 21st century*, 206, recalling Lord Devlin's observation in *Hedley Byrne* that the issue in the case was "a by-product of the doctrine of consideration. If the respondents had made a nominal charge for the reference, the problem would not exist.", [1964] AC 525.

213 Kincaid makes this comment discussing Caudron, J's opinion in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.* (1988) 62 *Australian Law Journal Reports* 508, which was based on unjust enrichment (Kincaid, 2 (1989-1990) *JCL* 166). Discussing the compatibility of the suggestions in LC's consultation paper to the will theory he notes: "...to focus upon intention alone is to focus upon duty divorced from correlative right and thus to deny the importance of a relationship between the plaintiff and the defendant as justifying obligation" (Kincaid, 8 (1994) *JCL* 60). Privity, in his view, is a manifestation of such a relationship, and consideration makes a moral obligation enforceable, linking rights and duties. It seems that the allegation about divorcing rights and duties, and possibly that regarding focusing on the defendant's duty should apply to e.g. the majority in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.*, which focused on intention. The question of the correlative relationship between rights and duties is recurring in Kincaid's work and consideration is in his views essential (together with privity) in identifying who has the right. (See Kincaid (1989) *CamLJ*, 259 et seq.). He, however seems to ignore the special situation of third party loss where a tort claim depends upon a contractual relationship.

214 See previous footnote, and Kincaid (1989) *CamLJ*, 261, comments on *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.*; "Its effect is to abandon not only bargain but any theory of promissory liability based on rationalising the plaintiff's right. The relationship of right and duty, as well as the historical course of the common law, make this effect unsatisfactory".

215 Recall the argument against the application of delict in Greek law, namely that delict has a punitive character and is unsuitable for a contractual context. See in "Delict's potential" in Chapter 3.

216 Fleming, 13 (1993) *OxflLSt*, 436. He notices that a duty analysis of these cases is not adequate to explain the rationale of the courts.

Ltd. v. McNiece Bros Pty. Ltd. ²¹⁷ is radical as it does not require the proof of actual reliance by the plaintiff²¹⁸, is difficult to compromise with the traditional view that third party beneficiaries can be protected had they reasonably relied on the contractual promise. To illustrate further the weakness of the traditional views, if the promisee alone is entitled to enforce the promise, how would the plaintiff's reliance be reasonable²¹⁹. Even if no actual reliance existed (if, for instance, the defendant being particularly experienced in transactions did not easily rely on the others' behaviour), the behaviour remains wrongful. Its evaluation is based on its ability to create reliance. The existence of reliance adds little to the normative understanding of the cases in question²²⁰.

It was argued that there are alternative ways, such as trust, agency or estoppel²²¹, to protect third party beneficiaries, instead of granting them a direct claim. However, these alternative means are often the product of legal fiction²²² and the courts cannot resort to them at all times. They would, moreover, place the protection of third parties under the very complicated and technical body of law of these mechanisms²²³ while the third party beneficiary might not obtain the benefit as the parties intended²²⁴. The suggestion that the courts should freely create exceptions to privity²²⁵ extending liability for pure economic loss, is undermined by the very record of the courts. As was argued, English law-making is retroactive and unlikely to accept major shifts. The legal change in question requires the use of concepts and techniques which are not already found in common law, and this area of

²¹⁷ (1988) 62 *Australian Law Reports* 508.

²¹⁸ Instead it requires potential reliance, namely that the defendant's behaviour could induce reliance.

²¹⁹ Beale, 9 (1995) *JCL* 114. Beale adds: "... to say that a promise is never to be enforceable in anyone but the promisee but that a third party who relies on it can enforce it in tort strikes me as unnecessarily conceptual."

²²⁰ See the critique on reliance as a basis for decisions on pure economic loss, in the footnotes in "Third party pure economic loss: Contractual approaches", in Chapter 5.

²²¹ See the judgments of the minority in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.* See Kincaid, 2 (1989-1990) *JCL* 163-164.

²²² Dowrick, 19 (1956) *MLR*, 386.

²²³ Beatson, 45 (1992), *CLP*, 17.

²²⁴ In the case of trust, for instance, where the benefit passes from the property of another person (their trustee), if the latter is bankrupt the trust beneficiary might not be sufficiently satisfied.

²²⁵ Whittaker 16 (1996) *OxfJLSt* 215.

reform might seem to involve decisions of policy "which are more appropriate to Parliament"²²⁶. (This seems indeed to be the case here.) The prospects of the suggestion for exceptions to privity seem to differ little from those of the incremental approach. The suggestion to create pockets of exception to privity²²⁷ is, in effect, similar to side-stepping privity on the bases of the largely fictitious constructions developed by the courts over time. There is a risk to reach the same outcome. It is positive however that the suggestions include taking into account the typical expectations of the parties.

There is a similar argument against compensation for third party pure economic loss in tort, namely that no compensation should be awarded when the victims should have exercised their ability to guard against the risks by self-protective measures such as other insurance arrangements²²⁸. It is doubtful whether the argument reflects a general rule. Apart from the fact that the meaning of the plaintiff's ability to protect himself is unclear²²⁹, if it is for the plaintiff to buy excess insurance, the only one to benefit is the victim's insurer²³⁰. Rejecting such claims will not necessarily involve avoiding multiple causation and protection for the more remote, deep-pocketed defendant²³¹. The opposite

226 Whittaker 16 (1996) *OxfJLSt* 217.

227 Whittaker 16 (1996) *OxfJLSt* 213. He notices that ".. the courts attachment to privity has been only formal, as they have proved very willing to find ways of circumventing its more strikingly unjust effects, either by fictitious construction or by reclassification."

228 Fleming, 5 (1993) *Canterbury LR*, 274. The argument, as Fleming observes, proves too much. It was not invoked in cases like *Hedley Byrne*. He notices that the argument against compensation does not square with the recognition of a duty in tort when the situation was "akin to contract" (*Hedley Byrne, Junior Books, Smith v Bush*). The argument is justifiably raised in relation to pure economic loss cases where because the transaction in question is planned and bargained for there is the possibility of alternatives. It could however be raised in property cases.

229 There is considerable uncertainty as regards the definition of the plaintiff's ability to guard against risks. See the definition of "modest dwelling" and "inexperienced buyer" in *Smith v Bush*. Fleming, 5 (1993) *Canterbury LR*, 275.

230 He will be subrogated in the victim's rights and enjoy a windfall for insurance damages he had to pay. Fleming, 5 (1993) *Canterbury LR*, 274.

231 Fleming, 5 (1993) *Canterbury LR*, 274. The idea is that the linear arrangement of contracts is better to avoid multiple causation and preferable to protect the most remote deep pocketed defendant. The defendant might be just as well prepared to guard against risks. This was the case in *Edgeworth Construction v. Lea & Associates*, [1993] 3 SCR 206, where a building contractor relied on faulty specifications supplied by the owner's design engineers. The latter could have provided for a contractual exception from liability. The plaintiff had even less reason to protect himself in his contract with the owner. The engineers' duty was not extinguished by the fact that the employer was exempted from

conclusion, that is, when there is no alternative protection a duty in tort should be accepted²³² is also doubtful. Compensation was awarded in *Junior Books* where there had been a compromise on the plaintiff's claims²³³.

The idea that abandoning privity undermines fundamental common law values, is shaky, as the very view of privity and consideration adopted by the critics of reform does not correspond to the reality or, at least, to what the majority of commentators think of the doctrines, and to the relative historical evidence, discussed in the chapter on American law²³⁴. The suggested alternatives are similarly inadequate.

6. Economic arguments.

The recent Canadian decisions in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited* and *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*²³⁵, instigated renewed critique on the award of damages for pure economic loss from an economic point of view²³⁶. The critique is based on the goals of minimising social costs and allocating resources efficiently²³⁷.

In cases involving a chain of contracts, the main argument against compensation is that it would impose a reallocation of allocated risks²³⁸. Allowing the third party claim would shift the economic loss away from those who have already been compensated, who have been paid to accept the risk, for instance, by not paying for warranty protection²³⁹ --.

liability for fault specifications since the owner-contractor contract did not purport to define the duties of the engineers (p.277).

²³² As with *White v. Jones*, or *Smith v. Bush*.

²³³ Beyleveld and Brownsword, 54 (1991) MLR 49.

²³⁴ See also Whittaker 16 (1996) *OxfJLS* 216.

²³⁵ [1992] 91 DLR (4th) 289.

²³⁶ See under "Economic efficiency" and Deterrence" in Chapter 4. As said elsewhere economic approaches to law are influential in American legal discourse but make little impact in other common law countries and even less in continental systems. Nonetheless many of the arguments on insurance in "Economic efficiency" are based on Atiyah's observations. However, it is noted in the same unit that the courts do not seem focus on issues of preferring first party over third party insurance for instance when deciding.

²³⁷ Feldthussen and Palmer, 74 (1995) *CanBarRev* 425-445, Cohen, 45 (1995) *UTLJ*, 143, Markesinis, 109 (1993) *LQR*, 5-12.

²³⁸ See also Banakas, 293 et seq.

²³⁹ See Feldthussen and Palmer, 74 (1995) *CanBarRev*, 434. He notices the deterrence goal in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Co.*, and

Just like many of the economists' arguments, this too is ambiguous. Certainly it would have to be evaluated on a case by case basis, and it is hoped that under a contractual view the context of the transactions will be highlighted clearly to evaluate the position of each party and whether it can be inferred from the contract or the transactions' ethics that no third party claim were to be expected²⁴⁰. A blanket exclusion of 'reallocation' makes little sense from a normative viewpoint, as the third party is not necessarily linked to this allocation, but is a factor which should be considered on a case by case basis.

The criticism on *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*²⁴¹ is more elaborate. It was argued that in this, as in most pure economic cases, there are no real social costs, but a mere transfer of wealth²⁴². The deterrence argument is not persuasive for pure economic loss, where, usually, the injuring behaviour is not morally blameworthy as in physical damage²⁴³, and it is doubtful whether the defendant could have best prevented the loss²⁴⁴. Moreover, it is argued that the first party insurance (that for direct losses, undertaken by the plaintiff), is cheaper. The best insurer is thus the plaintiff²⁴⁵; potential claimants could have protected themselves contractually²⁴⁶.

argues that negligence law would rightly place liability on the builder as the better cost avoider in physical damage cases. This is true according to the Coase theorem because the transaction costs are meant to be zero. However in cases involving a chain of contracts, due to the existence of particular legal rules, the transaction costs are substantial. The plaintiff is not aiming at having the court impose what he should have bargained in a zero costs transaction but he merely aims at changing for his purely private benefit a, supposedly efficient, bargain. It is incorrect, add the authors, to consider that subsequent purchasers are unable to allocate the risk efficiently by contract (as in the case of the injured pedestrian).

²⁴⁰ This is possible on the basis of a contractual solution, without applying strict contractual criteria which could be inconclusive or lead to commercially unreasonable results. See under "The case for contractual solutions" in Chapter 5 on the model of the possible contractual approaches, notably JQT but modified without strict intention requirements.

²⁴¹ [1992] 91 DLR (4th) 289(Supreme Court).

²⁴² Social costs occur usually in situation involving transferred loss. Even if the case falls within one of the exceptions to the exclusionary rule no compensation should be awarded once there are no social costs.

²⁴³ Feldthussen and Palmer, 74 (1995) *CanBarRev* 443.

²⁴⁴ Cohen, 45 (1995) *UTLJ*, 156.

²⁴⁵ Feldthussen and Palmer, 74 (1995) *CanBarRev* 443-444, and Cohen, 45 (1995) *UTLJ*, 156-158. Cohen is using the example of transport firms in carriage contracts. Once first party (direct losses) insurance, is less expensive than third party (liability) insurance, the transport firm should not be liable; the owner can buy insurance cheaper. (Insurance companies will charge more for third party insurance which is unpredictable.). Transport firms should not be liable because this immunity will increase the incentive to negotiate

Finally, the administrative costs²⁴⁷ are lower under a "bright line" exclusionary rule²⁴⁸. The truth of these statements has again to be tested. However, it appears incongruous to suggest that the protection of the weaker parties could be determined by arguments on administrative costs. The question here is for restoring the loss and moral blameworthiness should play no role. It is causality considerations, possibly centred on foreseeability, that establish the right to compensation²⁴⁹.

On the other hand, it could be argued that, since the purpose of the contract is to maximise joint wealth, courts, when interpreting contracts for the purpose of considering third party (beneficiary) claims, should apply the contract as agreed or fill in the gaps as they think it would have been optimal for the parties in question. Thus the decisions in *London Drugs Ltd v. Kuehne & Nagel International Ltd* and *Edgeworth Construction Ltd. v. N.D. Lea & Associates*, leaving questions of style aside, were right from an economic point of view²⁵⁰. This analysis is treating tort law, where, supposedly, the basic criterion is to minimise the cost of accidents, including that of precautions, from the point of view of a hypothetical bargaining on the costs involved²⁵¹. Therefore, under either tort or contract law, the courts should apply the solution which would have seemed optimal to the parties had they had the opportunity to agree on it. However, the situation will definitely be

with property owners against those losses. If the transport firms do not bargain and have no claim for compensation they will have to make other cheaper arrangements.

²⁴⁶ Feldthussen and Palmer, 74 (1995) *CanBarRev*, 444

²⁴⁷ "... the public and private costs of administering the accident compensation". Cohen, 45 (1995) *UTLJ*, 150.

²⁴⁸ A "bright line" exclusionary rule, provides clear signals to the parties who "must take steps to prevent accidents and obtain insurance", reduces uncertainty "which, to most firms and individuals represents an additional cost.", and "reduces the public and administrative costs of determining whether a particular plaintiff falls within the class of persons who have legal entitlements.". Cohen, 45 (1995) *UTLJ*, 159.

²⁴⁹ See See Brodie in *Scots law into the 21st century*, 212, who argues in favour of employing foreseeability as the prima facie test of liability, having thought that many cases decided on an assumption of responsibility concept were essentially based on foreseeability.

²⁵⁰ Siebrasse, 45 (1995) *UTLJ*, 59-62 and 67. As regards the economic purpose of a contract, he notes that if the parties had provided for every eventuality the contract would be optimal in the sense that it would maximise expected joint wealth "because the risks of changed circumstances would be allocated, just as are the goods which are the subject of the exchange." (58). The courts when interpreting the contract "should impose terms that would have been wealth maximising at the time the contract was made." (59).

²⁵¹ Siebrasse, 45 (1995) *UTLJ*, 60.

more complex, and there could be strong reservations and uncertainty towards such an intervention by the courts.

Economists' arguments are too complicated to be dealt with effectively in this context. As has been mentioned, Atiyah discussed extensively the insurance implication of pure economic loss cases and concluded that courts do not take account of such considerations²⁵². It was noted for instance, that the potential of the result in *Bryan v. Maloney*²⁵³ to have an adverse impact "on the insurance premiums of every builder in Australia was not even considered as being sufficiently important by any of the judges to address in passing"²⁵⁴.

Two ideas should be retained from the economic arguments developed before; that pure economic loss is different from physical loss and should be treated differently²⁵⁵ and that there can be no single (economically efficient) rule for pure economic loss²⁵⁶. The suggestion for contract-oriented solutions to third party pure economic loss is compatible with these statements, although the validity of the first in the context of today's' socio-economic circumstances can be seriously challenged²⁵⁷.

7. London Drugs Ltd v. Kuehne & Nagel International Ltd.

This decision²⁵⁸ is important as "it posed more poignantly the dilemma of how to resolve the tension between loyalty to doctrinal pieties and validating a contrary

252 Atiyah 5 (1985) *OxfJLSt* 489-490. See the references made in "Economic efficiency" in Chapter 4. See also Markesinis, 25 (1991) *The International Lawyer*, 953-965, and 106 LQR 1991, Rizzo 11 (1982) *JLSt* 281 and Bishop 2 (1982) *OxfJLSt* 1., 96 LQR 1980, 360.

253 HCA (March) 23 1995, 11 (1995) *ConsLJ* 273.

254 Miller (1995) *LLMCLQ* 331.

255 Feldthussen and Palmer, 74 (1995) *CanBarRev*, 432 et seq.

256 Cohen, 45 (1995) *UTLJ*, 148.

257 It can also be questioned whether the statement make sense as statements of principle at a time that eh artificiality of the separation has been repeatedly exposed and when the aim is for a more efficient civil liability. For the latter purpose, as will be seen a more unified and view of civil liability, a greater intechability between its different forms is a basic prerequisite. See under "Suggested reform: Increased contractual input" in Chapter 7.

258 See however Siebrasse, 45 (1995) *UTLJ*, 47, criticising the decisions in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 and *Edgeworth Construction Ltd. v. N.D. Lea & Associates*. [1993] 3 SCR 206, 107 DLR (4th) 169.

conclusion demanded by the contemporary sense of rightness"²⁵⁹. The British Columbia Court of Appeal and the Supreme Court of Canada reached the same results with highly fragmented majorities, in tort (with varying reasoning) or contract²⁶⁰. The agreement of the judges is evidence of the appeal the claim had. The commentator's reception was generally positive (there was critique on the arguments and the techniques used)²⁶¹. The relaxation of privity suggested by the Supreme Court has been criticised as being incoherent²⁶², but the idea has not been rejected²⁶³. Out of different tort-based opinions there seems to be

²⁵⁹ Fleming, 13 (1993) *OxfJLSt*, 430. Blom speaking on the decision of the Court of Appeal, which was based on tort, predicts that it "will have a pivotal effect on the law of negligence as it operated in relation to a transactions governed by contract" (Blom, 70 (1991) *CanBarRev*, 156, on the British Columbia Court of Appeal, (1990), 70 DLR (4th) 51. See previous footnotes on the views expressed in that decision.).

²⁶⁰ The four to one majority in the Court of Appeal in *London Drugs Ltd v. Kuehne & Nagel International Ltd* is split between three opinions based on tort and one accepting the existence of a separate contract linking the plaintiff and the defendant. The tort option is supported on three different tort bases.

²⁶¹ See Blom in his analysis and critique of the tort based opinions in the Court of Appeal (Blom, 70 (1991) *CanBarRev*, 167-172). Baer was especially critical on McLaughlin J's judgment who based the limitation of the employee's duty on the notion of the voluntary assumption of risk. Allegedly, with the use of this concept the complicated factors at play, and especially the issues raised due to the underlying contractual matrix, are not discussed. The emphasis is too much on the expectations of the customers and not on those of the employees. (McLaughlin praised La Forest J's 'duty' analysis but refused to accept his more comprehensive approach because of the major change in law it involved.). Baer however admits that there are certain advantages in the voluntary assumption of risks analysis. Thus it fits more comfortably with the traditional notion of the employer's vicarious liability than a 'duty' analysis. A voluntary assumption is possible when a customer does not rely on the employees being responsible for their carelessness, and it enables the formulation of a realistic presumptive rule in the face of a positive assumption of risk by the employer. (Baer, 72 (1993) *CanBarRev*, 396-397).

²⁶² The majority judgment is allegedly inherently unstable as although it purports not to relax the privity doctrine more than is absolutely necessary, this minimalistic view is not justified in the light of the liberal attitude taken in the relaxation of privity. Could the employee's immunity be extended to instances where he is performing tasks that are not related to the contract with the customer? This view ignores it could be argued, the contractual context by setting a presumptive rule which places an unrealistic burden on the employee. The relaxation of privity had, it was said, no connection to any known principle that should govern overlapping insurance coverage. Instead, Baer thinks that La Forest J's judgment, although more radical, is better explained, and comprehensive as it takes into account basic policy considerations, and illustrates the different situations which might emerge under the influence of varying factors. (Baer, 72 (1993) *CanBarRev*, 398-400).

The idea that the court is developing and applying social policy in a decision with potentially far reaching consequences makes it more difficult to deal with the judgments especially as regards the formulation of some presumptive rule on vicarious liability.

²⁶³ Baer makes suggestions for the more competent formulation of the relaxation of privity. As can be seen from the previous footnote, it is not the relaxation itself which is criticised but the, alleged, incoherence of the judgments minimalistic view. Baer suggests

preference for those that clearly address the policy issues concerned²⁶⁴ and take into account the contractual setting more effectively²⁶⁵. The decision is special in its potential to set not only a precedent but an example for the development of the law²⁶⁶.

8. Liability of private defendants for defective construction in New Zealand law.

*Invercargill City Council v. Hamlin*²⁶⁷ seems to have confirmed the liability of private defendants for the repair costs or reduced value of defective work. On the other

that the majority could have said that the courts' treatment of the exceptions to privity "demonstrates a central concern about the difficulty in determining the parties' intentions", so that a relaxation should be restrained "to expressly intended third parties and to those impliedly intended in limited and compelling circumstances". Baer, 72 (1993) *CanBarRev*, 400.

²⁶⁴ See Baer, 72 (1993) *CanBarRev*, 389-395, who praises the open discussion of the policy concerns in *La Forest J's* judgment. *La Forest* applied the two-stage test of Lord Wilberforce, and took policy considerations into account after concluding that the first stage of the test (reasonable foreseeability) was satisfied. *Iacobucci's* judgment for the majority seems to have an ambiguous stance towards policy considerations; at times it seems to be reduced to an analysis whether the damage was reasonably foreseeable. *La Forest J* in his approach focused on policy issues in the special situation of economic loss associated to a planned transaction and contractual expectations. It is arguable that *La Forest J* felt the need to embark on a more detailed and open analysis of policy considerations because he suggests the most radical departure from existing law.

²⁶⁵ Baer, 72 (1993) *CanBarRev*, 389-395. He thinks that it is difficult to establish reasonable reliance on the employee in the absence of an express or implied undertaking. The reliance in *La Forest J's* view is reliance on the employee to provide compensation. In the opinion of the majority, reliance on the employee to be careful is enough to establish a duty of care. *Blom* has the same view. This, Baer notices, is inconsistent; what the majority was saying in effect is "I don't expect you to pay, but you should pay because I expect you to be careful." (p.394). *Blom*, commenting on the tort based opinions of the majority in the Court of Appeal, clearly expressed his preference for *McEachern CJBC's* judgment which focused on the owner's expectations as the key to the decision. The allocation of risks which the plaintiff had accepted could only be given effect if it applied in favour of the employees as well. *Wallace JA* on the other hand, focused on the employees' actual or implied knowledge of the limitation of liability in the warehousing contract (*Blom*, 70 (1991) *CanBarRev*, 166). *Blom* notices conclusively that in this type of cases the expectations of the plaintiff, and not of the employer are important. The same view could be applied in a similar setting with independent contractors (p.169). Baer makes a comprehensive statement discussing the employer's vicarious liability, focusing again on the contractual background of the transaction: Once you recognise that reliance and contractual setting, as well as foresight should affect the determination of a duty of care, there is no particular reason why employer and employee should have precisely the same duty. Whether the duties are different or similar will depend on the expectations of the parties." (p.394). As Baer underlines elsewhere, the extent of vicarious liability will depend on the contractual matrix.

²⁶⁶ See under "Contracts for works" in Chapter 2. In German law restrictive covenants apply as a rule in favour of subcontractors. See also "Claims of the owner against the subcontractor", in Chapter 4, where the situation might be similar.

²⁶⁷ [1994] 3 NZLR 513, 11 (1995) *ConsLJ* 286 (Burr, Franklin, Ramsey, eds).

hand, it was argued that the decision failed to consider "that the special New Zealand climate of reliance on housing control by local authorities given as the basis of their judgments against the Invercargill City Council could hardly apply to private defendants..."²⁶⁸.

However apart from the precedent in the leading *Bowen v. Paramount Builders*²⁶⁹, the decision in *Lester v. White*²⁷⁰ confirmed the willingness of the courts to accept claims against private defendants. In any case, the doctrinally proper characterisation of *Anns, Murphy, Bowen, etc.*, concerns liability in negligence for non-dangerous defects. As has been assessed, "The courts in New Zealand began with the 'imminent risk' requirement, but seem to have now dispensed with this and to allow recovery in negligence for even non-dangerous structural defects"²⁷¹. There is no question, therefore, of applying the rationale of the liability of public defendants to the liability of private defendants. *Invercargill City Council v. Hamlin* is consistent with a substantial line of authority in New Zealand law.

9. The task of reform.

Compensation for third party pure economic loss and the establishment of a contract in favour of third parties²⁷², which concern similar situations, are rejected on the basis of similar doctrinal arguments. Privity, entrenched for more than 120 years is, along with consideration (which *has* to originate from the promisee)²⁷³, a formidable obstacle. The judicial and academic dissatisfaction with privity is easy to notice since the doctrine admittedly causes serious inconvenience and has been systematically and persuasively

²⁶⁸ Wallace, 11 (1995) *ConsLJ*, 249-254, at 250). See also Fleming, 111 (1995) LQR 362-366. Wallace underlines that the decision in *Invercargill City Council v. Hamlin*, was preceded by that in *Lester v. White* [1992] 2 NZLR 483, where a builder was held liable in tort for economic loss to a subsequent purchaser, and where the court declined to follow *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177, or *Murphy*. See Wallace 111 (1995) LQR, 287-288, on the relationship between *Anns* and *Invercargill City Council v. Hamlin*. However, it was acknowledged that the analysis of *Anns* in *Invercargill City Council v. Hamlin* laid emphasis on the idea that *Anns* is not limited to cases involving physical damages only.

²⁶⁹ [1977] 1 NZLR 394

²⁷⁰ [1992] 2 NZLR 483

²⁷¹ Feldthussen, *Economic Negligence*, 180.

²⁷² Where in the Commonwealth this has not been made on a statutory basis.

²⁷³ See under "In support of traditional doctrine".

undermined by academic comment²⁷⁴. However, judicial restraint has left privity largely untouched. The courts feel they lack the authority to repeal privity. They clearly think this is a question for the legislature alone²⁷⁵. More precisely, in many third party pure economic loss cases, the courts considered that their means to sidestep privity were inapplicable²⁷⁶. The deeply ingrained reluctance of the courts to tread on privity led the Law Commission and most commentators²⁷⁷ to suggest that legislation is the optimal way to reform (if not the only credible option)²⁷⁸. The uncertainty of the judiciary was reconfirmed by the Ontario Law Reform Commission 1987 Report, which registered the opinion of the judges seeking extensive and detailed legislative intervention in contrast to academics who suggested the legislative provision of fundamental principles only²⁷⁹.

274 It is difficult to give any comprehensive account of the critique on privity. See however Flannigan, 103 (1987) *LQR* 564-593, and the references made therein. See also on the historical context and the social and economic role of privity Atiyah, *The Rise and Fall of the Freedom of Contract*, 167 et seq. See previous references for the account of the inconveniences caused by the third party rule. See LC, Consultation Paper No 121, 65

275 As said before this is the clear implication in *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177 and, more recently in *White v. Jones*. [1995] 2 WLR 187. See Markesinis and Deakin, 55 (1992) *MLR* 639, and Hogson, 4 (1995) *Nottingham LJ.*, 14.

276 The courts, in one view, treat the usual means they employ to avoid privity as exceptions to privity. In the opinion of most academics "the ameliorating devices are really alternative ways of describing the same fact" (Baer, 72 (1993) *CanBarRev*, 397) See also Dowrick, 19 (1956) *MLR* 386. Baer thinks that this view of the courts "has more to do with a mistaken belief about which pretences or mysteries must be preserved to promote fidelity to the law than any lesser capacity to be masters rather than servants of these concepts."

277 Beatson, 45 (1992), *CLP*, 1-28, Degeling, 6 (1993) *JCL* 177-188, Beale, 9 (1995) *JCL* 102-124. See also Hayes, J.A. "After *Murphy*: Building on the Consumer Protection Principle", 12 (1992), *OxfJLSt*, 112-128, who notices that there is little scope for common law advancements in the face of the repeated point in *Murphy* that it is for the Parliament to bring about changes in the law. Some aspects, such as the liability of local authorities are complicated and would certainly require legislative intervention. Particular pieces of existing legislation such as the Defective Premises (England) Act 1972, should possibly be amended to offer broader protection to possible victims.

278 Recall Whittaker's reservations as regards the prospects of his suggestion for the judicial expansion of the exceptions to privity. Whittaker 16 (1996) *OxfJLSt* 217.

279 Beatson, 45 (1992), *CLP*, 19. Waddams refers to the Ontario Law Reform Commission's 1987 *Report on Amendment of the Law of Contract* as well, underlying that a basic suggestion of the report involved the restoration of flexibility in the law of contract. This, Waddams argued, is achieved by the decision which enables the incremental development of the relevant law. (Waddams, S.M. "Privity of Contract in the Supreme Court of Canada", 109 (1993) *LQR* 349-352 at 351.

Considering the slow process of consultation preceding the initiation of legislation and that detailed legislation is difficult to be agreed upon which a detailed plan could stifle the flexibility of case law, it seems reasonable to suggest the adoption of basic rules as the optimal model.

In the light of the continuing force of privity and of the courts' reluctance to take a different stance²⁸⁰, it is strange that it would seem possible to introduce a contract in favour of third parties in case law, on the basis of a narrow interpretation of the parties' intention to allow the beneficiary to enforce the promise²⁸¹. In theory the mechanism could be established judicially. However judicial development, as the experience from pure economic loss has shown, is likely to be slow²⁸², uncertain, and prone to arbitrariness, reversals and fluctuations of policy. The development will take place at the expense and to the cost of litigants²⁸³. The weakness of previous judicial attempts in England²⁸⁴ and the

280 This reluctance is accentuated by the case by case development of the law. Any decision allowing third party claims is, likely to be considered as limited to its own facts of to the particular category of cases it refers to (construction cases for example). In the *London Drugs Ltd v. Kuehne & Nagel International Ltd*, the majority underlined that the judgment is limited to the particular case. McLauchlin J's judgment by definition concerns the particular circumstances which limited the employee's duty. Baer notices that although La Forest J embarks upon a more comprehensive review of the case's policy considerations, his analysis of the special situation of tort liability in a contractual setting, is reiterating the distinction between the property damage and economic loss and between contractual and tortious liability and is in effect limiting the scope of his judgment, to cases where a specific contractual relationship exists, leaving thus the employees in no better position than the majority's judgment (Baer, 72 (1993) *CanBarRev*, 392-393). Leaving the latter point aside, it is significant to note that, under this view, La Forest J's judgment is clearly lacking a broader perspective of application.

281 Beale, 9 (1995) *JCL*, 117. This narrow approach to the second leg of the Law Commission's double intention test should, in his view, follow a generous interpretation of the first leg of the test, that concerning the intention to benefit the third party. Moreover, the treatment of defences and exclusion clauses could, in Beale's view, be based on existing statutes. It is easy to predict that the courts would take a narrow view of the intention to allow the third party to enforce the contract, were it ever to become legislation. This, however, does not answer how, in the first place, will the courts accept the idea of third party beneficiary claims from a doctrinal point of view. It is unlikely that the courts' would somehow resort to the Commission 'guidelines'. However, the arguments against privity and consideration for instance could prove influential.

There is a view, shared by a considerable number of commentators, that the exclusionary rule is the optimal starting point for pure economic loss. (Feldthussen is a prominent example. See *Economic Negligence*, 211 et seq.). In a similar manner, Beale believes that third party beneficiary claims should be allowed in selected cases only, when this would be beneficial for the relative economic activity (117)

282 "Development of doctrine by case-law proceeds best incrementally, by slow advance on existing decision. It is obviously more difficult to use this method if it requires departure from something long settled." Reynolds, 105 (1989) *LQR* 3.

283 Reynolds thinks of the litigants, especially those defeated, financing the gradual advance of the law. (Reynolds, 105 (1989) *LQR*, 4).

284 The case in favour of the establishment of a JQT in English was raised by Lord Justice Denning in the *obiter dicta* of three decisions; in *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board*, [1949] 2 KB 500, in *Drive Yourself Hire Co (London), Ltd. v. Strutt and Another*, [1954] 1 KB 250, and in *Adler v. Dickson and Another*, [1955] 1 QB 158.

necessarily limited JQT which, allegedly²⁸⁵, was established in *London Drugs Ltd v. Kuehne & Nagel International Ltd*,²⁸⁶, or whenever a third party beneficiary claim has been accepted²⁸⁷, illustrate the unlikelihood of such a development.

A specific feature of judicial policies which might affect third party loss and third party beneficiary situations, is the reluctance of the (English at least) courts to infer implied contractual terms avoiding thus to intervene in private autonomy²⁸⁸. It is not possible, therefore, that either the third parties will be protected on the basis of an implied contract between the plaintiff and the defendant²⁸⁹, or even that implied intentions to benefit third parties will be easily accepted.

The issue was also raised in *Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.*, [1954] 2 QB 402. Devlin J. spoke in favour of the doctrine, and concluded that the seller/plaintiff was a third party beneficiary to the contract of carriage, enjoying the rights conferred by the Hague Rules, subject, however to the limitation of liability clause. See Dowrick, 19 (1956) *MLR* 375-393. He argues that third party beneficiary claims are accepted in English law in a limited number of cases, as that of a seller in whose favour a commercial credit is issued by a bank under contract with the buyer (the seller acquires the right to enforce the credit against the bank), or in the case of a bill of lading containing exclusion clauses, if the parties so intent. The rights from the bill of lading extend not only to the carrier but also to other person engaged in carrying out the services provided by the contract, or when "an intention on the part of the promisee to act as trustee for him [the third party] can be discovered" (377).

285 Fleming, 13 (1993) *OxfJLSt*, 437.

286 [1992] 3 *SCR* 299.

287 See Dowrick, 19 (1956) *MLR* 375-393

288 "The extreme reluctance of British courts to 'imply' terms is indication enough of their opposition to interfere with the parties' autonomy by resort to ulterior goals like fairness or other social policies." Fleming, 12 (1992) *OxfJLSt*, 558-563, at 560 See the same author in 13 (1993) *OxfJLSt*, 437: "... long experience with 'implication' warns against the slide into fiction.". (See also Cane, *P. Tort Law and Economic Interests*, 1991, whose reference to the question of economic loss, is discussed in Fleming's first comment.) In *Adler v. Dickson*, [1955] 1 KB 158, Lord Denning spoke of a 'necessary implication'. See Banaks 72 et seq on the different attitude of the French courts.

289 This was the view of Lambert JA in the Court of Appeal decision in *London Drugs Ltd v. Kuehne & Nagel International Ltd.*, (1990) 70 *DLR* (4th) 51. He thought this should be the case in order to avoid 'commercial absurdity'. Lambert JA said that if the employees could be liable for the whole of the amount, then, under the British Columbia contributory negligence statute *Kuehne & Nagel*, could be held liable to contribute to the damages. Lambert JA's arguments were weak not only because there was no evidence in the contract between owners and employees to support the argument that *Kuehne & Nagel*, had acted as agents for the employees, but also because they run against established authority in Canada, *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 *SCR* 228, on employees liability, and *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 *SCR* 1346, on contributory negligence The judge tried to distinguish the case on which he was delivering an opinion from these two cases. See Blom, 70 (1991) *CanBarRev*, 159-162.

In the case of third party loss or third party beneficiary claims, the courts have to tackle complicated questions such as the litigants' defences, and the variation or cancellation of the benefit²⁹⁰. Taking the courts' conservatism into account, it seems unlikely that consistent solutions could be expected from case law alone²⁹¹.

Legislation is likely to create problems of its own. A degree of uncertainty²⁹², especially at the initial stages, is inevitable with any reform proposal. However the legislative improvement of the third party position is certainly preferable to today's confusion and it would seem more tangible and effective than, for instance, the American Restatements of the law or the JQT in Scots law²⁹³.

The basic impetus for reform should derive from the dissatisfaction with the present state of the law and with the reluctance of the courts to respond to the acknowledged need to improve the position of third parties in a number of situations. Legislative reform is itself a difficult and complicated task²⁹⁴. From a practical point of view, a wide ranging legislative intervention seems unlikely²⁹⁵. As consent to a detailed

²⁹⁰ See the issues left undecided by the Law Commission.

²⁹¹ It would be advisable for example to offer advice on foreign systems and academic comments. Can the courts afford the time and effort to process this input.

²⁹² See Beatson, 45 (1992), *CLP*, 20-21.

²⁹³ See the Scottish Law Commission report No 38 and the Discussion Paper No 83 (1989), § 3.9. The Scots law on third party rights is not well developed after more than 400 years (considering that the first reported case of JQT dates from 1527), to the dismay of commentators and the SLC.

²⁹⁴ Legislation implies consensus which might be difficult to achieve. The process of reaching consensus involves discussion and compromise. Legislated law might have a diminished thrust in comparison to the initial intentions or in relation to the actual needs. In modern times of extensive regulatory intervention, Parliamentary time is scarce.

Academic comments evidence the complexity of the legislative task: It has for instance been plausibly suggested that any legislative attempt to allow third party beneficiary claims should take into account other forms of civil liability such as unjust enrichment in order to ensure the harmonious introduction of the relative provisions and to assess the purpose of awarding damages in specific cases, as well as to test the preferability of a contractual solution. Degeling, 6 (1993) *JCL* 185 et seq. Degeling is wandering whether it would be a hastily made decision to place the reform suggested by the LC under contract. However although she recognised that contract solutions will likely have some problems (especially evidence questions), the problems under different heading of liability are likely to be greater. Legislative attempts would moreover have to distinguish third party loss cases where no liability would have been accepted on any possible basis (and not only in tort). (Beatson, 45 (1992), *CLP*, 25).

²⁹⁵ Parliamentary time is limited, legislation requires a political decision based on broader consent (which is unlikely as the issue might prove to be controversial), and there does not seem to be some sort of formulated pressure for reform, as was indeed during some

plan might be more difficult to achieve, the Law Commission's suggestion for a detailed reform seems off the point.

The reference to the reform of privity²⁹⁶, was made here in order to offer some hints on the gravity of the task in common law. Most of the arguments formed with a view to the third party beneficiary question are valid for third party loss in general (for the predictable future at least), as the judicial attitudes responsible for the present state of law and the questions involved in the reform are similar. Judicially motivated reform cannot be excluded and it should be considered in the light of the likelihood of legislative intervention or even as a guide to the latter. It is true that in the case of third party loss (that is, as regards compensation claims) a change of judicial policy seems more tangible as the courts would not have to be involved in such extensive law making, at least not as obviously²⁹⁷. The argument to be considered is whether -- provided legislation is not possible --, contract is actually a more plausible option than tort for the protection of third parties.

10. Advantages of the contractual solutions.

The advantages of contract in third party loss cases have been highlighted before²⁹⁸. Liability might be easier to assess and potentially limited in financial terms. The contract model entails self-limitation as to the extent of liability²⁹⁹, on the basis of

stages of the failed 1937 attempt. (See Beatson, 45 (1992), *CLP*, 1, for an account of this attempt .).

²⁹⁶ See also Siebrasse, 45 (1995) *UTLJ*, 67 et seq. discussing the relative advantages of an approach where a general principle is applied on a case-by-case basis (which is preferred by the majority in *London Drugs Ltd v. Kuehne & Nagel International Ltd* and *Edgeworth Construction Ltd. v. N.D. Lea & Associates*), and that of fashioning narrower categories of cases and special rules of presumption to apply in these categories.

²⁹⁷ See Blom's comment on the division of the Court of Appeal majority between three tort-based views and one opinion acknowledging the existence of a contract. The former were involved in law making, the former however to a larger, far reaching scale. Blom, 70 (1991) *CanBarRev*, 156-174.

²⁹⁸ See especially "Benefits from contractual solutions: An improved perspective", in Chapter 4, and "Advantages" in Chapter 5. See also See Brodie in *Scots law into the 21st century*, who acknowledges that "the key to all this [the contractual element in certain pure economic loss cases] may lie in an overall evaluation of the contractual matrix.." (p.209).

²⁹⁹ The limitation here concerns the number of potential claimants. In effect it refers to the level of financial exposure.

the causal and teleological interpretation of the transaction in question³⁰⁰. It was suggested, for instance, that in the case of interrelated contracts there should be contractual liability only when the contracts are necessary parts of the particular transaction or economic activity. Contract law would provide no compensation for product liability under this reasoning³⁰¹. Moreover, the use of contract will facilitate and make more predictable the treatment of defences, especially those based on limitation clauses³⁰².

Deciding on the basis of contract will facilitate the task of the courts as it resembles the application of a general rule to particular circumstances, contract being an adjustable mechanism³⁰³. For this reason, that is contract applying as a general rule, case law can become more consistent and better reasoned. Judges are experienced in dealing with particular forms of contract and could resort to case law or legislation in tackling the peculiarities of specific instances, something which would be more difficult under tort law. Thus, contract law combines and balances the advantages of a means of general application with the experience from particular categories of voluntary relationships³⁰⁴.

³⁰⁰ See Swanton 10 (1996) JCL 21, on concurrent liability. She generally suggests that the effects of contract and tort when they seem to apply concurrently be equalised.

³⁰¹ This idea is expressed on the model for dealing with pure economic loss in cases involving chains of contracts, suggested by Beyleveld and Brownsword. This model is based on the breakdown and subsumption principles. According to the former a claim should be rejected if the plaintiff has a (contractual) remedy to protect his interests. According to the latter a claim should be accepted if the contract to which the defendant is a party is functionally and causally subsumed to the one the plaintiff is a party. the former contract must be a component of the latter. This is not the case with product liability claims, where the different contracts are not organically related. (Beyleveld, and Brownsword, 54 (1991) MLR 64-68).

³⁰² As was argued, it will "spare us collateral problems (such as the applicability of the limitation clauses)". Fleming, 5 (1993) *Canterbury LR*, 269.

³⁰³ Siebrasse, 45 (1995) *UTLJ*, 67 et seq. discusses the advantages of a general rule applied on a case-by-case basis as was the case in *London Drugs Ltd v. Kuehne & Nagel International Ltd* and *Edgeworth Construction Ltd. v. N.D. Lea & Associates*. In practice there are a multiplicity of factors which need to be taken into account, in a process requiring expertise opinion which is not possible to have at least at all times. There have been unsatisfactory results from the application of this technique which the Supreme Court of Canada itself realised, the errors occurring because of misapplication of the principle.

³⁰⁴ In Siebrasse's words a method of formulating narrower categories of cases and specific rules of presumption applying in these cases, which seems to be the suggestion of La Forests J in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, "can alleviate the problem of lack of expertise by providing easily identifiable fact patterns which are not necessarily relevant to the underlying principle to categorise cases.". (Siebrasse, 45 (1995) *UTLJ*, 69). However, errors are inevitable as the classifications are bound to be imperfect and cannot always reflect accurately the underlying principles.

Similarly, the adoption of a JQT, advocated by many commentators and two Law Commissions' reports in this century, would have positive effects³⁰⁵ on common law even if it will only replace some of the legal fictions the courts use to evade privity³⁰⁶. Finally, the critique on the contractual solutions ignores the fact that the models discussed are relieved from strict intention requirement; the models are not identical to contracts in favour of third parties³⁰⁷.

11. The case for contract.

³⁰⁵ As Dowrick put it "The doctrine rationalises the cases by going behind the fictions and expressing what was evidently the principle which actuate the judges in the particular decisions. It would cut the Gordian knot of case law on constructive trusts which is notorious, and thereby save time in courts and cut down costs for litigants. It would enable the courts to escape one highly inconvenient implication of the trust concept, namely, that the original parties lose the power to vary or abrogate the promise in the third party's favour, and to escape the awkward implication of the fictitious contract or agency - that if the beneficiary is a principal to a contract he is bound by contractual duties." Dowrick, 19 (1956) *MLR*, 387.

It has been the suggestion of Curwen (Curwen, N. "The Problem of Transferring Carriage Rights: An Equitable Solution", 1992 *JBL*, 245-260), that the transfer of a bill of lading could be treated as an equitable assignment of the seller's carriage rights enabling the recipient of the bill to sue the carrier on the carriage contract. This seems to be Goode's opinion as well (Goode, R.M. "Ownership and Obligation in Commercial Transactions", 103 (1987) *LQR*, 433). There are sufficient opposing evidence from the case law. Curwen thinks the assignment solution is possible, as it is possible to assign contractual rights in support of proprietary interests. He focuses on the intention to assign carriage rights and underlines that there can be informal assignment outside the statutory machinery provided an intention to assign is evident (255). Curwen writes before the suggestions of the Law Commission led to the Carriage of Goods by Sea Act 1924, and argues that this equitable assignment solution might be one of the few viable remedies available to the buyer. Goode enumerated the advantages of the solution: There would be no need to comply with the specific legislative requirements which restricted remedies. As the holder of the bill would be the beneficiary of the carriage rights the carrier would not face double liability. By requiring the shipper to be joined as party to the action the carrier obtains a good discharge because the shipper cannot later assert that he owned the goods. The carrier could rely on the defences of the Hague-Visby rules. And the assignee could obtain the benefit of the estoppel of the Bills of Lading Act 1855 available to consignees and indorsees.

³⁰⁶ See previous reference. See Lorenz and Markesinis, 56 (1993), *MLR* 562; "If tort plain and simple is accepted, discovering a duty, in future but not identical cases, will be left to the vague notions of proximity, fairness, reasonableness and the like. Determining the expansion of the contractual duty (which is owed to the testator) to include third parties is much more manageable and concrete if one is doing it by searching for his 'intention' to benefit the third party. The contractual test is thus, if properly used, more definite."

³⁰⁷ As seems to be Whittaker's idea. Whittaker 16 (1996) *OxfJLSt* 198. See under "Legal basis for a contractual solution -- Introduction", in Chapter 5, on the model of a possible contract solution.

As mentioned in the chapter on Scots law, the question of whether third party loss should be compensated at all, precedes the question of contractual solutions. It is difficult to answer in abstract. However, it is clear that a blanket exclusionary rule is undesirable, and that in a number of cases there are serious legal and economic arguments to support compensation for third parties³⁰⁸. It is hoped that a contractual point of view will enable a consistent identification of the cases for which compensation is justified.

Contractual solutions enjoyed limited attention in common law oriented literature, usually on the occasion of presenting the German mechanisms³⁰⁹, and even less so in decisions³¹⁰. The purpose of these comments has been to highlight the advantages of such an approach, arguing, for instance, that for triangular situations such as *Caparo Industries plc v. Dickman*, *Tai-Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.*³¹¹ and *Greater Nottingham Co-operative Society v. Cementation Piling and Foundation Ltd.*³¹², contract is preferable especially as regards clarifying the standards of performance and the application of exclusion or limitation clauses³¹³. As a consequence of the confusing picture of the third party pure economic loss, credible studies and suggestions on contractual solutions usually refer to particular areas of law only, for example, construction law³¹⁴.

308 Feldthussen, *Economic Negligence*, 221 et seq.

309 See, for instance, Markesinis, 103 (1987) LQR 354, and *The German Law of Torts* 3rd ed., 1994, Kötz, (1990) *Tel Aviv University Studies in Law*, 195, Fleming, 12 (1992) *OxfJLSt*, 558-563, Shaw, Josephine "Recovery of third party loss in German Law" 1987 *JBL* 55-60, Curwen, 1992 *JBL*, 245-260, and Lord Goff in *The Aliakmon and White v. Jones*. However in American case law the third party beneficiary rule has been applied in third party loss cases, and there has been support for an extension of the rule's use to other pure economic loss cases.

310 See again Lord Goff's reference to the German contractual mechanisms and to the English language related literature, namely Markesinis and Kötz, in *The Aliakmon, Henderson v. Merret Syndicates*, and *White v. Jones*.

311 [1985] 3 WLR 317, [1985] 2 All ER 947 (PC).

312 [1989] QB 71.

313 Markesinis and Deakin, 55 (1992) MLR 627, and Markesinis, "Eternal and Troublesome Triangles", 106 (1990) LQR 556. See Fleming, 13 (1993) *OxfJLSt*, 435-437, discussing the inadequacy of the duty analysis.

314 Usually those involving multi-contract relationships, such as network contracts in the construction industry. (See Beyleveld and Brownsword, 54 (1991) MLR 48). The discussion for adopting a third party beneficiary rule envisages a more comprehensive reform.

There has been little discussion on the way to introduce contractual solutions in common law jurisdictions. The obvious possibility is a generously interpreted form of contract in favour of third parties or a JQT³¹⁵, without emphasis on the parties' intention. However, it is clearly implied from *White v. Jones*³¹⁶ and has been expressly contemplated in the New Zealand case of *Gartside v. Sheffield, Young & Ellis*³¹⁷, that a JQT, which for New Zealand has been statutorily introduced, would not suffice to award damages for third party loss³¹⁸. This is the result of emphasis being laid on the parties' intentions³¹⁹, and the reluctance of the courts to infer implied terms. Regarding English law, even if the Law Commissions's proposals for the reform of privity were accepted "there would still be situations where the parties ... intended also that the remedies be left in the hands of the contracting parties themselves."³²⁰ Thus, even a JQT would only marginally change the law on third party pure economic loss in Commonwealth countries, at least for the foreseeable future.

315 Considering that the two are not strictly speaking identical although represent the same concept, a third party deriving rights from a contract.

316 Lord Goff discussed Markesinis suggestion to make available to the third party the benefits of the contractual rights of the testator or his estate against the negligent solicitor. He notices the doctrinal obstacles of consideration and privity. "To proceed as Professor Markesinis has suggested may be acceptable in German law, but in this country could be opened to criticism as an illegitimate circumvention of these long-established doctrines; and this criticism could be reinforced by the fact that, in the case of carriage of goods by sea, a contractual solution to a particular problem of transferred loss, and to other cognate problems, was provided only by recourse to Parliament", *White v. Jones* [1995] 1 All ER (HL), 691 at 708

317 [1983] NZLR 37, at p.42.

318 In contrast to the law in California and Germany. Fleming, 109 (1993) LQR, 347.

319 See under the two units titled "Theoretical considerations" in Chapter 2, where it is underlined that due to the intention requirements §328BGB could not serve as the basis of the mechanisms. See also "The way to achieve contractual solutions" in Chapter 4, and "Legal basis for contractual solutions" in Chapter 5, on the possible model for the American and the Scottish system respectively, which should not employ a strict intention criterion.

320 Cartwright 10 (1996) JCL, 244. He focuses, however on the effectiveness of the claims of the contracting party. "If the party who had stipulated for the benefit ... wished to complain that the benefit had not been conferred, he would, therefore, still be left without a generally effective remedy, if he could seek neither specific performance nor substantial and adequate damages for the defaulting party's breach". Cartwright discusses third party loss in the light of *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*, [1994] 1 AC 85 and *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 1 WLR 68

A basic hypothesis in favour of adopting promise-based³²¹ approaches to liability, and of the possibility for the judicial introduction of such approaches, could be that the potential for reform is latent³²². This potential is evidenced in the courts' predisposition towards contractual solutions, in academic comment and in statute law.

First, there are positive signs in the legislation endorsing third party beneficiary rights³²³. More importantly, there is a gradual realisation among judges and academics of the special issues posed by third party loss situations and of the need to improve the position of third parties³²⁴, though the trend is not as strong as in American law, nor

321 Kincaid observed that the minority in *Trident General Insurance Co. Ltd. v. McNiece Bros Pty. Ltd.* was ready to accept a promise-based but, possibly, not a contract-based liability. Kincaid, 2 (1989-1990) *JCL* 169.

322 See the previous reference to Andrews who suggests that the third party beneficiary acquires rights on the contract suggesting that the division between primary and secondary obligations (and corresponding rights) and tertiary (remedial) rights is sound and that unless the third party right is established the promisor's undertaking will be empty of content in those cases where breach causes the promisee no personal loss. He interpretes *Beswick v. Beswick*, [1968] AC 58, as being consistent with the proposition that the third party holds both primary and secondary rights. Andrews 8 (1988) *LSt* 15, 30, 33.

323 See the statutes allowing third party beneficiary claims in Australia and New Zealand. See the recent example of the Carriage by Sea Act 1992, in England. See Dowrick, 19 (1956) *MLR* 374, who refers to examples of intervention by the Parliament to offer recognition to some limited classes to third party beneficiaries. See the reference to cases on legislative intervention in favour of third party beneficiaries in the LC, Consultation Paper No 121. See Andrews 8 (1988) *LSt* 14.

324 Prominent examples from the case law are *Hedley Byrne, Junior Books, Smith v Bush*, (treated as akin to contract), *Henderson v. Merret Syndicates Ltd*, *White v Jones*, *Ross v. Caunters*. As is the case with the latter example, privity did not hinder the award of compensation; in fact the tort claim was aiming at avoiding the constraints of privity. In one view, for instance, *Junior Books* is distinguished from *Anns* on the fact that for the former the contract was essential; damages were awarded for a breach of contract, while in *Anns* the duty of care was independent from the contract. Jaffey, J.E. "Contract in Tort's Clothing" 5 (1989)*LSt* 77 at 95. Jaffey describes the *Junior Books* as a return to the earlier common callings law.

In the words of Fleming "as is also coming to be realised in England, the operation of tort law in the context of a planned transaction calls for a modification of the rules familiar with the 'classic' non-consensus situations like the typical traffic accident." Fleming, 13 (1993) *OxfJLSt*, 435-436.

See, for an illustration, Lord Goff's opinions in *The Aliakmon*, *White v. Jones* and *Henderson v Merret Syndicates Ltd*, and the tort-oriented opinions in the appellate and the Supreme Court decisions in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, as well as the comments on the latter.

See Beale who discusses a number of decisions where the privity rule was sidestepped for the sake of reaching sensible and fair decisions. Such decisions, he underlines, have not eliminated the need for further reform. They did not in his view address the central question about the third party's right to sue. Although they showed willingness to use concepts such as a duty of care and bailment effectively, they were limited by those very concepts. (Beale, 9 (1995) *JCL* 110-112)

doctrinally justifiable as easily as in Scots law³²⁵. In both these systems contracts in favour of third parties are accepted but not privity. Another sign of change is the erosion of the doctrinal link between privity and consideration, and the weakening of the latter (even in English law³²⁶). The incremental approach to pure economic loss has been hailed with optimism for the development of the law from established categories³²⁷, while the use of voluntary assumption of responsibility has been treated as evidence of a progressive integration of contractual and tortious duties of care³²⁸. There is, moreover, the continuing appeal of the concept of a voluntary assessment of responsibility³²⁹ or of other means

See also *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*, [1994] 1 AC 85 which created an exception to the rule "that a claim for a breach of contract can compensate the plaintiff's own losses" and Cartwright's consideration of the third party loss (*Cartwright* 10 (1996) JCL, 244). See also *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 1 WLR 68 that unfortunately will not reach the House of Lords. See finally *Williams v. Natural Life Health Foods Ltd* [1996] 1 BCLC 288, Walters 17 (1996) *The Company Lawyer* 247-248.

³²⁵ See under "Tort v. Contract: Third parties and pure economic loss" in Chapter 4, and "Scots law doctrines" in Chapter 5.

³²⁶ See Chen-Wishart, Mindy "Consideration: Practical Benefit and the Emperor's New Clothes" in Beaton and Friedman *Good Faith in Contract Law*, Oxford 1995, 123-150. She discusses consideration in the light of the recent *Williams v. Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1, which by incorporating a 'practical benefit' into the definition of consideration seems to redefine the boundaries of considerations and with these those of contractual liability, as 'practical' might mean unenforceable, may be simply a promise. See also Carter, J. W. Phang, A. Poole, J. "Reactions to *Williams v. Roffey*", 8 (1995) JCL 249-271.

As has been promptly indicated [Dowrick, 19 (1956) *MLR* 375-393, and Kincaid, 8 (1994) *JCL* 51-66] a basic feature of privity and third party rule in their doctrinal and historical context has been consideration; more specifically the idea that it should originate from the promisee. There might be a dynamic towards alleviating the requirements of consideration and disentangling it from privity so that consideration is not a problem at least as regards third party beneficiary claims. The question of the weakening of the consideration doctrine will be addressed in the last chapter.

Andrews 8 (1988) LSt 14, is not arguing against privity but in the way it has been interpreted by the courts considering that third party protection is legitimate in English law.

³²⁷ Capper, Phillip in *Legal Times Supplement*, May 1996 17, referring to *Henderson v. Merret Syndicates*, *White v. Jones* and *Marc Rich v. Bishop Rock*, [1995] 3 WLR 227. McMillan argues that this form of development is more adopted with the traditional English law view and not with the Scots law one which draws more upon principle than precedent. McMillan 1996 SLT 163.

³²⁸ Oughton 1 (1995) *Contemporary Issues in Law* 35-42.

³²⁹ The critique on the concept is not discussed here. It could arguably be no more than a legal fiction, and it could serve as a pretext to apply policy considerations. The latter is true for concepts such as proximity or justice. (See the critique on McLaughlin's opinion in

evidencing the incorporation of contractual considerations in tort law such as reliance on professional performance³³⁰. One of the suggestions for the improvement of the treatment of pure economic loss involves specifically the incorporation of contractual considerations in the courts' reasoning³³¹. There have been breakthrough decisions such as that in *London Drugs Ltd v. Kuehne & Nagel International Ltd.*³³² The latter is pioneering from the point of view of its legal basis and because it is potentially opening the door to lower courts to pursue similar policies³³³. It is even possible to consider that *White v. Jones*³³⁴ and *Henderson v. Merrett Syndicates*³³⁵ might offer evidence of the English courts beginning to realise that *Murphy* and the reversal of *Anns* were a terrible mistake. However the Privy Council in the recent decision on *Invercargill City Council v. Hamlin*, thought that "It was regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle."³³⁶ Finally in the light of *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd*³³⁷ and *Darlington Borough Council v. Wiltshier Northern Ltd*³³⁸, there seems to be a question before English courts, notably the House of Lords, on the characterisation of the creditor's loss in third party loss situations. The assumption that the creditor has suffered no loss had obstructed the courts from awarding damages. It seems that the opposite tendency can now be traced. It has been argued, that the creditor might be

London Drugs Ltd v. Kuehne & Nagel International Ltd, by Baer, 72 (1993) *CanBarRev*, 395-396)

330 See under "Third party pure economic loss: Contractual approaches in Chapter 5 on the doubts over the credibility of reliance as the legitimising reason to award damages. Reliance can be relied upon as evidence to the assumption of responsibility, the most common basis for liability for pure economic loss.

331 Lorenz and Markesinis, 56 (1993), *MLR* 561.

332 [1992] 3 SCR 299. Recall also *Junior Books* and *Anns*.

333 "It is now open to any court to establish a new exception [to privity] whenever justice and commercial convenience require one, but, on the other hand, no court is required to enforce a contract for the benefit of a non-party where the enforcement would provide injustice and inconvenience. The word 'incremental', though implying slow growth, nevertheless also implies growth.". Waddams, 109 (1993) *LQR* 351.

334 [1995] 2 WLR 187.

335 [1994] 3 WLR 761.

336 *The Times*, February 15 1996.

337 [1994] 1 AC 85

338 [1995] 1 WLR 68

allowed to claim damages for the loss caused by the breach of contract as his own³³⁹ and that the damages belong, from the point of view of the House of Lords, to the injured third party. The fact is that the relative evidence is feeble³⁴⁰.

The reaction of commentators to decisions protecting third parties is generally encouraging, at least as regards the endorsement of contract-based considerations³⁴¹.

³³⁹ See Cartwright 10 (1996) JCL, 244. The idea is to recharacterise the plaintiff's loss. Cartwright lays emphasis on the decision in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*, particularly Lord Griffith's view that he could not accept that the recovery of more than nominal damages by the creditor could be dependent upon his having a proprietary interest on the subject matter of the contract at the time of the breach. The same view was accepted by Steyn LJ in *Darlington Borough Council v. Wiltshier Northern Ltd.* Cartwright argues that this approach could be applicable not only to contracts for the supply of goods and/or the performance of services as in *Linden* and *Darlington*, but also in contracts involving promises to pay money as can be evidence by Lord Scarman's judgment in *Woodar Investment Development Ltd v. Wimpey Construction UK Ltd.*, [1980] 1 WLR 277 at 300-301. Cartwright supports his arguments on the possibility for a change in the characterisation and quantification of the creditor's damages in third party loss cases with evidence from *Ruxley v. Forsyth*, [1995] 3 WLR 118, which was not a third party loss case. The House of Lords in a case over the construction of a swimming pool not fulfilling the provisions in the contract as to its depth at the deepest point, faced with the possibility for damages involving either the cost to cure the defect or the difference in value between the works properly performed and the works as completed, considered that the economic loss of the owner, employer of the defendant contractor was zero and yet it reinstated the trial judges award of £2,500 for the loss of amenity in having received a pool below the standards agreed upon. Cartwright believes that the decision offers evidence of the intentions at the House of Lords to investigate carefully the situations where there appears to be no monetary loss. Important is also that the court thought in *Ruxley* that in order to decide on the reasonableness of the damage it might also need to take into account what the plaintiff's intention as to the use of the damages. Cartwright suggests that the plaintiff's loss should be recharacterised so as to accept a general rule that the party is entitled to what he has agreed upon even if a third party would have benefited in economic terms. The two alternatives is first, to allow such claims as a narrow exception to the rule that the plaintiff can only claim damages that are his own as in *Linden*, and, second, Lord Griffith's view to characterise the loss as the plaintiff's. In *Linden* the court refused to generalise the circumstances where third party loss can be recovered. Cartwright discussed whether the damages are considered to belong to the third party, and thinks this is the case providing evidence from *The Albazero*, [1977] AC 774.

³⁴⁰ See the previous footnote. Apparently there are very few related cases. *Ruxley v. Forsyth*, [1995] 3 WLR 118, is not a third party loss case. Cartwright admits the uncertainty surrounding the whole issue. He offers evidence of the difficulty in recharacterising the plaintiff's loss from the Court of Appeals decision in *Donnelly v. Joyce*, [1974] QB 454, valid law until recently where it was stated that the victim could claim his own loss only and the only problem was the valuation of this loss, allowing the plaintiff in practice the value of the carer's loss, whereby the carer was a relative and his loss that involved in his giving up employment. Only recently in *Hunt v. Severs*, [1994] 2 AC 350 the House of Lords seems to have doubted the validity of *Donnelly*. The fact that the House will not rule on *Darlington Borough Council v. Wiltshier Northern Ltd* perpetuates the uncertainty on the plaintiff's claims in third party loss cases. Cartwright 10 (1996) JCL, 257-8.

³⁴¹ Recall, that, in commenting on *London Drugs Ltd v. Kuehne & Nagel International Ltd*, both Blom (commenting on the Court of Appeal decision) and Baer (commenting on the

There are certain signs of improvement in the quality of the courts approach. In *White v. Jones*³⁴⁶ the speeches, unlike the counsel³⁴⁷, dealt with the arguments on the point. The case could be heralding a shift of the focus towards legal pragmatism. In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*³⁴⁸, the decision is meticulous from the point of view of the cases and foreign systems referred to, and of the implied importance attributed to comparative views³⁴⁹. The same applies to *London Drugs v. Khuene & Nagel*³⁵⁰, where "all five judgments are alive to the functional realities of the 'contort' situation and evince a determination to overcome doctrinal impediments on the road to a commercially acceptable decision", and where attention was paid "more to the actual decision than to what the courts said in explanation"³⁵¹. As a whole, the emerging judicial style of the Supreme Court of Canada is markedly different from that of the House of Lords. The decisions in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*³⁵². and *London Drugs Ltd v. Kuehne & Nagel International Ltd* achieved great majorities, although not on the legal bases. Finally the Privy Council seems to tolerate differentiations between the jurisdictions based on the courts' perception that the circumstances in other jurisdictions are different from those in English law³⁵³.

346 [1995] 2 WLR 187.

347 Fleming, 109 (1993) LQR, 348-349. All three judgments spared the usual load of quotations, and addressed "instead substantive arguments that clearly express, not cloak, their reasoning." (349). In contrast Counsel read thousands of pages and referred to a vast number of decisions, without referring to a single piece of academic writing on *Ross v. Caunters*, according to the comment by Steyn L.J. Fleming hails the inauguration "of a new epoch in judicial style" (348), the "return to the pragmatic heritage of the common law" (349), which is marked by the decision.

348 [1992] 91 DLR (4th) 289.

349 As Markesinis notes the decision quoted 32 academic writers, covering seven countries, and 62 decisions from five jurisdictions, making thus unprecedented use of foreign law. (Markesinis, 109 (1993) LQR, 11).

350 [1992] 3 SCR 299.

351 Fleming, 13 (1993) OxfJLSt, 438-439, The court embarked on a close analysis of precedents, especially its own, focusing not on the decision itself but on what the court said in its explanation. Thus as noted by both Iacobucci J. and La Forest J., there were no precedents against the present decision.

352 [1992] 91 DLR (4th) 289.

353 See the decision of the Privy Council on the appeal against *Invercargill City Council v. Hamlin* [1994] 3 NZLR 513, 11 (1995) *ConsLJ* 286 (Burr, Franklin, Ramsey, eds). *The Times*, February 15 1996. As said, New Zealand judges were in a much better position to decide on the questions of the case than the Board of the Privy Council, irrespectively of

There is no evidence, however, of the courts taking account of the academic comments on pure economic loss, or on privity, or on contractual protection for third party loss. Lord Goff referring to the German contractual mechanisms is an exception³⁵⁴. It would be important for shaking off the privity constraints if the courts were sensitive to academic critique on the doctrine's theoretical foundations and on the meaning of the third party rule in the common law rationale³⁵⁵. It is doubtful whether judges are sufficiently informed on academic suggestions.

Nonetheless, this account of positive signs with regard to a contractually based treatment of third party loss does little to change the overall picture of confusion and uncertainty. As said, in England at least, the attachment to doctrine and the understanding of judicial authority are deeply entrenched. These latent signs are rather circumstantial and do not amount to some consistent majority opinion as far as courts are concerned. It is hoped that the judiciary have at least realised the special situation of third party loss. However, significant academic effort has had little effect. The problem, as has already been expressed, centres on judicial attitudes. It is hoped that this accumulation of positive signs could have indicated the potential for development which has to be matched with judicial determination which, unfortunately, is lacking especially as regards a broader reform.

whether the circumstances in New Zealand and England were in fact so very different: "What mattered was the perception.". There are other Privy Council decisions accepting liability for pure economic loss. See *Brown v. Heathcote City Council*, [1987] 1 NZLR 70, Privy Council [1987] 1 NZLR 720, *NZ Shipping Co v. Satterthwaite (The Eurymedon)* [1975] AC 154, *Stieller v. Porirua C.C.* [1986] 1 NZLR 84. There are however decisions by the privy Council to the opposite direction. See *Candlewood Navigation Corpn v. Mitsui OSK Lines Ltd, (the Mineral Transporter)*, [1986] AC 1, [1985] 2 All ER 935 and *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] 1 AC 80, [1985] 3WLR 317, [1985] 2 All ER 947 (PC).

³⁵⁴ In *White v. Jones*, for instance, examining the German experience, Lord Goff, refers to the work of Lorenz (in *The Gradual Convergence*, Markesinis, ed, 1994) Markesinis, (103 (1987) LQR 354), Kötz, (1990) *Tel Aviv University Studies in Law*, 195, [1995] 1 All ER (HL) 705-706.

³⁵⁵ As, for instance, Flannigan's argument that privity is not justified on the basis of any theory of contract (Flannigan, 103 (1987) LQR 564-593), or Drowrick's view that a JQT is compatible with the basic authorities of English law (Dowrick, 19 (1956) *MLR* 390 et seq, and Andrews 8 (1988) *LSt* 14). Little attention was paid to suggestions such as that of Curwen, 1992 *JBL*, 245, to transfer carriage right on the basis of equity.

However, as the evaluations of the decisions usually differ³⁴², there is accordingly disagreement as to the extent and form of change in judicial policy which would be considered acceptable³⁴³. Even so, the differences in opinion among academic commentators are not as confusing as the case law itself. The suggestions for upgrading the role of equity principles and of good faith in particular, should also be mentioned³⁴⁴. An increased role of good faith could drive the courts towards accepting the existence of duties of care in more cases where loss is carelessly inflicted, as examples from the application of the provision of good faith of the Civil Code of Quebec indicate³⁴⁵.

decision of the Supreme Court) show their preference for the opinions which take into account the contractual context of the transactions and the policy implications it has. Baer, 72 (1993) *CanBarRev*, 385-402, Blom, 70 (1991) *CanBarRev*, 156-174.

See also Cartwright 10 (1996) *JCL*, 244 suggesting a change in the law on third party loss, following *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.*, and *St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd.*, [1994] 1 AC 85 and *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 1 WLR 68

³⁴² According to a somewhat different evaluation the Court of Appeal decision in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, for instance, the majority qualified the employee's duty of care (Swadling, 4 (1991) *JCL* 216-217). The contractual setting is central to this qualification.

³⁴³ Waddams, for instance, thinks that the decision in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, was wisely cautious not to abrogate outright the privity rule, as it would have set a binding precedent for the lower courts (109 (1993) *LQR* 351). Baer considers that the opinion of the majority contained no mechanisms for limiting the relaxation of privity (Baer, 72 (1993) *CanBarRev*, 398-399).

³⁴⁴ See *Good Faith and Contract Law*, Beatson and Friedman, eds, 1995

³⁴⁵ See *Bank de Montréal and Gilles Tremblay v. Commission Hydroélectrique du Québec (Hydro-Québec), Bail Ltée (Bail/Sotrim), et Travelers du Canada, compagnie d'indemnité*, [1992] 2 SCR 554. The case involved, among other things, a claim in delict by the assignees of the subcontractors (they were assignees of the subcontractor's accounts receivable; the subcontractor had gone into bankruptcy) of engineering work against the owners who have violated their duty to inform the subcontractors on the condition of the soil as described in a study that the owners had at their disposal. The duty to inform was based on the duty of good faith of §1375 of the Civil Code of Quebec. §1375 reads: "The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished." (*Code civil du Québec*, Kélada, H. (ed) 1993, Carswell). The Supreme Court of Canada allowed the appeals by the assignees of the subcontractor overruling the decision of the Court of Appeal that reversed the Superior Court's judgment in favour of the claimants. The decision is meant to consolidate the law of Québec as regards at least the duty to inform in delict. As noted, the failure to perform a contractual obligation, as a juridical fact, may form the basis for an action in delictual liability by a third party against the contracting party who is at fault.

12. Conclusion.

There are definitely positive developments in the Commonwealth systems (including the English one) in the recent years, with regard to third party loss. In England the rule is to reject such claims. Even in the Commonwealth systems discussed here there is considerable uncertainty. The reluctance of the courts and previous experience with the introduction of a contract in favour of third parties in England justify a less optimistic view of the future in English law. After decades of discussion³⁵⁶ there seems to be a stagnation in English law which the courts seem to believe could change by means of legislation only. It is unclear whether the progressive trend elsewhere will be viable and lasting. This is worrying for a system which is based on judge made law and relies on judicial creativity³⁵⁷. A planned, organised statutory reform is unlikely. One could hope for further gradual erosion of the doctrines of privity and consideration and for greater awareness of the situation and self-confidence by the courts.

³⁵⁶ One could notice the fluctuations of the case law on the third party pure economic loss. The question arose with *Hedley Byrne* in 1964. It is in the last 15 years that the debate has intensified. In England the high point of *Junior Books* was never reached again. Instead the law seems to be becoming entrenched in a stalemate.

The decades of simmering debate on the third party beneficiary claim evidence the arduous task of reform. The debate is going back 50 years at least to the proposals of the Law Revision Committee in 1937.

³⁵⁷ See Markesinis and Deakin, 55 (1992) MLR 641, noting that civil law lawyers are surprised as when they are told of the extent the common law of torts has "been modernised by statute or a result of judicial abdication".

Chapter 7: Conclusion.

1. Introduction.

The contractual mechanisms applied in German law on third party loss cases were the starting point of this work. The identification of the problem as the loss caused to non-parties due to the violation of contractual obligations was based again on the German law approach. In common law this is a problem of pure economic loss; however, in a number of cases where the cause of the loss was a contractual violation, the links to a contract and/or the similarity of the plaintiff-defendant relationship to a contractual relationship has been duly acknowledged¹. The delimitation of the relative group of cases is based on the observation that the effects of contracts often extend beyond the parties. The study had the specific purpose of examining the prospect of developing contract-based protection in other jurisdictions instead of what appears to be the natural option, delict.

German law shares with common law a strong aversion towards extending liability beyond physical or property damage, as well as the belief that pure economic loss falls into the domain of contract². The trend in common law of pure economic loss was to opt for tort solutions due to the inadequacy of contract law³. By contrast, in Germany the trend was towards contractual solutions due to the inadequacy of the BGB system of enumerated delicts to accommodate pure economic loss⁴. As demonstrated, German law developed contractual solutions because of the rigidity of the law of delict, while common law focused on tort due to the rigidity of contract doctrine⁵. As argued, contract law was the only plausible way to provide compensation for third parties in German law. This was not the case with Greek law, where delict provides protection and can be further improved to

¹ As in *Junior Books* or *Hedley Byrne*.

² As said both systems share "hostility towards pure economic loss". Markesinis, and Deakin 55 (1992) MLR, 633-634. See also Castronovo in Wilhemston, 273-289.

³ Castronovo in Wilhemston, 282, Markesinis, 103 (1987) LQR 354-397.

⁴ Castronovo in Wilhemston, 283, Markesinis 103 (1987) LQR 354-397.

⁵ Privity and the related doctrine that pure economic loss is compensated under contract only.

balance competing interests more fairly. In the American system, contract law, namely the third party beneficiary rule, is applied in some third party pure economic loss cases. It seems that, in American law, reform based on the expansion of contract law is preferable to improving tort law, which is nevertheless more protective of third parties than tort law in other common law systems. The development of contract-based protection in Scots law, even if it seems a distant possibility, is still a more plausible option for reform than the development of the defunct law of delict. Even in Commonwealth systems where reform seems to face harder constraints from both contract and tort doctrines, the argument in favour of a contract-based approach appears promising or, at least, not totally beside the point.

In this conclusion, the methodological approach will first be re-evaluated and, subsequently, two basic accounts on issues on substance will be made. The one concerns the role of the judiciary in promoting reform and the other the overall lessons to be learnt from the review of the systems in this study regarding the optimal development and the virtues to be looked for in a system of civil liability.

2. Methodological issues revisited.

As discussed in the introduction, the microcomparative⁶ character of this study, the very specific nature of the problem in question, and the need to avoid reiterating studied differences between common law and civil law systems, significantly determine the decision to examine a fairly large number of systems and to focus on individual jurisdictions. Eventually, the study's scope and expectations, are thus determined. As the broad similarities between the systems illustrate, the selection of the topic, which is after all a matter of personal choice is crucial.

⁶ A microcomparative view focuses on a particular legally significant social problem, and its treatment in different jurisdictions, unlike a macrocomparative view where entire legal systems are compared. Although the delimitation between the two is often difficult to make, the subject of this thesis is clearly microcomparative. The criterion for the existence of a legal problem is one of function, involving the solutions to the situations in question. Rheinstein 208. The very definition of a legally interesting social problem, entails difficulties because it is itself an evaluative judgment. Comparative law often has to rely on other social sciences for this evaluation. See Zweigert and Kötz 5 et seq. .

The study's *raison d' être* is justified in the sense that, as shown, a legal problem related to third party pure economic loss that arises in similar situations⁷ and that involves similar concerns exists in all the jurisdictions. The problem is compensating third parties while protecting the legitimate interests of the defendant. It is presented differently in each system, with emphasis on different aspects of civil liability⁸, and its seriousness varies⁹, but in fact similar considerations are posed.

The decision to focus on the legal orders separately and in depth¹⁰ was especially useful in order to illustrate the role of the judiciary, as 'black letter' law or known

⁷ In all the jurisdictions the question boils down to compensating the third party under a regime sufficiently flexible to balance the private interests involved and the related social policy concerns such as to avoid the excessive financial exposure of the defendant, which could discourage economic activity. Reviewing the possibility for contractual solutions is also a common concern, since - as was shown - contractual solutions or the incorporation of contractual standards, is generally advantageous. For instance, the relative defences are taken into account more efficiently, the financial exposure is or can be limited to the dimensions of the contract, and evidencing is facilitated. (In Germany and Greece there is a presumption of fault in contractual liability which transfers the burden of proof, that there was no fault to the defendant.). Moreover, as indicated in the concluding remarks, a common element related to the promotion of reform (or generally the improvement of the current situation) is that of judicial activism raising, among others, questions of legitimate judicial law-making authority. Thus, for instance, although the possibility of lack of judicial authority seems stronger in relation to the Greek and Scottish systems, from the point of view of constitutional arrangements, it was proven similarly substantial with regard to the Commonwealth judiciary. The authority of the German judges has been doubted as well.

In conclusion, the microcomparison is therefore plausible. As Kamba puts it, the commentator should make sure that "legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions in another system", (517).

⁸ This phrase implies a unified view of civil liability, which, it is hoped, is compatible to common law approaches.

⁹ The lengths reform has to go differ accordingly. There is some at least dissatisfaction with the solutions on third party economic loss in all the jurisdictions. A handful of academics have made relative comments on Greek law. In Germany there are opinions against contractual solutions.

¹⁰ This decision seems justified on the fact that it is not so much the basic, easily recognisable (and studied) doctrinal differences but the more subtle, differing legal environment, especially the law production processes and the role of the courts, that were crucial for the efficient treatment of the problem. Thus, for instance, the Greek law although heavily influenced by the German is not identical to the latter. There are differences in specific civil code provisions which are important to the third party pure economic loss problem. Such are the general clause of the law of delict (914 AK), or provisions such as 702 AK (enabling construction employees to claim wages from the co-contractor of their insolvent employer), mandate - 715 (3) AK - and deposit - 825 (2) AK. Moreover Greek courts follow the French courts' style of short decisions with little explanation, while the Greek courts have never been so daring as their German counterparts. A close view of the individual jurisdictions was necessary for a detailed account of the problem and accordingly for the credibility of research into the potential for

principles give an inaccurate picture¹¹. Apart from neglecting details, an outright comparison would lead to reiterating differences between the families of systems that are largely known¹².

The variety of the approaches in these legal orders -- arguably there is no 'representative' treatment -- the 'hidden' potential for reform, including the uncertainty as regards contractual views in German law, improve the quality of the specimen¹³ in such a limited topic, but impose the modesty of the overall assessment.

As remarked, the scope of the research and its expectations are determined by the topic. It would be unconvincing to argue that the final conclusion would have been qualitatively different if, for instance, only major jurisdictions had been chosen. There could have been more practical suggestions, for instance illustrating to American lawyers the

contractual solutions, which, as can be concluded by the variations of the national laws, cannot be appreciated outside its 'natural' context, where it is meant to be realised.

¹¹ The position in Greece for example is not identical to Germany, there are differences between Commonwealth countries, and the role of the Scottish courts is complex. See the relative chapters.

¹² As for instance that English and German law alike reject compensation of pure economic loss in tort and that while it is the rigid contract in English law that led to tortious solutions, it is the rigid law of delict in Germany that drove to the development of the contractual mechanisms.

¹³ As said, each system presents special challenges. The specimen includes both common and civil law jurisdictions and 'major' and 'minor' orders, giving an idea of the possible variations. Both the civil law systems discussed belong to the Germanic family of legal systems. Through the reference to Greek law an impression of the Romanistic family of systems' law of delict is provided. There are references in the footnotes of other civil law systems, predominantly the French system. One conclusion would point to the dissimilarities in the details which a very general view or the examination of only 'major' or 'representative' orders would likely disregard. There are no representative orders actually as far as our problem is concerned. Thus, as regards common law, there is considerable discrepancy between American and Commonwealth law, and, as regards civil law or the Germanic family of laws, there are important differences between the German on the one hand and the Greek and Swiss systems on the other. There is certainly more in Scots law than the picture of a system largely assimilated to the English law as far as civil liability is concerned. The general delictual provisions in the Greek (and Swiss) law are not found in the German law -- nor they are the same to the general French provisions on delict -- and the Greek civil code provides for the protection of third parties in a number of occasion where the German judiciary had to develop protection. See the provisions on mandate 715 (3)AK, deposit 825 (2)AK. Moreover, in Greek case law carriage contracts are steadily considered as contracts for the benefit of third parties. American law has distanced itself considerably from other, more traditional, common law countries on the relevant issues, while Commonwealth jurisdictions are far from unanimous. Contractual protection is not finalised even for German law. There is disagreement with the idea of contractual solutions by certain academics at least. See the reaction of Lorenz in the chapter of German law.

benefits of contractual solutions and urging the expansion of their own mechanisms, or illustrating to Commonwealth judges the reasoning of the German courts with the aim of encouraging similar attitudes¹⁴. Such suggestions have been made already¹⁵. Although this work could be used for such purposes, the study would have been poorer if the wider selection had been abandoned, and the benefit from the specificity of the suggestions would have been small and not novel.

It is hoped national (and comparative) lawyers will benefit from the account of the national systems and advance their critical perspective of the specific topic and of the broader related issues of civil liability. This account would be ineffective in promoting a change of view, if it is not combined with other factors making reform necessary. This work would be more useful to a judge or practitioner in a specific case than to the legislature or to a transnational law unification project¹⁶: Neither is likely, at least as far as generally applicable mechanisms are concerned¹⁷.

3. Judicial assertiveness .

The research would be inconclusive if the role of judicial law-making was not acknowledged. Confirming the suggestion that civil and common law systems are not so much different in content as different in method and tradition¹⁸, what mostly distinguishes the German jurisprudence on third party loss from other jurisdictions is the courts' assertiveness and creativity, their flexing of law-making power and the consequent formulation of the institutional balance in shaping civil liability in the German system. The difference arises not from the substantive potential of each system, but from the realisation of this potential.

14 As has been done by Markesinis and Deakin, Fleming, Kötz, Von Bar, Weir.

15 See the work of Markesinis, Fleming, Kötz.

16 Zweigert and Kötz 23 et seq., Gutteridge 145 et seq. .

17 See the reference in the chapter on Commonwealth as regards the possibility of legislative action. Such action was unlikely for German law as well. It is to be hoped that the overall approach might be of some benefit to e.g. legislation on specific areas.

18 Rheinstein, 209

The commitment displayed by the German courts¹⁹ developing contractual protection is impressive because their authority is strictly constrained by the nature, plan and spirit of the legislature²⁰. The German judiciary became involved in active law-making, which in the case of the contract with protective effects verges on the limits of the forbidden 'strategic' law reform²¹.

In contrast, while the "creative power of the judge"²² is, supposedly, the basic force for the evolution of the law in common law systems²³, judicial reluctance is largely to blame for the situation of (third party) pure economic loss in the Commonwealth jurisdictions²⁴.

In American law, where privity does not have the same degree of importance as in English law, the courts felt free to choose contract instead of tort in certain instances, under the perception that contract is a "more germane and efficient way" to handle such cases²⁵. They have not yet reached a consistent and satisfactory solution on pure economic loss; especially, they have not systematically distinguished third party loss cases.

The reluctance of the Scottish courts, which are at least as important for the preservation and development of the Scottish doctrine as their English counterparts for

19 As Fleming put it with regard to product liability: "What is at issue is not the precise formula suggested by the German court as its willingness, indeed eagerness, to extend tort protection for damage to the defective thing itself." (Fleming, J. "Property Damage - Economic Loss: A Comparative View", 105 (1989) LQR 511.)

20 See the relative reference in the chapter on Greek law. The judiciary is not meant to engage in law-making unless there is a "genuine legal necessity" - a serious gap in the law. Moreover, they are not meant to engage into "strategic law reform". (Banakas, 68-72. See also Larenz, *Methodenlehre*, 1988, 380 et seq.

21 Larenz, *Methodenlehre*, 1988, 380 et seq., and Banakas 69.

22 Banakas 74.

23 However, a considerable part of developments in English tort in recent years were based on statute: "... civil law lawyers are surprised when they are told how much of our law of tort has been modernised by statute or as a result of judicial abdication." Markesinis, and Deakin 55 (1992) MLR, 641.

24 Commonwealth judges have traditionally been cautious to expand their law-making powers. This is the view they took with privity questions, considering that the reform of privity is an issue for the legislation. This attitude (with English courts being profoundly more conservative), came on top of express discontent with the existing law. See the relative reference in the chapter on Commonwealth legal systems, and Banakas 74-75.

25 Fleming, 5 (1993) *Canterbury LR* 278-280. He notes that Canadian courts took a similar view in the sense that they felt less constrained by privity than English courts did. Although Canadian courts are definitely more decisive in protecting third parties than their English counterparts, they cannot be dealt on an equivalent basis with American courts as regards their overall approach to the pure economic loss issue.

English law, is easy to explain but not to justify²⁶. Their cautious policy amounts to treating Scottish legal culture as acceptable only when it creates no discrepancies to the uniformity of the approach throughout the UK; practically the English law approach. In fact, Scottish courts do embark in law making, assimilating further Scots law to English law, ignoring a profound potential for convincing and lasting solutions to at least part of the pure economic loss problem.

Greek courts, employing a general clause of delictual liability²⁷, might have never felt the need to procure solutions for third party loss as greatly as the German courts did, yet again they were cautious and uninventive, especially as regards extending the application of §288AK. On the other hand, French courts, which also employ a general delict clause as well, have retreated from a brief venture into contract law in the cases of a "group of contracts" (usually when subcontracting was involved)²⁸.

²⁶ Although not obstructed by privity and consideration they act as if they did, and in effect refute Scottish principles (as JQT) in order not to upset the uniform practice - in fact English law. Scottish courts could not claim lack of authority and could not argue that there are not any differences in the particular area between Scots and English law.

²⁷ As Castronovo puts it: "To affirm liability in tort for economic loss, first of all, the tort system must be one based on a general clause,.. . A system based on a general clause means indeed that the damage as a solely patrimonial detriment, is sufficient to found a right to recover, the violation of a legal right of the plaintiff not being necessary.". (Castronovo in Wilhemston, 283). Moreover, there is generally no difference in the level of compensation.

²⁸ See Whittaker, S. "Privity of Contract and the Law of Tort: the French Experience", 15 (1995) *OxFLSt* 328-369, at 354-357. In the course of the 1970s it was supported by some jurists that the traditional interpretations of privity should be abandoned in the cases where certain contracts are inextricably linked and the actions between the members of such groups of contracts should be based in contract with the double limit of the defendant's duties in his own contract and the plaintiff's rights in his own. Since 1988 the French courts have applied these ideas in three cases, one involving the subcontracting of the production of a film where one of the subcontractors lost the negatives, another involving the liability of the manufacturers of a tractor for the coupling used by the latter in pulling the plaintiff's aircraft, the third the surrender of the plaintiff's deposited items with another depositary who by mistake put them in the rubbish bin. The Plenary Assembly of the Supreme Court put a, temporary at least, end to this development in a 1991 case involving the liability of a plumber subcontractor in respect of defects in the plumbing to the employer. Among other reasons, Whittaker notes the uncertainty of the concept of a 'group of contracts' and the idea that the scheme, coupled with the double limit of liability was too prejudicial for the plaintiffs.

It should be reminded that French courts have an impressive record in implying the existence of contractual relationships. Many defective product cases have been thought to fall in the domain of contract. Banakas, E. *Tortious Liability for pure Economic Loss: A Comparative Study*, 1989, 78 et seq. .

As discussed by Professors Markesinis and Fleming²⁹, the German courts did not try to label the loss as property damage, so as to fall under one of the BGB delict headings³⁰, neither did they rely arbitrarily on special legislation to award compensation³¹. Regarding liability for damage to the product itself³², they dealt early with the concept of "complex structures" (according to which damage to a component, reducing the value of the whole, could be treated as property damage -- damage to other property in common law terms) and, despite justified academic criticism, they were willing to rely on the concept to overcome the rigidity of the law of delict³³. This readiness is furthermore evident in the treatment of the liability of accountants, where the contract with protective effects might be applied, when, of course, the liability of accountants does not fall under the relative statutory regime, which is more protective of the professionals than the corresponding UK law³⁴. Further evidence can be drawn from the evolution of the contractual solutions in

²⁹ Fleming, 5 (1993) *Canterbury Law Review*, 278-280, and 105 (1989) LQR 508, Markesinis and Deakin 55 (1992) MLR, 619-646, and Markesinis, 103 (1987) LQR 354-397. See also Lorenz, W. and Markesinis, B. "Solicitor's Liability Towards Third Parties: Back Into the Troubled Waters of the Contract/Tort Divide", 56 (1993) MLR 558-563.

³⁰ As was the case with *Anns v. Merton London Borough Council*, [1978] AC 728 or *Dutton v. Bognor Regis United Building Co. Ltd.* [1972] 1 QB 373. See Fleming, J. "Property Damage - Economic Loss: A Comparative View", 105 (1989) LQR 508, "Requiem for Anns", 106, (1990) LQR 525-530. See also Markesinis and Deakin 55 (1992) MLR, 633-634.

³¹ As was the case with Public Health Act of 1936 in *Anns*. In contrast The Federal Court had interpreted teleologically the German equivalent of the Public Health Act 1936, and held that the owner or developer were not beneficiaries of the protective function of the statute and had rejected a relative claim (BGHZ 39 358). Markesinis and Deakin 55 (1992) MLR, 634.

³² While in the UK most of these cases involved liability for defective buildings, in Germany most of the cases involved liability for defective products. Fleming, J. "Property Damage - Economic Loss: A Comparative View", 105 (1989) LQR 511. For an extensive review of these cases see Bungert, Hartwin "Compensating harm to the defective product itself - A Comparative Analysis of American and German Products Liability", 66 (1992) TullR, 1179-1266.

³³ As Fleming put it; "in relation to buildings this rationale enjoys substantial support in Germany, less because of their complexity than because the finished product would be typically put together by successive deliveries and incorporation". (105 (1989) LQR 510).

³⁴ Markesinis and Deakin 55 (1992) MLR, 636. The relative norm §323HGB regulating the position of auditors for mandatory audits, restrict the liability of the auditor to the company only. The provision does not protect the interests of shareholders. As the loss is purely economic, there is no protection from §823 I BGB. An injured shareholder could seek compensation however, under §823 II BGB, allowing claims for breach of a statutory duty. The courts became more adventurous once moved out of the regime for public stock corporations. The courts have relied on §826 BGB, establishing liability for damage caused intentionally and *contra bonos mores*, to compensate for pure economic loss, extending in some

question, where, for instance, the requirements of the contract with protective effects are progressively relaxed³⁵. It finally should be recalled that the development of contractual mechanisms for third party loss is added to a chain of judicial interventions to adjust the BGB civil law to the evolving needs of transactions³⁶.

The balanced result of the German courts' law-making venture should not be underestimated, because there was a greater need in German law, compared to the other systems, for the protection of third parties³⁷. Creating the contractual mechanism was an arduous and, potentially, controversial task. The choice for specifically enumerated delicts is fundamental and precise enough so as to be difficult to create exceptions in case law. Privity, on the other hand, has been sidestepped and the tort of negligence has expanded to approximate a general clause. Third party pure economic loss can be thought to be a borderline case where either sidestepping privity/relativity or extending specifically enumerated delicts is possible. English courts failed in moving in any of these directions, although as said, with regard to tort law, they would have had to take fewer pains to expand protection for pure economic loss than their German counterparts³⁸ (and the task of

cases the concept of intention to include *dolus eventualis*.. The courts in cases of auditors violating §323BGB have also resorted to the device of the contract with protective effects to award damages.

³⁵ The German courts seem to be pursuing contractual solutions systematically once no legally protected entitlement is violated. Castronovo in Wilhemston, 285. In contract in Commonwealth and Scots law a number of reversals from policies protecting third parties have occurred, as the overruling of *Anns* the watering down of *Junior Books* the re-establishment of a voluntariness requirement to the assumption of responsibility concept with *Smith v. Bush*. In American case law there is uncertainty as to which third parties will be compensated. French case law recently changes course from treating 'groups of contracts' (cases involving subcontracting) under contract law.

³⁶ See the discussion in a previous footnote. The German courts have developed a mechanism for judicial adjustment of the contractual obligations in the case of grave, unexpected change of circumstances, have provided for the invalidity of unfair terms of contracts, for which there is no negotiations and have expanded delictual protection to include the right to an established business. As Castronovo notes, the concept of protective duties has been the vehicle of expanding contractual protection to other interests or non-parties. See Castronovo in Wilhemston 279-280, referring to the Italian and French systems as well.

³⁷ The lack of provisions for third party pure economic loss in Commonwealth laws is not a result of a systemic, 'inherent' deficiency as is the case with the German law of delict but a result of malfunction of the particular systems which are meant to be relying to a considerable extent to case law for their continuous adjustment to newer needs.

³⁸ Fleming, J. "Property Damage - Economic Loss: A Comparative View", 105 (1989) LQR 511.

Greek courts would have been still less). The statement applies to sidestepping privity as well -- that is, to contract law -- and is valid for all Commonwealth jurisdictions.

The German courts did not rely on the contract in favour of third parties provided in the BGB³⁹; an overstretched and dubious interpretation would be required to accommodate third party pure economic loss on this basis⁴⁰. By contrast, it was doctrinally easier for American courts to justify the use of the flexible third party beneficiary rule for cases of third party pure economic loss⁴¹. This, however, is not the case with Commonwealth countries where third party beneficiary contracts are accepted (for instance, in New Zealand and Australia) since the intention requirements are definitely stricter. The contract with protective effects is a novel mechanism. The analogy to existing provisions cannot explain its creation adequately. American courts could, it seems with less difficulty, expand the third party beneficiary rule.

The German courts display a consistent understanding of the situation at hand, (especially in identifying the contractual violation as the cause of damage⁴²) and of the means at their disposal. Such a view of the situation appears only in certain common law decisions, those, for instance, emphasising the similarity of the litigants' relationship to a contractual one. However, the self-confidence of the German courts is evident not only in their determination to respond to real needs, but specifically in their promotion of a mechanism of general application, for the cases where the non-party loss is the product of a contractual violation, indicating the courts' awareness of the nature and extent of the problem.

3.1. Legitimate authority.

³⁹ §328 BGB et seq.

⁴⁰ At an initial stage this mechanism was used as additional justification. Certain theoreticians think it is the proper basis for the contractual mechanisms created by the courts. See the reference to the theoretical debate in the chapter on German law.

⁴¹ It is doubtful whether the same result would have also been possible if such a mechanism existed in English law. Judging from the Law Commission's suggestions and from the reaction to the latter, it is unlikely that such a wide ranging mechanism would be introduced. It is also unlikely that English courts would feel comfortable to expand such a mechanism as an effective means to treat third party pure economic loss.

⁴² See Castronovo in Wilhemston, 285.

As was also indicated, the German courts have no doubts that their exercise of authority is within constitutional bounds⁴³. Once they consider that the civil liability principles, framework and rationale impose the compensation of the third party, without dismissing the issue as a matter for the legislature to decide⁴⁴, they fulfil their constitutional role, to give answers to legally important problems and adjust an ever-changing civil liability. The German courts seem aware of the plain reality that the institutional balance and the allocation of law-making responsibilities within a legal system, change according to pressures and to the attitude of the actors at play; they are confident to enhance their role. Finally, the German courts are decisively assessing their mandate to promote socially oriented solutions. Their decisiveness is strikingly at odds with that of the courts in Scotland and England. In the latter the indecisiveness reflects the uncertainty over the courts authority, while in the former the indecisiveness epitomises further the institutional weakness of the Scottish private law system as an independent order.

The common law courts' unwillingness to expand protection is based on deeply entrenched views of their judicial authority and is more resistant to change⁴⁵. However, as discussed, the courts would not be transcending the limits of their legitimate authority in any of the jurisdictions involved were they to embark upon protecting third parties more vigorously and upon enhancing the contractual input of the relative solutions, even by applying contract law directly. A basic prerequisite for a judicially motivated reform would be to convince the courts of their authority to promote change in the law in the

⁴³ This is the case with the other jurisdictions as well, provided that in the Commonwealth especially, this mandate would in effect be decisively shaped by the courts. Most arduous, from a constitutional point of view, as regards the introduction of contractual solutions is definitely the position of Scottish courts once their mandate is to follow Scots law.

⁴⁴ The courts could easily foresee that it is unlikely that the legislation would undertake specific initiatives. Recall the case for the third party beneficiary claims in England.

⁴⁵ Referring to legal 'transplantation' Kahn observed that "all rules which organise constitutional, legislative, administrative or judicial institutions and procedures ... are the most resistant to transplantation." This does not concern the question here directly, but gives an indication of the problem of reforming judicial attitudes and institutional balance. 37 (1974) MLR 17.

particular area, apart from encouraging preference for contractual solutions. Even so, it is doubtful that the judicial development would be consistent and continuous, since legislative guidance is improbable, persuasion acquires greater significance. It is hoped that this work could contribute to this purpose.

3.2. Conclusion.

If a lesson is to be learned from the German courts' assertiveness, it is that greater responsibility and decisiveness of the courts is valuable to cover the gaps in law. With the exception of certain Commonwealth and American decisions, courts in the other jurisdictions remained generally preoccupied with an outdated perception of their law-making role and failed to move with the present socio-economic conditions⁴⁶. This did not matter much in the Greek system and, presumably, it does not in systems where a satisfactory solution in delict is possible. Even so, the examples from Greek case law are not enough for a categorical statement.

The basic prerequisite for such a determined judicial attitude is the self-confidence of the courts which is, itself, evidence of a well-studied approach. This attitude can be strengthened if the judges are more open to academic comment⁴⁷, and consequently more informed on the legal problems of transactions, on the feeling with which the current case law is received, and on new ideas. The judiciary must show greater social and juridical alertness. A final concern is that a judicially motivated change of policy depends, after all, upon the personalities of the judges and the relative balance of opinion which might fluctuate in time.

4. Suggested reform: Increased contractual input.

⁴⁶ There is often a lack of determination to play the role the judges are meant to play. To a considerable extent it is a self imposed limitation of the authority of the courts reinforced by the lack of a clear view over the situation in law. This uncertainty could have contributed to the outright rejection of the third party claims in certain cases.

⁴⁷ Lord Goff, referring to academic works related to the German law contractual mechanisms, is a rather rare example.

The main conclusion from the review of third party loss is that input from contract law into civil liability is undoubtedly needed, either through a more prominent role for contract in existing approaches in delict⁴⁸, or through outright contractual solutions. Fairness and economic rationality arguments advocate third party compensation on a number of occasions. The decision to compensate and the need for an increased contractual input are part of the same train of thoughts, and stem from the disappointment with existing solutions. No protection might be available in delict, and/or there is no sufficient consideration of the defendant's position; no adequate balance of interests is therefore attainable under delict.

Under contract-based liability (once such a possibility is accepted), it is easier to demonstrate the causality of the loss and the defendant's culpability; a strict liability regime, where no defendant's knowledge is required, and which is profoundly unfair towards the defendant, is avoided. (As can be seen from this latter point, fairness considerations do not operate to one direction, i.e. that of the claimant, only. It would be more accurate to speak for fairness balancing the arguments of the parties. The starting point, however, is the need to compensate the injured third party.)

Increased contractual input can lead to a fairer balancing of the interests involved. The argument is better illustrated with the treatment of the defences that the defendant might raise from the contract; it would seem fair to consider some of these defences as valid against third parties. Looking thus to the difficulties and undesired consequences involved with a delict-based approach -- difficulty to establish liability, lack of effective control as to the defendant's financial exposure -- the contractual input certainly is preferable. As was explained, third party pure economic loss is distinguished from other instances of pure economic loss because the contractual context plays, inevitably, a significant role towards the evaluation of the loss and of the injuring behaviour. Because of the nature of the third party loss, especially the significance of the contractual context, in the narrow band of

⁴⁸ This seems to be the argument promoted by Markesinis and Fleming.

third party loss cases the improvement of the current regime involves a degree of contractual input and a greater role for the voluntary arrangement.

The need for improvement and, therefore, of increased contractual input varies between the jurisdictions as a result of the actual or potential suitability of existing approaches, i.e. suitability including the potential for improvement. More functional are the solutions in the Greek and the American systems where contract has a more prominent role to play, often making substantial inroads into delict⁴⁹. The need for reform is more acute where the solutions are simply not functional as is the case in the German, the Scottish and the English systems. Not all partially satisfactory existing solutions are amenable to improvements. In Greek law there is little need for radical reform and the improvements are on a moderate -- corrective -- scale, within existing liability schemes.

⁴⁹ Recall the case with supply of electricity to a sublessee in Greece, where a resemblance of the setting to a contract in favour of third parties was pointedly noted although the decision was based in delict. (In the most important case (3148-1982 Appellate Court of Athens, Armenopoulos, (1973), 94.) the public electricity company had a contract with the owner of a chicken farm. The latter leased the farm to a chicken farm business without informing the electricity company as he was obliged to do by the supply contract. The company's employees failed negligently to notify the owner of a programmed power cut, notification being a contractual duty. As a result of the power cut, several thousands of incubating eggs were destroyed. The court noticed that the lessee was in a position similar to a third party beneficiary of the supply contract, but resorted to delict in order to award damages. The lessee could not turn against the owner because the loss had been caused from a fact the owner had no responsibility for. Kefalas notices that such a case in Germany would have been dealt under a mechanism of contractual protection (the contract with protective effects possibly)-Kefalas 94 et seq.). Recall cases of attorney liability for the drafting of will in American case law, where the fact that the attorney was employed for the intended beneficiary's benefit was steadily underlined. In American law, decisions on attorney liability for the drafting of wills are based either in tort (mostly), or in contract. The attorneys' negligent behaviour could be treated as malpractice for non-performance of an obligation to exercise care imposed by law, or breach of a contract to exercise care agreed by the third parties. See Markesinis, 25 (1991) *The International Lawyer*, 953-965, and "The Need to set acceptable boundaries between Contract and Tort". See also Eisenberg, M. A. 92 (1992) *ColL R*, 1394. Recall *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958), establishing the rule considered to be a means for compensating the promisee's expectations and the intended beneficiary's reliance. The majority of the relative decisions is based in tort. The negligent behaviour constitutes a breach of a duty based in statute or in contract. See also *Lucas v. Hamm*, 56 Cal 2d 583, 364 P 2d 685, 15 Cal Rptr. 821 (1961), where the third party beneficiary rule was examined as one basis of liability, the other being tort, while tort language was used. In *Heyer v. Flaig*, 70 Cal 2d 223, 74 Cal Rptr. 225, 449 P. 2d 161 (1969), the court held that an attorney "realistically and in fact" assumed a relationship, not only with the client but also with the would be legatee whose rights were "clear and foreseeable". (In this case the attorney failed to inform the prospective testatrix of the effect her planned marriage would have on her testamentary succession.)

The existing tortious approach in American law is partly satisfactory, but as discussed, its potential for improvement is limited; a straightforward contractual approach is more viable in the long run, and indeed preferable as regards balancing the relative interests. In Scots law revitalising *culpa*, essentially a general clause as §1382 FCC and §914 AK, is possibly out of the question. A contractual solution based on the JQT model represents a major change and yet seems more credible. In Commonwealth systems where either alternative seems to run into severe obstacles, the expansion of the tort of negligence appears naturally more plausible, yet the case law is not encouraging. Expanding the application of contract law is less likely; however, prospects could improve with a legislative change such as the introduction of the contract in favour of third parties, as the discussion on New Zealand law indicates.

A straightforward application of contractual solutions is not necessarily the best alternative as the discussion on Greek law and the references to the French approach have shown. It involves reform on a considerable scale, which might be difficult to achieve and will possibly be uncertain. The implication throughout this work is that, given the structure of the civil liability, the delictual option remains the natural priority when no contractual relationship exists. This, in principle, is the case for German law as well. On the other hand, for certain jurisdictions (most notably for Scots law), delict is not a viable option.

4.1. Flexibility in a civil liability system.

The advantage the Greek law presents demanding fewer and more easily attainable improvements, is based on the greater coherence and flexibility of the civil liability system, as expressed through the greater interchangeability of roles between contract and delict; the porousness of their dividing line, at least as regards taking account of contractual standards under delict. In German and English laws the rigidity of delict and contract respectively have hindered response to borderline cases. This rigidity reflects a stricter delimitation between contract and delict and a fragmented view of civil liability.

The rigidity has been acknowledged by the courts as a constraint⁵⁰, but the very structure of the BGB and the entrenchment of the common law privity doctrine do not enable an alternative approach.

The flexibility of the Greek and, presumably, the French and the Swiss systems is based on their fairly broad definition of contract and mainly on the open, general delictual clauses⁵¹. Crucially, the normative consistency of the solutions is achieved through reference to guiding principles of private law such as abuse of right and good faith. The effectiveness of such principles in unifying civil law is reinforced by the greater interchangeability of the forms of liability; good faith is much used in German law, but cannot have a similar impact in improving the comprehensiveness and flexibility of the liability system. The use of such principles makes civil liability itself more coherent and flexible. It is necessary to consider the role of the general clauses in enabling protection in German law and in unifying and rationalising the civil liability system as a whole -- especially improving delict in Greek law -- alongside calls for the expansion of the role of good faith in American and English law. This is demonstrated by the beneficial effect of the fundamental principles when answers are not provided by the particular civil liability provisions. Little is provided, of course, on the practical way to implement such an expansion of equity considerations. As noted, crucial is the attempt to persuade the courts on the reasonableness of expanding, elaborating, and standardising equity arguments as was the case with good faith in German law. Dissatisfaction with the law on third party pure economic loss will, hopefully, play a role. Important will be the weakening in common law of the doctrinal obstacles to more effective third party protection, especially that of consideration. However, in this work only a tentative suggestion can really be made.

⁵⁰ As said before the attempts to expand delict in German law had probably reached their peak with the establishment of a right to an existing and operating business. In many English and Scottish cases the similarity of the defendant-plaintiff relationship to a contractual one was duly identified, and Lord Goff has made frequent references to the German law contractual mechanisms. *Junior Books* and *Hedley Byrne* are ready examples.

⁵¹ See Markesinis in Hartkamp *Towards a European Civil Code*, 285, on the possible development in the field of delict.

The integrated character of civil liability is an expression of realism as regards private law and especially as regards the restorative purposes of compensation. This can be illustrated by the difficulties that could be caused by the artificiality of conceptual separations and the role models for delict and contract. The fact that delict appears to be the catalyst of this flexibility and the basic expression of this realism in civil liability, seems natural in any of the jurisdictions examined -- even those where delict is not a viable option in the cases in question -- when no contractual relationship exist. Even when delicts are enumerated, the law of delict is treated as covering a wide variety of instances that are not covered by other narrower forms of liability. The wrongfulness associated with delict must play a significant role for this understanding. Liability is more profoundly imposed than assented to in third party loss, something which seems more natural under delict.

Moreover, the adjustability of the liability system cannot be based on contract law. The latter, by its nature, faces serious limitations regarding its potential to expand, limitations stemming from intent and mutuality requirements. Thus the German law mechanisms constitute instances of notable creativity.

Extending this line of thought, one could refer to delict as a prior, more archetypal form of liability, closer to criminal law, than to contract, which is a narrower enclave in civil law. However, it has not been the object of this work to examine this view⁵². It should be repeated that, in the systems where delict is based on a general clause, delict plausibly covers that which is not specifically allocated to other liability forms and is thus effectively encircling civil liability. Delict thus operates as an alternative for compensation when other means prove fruitless. Delict, therefore, has the potential to expand and claim what cannot be covered by other specific and limited liability forms. This is not the case with systems where delicts are enumerated, since the expansiveness of delict is severely constrained and its separation from contract is more effective. As regards the object of this research, with the exception of the Greek system, delict does not have

⁵² This is the view taken in many American legal commentaries, most noticeable being Gilmore's *The Death of Contract*, and Calabresi, G. "Torts - The Law of the Mixed Society", in *American Law: The Third Century, The Law Bicentennial Volume*, Schwartz, B. (ed), 1976, 103.

substantial potential to expand and cover third party loss; whence the urge for radical alternatives.

The greater interchangeability between contract and delict should not be understood as enabling the choice of one solution simply because it seems more advantageous for specific policy reasons (for instance protecting the defendant) than an existing satisfactory and improvable solution. Doctrinally sound solutions are usually based on the prerogative of the legislature, and judicial law-making when no gap in the law exists, is unacceptable: judicial intervention should be encouraged only when there is a serious defect in law. It was argued in this work that there is such a serious defect in English and Scots laws. On the other hand, it could be argued that the precedent system, although often an ossifying force, could allow for the gradual overturning of unacceptable decisions if they are found to be in disagreement with the beliefs prevailing in society. There is evidence of such a rising assertiveness by the courts in recent times. Nevertheless, as with any question of judicial activism, it boils down to be a question of personalities of the judges and of the contemporary majorities in the judicial bodies.

Recapitulating, increased contractual input is a desirable development in the treatment of third party loss and could lead to greater comprehensiveness and flexibility of the civil liability system. This in turn will enable a more effective treatment of cases on the borderline between delict and contract; at present these cases are inadequately treated in systems where the division between the two forms of civil liability is stricter. What is important in this line of reasoning is the advantages of the contractual input and of the unified character of civil compensation. There is no implication that delictual solutions with a contractual touch are necessarily preferable to the straightforward application of contract law. Moreover, it is not within the ambitions of this study to proclaim the launching of some new, *sui generis* form of liability for cases where delict and contract seem to overlap.

4.2. Similarities between the systems.

In all jurisdictions examined here, positive evidence exists on the potential for change in the law, for instance by reinforcing the contractual input in third party loss cases, where this input is lacking. In identifying a fertile background for the introduction of contractual solutions, the study was influenced by the prototype German mechanisms. The relative arguments, especially those related to common law jurisdictions, centred on the removal or weakening of doctrinal obstacles to third party compensation or to contractual solutions and unintentionally implied similarities to the German law background, illustrated or confirmed by this doctrinal shift. It is well known that similar provisions in different orders do not lead to similar results⁵³. The similarities simply indicate common elements in Western legal culture and, more importantly, the parallel development of private law, following the peak of the freedom of contract in the 19th century that actually reflects, as codification did, earlier law, and was never absolute⁵⁴. The similarities are an expression of the fact that civil and common law have far more in common than was traditionally thought to be the case. This convergence was duly underlined by comparative studies that confirm the unity of 'Western' - capitalist - legal systems⁵⁵. The convergence is explained on the basis of the similar social and economic background, the process towards the welfare state in the last two centuries⁵⁶ and the increased effort for internationally uniform laws.

⁵³ Comparative works have indicated that similar provisions do not lead to the same results if applied in different contexts. Rheinstein, at 208. See also Frankenberg.

⁵⁴ See the relative reference in the Introduction.

⁵⁵ See Rheinstein, at 208-209, Zweigert and Kötz, Malmstrom "The System of Systems" 13 (1969) *Scandinavian Studies in Law* 129-149, and Markesinis, B.S. "The not so dissimilar tort and delict", 93 (1977) *LQR* 78-123.

⁵⁶ See generally Atiyah *The Rise and Fall of the Freedom of Contract*, 1979, Horwitz, Morton. J. *The Transformation of American Law 1870-1960 - The Crisis of Legal Orthodoxy*, 1992, Coing. See also Alvarez, and others, *The Progress of Continental Law in the nineteenth century*, 1969, who note that the existing system was supplanted by a realistic and social system of law, and refer to the rise of the idea of social function and solidarity (70 et seq.). There is a corresponding change in legal theory (114).

The convergence and interrelation of contract and tort in common law should not be confused with the alleged progressive disappearance of contract, and its supposed absorption by tort (or by other schemes of imposed liability), which is supported by prominent academics. (Gilmore *The Death of Contract*, Atiyah, *The Rise and Fall of the Freedom of Contract*). The counter tendency has also been detected. As O'Connell notices the legislation is using contract-like criteria and courts are using contract doctrine to impose tort liability. It is necessary, in his view, to vary tort by means of contract if a sensible

The modern common law of contract is characterised by the diminishing importance of consent⁵⁷, a more unified perception of civil liability⁵⁸, and the increased use of equity principles⁵⁹. In the same period a parallel development takes place in German law⁶⁰,

distribution of losses is to be achieved. O'Connell, J. "The Interlocking Death and Rebirth of Contract and Tort", 75 (1977) *Michigan Law Review* 659-685). See also Fleming, 5 (1993) *Canterbury Law Review*, 269-279. It would be more accurate to say that contract law is changing in a context of changing social and legal needs. Castronovo makes this point evident for both civil and common law. See Castronovo in Wilhemston, 273-289.

⁵⁷ The current period of English, (and presumably Commonwealth contract law) is described, by Beatson and Friedman, as that of 'modern' contract law in contrast to the 'classical' contract law prevalent in the nineteenth and until the beginning of the twentieth century. "In the modern period there is evidence of the reshaping of contract law accompanied by an expansion of the non-contractual field of liability." (Beatson and Friedman "From 'Classical' to 'Modern' Contract Law" in *Good Faith and Fault in Contract Law*, 3-24, at 12). In contrast to the previous period, current law is characterised by increased control over the contractual regime through judicial and legislative intervention. Formal requirements are diluted and emphasis is on substantive fairness. The historical process of contract law until this day has been brilliantly explained by Atiyah in *The Rise and Fall of the Freedom of Contract*, 1979, who notes that "during the past hundred years there has been a continuous weakening of belief in the values involved in individual freedom of choice as this weakening has been reflected in the law" although "there is still considerable faith in the classical model in its essentials" (726).

American law has advanced further in the same direction. See Horwitz and King, Donald, B. "Reshaping Contract Theory and Law: Death of Contract II: Part Two: Ending Consideration and Beginning New Performance and Remedies", 8 (1994) *JCL* 16-36.

A basic aspect of those tendencies is the setback suffered by the privity and especially by the consideration doctrine. The tendency is more evident in America (see King 17, Eisenberg, M. A. "The Principles of Consideration", 67 (1982) *Cornell Law Review* 640-665), but is present in England and other Commonwealth countries as well (see Flannigan 103 (1987) *LQR* 564-593. There are calls to allow third party contract beneficiary claims in England and Canada, while such claims have been statutorily allowed in Australia, New Zealand and Israel. See also Chen-Wishart, Mindy in Beatson and Friedman 123-150, and Carter, J. W. Phang, A. Poole, J. "Reactions to *Williams v. Roffey*", 8 (1995) *JCL* 249-271.

⁵⁸ The perception of civil liability is becoming more unified with the breakdown of the strict "contractualism" of the 19th century which imposed a strict division between contract and tort that found its strictest expression in pure economic loss. From a historical point of view this tendency brings the law nearer to the pre-19th century more generalised notion of civil liability. This tendency is mostly evident in relationships where reliance is a crucial element. See McLaren, J.P.S. "The Convergence of Tort and Contract: A Return to more Venerable Wisdom", 68 (1989) *CanBarRev* 30-59 for a comprehensive review with a substantial historical account.

Fridman and Reiter underline the increasing interdependence between contract and tort (Fridman, G.H.L. "The Interaction of Tort and Contract", 93 (1977) *LQR* 422-449, Reiter, B.J. "Contracts, torts, Relations and Reliance" in *Studies in Contract Law*, Reiter, B. and Swan, J. (eds), Toronto, 1989, 235-311). Reiter thinks that a broad range of situations could be called either tort or contract and that tort and contract should evolve into a law of relational obligations whereby courts would examine policy issues relieved from doctrine. See also Powers attempt to redefine their respective areas of application giving priority to contract rules. (Powers, William Jr. "Border Wars", 72 (1994) *TexasLR* 1209-1233).

⁵⁹ Equity principles play a basic role in this transformation, as "tools for the control of contractual terms and their application". (Beatson and Friedman 14.). One such example is good faith which is accepted in American law but it does not involve the same connotations

involving for instance the greater use of equity principles⁶¹, the adjustment of BGB rules towards more equitable solutions, not provided for originally, and the expansion of

as its continental synonym. See Farnsworth, in Beatson and Friedman 153-170 for a comprehensive account. The prediction that the doctrine is about to burst out of its geographical borders to Australia and Canada might be exaggerated. There is support for the introduction of a good faith principle in the Commonwealth. (See Farnsworth 156-158, Lücke, H.K. "Good Faith and Contractual Performance", in *Essays on Contract*, 1987 - on Australian law). "Fairness" is the basic equity principle in the English law. Allegedly, courts would have great difficulty to attribute a meaning to good faith (Goode quoted by Farnsworth). Recently the concept was indirectly introduced through the European Community directive on Unfair Terms in Consumer Contracts. (Beatson, J. and Friedman, D., 14.). See also Powel, R. "Good Faith in Contracts", 9 (1956) CLP 16, Brownsword, R. "Two Concepts of Good Faith", 7 (1994) JCL 917-244.

Both the contractual mechanisms for the protection of third parties in German law could be based on the BGB good faith principle (§242BGB); this was the most prominent explanation for the contract with protective effects. (See in the chapter on German law the development of the contractual mechanisms and the theoretical debate on their doctrinal basis.) Good faith seems the most credible basis of contractual solutions or of the increased contractual input in delict in Greek law where, as in Germany, its role for the development of secondary obligations is pivotal. (See Ebke, W.F. and Steinhauer, B.M. "The Doctrine of Good Faith in German Contract Law" in Beatson and Friedman 171-190). It was also argued that concepts equivalent to good faith might be more influential in Scots law than in English law. (See the conclusion of the chapter on Scots law).

Equitable principles introduce social policy criteria in contract law. Such criteria have dominated the transformation of common law and civil law towards greater intervention into private arrangements. (Atiyah, *The Rise and Fall of the Freedom of Contract*, 1979, Horwitz, Coing, Castronovo in Wilhemston, 273-289).

⁶⁰ The momentum of this trend in German contract law is exemplified by the contractual mechanisms discussed in this thesis. Castronovo thought that they express the emergence of a new meaning of contractual liability, where performance violation generates compensation even if there is no violation of legal entitlements as is required by the law of delict since contract violation concerns not only the parties but others as well. The cases Castronovo focused upon are cases where specific duties of trade, (meaning professional duties, or duties involving the performance of economic activities), are violated. These are pre-existing duties, and the compensation claims are treated as claims for non-performance (the cause of damage is non-performance), and contract-based remedies apply. (Castronovo in Wilhemston, 273-289).

⁶¹ The reference to the equitable principles in German law in a previous footnote is one example of the transformation of the German civil law in this century. For most part this transformation involved the adjustment of the civil liability rules (mainly those in the BGB which was introduced in 1900) to the requirements of transaction, as the latter appeared in modern complex relationships. Thus the German courts have developed a mechanism for judicial adjustment of the contractual obligations in the case of grave, unexpected change of circumstances, have provided for the invalidity of unfair standard terms of contracts and have expanded delictual protection to include the right to an established business. A basic vehicle for such developments has been the principle of good faith. The use of the latter is possibly unprecedented in other civil or common law systems. See in the chapter on Greek law, the discussion on the possibility of using 288AK (good faith) as the basis for the construction of contractual solutions.

contractual obligations to include protective duties. With a certain delay, a similar trend occurred in Greek law, where the AK incorporates case law improvements of the BGB⁶².

The contractual solutions on third party loss are an expression of the expansion of contract law as a result of the retreat of intent requirements and of the effect of equity considerations. The emphasis on these common elements in the systems examined should, therefore, not be overestimated, since the actual state of the law is influenced by a host of factors, many of which are too subtle to describe and assess accurately⁶³. Of course, focusing

⁶² The most typical example is § 388 AK on the collapse of the basis of the contract. See Christodoulou "Law of Obligations", in the *Introduction* Kerameus & Koziris eds, 75 et seq.

⁶³ See Watson, *Transplants, and Society and Legal Change*, "Causes of Divergence", 115 et seq.

Moreover, a discussion of the debate in common law contract theory, shifting from traditional patterns, is hopeless. The expansion of promise-based liability could be based on a number of different theories on civil liability promoted in the common law jurisprudence, ranging from those speaking of a retreat of contractual liability and expansion of tort or tort-like liability protecting reliance and restitution interests (tort theories), to those suggesting to give effect to all ongoing social, personal, business relationships (relational contract law theories) or those supporting to balance the intention criterion with fairness requirements (promise theories).

On the tort theories see Gilmore, G. *The Death of Contract*, 1974, Atiyah, *The Rise and Fall of the Freedom of Contract*, 1979 and Schelgen, J.H. *American legal Realism and Empirical Social Science*, 1985 and Barnett, R. E. "A Consent Theory of Contract", 86 (1986) *ColLR* 269-321. Theoreticians supporting such views have criticised brilliantly the currently prevailing doctrines especially the doctrine of consideration. Their suggestions on the emerging trends do not reflect the situation of the law while it is difficult conceptually to alienate liability in contract from the voluntary element. (See in a previous footnote the reference to O'Connell's work.). On relational theories see McNeil, Ian R. *The New Social Contract: An inquiry into Modern Contractual Relations*, 1980; the critique on existing law is illuminating but the suggestions are generally vague. On promise theories see Fried, C. *Contract as Promise - A Theory of Contractual Obligation*, 1978, Eisenberg, M.A. "The Bargain Principle and its Limits", 95 (1982) *HarvardLR* 741-801, and "The Responsive Model of Contract Law" 36 (1984) *StanfordLR* 1107-1167, Levin, J. and McDowell, B. "The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations", 29 (1983) *McGill LJ*, 24-87. See the reviews of the relative works; Fried, C. "The Rise and Fall of the Freedom of Contracts (Atiyah, P.S.)", (book review), 93 (1980) *Harvard LR*, 1850-1868, Atiyah, P.S. "Book Review: Contract as Promise: A theory of Contractual Obligation by Fried C. " 95 (1982) *HarvLR* 509-528, Kronman, A.T. "A New Champion for the Will Theory", 91 (1982) *Yale LJ* 404-423, (on Fried's book), and Borows, A.S. "The Will Theory of Contract Revived - Fried's 'Contract as Promise' ", 38 (1985) *CLP* 141-152. Brief accounts are provided by Flannigan, 103 (1987) *LQR* 564-593, Levin and McDowell 29 (1983) *McGill LJ*, 24-87, and Barnett, 86 (1986) *ColLR* 269-321. See Barnett on the categorisation problems.

Most theoretical suggestions for a change in jurisprudence might offer some indication of the jurisprudential atmosphere, but prove little of the actual potential to pursue contract-based solutions. (The very existence of a great number of theories with evidently different orientations is proof of the dissatisfaction with the prevailing so far (in the Commonwealth at least) bargain theory and with the state of the law generally.

This theoretical suggestions might seem closer to the interventionist culture of the German jurisprudence. Advocates of greater judicial empowerment explained the contract

on the weakening of the doctrinal obstacles to third party compensation in common law countries is important but apparently not enough to foster some sort of reform. Although most evident in Scots law, the potential for an increased contractual input is dormant in all the jurisdictions involved, even including German law where, after all, contractual solutions are not part of statute law⁶⁴. The activation of this potential depends upon a number of factors. The most important of these is the real and serious need for some legal solution, as in the case of German law where, otherwise, third parties would remain unprotected. Even where the need for improvement is more acute, as in English and Scots laws only occasionally has the similarity of the plaintiff-defendant relationship to contract been noticed. In such cases compensation was actually awarded⁶⁵, but this had no continuity or lasting impact as far as judicial attitudes are concerned. The doctrinal obstacles are too well entrenched to be shaken off easily, especially if judicial reluctance is taken into account. After all, in none of the jurisdictions is the need for third party protection as pressing as it was (and in black letter law terms, is) in German law.

The same comments apply to similarities regarding the socio-economic orientation of the discussed improvements in law towards greater contractual input. The basic criterion behind the German courts' development of the contractual mechanisms is a social policy one. Third parties would otherwise lack effective and/or adequate protection⁶⁶. The contractual mechanisms serve the weaker parties in the transactions; consumers, employees, investors, shareholders. An argument used to justify contractual solutions, especially in

with protective effects as an *extra legem intra jus* interpretation by the courts (Kümmeth's views - see the German chapter.). Common law and German theoreticians agree on the practical advantages of a direct claim in *Drittschadensliquidation*).

However, the similarities certainly can prove little more than a compatible level of jurisprudential and philosophical development. Looking at theoretical perceptions might lead to considerable confusion; Calabresi half-way through his article on torts notes that he has been referring to what "I have been calling torts and which in Europe is more felicitously called 'civil responsibility' ", (Calabresi, in *American Law: The Third Century, The Law Bicentennial Volume*, Schwartz, B. (ed), 1976, 103, at 108).

⁶⁴ This is additional evidence of the 'naturally' delictual character of third party loss.

⁶⁵ For instance in *Junior Books* and in *Henderson v. Merret Syndicates*.

⁶⁶ The same argument did motivate decisions in common law jurisdictions, the latest example being *White v. Jones*.

common law countries, is that the financial exposure of the defendant will be limited⁶⁷. This solution would thus benefit businesses and professionals, indeed not disadvantaged parties. The truth is that, especially from a common law point of view, once it seems fair and reasonable to compensate third parties, the defendants would be in a disadvantaged position were they to be sued in tort, due to the uncertainty over limiting the defendants' financial exposure under tort. The defendants are thus the weaker parties⁶⁸. In common law jurisdictions the policy criteria for limiting the defendant's exposure led to the rejection of liability altogether, as liability seemed potentially unlimited under a delictual point of view. The crucial point, regarding pro-market, pro-business policies, is the decision to award damages in the first place. Awarding damages to third parties, as imposed on economic rationality grounds, is balanced under a contractual regime by the social concern to protect the economic activity and not to expose the defendant to an intolerable financial burden. The Commonwealth courts failed to achieve this balance of interests, hesitant as they were to employ a more critical view and distinguish the situations where compensation should be awarded⁶⁹: achieving a balance could be facilitated by greater contractual input.

4.3. The way for reform.

⁶⁷ Even if there were a general delictual clause in German law, it is doubtful whether the result of the policy towards third parties would be at all different; liability would be promptly contained on the bases of equity principles, possibly §242 BGB.

⁶⁸ Contractual solutions can balance competing interests more effectively than any other means and thus to play a social role in today's complex circumstances.

⁶⁹ German courts on the other hand were not simply ready to compensate any relative claim. They have rejected third party claims in a number of the so-called cable cases, where the loss occurs following a power cut, when the circle of injured was too broad to be economically reasonable and socially justifiable to award compensation. The basis of this claims was either the law of delict (often the right to an established business) or the contract with protective effect vis-à-vis third parties. See Banakas, 268 et seq. The decisiveness of the German courts is exemplified with a famous decision of the Federal Court from 1977 (BGH 16.6.1977, BGHZ 69, 129 in NJW 1977 1875). The case concerned a claim by a tour operator who suffered losses as a result of industrial action involving "go slow" "go sick" practices by the flight controllers. The industrial action lasted several months in 1973. The claimant turned against the Federal Government. The court accepted the defendant's delictual liability considering, among others, that the plaintiff's right to an established business had been violated.

Judicially motivated reform appears to be the most plausible alternative. Legislative intervention aside, another possibility could be the promotion of reform by regularly providing for a third party right to sue in the relative violated contracts. This possibility is clearly weak. It would apply only if there is sufficient drive by those concerned, which is far from certain in the light of competing interests. It is possibly out of the question for contracts in the construction industry. This alternative, which only in the long run could lead to a shift in law, is more a compromise than real reform as it will possibly reproduce existing arrangements. Contracting parties might, for instance, opt for established models ensuring third party rights, as trust in English law, which can offer limited third party protection⁷⁰. Even if the provisions are made clear, such models cannot possibly cover all events; indeed it is doubtful whether the judiciary will be ready to offer comprehensive protection to third parties when the contractual clauses are not ambiguous. Uncertainty over the courts' reaction may be reflected in the jurisprudence concerning such contracts; most likely it will be unstable. Finally, it is possible to foresee judges arguing that, if in the circumstances where it seemed fair and reasonable for third parties to have a right to claim damages, this was provided contractually, the courts should not devise any other means of protection when no such contractual provisions are made. Thus the protection of third parties could be further constrained.

This alternative does not address the cause of judicial restraint, the actual or supposed (due to lack of self-confidence) absence of judicial authority and is a less adequate solution. Judicially promoted reform remains the optimal alternative and to that purpose the role of the judiciary must be highlighted.

5. Conclusion.

⁷⁰ See the comparison between trust and JQT by MacQueen in Notes for the Honours Contract law course.

A considerable part of the study is devoted to speculation on the possibility of a contract-based solution⁷¹. It is easy to argue that, once established, contractual solutions will operate in a similar manner in the different jurisdictions.

Certainly, prescribing a single model of contract-based liability or the process to reach reform for each jurisdiction is beyond the scope of this work. The expansion of the application of contract law will, for instance, be received differently in jurisdictions where a contract in favour of third parties is already accepted than in those systems where it is not part of the law (as in the English or the Canadian systems). Important factors would be the degree to which the attachment to intention in contract law has been eroded, and how comfortable the judges are with sidestepping intention requirements. Both are difficult to measure. The question of judicial attitudes is central, as they are notoriously slow to shift.

'Process' -- i.e. the process of reform -- is an obscure concept involving, at best, considerable speculation which can hardly be the object of academic research, certainly not of such a specifically targeted study. The practical usefulness of such speculation is minimal. After all, courts are likely to illustrate their conviction on the justification and viability of the improved (contractual) solutions, as German courts did introducing contractual mechanisms, rather than engage in an in-depth doctrinal discussion. As again the German example indicates, theoretical accounts of case law came later. What this study can do is to indicate broadly the factors that could initiate and foster reform, the gateways through which reform can be brought. The purpose here was limited to laying emphasis on the potential for change and the fundamental prerequisite of judicial assertiveness⁷², as the necessary background for reform.

⁷¹ The study does not purport to offer new alternative solutions as is often thought to be the purpose of comparative works, as the alternatives (tort/delict or contract) are largely known. One exception is the suggestion by Cauldon J in the Australian case of *Trident Const.Ltd. v. W.L. Warlop & Associates Ltd.*, [1979] 6 WWR 481 She argued that the third party beneficiary claim should be based in unjust enrichment. Obviously this solution cannot apply in all possible situations

⁷² No implication is made that a legal borrowing is possible; not only is the issue too complicated to discuss here, but the idea for contractual solutions is not unique in Germany. This idea will inevitably linger in the mind of the reader once the starting point of this thesis was German law. German law was chosen because it has developed contractual protection for third party loss to a degree and in a way not found in other systems.

A considerable element of uncertainty stems from the fact that the reform discussed is meant to be judicially motivated. One of the purposes of the study was to spot the inherent potential for reform which the judiciary can exploit. However, in referring to judicial intervention the study necessarily becomes more precarious, and can be phrased in general terms only. The overall conclusion, therefore, has a more abstract, suggestive character and cannot combine the conclusions and suggestions that are related to specific jurisdictions.

Moreover, a need exists for realistic suggestions, such as, the inclusion of contractual considerations in delict⁷³, which may be more easily acceptable than, say, the outright application of contract law, especially since the latter could be associated with greater judicial free-handedness. The purpose of this work has been to discuss the alternatives; the outcome cannot be categorical for any option.

The final conclusion emphasises the most interesting lessons for the legal systems where the protection of the third parties is less certain or efficient, namely the need for greater contractual input and thus for greater unity and flexibility of the civil liability system, and the importance of well-founded judicial assertiveness. As indicated in the

Borrowing between legal systems has been the most fertile source of legal development (Watson, *Legal Transplants* 21 et seq.). It is a very complicated issue (the very definition of borrowing might be uncertain) and there are possibly a number of different methods to approach it, one of the most persuasive being a historical comparative method which Watson follows.

A host of factors affect legal borrowing, most of which, such as the authority a legal order enjoys in another would more suitably be the object of macrocomparative research, extending over a substantial period of evolution, and examining finalised developments. This topic and method of approach here do not allow such ambitions.

However, each system, even within the same family has its own rationale, and logical/doctrinal balance which it reflects even on those provisions which might seem identical. The systems in question are developed and elaborate and that makes borrowing less likely as, possibly, none of the jurisdictions is actually left with no answers. (Similarly developed systems might be less open or flexible to legal borrowing.) In order not to upset the rational balance of a legal culture it makes sense to discuss the exchange of information and ideas which would help jurisdictions develop their own solutions to the problem. For Commonwealth countries, a partial answer has been the inclusion of contractual considerations in tort. (Markesinis and Deakin, 643 et seq.)

It should not be forgotten that the initial reaction to the third party loss problem would be to seek treatment in delict. Contractual solutions are exceptional for German law as well. This diminishes the possibility of legal borrowing.

On the issue of legal 'transplantation', see also Kahn, MLR 1974.

⁷³ Markesinis and Deakin 643 et seq.

introduction, the greatest benefit from this thesis might originate from the individual parts than from the final result. This is possibly the case with a number of microcomparative studies: the final result entails an account of the uncertainties and limitations of the study.

Thinking that microcomparative approaches might lead to less impressive but better targeted and exploitable results, it is hoped that this study has indicated the benefit in being informed about foreign systems, as well as seeing beyond doctrinal or other obstacles to prudent and fair solutions. The development of a self-critical spirit is a major goal of comparative legal studies⁷⁴: it is a basis to overcome legal 'ethnocentrism', not only for the purpose of reaching specific improvements, but, mainly, for the realisation of the relativity and ambiguity of many of the set values and principles that hinder evolution in law. Hopefully such a self-critical view will be facilitated by this work.

Comparative studies cannot offer ready-made solutions. A basic ambition of this work is to inform those involved with the application of the law, of the situation in different jurisdictions concerning a specific problem linked to major private law issues, such as the delict-contract relationship or the third party beneficiary principle, which are the subject of ongoing debates. Its comparative character aside, if this research has contributed to these debates and motivated further discussion, its basic ambition will have been fulfilled.

⁷⁴ Frankenberg, 441 et seq., describes this spirit as a prerequisite and purpose of comparative legal studies.

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Appendix 1: German law.

BGB.

Certain articles of the German Civil Code which are often referred to in the text will be placed in German and in translation¹.

§ 133 [Auslegung einer Willenserklärung] Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.

§ 133 [Interpretation of a declaration of intention] In interpreting a declaration of intention the true intention shall be sought without regard to the declaration's literal meaning.

§ 138 [Sittenwidrigkeit] (1) Ein Rechtsgesäft, das gegen die guten Sitten verstößt, ist nichtig.

(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Notlage, des Leichtsinns oder der Unerfahrenheit eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren läßt, welche den Wert der Leistung dergestalt übersteigen daß der Umständen nach die Vermögensvorteile in auffälligem Mißverhältnisse zu der Leistung stehen.

§ 138 [Legal transactions against public policy; usury] (1) A legal transaction which is against public policy² is void.

(2) A legal transaction is also void whereby a person exploiting the need, carelessness or inexperience of another, causes to be promised or granted to himself or to a third party in exchange for a performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance.

§ 157 [Auslegung von Verträgen] Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

§ 157 [Interpretation of contracts] Contracts shall be interpreted according to the requirement of good faith, giving consideration to common usage.

§ 164 [Willenserklärung innerhalb der Vertretungsmacht] (1) Eine Willenserklärung die jemand innerhalb der ihm zustehenden Vertretungsmacht im Namen des Vertretenen abgibt, wirkt unmittelbar für und gegen den Vertretenen. Es macht keinen Unterschied, ob die Erklärung ausdrücklich im Namen des Vertretenen erfolgt oder ob die Umstände ergeben, daß sie in dessen Namen erfolgen soll.

(2) Tritt der Wille in fremden Namen zu handeln, nicht erkennbar hervor, so kommt der Mangel des Willens, im eigenen Namen zu handeln, nicht in Betracht

(3) Die Vorschriften des Absatzes 1 finden entsprechende Anwendung, wenn eine gegenüber einem anderen abzugebende Willenserklärung dessen Vertreter gegenüber erfolgt.

§ 164 [Effect by a declaration by a representative] (1) A declaration of intention which a person makes in the name of a principal within the scope of his agency operates both in favour of and against the principal. It makes no difference whether the declaration is

¹ For the German text the "Bürgerliche Gesetzbuch" edited by C.H.Beck, in 1968 is used. The translation of the BGB is taken from "The German Civil Code", Forrester I., Goren S., Ilgen H-M., of 1975. Whenever it is felt that a comment is required it will be placed in a footnote.

² The translation of the expression "guten Sitten"; the good, proper morals, practice; the moral standards, as "public policy" is a considerable failure to express the spirit of the provision to my opinion. A better view would be to use the expression "moral standards" or "social-moral practice" or some equivalent.

made expressly in the name of the principal, or if the circumstances indicate that it was to be made in his name.

(2) If the intention to act in the name of another is not apparent, the agent's absence of intention to act in his own name is not taken into consideration.

(3) The provisions of (1) apply *mutatis mutandis* if a declaration of intention required to be made to another is made to his agent.

§ 185 [Verfügung eines Nichtberechtigten] (1) Eine Verfügung die ein Nichtberechtigter über einen Gegenstand trifft, ist wirksam, wenn sie mit Einwilligung des Berechtigten erfolgt

(2) Die Verfügung wird wirksam, wenn der Berechtigte sie genehmigt oder wenn der Verfügende den Gegenstand erwirbt oder wenn er von dem Berechtigten beerbt wird und dieser für die Nachlaßverbindlichkeiten unbeschränkt haftet. In den beiden letzteren Fällen wird, wenn über den Gegenstand mehrere miteinander nicht in Einklang stehende Verfügungen getroffen worden sind, nur die früherte Verfügung wirksam.

§ 185 [Disposition by unauthorised person] (1) A disposition affecting an object which is made by a person without title, if made with the approval of the person entitled, is valid.

(2) The disposition is valid if the person entitled ratifies it, or if the disposer acquires the object, or if the person entitled has succeeded to his estate and is liable without limitation for the obligations of the estate. In the last two cases, if several incompatible dispositions have been made affecting the object, only the first disposition is effective.

§195 [Regelmäßige Verjährungsfrist] Die regelmäßige Verjährungsfrist beträgt dreißig Jahre.

§195 [Regular period of prescription] The regular period of prescription is thirty years.

§ 241 [Wesen des Schuldverhältnisses] Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen.

§ 241 [Content of obligation] The effect of an obligation is that the creditor is entitled to claim performance from the debtor. The performance may consist of refraining from acting.

§ 242 [Leistung nach Treu und Glauben] Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

§ 242 [Performance according to good faith] The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.

§ 249 [Schadensersatz durch Naturalherstellung] Wer zum Schadensersatz verpflichtet ist, hat den Zustand herzustellen, der bestehen würde, wenn der zum Ersatze verpflichtende Umstand nicht eingetreten wäre. Ist wegen Verletzung einer Person oder wegen Beschädigung einer Sache Schadensersatz zu leisten, so kann der Gläubiger statt der Herstellung den dazu erforderlich Geldbetrag verlangen.

§ 249 [Compensation in kind] A person who is obliged to make compensation shall restore the situation which would have existed if the circumstances rendering him liable to make compensation had not occurred. If compensation is required to be made for injury to a person or damage to thing, the creditor may demand, instead of restitution in kind, the sum of money necessary for that restitution.

§ 252 [Entgagnener Gewinn] Der zu ersetzende Schaden umfaßt auch den entgagnenen Gewinn. Als entgangen gilt der Gewinn, welcher nach dem gewöhnliche Laufe der Dinge oder nach den besonderen Umständen, insbesondere nach den getroffenen Anstalten und Vorkehrungen, mit Wahrscheinlichkeit erwartet werden konnte.

§ 252 [Lost profit] The compensation shall also include lost profits. Profit is deemed to have been lost which could probably have been expected in the ordinary course of events, or according to the special circumstances, especially in the light of the preparations and arrangements made.

§ 254 [Mitverschulden] (1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatze sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teile verursacht worden ist.

(2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, daß er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen mußte, oder daß er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des § 278 findet entsprechende Anwendung.

§ 254 (1) [Joint Debts] If any fault of the injured party has contributed to causing the damage, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party.

(2) This applies also even if the fault of the injured party consisted only in an omission to call the attention of the debtor to the danger of unusually high damage which the debtor neither knew nor should have known, or in an omission to avert or mitigate the damage. The provision of § 278 applies mutatis mutandis.

§ 278 [Verschulden des Erfüllungsgehilfen] Der Schuldner hat ein Verschulden seines gesetzlichen Vertreters und der Personen, deren er sich zur Erfüllung seiner Verbindlichkeit bedient, in gleichem Umfange zu vertreten wie eigenes Verschulden. Die Vorschrift des § 276 Abs. 2 findet keine Anwendung.

§ 278 [Responsibility for persons employed in performing obligation] A debtor is responsible for the fault of his legal representative and of persons whom he employs in performing his obligation, to the same extent as for his own fault. The provision of § 276(2) does not apply.

§ 281 [Herausgabe des Ersatzes bei Unmöglichkeit]

(1) Erlangt der Schuldner infolge des Umstandes, welcher die Leistung unmöglich macht, für den geschuldeten Gegenstand einen Ersatz oder einen Ersatzanspruch, so kann der Gläubiger Herausgabe des als Ersatz Empfangenen oder des als Abtretung des Ersatzanspruchs verlangen.

(2) Hat der Gläubiger Anspruch auf Schadensersatz wegen Nichterfüllung, so mindert sich, wenn er von dem im Absatz 1 bestimmten Rechte Gebrauch macht, die ihm zu leistende Entschädigung um den Wert des erlangten Ersatzes oder Ersatzanspruchs.

§ 281 [Delivery of a substitute in case of impossibility]

(1) If, in consequence of a circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.

(2) If the creditor has a claim for compensation on the grounds of non-performance, the compensation to be made to him is diminished, if he exercises the right specified in (1) by the value of the substitute received or of the claim for compensation.

§ 328 [Vertrag Zugunsten Dritter] (1) Durch Vertrag kann eine Leistung an eine Dritten mit der Wirkung bedungen werden, daß der Dritte unmittelbar das Recht erwirbt, die Leistung zu fordern.

(2) In Ermangelung einer besonderen Bestimmung ist aus den Umständen, insbesondere aus dem Zwecke des Vertrags, zu entnehmen, ob das Recht der Dritten sofort oder nur unter gewissen Voraussetzungen entstehen und ob den Vertragsschließenden die Befugnis vor behalten sein soll, das Recht des Dritten ohne dessen Zustimmung aufzuheben oder zu ändern.

§ 328 [Contract for the benefit of a third party] (1) A contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance.

(2) In the absence of express stipulation it is to be deduced from the circumstances, especially from the object of the contract, whether the third party shall acquire the right, whether the right of the third party shall arise forthwith or only under certain

conditions, and whether any right shall be reserved to the contracting parties to take away or modify the right of the third party without his consent.

§ 334 [Einwendungen] Einwendungen aus dem Vertrage stehen dem Versprechen auch gegenüber dem Dritten zu.

§ 334 [Defences of the debtor against the third party] Defences arising from the contract are available to the promisor even as against the third party.

§ 335 [Versprechensempfänger] Der Versprechensempfänger kann, sofern nicht ein anderer Wille der Vertragsschließenden anzunehmen ist, die Leistung an der Dritten auch dann fordern, wenn diesem das Recht auf die Leistung zusteht.

§ 335 [Right to claim of promisee] The promisee may, unless a contrary intention of the contracting parties is to be presumed, demand performance in favor³ of the third party even if it is the latter who has right to the performance.

§ 362 [Erlösen] (1) Das Schuldverhältnis erlischt, wenn die geschuldete Leistung an den Gläubiger bewirkt wird.

(2) Wird an einen Dritten zum Zwecke der Erfüllung geleistet, so finden die Vorschriften des § 185 Anwendung.

§ 362 [Extinction by performance] (1) An obligation is extinguished if the performance owed is made to the creditor.

(2) If performance is made to a third party for the purpose of fulfilment. the provisions of § 185 apply.

§ 447 [Versendungskauf] (1) Versendet der Verkäufer auf Verlangen des Käufers die verkaufte Sache nach einem andere Orte als dem Erfüllungsorte, so geht die Gefahr auf der Käufer über, sobald der Verkäufer die Sache dem Spediteur, dem Frachtführer oder der sonst zur Ausführung der Versendung bestimmten Person oder Anstalt aus geliefert hat.

(2) Hat der Käufer eine besondere Anweisung über die Art der Versendung erteilt und weicht der Verkäufer ohne dringenden Grund von der Anweisung ab, so ist der Verkäufer dem Käufer für den daraus entstehenden Schaden verantwortlich.

§ 447 [Passage of risk in event of dispatch of purchased goods] (1) If, at the request of the purchaser the seller dispatches the thing sold to a place other than the place of performance, the risk passes to the purchaser as soon as the seller has delivered the thing to the forwarder, freighter, or other person or entity designated to carry out the consignment.

(2) If the purchaser has given special instructions as to the manner of forwarding, and the seller deviates from the instruction without urgent reason, the seller is responsible to the purchaser for any damage arising therefrom.

§ 538 [Schadensersatzpflicht des Vermieters] (1) Ist ein Mangel der im § 538 bezeichneten Art bei dem Abschluß des Vertrages vorhanden oder entsteht ein solcher Mangel später infolge eines Umstandes, den der Vermieter zu vertreten hat, oder kommt der Vermieter mit der Beseitigung eines Mangels in Verzug, so kann der Mieter unbeschadet der im § 537 bestimmten Rechte Schadensersatz wegen Nichterfüllung verlangen.

(2) Im Falle des Verzugs des Vermieters kann der Mieter den Mangel selbst beseitigen und ersatz der erforderlichen Aufwendungen verlangen.

§ 538 [Lessor's duty to compensate] (1) If a defect of the kind specified in § 537 exists at the time of entering into the contract, or if such a defect arises subsequently in consequence of a circumstance for which the lessor is responsible, or if the lessor is in default in respect of a removal of a defect, the lessee may demand compensation for the nonfulfillment, without prejudice to the rights specified in § 537.

³ I kept the spelling of the original ("*The German Civil Code*", Forrester I., Goren S., Ilgen H-M., of 1975), which is an American publication.

(2) If the lessor is in default the lessee may himself remove the defect and demand compensation for any necessary outlays.

§ 549 [Untermiete] (1) Der Mieter ist ohne die Erlaubnis des Vermieters nicht berechtigt, den Gebrauch der gemieteten Sache einem Dritten zu überlassen, insbesondere die Sache weiter zu vermieten. Verweigert der Vermieter die Erlaubnis, so kann der Mieter das Mietverhältnis unter Einhaltung der gesetzlichen Frist kündigen, sofern nicht in der Person des Dritten ein wichtiger Grund vorliegt.

§ 549 [Sublease] (1) A lessee is not entitled, without the permission of the lessor to transfer to a third party, particularly to sublet the thing. If the lessor refuses permission, unless a serious reason exists in the identity of the third party, the lessee may give notice to terminate the sublease with observance of the statutory period.

§ 556 [Rückgabe der Mietsache] (3) Hat der Mieter den Gebrauch der Sache einem Dritten überlassen, so kann der Vermieter die Sache nach der Beendigung des Mietverhältnisses auch von den Dritten zurückfordern.

§ 556 [Return of leased thing] (3) If the lessee has transferred the use of the thing to a third party the lessor may, after the termination of the lease, demand the return of the thing even from the third party.

§ 604 [Rückgabepflicht] (4) Überläßt der Entleiher den Gebrauch der Sache einem Dritten, so kann der Verleiher sie nach der Beendigung der Leihe auch von dem Dritten zurückfordern.

§ 604 [Duty to return object of gratuitous loan for use] (4) If the borrower transfers the use of the thing to a third party, the lender may also demand it back from the third party after the termination of the loan.

§ 618 [Schutzvorschriften] (3) Erfüllt der Dienstberechtigte die ihm in Ausübung des Lebens und der Gesundheit des Verpflichteten obliegenden Verpflichtungen nicht, so finden auf seine Verpflichtung zum Schadensersatz die für unerlaubte Handlungen geltenden Vorschriften der §§ 842 bis 846 entsprechende Anwendung.

§ 618 [Duty to take protective measures] (3) If the employer does not fulfil the obligations imposed upon him in regard to the safety and health of the employee, the provisions of §§ 842 to 846 applicable to delict apply mutatis mutandis to his obligation to make compensation.

§ 701 [Haftung des Gastwirts] (1) Ein Gastwirt, der gewerbsmäßig Fremde zur Beherbergung aufnimmt, hat den Schaden zu ersetzen, der durch den Verlust, die Zerstörung oder die Beschädigung von Sachen entsteht, die ein im Betrieb dieses Gewerbes aufgenommener Gast eingebracht hat.

§ 701 [Liability of Innkeeper] (1) An innkeeper who is in the business of accommodating strangers has to make good the damage which a guest accommodated in the course of business suffers through the loss, destruction or damage of things brought into the premises.

§ 784 [Annahme der Anweisung] (1) Nimmt der Angewiesene die Anweisung an, so ist dem Anweisungsempfänger gegenüber zur Leistung verpflichtet; er kann ihm nur solche Einwendungen entgegensetzen, welche die Gültigkeit der Annahme betreffen oder sich aus dem Inhalte der Anweisung oder dem Inhalte der Annahme ergeben oder dem Angewiesenen unmittelbar gegen den Anweisungsempfänger zustehen.

§ 784 [Acceptance of order] (1) If the drawee accepts the order he is bound to make payment or delivery to the payee; he may raise against him only such defences which affect the validity which affect the validity of the acceptance, or result from the contents of the order or the contents of the acceptance, or which the drawee has directly against the payee.

§ 812 [Ungerechtfertigte Bereicherung-Grundsatz] (1) Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zu Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann wenn die rechtliche Grund später wegfällt oder der mit eine Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt.

§ 812 [Unjust enrichment-Principle] (1) A person who, through an act performed by another, or in any other manner, acquires something at the expense of the latter without any legal ground, is bound to return it to him. This obligation subsists even if the legal ground subsequently disappears or the result intended to be produced by an act to be performed pursuant to the legal transaction is not produced

§ 823 [Schuldhaftes Verletzung ausschließlicher Rechte] (1) Wer Vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatze des daraus Entstehenden Schadens verpflichtet.

(2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt, ist nach dem Inhalte des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein.

§ 823 [Duty to compensate for damage] (1) A person who wilfully or negligently, unlawfully injures the life, body, health, freedom property or other right of another is bound to compensate him for any damage arising therefrom.

(2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.

§ 826 [Sittenwidrige vorsätzliche Schuldigung] Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist ihr zum Ersatze des Schadens verpflichtet.

§ 826 [Wilful damage contrary to public policy] A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.⁴

§ 831 [Haftung für den Verrichtungsgehilfen] (1) Wer einen anderen zu einer Verrichtung bestellt, ist zum Ersatze des Schadens verpflichtet, den der andere im Ausführung der Verrichtung einem Dritten widerrechtlich zufügt. Die Ersatzpflicht tritt nicht ein, wenn der Geschäftsherr bei der Auswahl der bestellten Person und, sofern er Verrichtung oder Gerätschaften zu beschaffen oder der Ausführung der Verrichtung zu leiten hat bei der Beschaffung oder der Leitung die im Verkehr erforderliche Sorgfalt beobachtet oder wenn der Schaden auch bei Anwendung dieser Sorgfalt entstanden sein würde.

(2) Die gleiche Verantwortlichkeit trifft denjenigen, welcher für den Geschäftsherrn die Besorgung eines der im Absatz 1 Satz 2 bezeichneten Geschäfte durch Vertrag übernimmt.

§ 831 [Liability for employees] (1) A person who employs another to do any work is bound to compensate for any damage which the other unlawfully cause to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised necessary care in the selection of the employee, and, where he has to supply apparatus or equipment or he has to supervise the work, has also exercised ordinary care as regards such supply or supervision, or if the damage would have arisen notwithstanding the exercise of such care.

(2) The same responsibility attaches to a person who, by contract with the employer, undertakes to take charge of any other matters specified in (1), sent.2.

⁴ See the reference under footnote 2.

§ 839 [Amtspflichtverletzung] (1) Verletzt ein Beamter vorsätzlich oder fahrlässig die ihm einem Dritten gegenüber obliegende Amtspflicht, so hat er dem Dritten den daraus entstehenden Schaden zu ersetzen. Fällt den Beamten nur Fahrlässigkeit zur Last, so kann er nur dann in Anspruch genommen werden, wenn der Verletzte nicht auf andere Weise Ersatz zu erlangen vermag.

§ 839 [Liability for breach of official duty] (1) If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere.

§ 985 [Herausbeanspruch] Der Eigentümer kann von dem Besitzer die Herausgabe der Sache verlangen.

§ 985 [Claim for delivery] The owner can demand from the possessor the delivery of the thing.

§ 991 (2) War der Besitzer bei der Erwerbe des Besitzes in gutem Glauben, so hat er gleichwohl von dem Erwerb an den im § 989 bezeichneten Schaden dem Eigentümer gegenüber insoweit zu vertreten, als er dem mittelbaren Besitzer verantwortlich ist.

§ 991 [Liability of the indirect possessor] (2) If the possessor was in good faith at the acquisition of possession, he is nevertheless, from the time of the acquisition, answerable to the owner for the damage indicated in § 989, to the extent that he is responsible to the indirect possessor.

HGB.

§ 98 [Haftung gegenüber beiden Parteien]

Der Handelsmakler haftet jeder der beiden Parteien für den durch sein Verschulden entstehenden Schaden

§ 98 Liability with respect to both parties.

The commercial broker is liable to each of the two parties for damages arising through his fault.

§ 126 [Umfang der Vertretungsmacht]

[1] Die Vertretungsmacht der Gesellschafter erstreckt sich auf alle gerichtlichen und außer gerichtlichen Geschäfte und Rechtshandlungen einschließlich der Veräußerung und Belastung von Grundstücken sowie der Erteilung und des Widerrufs einer Prokura.

[2] Eine Beschränkung des Umfanges der Vertretungsmacht ist Dritten gegenüber unwirksam; dies gilt insbesondere von der Beschränkung, daß sich die Vertretung nur auf gewisse Geschäfte oder Arten von Geschäften erstrecken oder daß sie nur unter gewissen Umständen oder für eine gewisse Zeit oder an einzelnen Orten stattfinden soll.

§ 126 Scope of the power to represent.

(1) The partner's representation power extends to all court and non-court proceedings and transaction, including the alienation and encumbrance of real property and the conferral and revocation of a Prokura.

(2) A limitation of the scope of the representation power is ineffective against third parties; this applies especially to limitations which restrict the representation to only certain transactions or kinds of transactions or by which the power is only to be exercised under certain circumstances, for a specific period of time or at a certain location.

§ 161 [Begriff der KG; Anwenbarkeit der OHG-Vorschriften]

[1] Eine Gesellschaft, deren Zweck auf den Betrieb eines Handelsgewerbes unter gemeinschaftlicher Firma gerichtet ist, ist eine Kommanditgesellschaft, wenn bei einem oder bei einigen von der Gesellschaftern die Haftung gegenüber den Gesellschaftsgläubigern auf den Betrag einer bestimmten Vermögenseinlage beschränkt ist

(Kommanditisten), während bei dem anderen Teile der Gesellschafter eine Beschänkung der Haftung nicht stattfindet (persönlich haftende Gesellschafter).

§ 161 Definition of the limited partnership

[1] A partnership whose purpose is the operation of a commercial enterprise under a common firm name in a limited partnership, if the liability of one or more of the partners is limited with respect to the partnership's creditors to the amount of a specific capital contribution (limited partners), and there is no limitation of liability for the other partners (general partners).

§ 316 Pflicht zur Prüfung

[1] Der Jahresabschluß und der Lagebericht von Kapitalgesellschaften die nicht kleine im Sinne des §267 Abs. 1 sind, sind durch einer Abschlußprüfer zu pruefen. Hat keine Pruefung stattgefunden, so kann der Jahresabschluß nicht festgestellt werden.

[2] Der Konzernabschluß und der Konzernlagebericht von Kapitalgesellschaften sind durch einen Abschlußprüfer zu prüfen.

[3] Werden der Jahresabschluß, der Konzernabschluß, der Lagebericht oder der Konzernlagebericht nach Vorlage des Prüfungsberichts geändert, so hat der Abschlußprüfer diese Unterlagen erneut zu prüfen, sowet er die Änderung erfordert. Über das Ergebnis der Prüfung ist zu berichten der Bestätigungsvermerk ist entsprechend zu ergänzen.

§ 316 Audit Requirements.

(1) The annual financial statement and the management report of companies, which are not small within the meaning of 6 267, paragraph 1, shall be examined by an ayditor, If no examination has taken place, then the annual financial statement cannot be finalised.

(2) The consolidated financial statement and consolidated management report of companies shall be examined by an auditor.

(3) If the annual financial statement, consolidated financial statement, manarement report or consolidated financial reportis changed after the presentation of the accountant's report, then the auditor shall exzamine these records again to the extent that the changes require. The result of the examination shall be reported; the certification of the annual financial satement shall be correspondingly revised.

§ 319 Auswahl der Abschlußprüfer.

[1] Abschlußprüfer können Wirtschaftsprüfer und Wirtschaftsprüfungsgesellachaften sein. Abschlußprüfer von Jahresaschlüssen und Lageberichten mittelgroßer Gesellschaften mit beschränkter Haftung [§267 Abs.2] können auch vereidigte Buchprüfer und Buchpruefungsgesellschaften sein.

§ 319 Choice of Auditors

[1] Auditors may be qualified auditors and qualified auditing firms. Auditors of the annual financial statements and management reports of medium-sized limited liability companies (§267, paragraph 2) may also be certified accountants of certified accounting firms.

§ 369 [Kaufmännisches Zurückbehaltungsrecht] (1) Ein Kaufmann hat wegen der fälligen Ferderungen, welche ilm gegen einen anderen Kaufmann aus den zwischen ihnen geschlossenen beiderseitigen Handelsgeschäften zustehen, ein Zurückbehaltungsrecht an den beweglichen Sachen und Wertpapieren des Schuldners, welche mit dessen Willen auf Grund von Handelsgeschäften in seinen Besitz gelangt sind, sofern er sie noch im Besitze hat, insbesondere mittels Konnossements, Ladenscheins oder Lagerscheins darüber verfügen kann. Das Zurückbehaltungsrechtist auch dann begründet, wenn das Eigentum an dem Gegenstande von dem Schuldner auf den Gläubiger übergegangen oder von einem Dritten für den Schuldner auf den Gläubiger übertragen, aber auf den Schuldner zurückzuübertragen ist.

§ 369 [Merchant's Right of Retention] (1) A merchant has, onthe basis of claims due him from another merchant which arise out of bilateral commercial transactions concluded between them, a right of retention with regard to personal property and securities of the

debtor which have come into his possession with the debtors consent by reason of commercial transactions, to the extent he still has possession of them, particularly where he has the power of disposition over them by means of bills of lading, and warehouse receipts. The right of retention also arises where ownership of the items has passed from the debtor to the creditor or has been transferred by a third party for the debtor to the creditor, but is to be re-transferred to the debtor.

§ 392. [Forderungen aus dem Kommissiongeschäft]

[1] Forderungen aus einem Geschäft, das der Kommissionär abgeschlossen hat, kann der Kommittent dem Schuldner gegenüber erst nach der Abtretung geltend machen.

[2] Jedoch gelten solche Forderungen, auch wenn sie nicht abgetreten sind, im Verhältnisse zwischen dem Kommittenten und dem Kommissionär oder dessen Gläubiger als Forderungen des Kommittenten,

§ 392 [Claims arising from Transactions on a Commission Basis]

[1] Claims arising from a transaction concluded by the commission agent may be asserted by the principal against the debtor only after assignment.

[2] Such claims are deemed, however, even without assignment, to be claims of the principal with respect to the relationship between the principal and the commission agent or his creditors.

§ 396 [Provision des Kommissionärs; Ersatz von Aufwendungen].

[1] Der Kommissionär kann die Provision fordern, wenn das Geschäft nicht zur Ausführung gekommen ist. Ist das Geschäft nicht zur Ausführung gekommen, so hat er Gleichwohl den Anspruch auf die Auslieferungsprovision, sofern eine solche ortgebräuchlich ist; auch kann er die Provision verlangen, wenn die Ausführung des von ihm abgeschlossenen Geschäfts nur aus einem in der Person des Kommittenten liegenden Grunde unterblieben ist.

§ 396 [Commission'Agent's Commission; Reimbursement for Expenditures]

[1] The commission agent may demand commission when the transaction has been performed. where the transaction has not been performed, he nevertheless has the right to a delivery commission insofar as one is customary within the area; he may also demand the commission if the performance of the transaction concluded by him does not take place solely because of a reason related to the principal.

§ 564b. [Liability for dangerous substances]⁵

[1] If flammable, explosive or otherwise dangerous goods are brought aboard, the captain having obtained no knowledge of them or of their dangerous nature or condition the shipper or forwarder is liable under §564, even when not guilty of a fault. In this case the captain is empowered to discharge the goods at any time at any place chosen at his discretion or to destroy them or render them harmless in some other manner

⁵ From *The German Commercial Code*, by Goren, S. Forrester, I.S. 1979. This is a maritime law provision.

Appendix 2: Greek law.

Articles from the Greek Civil Code⁶.

Section 281. Abuse of right. The exercise of a right shall be prohibited if such exercise obviously exceeds the limits imposed by good faith or morality or by the social or economic purpose of the right.

Section 287. Notion of obligation. An obligation is the relationship whereby a person undertakes to furnish something to another. An obligation may also consist of an abstaining (from doing something).

Section 288. A debtor shall be bound to perform the undertaking in accordance with the requirements of good faith taking into consideration business usages.

Section 361. Contractual obligation. A contract is necessary in order to create or to modify an obligation through an act subject to any differing provision of the law.

Section 388. Unforeseen change of circumstances. If having regard to the requirements of good faith and business usages the circumstances on which the parties had based the conclusion of a bilateral agreement have subsequently changed on exceptional grounds which could not have been foreseen and the performance due by the debtor taking also into consideration the counter-performance has as a result of the change become excessively onerous the Court may at the request of the debtor and according to its appreciation reduce the debtor's performance to the appropriate extent or decide the dissolution of the contract in whole or with regard to its non performed part. If the dissolution of the contract has been decided the obligations to perform arising therefrom shall be extinguished and the contracting parties shall be reciprocally obligated to restitute the performance by which each benefited pursuant to the provisions governing enrichment without just cause.

Section 410. Stipulation for the benefit of a third party. If a person has accepted a promise of performance in favour of a third party such person may demand that the promisor pay to the third party.

Section 411. Right of the third party. The third party may demand the performance directly from the promisor if it appears that such was the intention of the contracting parties or if such conclusion results from the nature and the purpose of the contract.

Section 412. When a third party which is entitled to demand directly the performance has declared to the promisor that it shall exercise its right the party which accepted the promise may not release the promisor from the latter's obligation.

Section 413. Refusal of the third party. If the third party has by means of a declaration addressed to the promisor refused the right accruing to such third party from the contract such right shall be deemed not acquired.

Section 414. Pleas as against the third party. The promisor may also set up as against the third party the pleas flowing from the contract.

Section 415. Stipulation burdening a third party. A person who has promised to another that a third party shall furnish a performance shall unless a different conclusion can be drawn from the contract be liable for damages if the third party refused the performance.

⁶ The translated articles are taken from the *Greek Civil Code*, by Taliadoros, 1982.

Section 599. Restitution of leased thing. At the expiration of the lease a lessee shall be bound to restitute the leased thing in the condition in which he had taken possession thereof.

In case of sub-lease or assignment of the use of the leased thing to a third party the lessor can upon the expiration of the lease claim the rent also from the sub-lessee or from the person to whom the use was assigned.

Section 702. Salary of employees. Persons employed by the contractor for the construction of a building or other immovable installations shall have a direct claim against the master of the work in respect of their salaries to the extent of the sum which the master owes to the contractor.

As from the time an employee has declared to the master that he makes use of his right to claim the master shall be prevented to pay the contractor or assign or to enter into a compromise with either of them to the detriment of the employee.

An agreement limiting beforehand such right of an employee shall be void.

Section 819. If the borrower for use has handed the thing over to a third party the lender may upon the expiration of the loan contract claim the restitution of the thing also from the third party.

Section 825. A depositary who has redeposited the thing with a third party shall be responsible if he did so without right for any fault of such third party and if he had the right to do so for a fault in choosing the third party.

In both cases the depositor may bring directly against the third party the legal action which the depositary has against such party.

Section 834. Extent of responsibility. A hotel owner shall be responsible for any damage to or deterioration or abstraction of things brought in by residents except if the loss is imputable to the resident himself or to a visitor fellow-traveller or servant of the resident or to the particular nature of the thing or to force majeure.

Boarding-houses clinics sleeping-cars passengers vessels or airplanes shall be assimilated to hotels as regards the lodging offered to the passengers.

Section 904. Notion. A person who has become richer without a lawful cause by means or to the detriment of the patrimony of another shall be bound to restitute the benefit. Such obligation shall particularly arise by reason of payment made which was not due or payment for a consideration that did not materialise or that ceased to exist or that was illegal or immoral.

An acknowledgement by contract of the existence or non existence of a debt shall be assimilated to a payment.

Section 914. Notion. A person who through his fault has caused in a manner contrary to the law prejudice to another shall be liable for compensation.

Section 919. Morality offended. A person who has intentionally caused prejudice to another in a manner contrary to morality shall be liable for damages.

Appendix. 3: American law.

Restatement first.

Chapter 6: Contractual rights of persons not parties to the contract.

§133. Definition of the donee beneficiary, creditor beneficiary, incidental beneficiary.

(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is except as stated in Subsection (3):

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due or supposed or asserted to be due from the promisee to the beneficiary;

(b) a creditor if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;

(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

(2) Such a promise as is described in Subsection (1a) is a gift promise. Such a promise as is described in Subsection (1b) is a promise to discharge the promisee's duty.

(3) Where it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee is to benefit a beneficiary under a trust and the promise is to render performance to the trustee, the trustee, and not the beneficiary under the trust, is a beneficiary within the meaning of this Section.

§ 135 Duties created by a gift promise.

Except as stated in §140,

(a) a gift promise in a contract creates a duty of the promisor to the donee beneficiary to perform the promise; and the duty can be enforced by the donee beneficiary for his own benefit;

(b) a gift promise also creates a duty of the promisor to the promisee to render the promised performance to the donee beneficiary.

§ 136. Duties created by a promise to discharge a duty.

(1) Except as stated in §§ 140, 143,

(a) a promise to discharge the promisee's duty creates a duty of the promisor to the creditor beneficiary to perform the promise;

(b) a promise to discharge the promisee's duty creates also a duty to the promisee;

(c) whole or partial satisfaction of the promisor's duty to the creditor beneficiary satisfies to that extent the promisor's duty to the promisee;

(d) whole or partial satisfaction of the promisor's duty to the promisee in any other way than by rendering the promised performance in whole or in part does not limit the promisor's duty to the creditor beneficiary.

(2) Whether the extent of the promisor's duty to the creditor beneficiary is measured by the promisee's actual, supposed or asserted duty to the beneficiary at the time of the making of the contract, or at some other time, depends upon the interpretation of the promise.

§ 137. Disclaimer by a beneficiary.

A donee beneficiary or a creditor beneficiary who has not previously assented to the promise for his benefit, may, in a reasonable time after learning of its existence and terms, render the duty to himself inoperative from the beginning by disclaimer, unless such action is a fraud on creditors.

§ 139 Beneficiaries unidentified at the time of contract.

It is not essential to the creation of a right of a donee beneficiary or in a creditor beneficiary that he be identified when the contract containing the promise is made.

§ 140. Availability against a beneficiary of the promisor's defences against the promisee.

There can be no donee beneficiary or creditor beneficiary unless a contract has been formed between a promisor and a promisee; and if a contract is conditional, voidable or unenforceable at the time of its formation, or subsequently ceases to be binding in whole or in part because of impossibility, illegality or present or prospective failure of the promisee to perform a return promise which was the consideration for the promisor's promise, the right of a donee beneficiary or creditor beneficiary under the contract is subject to the same limitation.

§ 141 A creditor beneficiary's right to judgement and satisfaction, Promisee's right against the promisor.

(1) A creditor beneficiary who has an enforceable claim against the promisee can get judgement against either the promisee or the promisor or each of them on their respective duties to him. Satisfaction in whole or in part of either of these duties, or of judgements thereon, satisfies to that extent the other duty or judgement.

(2) To the extent that a creditor beneficiary satisfies his claim from assets of the promisee without resorting to the promisor's contract the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the creditor's beneficiary's claim is fully satisfied, and to any judgement thereon and to any security therefor of the promisor.

§ 142. Variations of a duty to a donee beneficiary by agreement of promisor and promisee.

Unless the power to do so is reserved, the duty of the promisor to the donee beneficiary cannot be released by the promisee or affected by any agreement between the promisee and the promisor, but if the promisee receives consideration for an attempted release or discharge of the promisor's duty, the donee beneficiary can assert a right to the consideration so received, and on doing so loses his right against the promisor.

§ 143 Variations of the promisor's duty to a creditor beneficiary by agreement of promisor or promisee.

A discharge of the promisor by the promisee in a contract or a variation thereof by them is effective against a creditor beneficiary if,

- (a) the creditor beneficiary does not bring suit upon the promise or otherwise materially change his position in reliance thereon before he knows of the discharge or variation, and
- (b) the promisee's action is a fraud on creditors.

§ 144 Effect of an erroneous belief as to the existence of a duty of the promisee to the beneficiary.

Unless the case is within the rules making contracts voidable for mutual mistake, where performance of a promise in a contract will benefit a person other than the promisee, the promisor's duty is not avoided or limited by an erroneous belief of the promisor or of the promisee as to the existence or extent of a duty of the promisee to the beneficiary.

§ 145 Beneficiaries Under promises to the United States, a State or a Municipality.

A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is under no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,

- (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for the injurious consequences, or

(b) the promisor's contract is with a municipality to render services the non-performance of which would subject the municipality to a duty to pay damages to those injured thereby.

§ 146 Surrender of security by a creditor beneficiary.

A creditor beneficiary who holds security for the performance due him and who, knowing of the contract between the promisor and the promisee, voluntarily or negligently surrenders to the promisor all or any part of the security or impairs or destroys the same, thereby limits his right against the promisee to the extent that he is injured by the diminution or destruction of the value of the security.

§ 147 Effect of a promise of incidental benefit.

An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

Restatement second.

Chapter 14. Contract Beneficiaries.

§ 302. Intended and Incidental Beneficiaries.

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if a recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

§ 303. Conditional Promises; Promises Under Seal

The statements in this Chapter are applicable to both conditional and unconditional promises and to sealed and unsealed promises.

§ 304. Creation of a duty to beneficiary

A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.

§ 305. Overlapping Duties to Beneficiary and Promisee

(1) A promise in a contract creates a duty in the promisor to the promisee to perform the promise even though he also has a similar duty to an intended beneficiary.

(2) Whole or partial satisfaction of the promisor's duty to the beneficiary satisfies to that extent the promisor's duty to the promisee.

§ 306. Disclaimer of a Beneficiary

A beneficiary who has not previously assented to the promise for his benefit may in a reasonable time after learning of its existence and terms render any duty to himself inoperative from the beginning by disclaimer.

§ 307. Remedy of Specific Performance

Where specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary.

§ 308. Identification of Beneficiaries

It is not essential to the creation of a right in an intended beneficiary that he be identified when a contract containing the promise is made.

§ 309. Defences against the Beneficiary

(1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if the contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.

(2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, the right of any beneficiary is to that extent discharged or modified.

(3) Except as stated in Subsection (1) and (2) and in §311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defences against the promisee or to the promisee's claims or defences against the beneficiary.

(4) A beneficiary's claim against the promisor is subject to any claim or defence arising from his own conduct or agreement.

§ 310. Remedies of the Beneficiary of a Promise to Pay the Promisee's Debt; Reimbursement of Promisee.

(1) Where an intended beneficiary has an enforceable claim against the promisee, he obtains a judgment or judgments against either the promisee or the promisor or both based on their respective duties to him. Satisfaction in whole or in part of either of these duties or of a judgment thereon, satisfies to that extent the other duty or judgment, subject to the promisee's right of subrogation.

(2) To the extent that a claim of an intended beneficiary is satisfied from assets of the promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the beneficiary's claim is fully satisfied, by subrogation to the claim of the beneficiary against the promisor, and to any judgment thereon and to any security therefor.

§ 311. Variation of a duty to a Beneficiary.

(1) Discharge or modification of a duty to a beneficiary by conduct of the promisee or by subsequent agreement between the promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain the power to discharge or modify the duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notice of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

(4) If the promisee receives consideration for an attempted discharge or modification of the promisor's duty which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration so received. The promisor's duty is discharged to the extent of the amount received by the beneficiary.

§ 312. Mistake as to Duty to Beneficiary

The effect of an erroneous belief of the promisor or promisee as to the existence or extent of a duty owed to an intended beneficiary is determined by the rules making contracts voidable for mistake.

§ 313. Government Contracts

(1) The rules stated in this Chapter apply to contracts with the government or governmental agency except to the extent that application would contravene the policy of the law authorising the contract or prescribing remedies for its breach.

(2) In particular a promisor who contracts with the government or governmental agency to do an act for or to render a service to the public is not subject to contractual liability to a

member of the public for consequential damages resulting from performance or failure to perform unless.

(a) the terms of the promise provide for such liability; or

(b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorising the contract and prescribing remedies for its breach.

§ 314. Suretyship Defences

An intended beneficiary who has an enforceable claim against the promisee is affected by the incidents of the suretyship of the promisee from the time he has knowledge of it.

§ 315. Effect of a Promise of Incidental Benefit

An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

UCC § 2-314 on "Implied Warranty: Merchantability; Usage of Trade" reads:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale

(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform with the promises and affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

(Uniform Laws Annotated-Uniform Commercial Code, Master Edition, 1989). See White and Summers *Uniform Commercial Code*, 3rd ed. 1988, 434 et seq.)

Restatement of the Law of Torts, §402.

Strict product liability is expressed in §402A of the second Restatement of the law of Torts which reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby used to the ultimate user or consumer, or to his property, if, (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Appendix 4: Scots law.

Book I Title 10. Paragraph 5, of the Stair's "Institutions of the Law of Scotland", (first edition in 1693), is quoted here as edited Walker, D.M. from 1981, pp.197-198. The notes of the editor are omitted. (In numerous cases reference is made, in respect of the *jus quaesitum tertio*, the 5th edition, which offers a less accurate picture of what Stair actually wrote. See Rodger, Allan "Molina, Stair and the *Jus Quaesitum Tertio*", *Juridical Review* (JR), 1969, 34-44, and 128-151.)

5. It is likewise the opinion of Molina, cap. 263 and it quadrates to our customs, that when parties contract. if there be any article in favours of a third party, at any time, *est jus quaesitum tertio*, which cannot be recalled by both the contractors, but he may compell either of them to exhibit the contract, and thereupon the obliged may be compelled to perform. So a promise, though gratuitous, made made in favour of a third party, that party, albeit not present, nor accepting, was found to have right thereby, Had November 25. 1609, *Achimoutie contra Hay*. Promises dependent upon acceptance may either be made by way of offer, or when the promise some things to be done on the part of him to whom it is made, not as a condition annexed only to the performance, for then the promise is presently obligatory, though the effect be suspended till the condition exist, but if the condition be so meant of expressed, that it must precede the obligation itself, as in mutual contracts, the one party subscribing is not obliged until the other also subscribe, or that the other party accept or consent: and so a contract being registrate was found orderly proceeded, though he who registrate it had not subscribed, seeing at the discussing he did summarily consent to the registration therof against himself, February 9, 1627, *M'Culloch*. Hence is our vulgar distinction betwix obligations and contracts, the former being only where the obligation is *μονοπλευρος*, on the one part: the other where the obligation is *δευπλευρος*, obligatory on both parts, whereby both parties are obliged to mutual prestations.

In order to comprehend Stair's views however the predecing two paragraphs should be quoted. The paragraphs expose the connection between *jus quaesitum tertio* and pollicitation.

3. Again we must distinguish betwixt promise, pollicitation or offer, paction and contract, the difference amongst which is this, that the obligatory act of the will is sometimes absolute and pure, and sometimes conditional, wherein the conditions relates either unto the obligation itself, or to the performance; such are the ordinary conditional obligations, which, though they be presently (upon the granting thereof) binding, and cannot be recalled, yet they are only to be performed, and have effect, when the conditions shall be

existent; but when the condition relateth to the constitution of the obligation, then the very obligation itself is pendent, till the condition be purified, and till then it is no obligation; as when any offer or tender is made, there is implied a condition, that before it become obligatory, the party to whom it is offered must accept; and therefore an offer by a son, to pay a debt due by his mother, was made known to be accepted at such a time, and in such a place, was found not obligatory after the mother's death, unless it had been so accepted, June 24, 1664, *Allan contra Collier*. So then, an offer accepted is a contract because it is the deed of two, the offerer and acceptor.

4. But a promise is that which is simple and pure, and hath not implied as a condition, the acceptance of another. In this Grotius differeth *de jure belli, lib.2.cap.11. § 14* holding, "that acceptance is necessary to every conventional obligation in equity, without consideration of positive law;" and to prevent that obvious objection that promises are made to absents, infants, idiots, or persons not yet born, who cannot accept, and therefore such obligations should ever be revocable, till their acceptance, which in some of them can never be; he answereth, that the civil law only withholdeth, that such offers cannot be revoked, until these be in such capacity as to accept or refuse. Promises now are commonly held obligatory, the canon law having taken off the exception of the civil law, *de nudo pacto*. It is true, if he in whose favour they made, accept not, they become void, not only by the negative non-acceptance, but by the contrary rejection. For as the will of the promiser constitutes a right in the other, so the other's will, by renouncing and rejecting that right, voids it, and makes it return. This also quadrates with the nature of the right, which consisteth in a faculty of power which may be in these, who exercise no act of the will about it, nor know not of it; so infants truly have right as well as men though they do not know, nor cannot exercise it. Promises with us are not probable with witnesses though within an hundred pounds, July 3, 1668, *Donaldson contra Harrower*. The like was found for a promise engaging for a party, who bought good not being a partner in the bargain; for promises, when they are parts of bargains about moveables, are probable by witnesses, January 19, 1672, *Dewar contra Brown*. And the reason our custom gives no legal remedy for performance of promises of things of importance by witnesses, is the same that the Roman law gave no action upon naked pactions, to prevent the mistakes of parties and witnesses in communings, that they should use a set form of words in stipulations so now, when writ is so ordinary, we allow no processes for promises, as a penalty against these who observe not so easy a method; yet the promise obliges the conscience and the honesty of the promiser.

Appendix 5: Commonwealth laws.

1. New Zealand.

Contracts (Privity) Act 1982.

Section 4. Deeds or contracts for the benefit of third parties

Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

Section 5. Limitation or variation or discharge of promise

(1) Subject to the sections 6 and 7 of this Act, wher, in respect of a promise to which section 4 applies

(a) The position of a beneficiary has been materially altered by the reliance of that beneficiary or any other person on the promise (whether or not that beneficiary or that

other person has knowledge of the precise terms of the promise); or

(b) A beneficiary has obtained against the promisor judgement upon the promise; or

(c) A beneficiary has obtained against the promisor the award by an arbitrator upon a submission relating to the promise,

the promise and the obligation imposed by that section may not be varied or discharged without the consent of that beneficiary.

Section 6. Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge

Nothing in this Act prevents a promise to which section 4 of this Act applies or any obligation imposed by that section from being varied or discharged at any time

(a) By agreement between the parties to the deed or contract and the beneficiary; or

(b) By any party or parties to the deed or contract if

(i) The deed or contract contained, when the promise was made, an express provision to that effect; and

(ii) The provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and

(iii) The beneficiary had not materially altered his position in reliance on the promise before the provision became known to him; and

(iv) The variation or discharge is in accordance with the provision.

Section 7. Power of Court to authorise variation or discharge

(1) Where, in the case of a promise to which section 4 of this Act applies or of an obligation imposed by that section,

(a) The variation or discharge of this obligation is precluded by section 5(1)(a) of this Act; or

(b) It is uncertain whether the variation or discharge of this promise is so precluded,

a Court, on application by the promisor or promisee, may, if it is just and practicable to do so, make an order authorising the variation or discharge of the promise or obligation or both on such terms and conditions as the Court thinks fit.

(2) If a Court

(a) Makes an order under subsection (1) of this section; and

(b) Is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation,

The Court shall make it a condition of the variation or discharge that the promisor pay to the beneficiary, by way of compensation, such sum as the Court thinks just.

Section 8. Enforcement by beneficiary

The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including injunctions, shall not be refused on the ground that the beneficiary is not a

party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

Section 9. Availability of Defences

(1) This section applies only where, in proceedings brought in a court or an arbitration, a claim is made in reliance on this Act by a beneficiary against a promisor.

(2) Subject to subsections (3) and (4) of this section, the promisor shall have available to him, by way of defence, counterclaim, set-off or otherwise, any matter which would have been available to him

(a) If the beneficiary had been a party to the deed or contract in which the promise is contained; or

(b) If (i) The beneficiary were the promisee, and

(ii) The promise to which the proceedings relate had been made for the benefit of the promisee; and

(iii) The proceedings had been brought by the promisee.

(3) The promisor may, in the case of a set-off or counterclaim arising by virtue of subsection(2)

of this section against the promisee, avail himself of that set-off or counterclaim against the beneficiary only if the subject-matter of that set-off or counterclaim arises out of or in connection with the deed or contract in which the promise is contained.

(4) Notwithstanding subsections (2) and (3) of this section, in the case of a counterclaim brought under either of those subsections against a beneficiary,

(a) The beneficiary shall not be liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with his claim against the promisor; and

(b) If the beneficiary so elects to proceed, his liability on the counterclaim shall not in any event exceed the value of the benefit conferred on him by the promise.

Appendix 6: Case law¹.

Contents.

German law.

Drittschadensliquidation.

Indirect agency.

Compulsory transfer of danger.

Duties of care.

Agreed *Drittschadensliquidation.*

Drittschadensliquidation and corporate identity.

Public contracts.

Product liability.

Retail chain.

Contract with protective effects.

Precontractual relationships.

Creditor's interest in the protection of the third party.

Advocate's liability.

Information, Expert opinion.

Banking contracts.

Contracts for medical treatment.

Transport contracts.

Contracts for services.

Contracts for works.

Contracts of lease.

Contracts of sale -- Producer's liability.

Drittschadensliquidation and contract with protective effects: Delimitation.

Public utility cases, ("cable" cases).

Greek law.

Third parties before the AK.

Building contracts.

Delictual protection.

Product liability.

American law.

Privity.

Decline of privity.

Third party beneficiary rule.

Intended/Incidental beneficiaries.

Third party beneficiary rule -- Defences.

Defences from the promisee-third party relationship.

¹ The cases, most of them that is, are placed here in summary form, and following the units in the content, as far as German, Greek and American law are concerned. As regards Scots law and especially the Commonwealth systems, different grouping are provided. At the end there are, indicatively certain groupings following common patterns of the relative literature. The model for this Appendix is the Restatement of Law of the American Institute of Law. Problems with the categories of the cases are caused with the Scottish and Commonwealth cases. Certainly some cases could fall into more than one categories, and there are different opinion as to the categorisation. I apologise for inconvenience caused by the categorisation followed here and for the fact that certain of the cases referred under a category might not be typical of the category. A number of case which are only briefly referred to in the text and/or the footnotes are referred to in greater detail here.

Donee and creditor beneficiaries.
Attorney liability for negligent advice.
Attorney liability for the drafting of wills.
Beyond will beneficiaries.
Construction.
Claims against the sureties of the prime contractors.
Claims between contractors.
Claims of the owner against the subcontractor.
Corporate transactions.
Financing.
Government contracts.
Stock exchange cases.
Public welfare programmes.
Housing cases.
Other welfare cases.
Pure economic loss.
Defences.
Misrepresentation.
Product liability.

Scots law.

Jus Quaesitum Tertio.

Defences.
Applications.
Donative intent.
Insurance contracts.
Banking contracts.
Partnerships.
Restrictive covenants.
Solicitor's liability.
Co-feuers.
Delict -Pure economic loss.
Negligent misstatements.
Subcontractor's liability.
Solicitor's liability.
Secondary economic loss (loss as a result of personal or property damage suffered by another person).
Construction.
Defective products.

Commonwealth systems.

English law.

Pure economic loss.
Privity-- Third party beneficiary claims.
Misrepresentation.
Solicitor's liability.
Carriage cases.
Exemption/limitation clauses.
Subcontractor's liability.
Liability of local authorities.

Australian law.

Pure economic loss.
Liability of local authorities.
Secondary economic loss.

Construction
Solicitor's liability.

Canadian law.

Privity.
Misrepresentation.
Manufacturer's liability.
Liability of local authorities.
Co-lessees.
Solicitor's liability.
Secondary economic loss.
Construction.
Negligence - Contribution.

New Zealand law.

Misrepresentation.
Solicitor's liability.
Exemption/limitation clauses.
Construction.
Liability of local authorities.

Honk Kong.

South Africa.

Quebec.

Categories of cases.

Common law systems and Scots law.

Privity - Consideration.
Negligent misrepresentation.
Negligent performance of services.
Defective products/constructions.
Liability of public authorities.
Solicitors, Advocates, Attorneys.
Exemptio/Limitation clauses.
Secondary economic loss.

German law.

Construction
Lease.
Services.
Services - Carriage
Services - Banking.
Services - Medical treatment.
Product liability -- Sale contracts.
Advocates' liability
Notaries.
Experts (auditors, valuers etc.)
Precontractual liability.
Secondary economic loss -- 'Cable' cases.

Greek law.

Construction.
Transport.
Services.

Banks' liability.
Supply of electricity.
Government contracts.
Product liability.

Cumulative index of cases.

German law.

Drittschadensliquidation.

Indirect agency.

In 1855 the Upper Appeal Court (*Oberappellationsgericht*) of Lübeck decided the first relative case², allowing undisclosed agents of cork traders to claim compensation from the defaulting shippers with whom they had contracted for their principals. Cork traders from Delmanhorst bought a quantity of cork in Oporto, and contracted with a forwarding agents' firm for the transportation of the cork. The carriage contract between the agents and a shipper provided, among others, that the shipper could unload upon arrival at Cuxhaven. The shipper did not do so; instead he unloaded at Hamburg later, and the cork traders suffered loss because of the delay. The agents' firm was allowed to claim damages for its undisclosed principal. Markesinis *A Comparative Introduction* 47.

Compulsory transfer of danger.

BGH, Urt. v. 30.9.1969-VI ZR 254/67 (Braunschweig); NJW 1970 38. Claimant was the insurance company of a contractor with the federal government for works in a high technology physics laboratory. A fire that was caused negligently by an employee of the subcontractor destroyed already executed works which had to be redone. The insurance company obtained the first contractor's claim after it gave him compensation. The LG and the OLG accepted the liability of both the subcontractor and the employee. The BGH thought that the indemnification agreed between the Federal Government and the contractor did not extend to the subcontractor. The Federal Government had no duty to offer security to the latter. No contract with protective effect was taken to exist in favour of the subcontractor. The court accepted in principle that the plaintiff's contracting party was under a duty to seek compensation for the damages suffered by the plaintiff due to the subcontractor's negligence.

In OLG Celle VersR 1975, 838, (Lange 287) the defendant had contracted with a company for the use of space in a garage enterprise. The contract allowed the company to leave the enterprise to a third person. The company did that. The new manager of the enterprise sued the defendant for damages because due to the latter's behaviour, (causing floods of water), the former could not lease certain parking places. The claim was successful.

Duties of care.

In BGHZ 15 224, 1955, the defendant, a forwarding agents firm, had appointed a carrier to transport scrap metal from West Berlin to West Germany. The heavy goods vehicle which belonged to the carrier was confiscated by the East German authorities at the borders because part of the metal scrap was of East German origin. The court of first instance applied a "supplementary" interpretation of the contract and held the view that the basic contractual duties of protection towards the other party, applied, according to the contractual purpose, when the object of the obligation belonged to someone else. Westermann on §447 BGB, 257.

BGH, 29.1.1969 - I ZR 18/67 (Frankfurt); NJW, 1969, 789. A business representative spent the night in a hotel. He left his car in a garage bellow the hotel as suggested to him by the hotel's personnel. On the next day he found that from a watch collection that belonged to his company, and which he had left in the car, certain valuable pieces were missing. The court held that there was a contract for the deposit of the car in the garage. It also considered, following a reasoning similar to that in the previous case, that between the hotelier and his client a contract of deposit had been concluded regarding the car and its contents. It was decided that the duties of care arising from the contract of deposit extend to the thing that did not belong to the depositor. Westermann on §447 BGB, Lange 290.

² Lorenz "Some Thoughts about Contract and Tort", 89, Lange 281.

Agreed Drittschadensliquidation.

In RGZ (Reichsgericht Zeitung), 170, 246, a town administration, contracted with a firm for repairs to some town owned cool-store depots. It was especially provided in the contract that the works would be operated without causing any interruption of business. Because of lack of proper attendance shown in the execution of the works, fire broke out. Damages were caused to the cool store depots' equipment and to meat supplies stored in the depots. The town administration had excluded the repairing firm's liability in the storage contract. The third party that suffered loss was a butcher whose supplies were kept in the damaged depots. The court accepted his claim. It considered that the clause referring to the absence of any interruption of business evidenced an implied agreement that the town administration was under a duty to restore the third party damage. On the basis of §281 BGB, the town administration was obliged either to assign its claims to the butcher or to sue the injurer on his account. See Lange 280, Sirp, on §249 BGB, 535.

In RG Recht 1923 Nr 1977, the owner of a store room had leased a part of the available space to a carpet trading business, and another part to a linoleum trading business. In both lease contracts the same clause existed which stated that the lessee would not perform activities competitive to the other lessees-possessors of the storeroom. The linoleum trading business violated that provision. The Court, on appeal by the other lessees, found that the agreement concerning the exclusion of competitive activities was obviously made to the interest of third parties; any other persons who at any time would be lessees. Only the latter could have been injured from a violation of the relevant clause. The owner had suffered no loss and he had no interest to sue on his own account; he was nevertheless under a duty to claim compensation for the damages the carpet traders had suffered. See Lange 281.

BGH 15.1.1974 - X ZR 36/71 (München), NJW 1974, 502. The plaintiff had patent rights for a special method of filling tablet tubes. It had granted a firm a simple (not exclusive) licence to use the method and provide with its products three particular business establishments. Subsequently the plaintiff gave a license for the exclusive use of the patent to a second firm, by a written contract. A clause in the license contract provided that the licence did not entitle the firm to make sales to the three particular firms mentioned before. Any offer for sales to these firms would be invalid unless the first firm (the holder of a simple license) had previously given its consent to these offers. The exclusive licensee sold its products that had been produced with the patented method to two of the three firms that had previously been provided by the first firm (the other licensee) and paid royalties to the plaintiff. The first firm rescinded the contract with the plaintiff and exercised its right of retention as to the royalties owed. The plaintiff was thus compelled to sue the defendant (the second company) for the violation of the contract and pass the damages acquired to the first firm which suffered loss. The central aspect of the decision's rationale lies in the fact that in these cases the interests of the person entitled to sue were combined, tied together with the interests of the third party, in such a manner that the former had to look after the interests of the third party. The party that contracted with the person entitled to sue should take this protection requirement into account. The plaintiff was entitled to withhold from the compensation whatever was owed to him by the first firm.

BGH, 21.3.74, - VII ZR 87/73 (Hamburg), NJW 1974, 1046; the decision was based on §631 BGB. A travel agent contracted with a charitable establishment for the youth, for the organisation of transport from Berlin to Osaka and return, at the cost of 1,200 DM per participant. A chartered flight was booked for the 39 participants. The flight could not be made however because neither the agent nor the air carrier had obtained landing authorisation. The travellers had to reach Osaka by other means in order to be there at the scheduled time. The additional costs they had to bear, were claimed by the charitable organisation which had contracted with the agent in its own name. In both degrees of jurisdiction the claim was considered well founded. The defendants' appeal on reasons of law was rejected.

Drittschadensliquidation and corporate identity.

BGH, München 13/11/73, NJW 1974, 134. The plaintiff, capital estate agent and sole shareholder of a limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH) sued his advocate for losses he suffered as a shareholder when, due to the advocate's negligence the plaintiff's name entered the list of debtors. Following non payment of personal execution costs, for a demand of 62.19 DM, the plaintiff was ordered to submit the company to a special judicial procedure aiming at imposing a statutory affidavit. The procedure was then limited to taking an oath of disposal (*Offenbarungseid*; oath of manifestation, affidavit as to the accuracy of an inventory). The advocate whom the plaintiff authorised to handle the issue, did not take notice of the relative hearing. As a consequence of the plaintiff's not participating to the procedure, a warrant of arrest was issued against him and his name entered the list of debtors drawn by the executions' court (*Vollstreckungsgericht*). The plaintiff sued the advocate, claiming compensation for the losses he suffered due to the violation of the advocate's duty of legal representation and asking 463,763.79 DM compensation. The plaintiff argued that he suffered the loss in his capacity as the sole shareholder of the limited liability company. Following his entering the debtors' list, the bank that had credited the company, regarded the latter as credit unworthy. In order to repay a purchase loan which was now demanded by the bank, the plaintiff had to sell a piece of land he had bought for the purpose of development. The court of first instance rejected the plaintiff's claim because the damage had been suffered by a third person; the company. The exception of the *Drittschadensliquidation* was not found applicable. The company did not fall in the circle of people that could be protected by the contract between the plaintiff and the advocate. See Roll, Anmerkung, NJW 1974, 492-493. The plaintiff's appeal was successful and the case was remitted to the lower court. The legality of the claim was recognised as it concerned the property of the one-shareholder company; the plaintiff's own separate property ("*Sondervermögen*"). It was thought that it was not clear whether the company had suffered any loss at all and whether there was any causal link between the loss and the advocate's behaviour. See Sirp on §249 BGB, 535. Evidence was, in addition, required as regards the plaintiff's possible contributory negligence and on whether the defendant had ever been informed on the procedure regarding the still owed execution costs. See also Berg NJW 1974 935, at 934, Sirp on § 249 BGB, 535, and Grunsky on § 249.

Public contracts.

In BGH, 2.12.1971 - VII ZR 73/70, (Hamm), NJW 1972, 288-289. The defendants, building contractors, had undertaken certain excavation and building works for the first part of a by-pass road in 1959. They contracted (in writing) with a landscape association which acted as a mandator for the federal government. Explosives had to be used in the works, and properties bordering the by-pass were damaged. A couple whose home suffered damage, sued the federal government asking for compensation. They obtained an order from the *Oberlandesgericht* of Hamburg, holding the federal state liable to pay adequate compensation for the loss suffered. The decision became "final and absolute", (*res judicata*), after the federal government withdrew its appeal. Finally an out of court settlement was agreed on the basis of which the government paid 75,000 DM, compensation. The government had given notice of the proceeding to the contractors. The latter intervened in the dispute in support of the federal government, the then appellant. The BGH thought that this intervention was legitimate if it was considered that the landscape association was not a representative but an undisclosed representative of the federal government. The federal government sued the building contractors seeking compensation for the loss if suffered restoring the damages the explosives caused. The appellate court thought that the claim was based in law.

Product liability.

In BGHZ 40, 91, NJW 1963, 2071, the defendant, a leather trader, bought wild suede leather from a factory, and delivered a quantity to a belt producing factory. The latter produced

ladies' belts and supplied a clothing factory which fitted the belts on ladies' dresses. Due to defective work on the leather the colour on many dresses changed where they touched on the belts. The same thing happened to a small number of dresses of another firm that had also been supplied with belts from the plaintiffs. The belt producing factory which could not be held liable for the damage, sued the factory that processed the leather for the damages the former's customers suffered. The plaintiff thought it was entitled to ask for the recovery of its clients' loss. The court of first instance held that the plaintiff was entitled to seek compensation for the loss his customers suffered. The appellate court rejected the defendant's appeal. The defendant used his last procedural means; with an appeal on questions of law (*Revision*) he attempted to have the plaintiff's claim wholly rejected. The court of final instance decided against the previous decisions that the plaintiff was entitled to recover his customers' losses. The claim was considered as unfounded. A contract of sale could not be interpreted on the basis of good faith so as to entitle compensation for a third party who is injured due to defects to a product bought. (Markesinis *A Comparative Introduction*, 354) *Drittschadensliquidation* was explicitly rejected after examining in turn agreed *Drittschadensliquidation*, indirect agency, transfer of danger and the duty of care as potential bases. (BGHZ NJW 1963, 2074).

BGHZ 51, 91, NJW 1969, 269, JZ 1969, 287. The case was decided in 1968. The plaintiff who ran a chicken farm had her chickens inoculated against fowl pest by a vet on 19/11/1963. Due to fowl pest that broke out only a few days later 4,000 chicken died and 100 had to be slaughtered. The plaintiff claimed compensation from the manufacturers of the vaccine the vet used. This vaccine, bottled in 500ml bottles, came from a batch that had been inspected on 18/10/1963. On 22/11/63 the same vet inoculated the chicken in another farm; fowl pest broke out there too. The disease appeared in three other farms in the Württemberg area where vaccine from the same batch had been used. Special inspection of the unused bottles found in some of them bacterial immunities and still active Newcastle disease viruses which had not been sufficiently immunised. The defendant argued that the use of the vaccine caused the fowl pest and not the vaccine in the defectively sterilised bottles. The court of the first instance and the appellate court held the claim to be well founded. The appellate court considered in detail the question of the applicability of *Drittschadensliquidation*. See for a translation the *Sourcebook on German Law*, 1994, by Young, R. 364, and Markesinis *A Comparative Introduction*, 1990, 351.

Retail chain.

OLG Hamburg, NJW, 1974, 2091. The defendant had sold a second hand car to a witness at the hearing. The latter after having used the car for a year resold it to the plaintiff. The plaintiff observed after delivery that the car had been damaged in a collision. He rescinded the contract of sale for the reason of cunning behaviour from his immediate seller. The latter was however in good faith. He assigned his compensation claims against the defendant to the plaintiff who then sued. The court of first instance rejected the claim holding that the assignment of the claims was not valid. The claim was examined in relation to the provisions of unjust enrichment, and it was thought that it could not succeed on this basis, since the witness had not rescinded his contract with the first seller (the plaintiff had no such right). A claim on the basis of §463 BGB (providing for the liability of the debtor in case of absence of a promised quality) could not be considered because the witness suffered no loss. *Drittschadensliquidation* was not found applicable, while it was thought that a plaintiff could not have a claim of his own against the defendant; the possible basis would have been §823(II) BGB, or §826 BGB. In sales of second hand objects the prevailing view is that the liability of the seller is limited. The appeal was partly successful since the validity of the assignment of claims was accepted.

Contract with protective effects.

In OLG Hambourg 18.10.1907; Recht 1907 3469³ a company which had contracted with a travel agent for an excursion of its personnel, sued successfully the agent in contract for the injuries certain employees suffered in a traffic accident. Two vehicles were used. Some of the employees who were on one of the vehicles were injured in an accident which was caused culpably by the driver. The passengers could not establish a compensation claim against the travel agency on the contract of carriage because they were not parties to that contract. It seemed, furthermore, difficult to infer a contract in the favour of third parties (§ 328 BGB). (It had been the steady policy of the German courts to apply § 328 BGB only as regards performance duties and when the benefit favouring a third party was expressly provided for. See Strauch JZ 1982 823, Gottwald on §328 BGB, 1020, Larenz "Anmerkung an BGH 25.4.1956-VI ZR 34/55 (Düsseldorf)," NJW 1956 1193.). In the case in question the performance duty had been fulfilled but duties of protection and care had been violated. *Drittschadensliquidation* was not applicable because the loss suffered had not been the result of the violation of the basic duty but of the violation of the duty of care of the debtor (travel agency), towards the creditor (company).

BGH 24.2.1954; NJW 1954, 874. A building firm contracted for works with the lessee of a building. The owner had agreed for the performance of these works. When a wall, the stability of which the firm had omitted to examine, collapsed, the owner was allowed to claim compensation from the firm. The decision inferred an agreement in favour of the owner as regards a duty of care although he was not a contracting party. It was considered that in the building contract the secondary duties of care were meant to benefit the owner. Interpreting the contract on the basis of §157 BGB, in the light of §242 BGB, and of the provision on the liability for agents and employees (§278 BGB), the court considered that each of the parties entrusted their contracting party not only for the execution of the basic duties but also for the realisation of the secondary duties of care. The latter duties were extended to the third parties who were in such a position in relation to the contract that their well-being was affected by the violation of the protection duties.

BGH 25.4.1956-VI ZR 34/55 (Düsseldorf); NJW 1956, 1193. The case involved the sale of an operationally safe transmission disc for a threshing machine. It was held that the seller was under a duty to protect, with information, guidance, etc., not only his contracting party but also the latter's employees. They were entitled to compensation for injuries caused by the operation of the machine. The seller was liable to compensate because in accordance with good faith and the purpose of the contract he should have recognised that, not only the buyer of the disc, but also other people were likely to be affected by the operation of the disc and should have given his consent to protect their interests also. Gernhuber notes that the object of the sale plays an important role in the case of sale of machinery, considering that they are somehow special not representative situations (Gernhuber "Drittwirkungen im Schuldverhältnis", 259). Although there was no express agreement the court inferred that the debtor should have expected to be exposed to the claims for compensation of a wider circle of persons. The decision relied on §328 BGB assuming that it can apply as far as secondary non performance duties are concerned. Gernhuber thinks that case law gave at that stage a new dimension to the contract for the benefit of third parties. It was not possible to foresee how far would the courts go in the development of the case

³ This reference (OLG Hambourg 18.10.1907; Recht 1907 3469) was found in Kefalas 73. There are nevertheless cases of the same period as one on the liability of a carrier, liable towards the owner of the things carried who was not his contracting party (RG 16.5.1906; RGZ 63 308 and a similar case in 1918; RG 3.1.1918; RGZ 92 8); See Blaurock "Haftungsfreizeichnung zugunsten Dritter. Die Ausdehnung vertraglicher Haftungsregelungen auf Dritte" ZHR 146 (1982) p.238. Another early decision found the carrier liable for injuries sustained by the child of his contracting party when the steamship was murring (RG recht 24 Nr 161; in Heinrichs on § 328 BGB 355.). See also Gottwald on § 328 BGB, 1020, footnote 140.

law. A decision of the higher court would not be conclusive of the direction of the case law. (Gernhuber "Drittwirkungen im Schuldverhältnis", 260).

BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 167 (The Capuzol 22 decision) The case concerned a suit by a worker, employed in a metallurgical industry, who was injured using anticorrosive material ordered by his company-employer, from the defendant producer. The latter delivered a new product (the Capuzol 22) instead of the usual one failing to warn on its flammability, and violating relative labelling provisions of the legislation. When the worker used the material, it caught fire followed by an explosion that resulted in her suffering serious burns on the face and hands. The claim against the producer was preferred to a claim against the liable employer possibly for reasons of advocate tactics. (The employer is liable for the safety of his employees on the basis of §618 BGB.) The Federal Court of Appeal referring to concurring case law (to BGH 25.4.1956-VI ZR 34/55 (Düsseldorf); NJW 1956, 1193 for instance) accepted the compensation claim of the worker against the producing company. The producer was under a contractual duty to inform his contracting party on the flammability of the product. The contract of sale created protective effects for the worker. The innovation of the decision lay in the fact that it abandoned the contract in favour of third parties as the basis of the mechanism and justified the extension of the protective effect on the provision of good faith (§242 BGB). (The provisions on the contract in favour of third party were taken into account in order to reinforce the decision's argumentation but not as the basis of the mechanism.) The decision was thus consistent with the legal explanation of protection duties, which are violated here, good faith being their legal basis (see Larenz I, 185. See also Canaris JZ, 1965 475-482). The debtor owed these protection duties towards certain third persons.

In OLG Düsseldorf, 9.12 64-9 U 172/63; NJW 1965 539 the Appellate Court of Düsseldorf accepted the claim of a landowner against the building contractor, hired by a neighbouring landowner to repair a middle wall, for the additional expenses the plaintiff would have to undergo for the erection of a building on his property, because the defendant had used debris and refuse to fill bomb craters and the ground was unstable. The court focused on good faith requirements in the building works; the foundations should suffice for both buildings. The contractor should have worked keeping in mind the needs of the neighbour for the future erection of a building. The decision referred to the relative building regulations in order to reinforce the relative arguments.

BGH 6.7.1965-VI ZR 47/64 (OLG Hamburg); JZ 1966 141. The advocate was held liable when a testator died, without having realised his will to leave as sole heir his daughter (the claimant) and his granddaughter, from another child, as legatee of a property item. Due to the advocate's lack of care (postponement of consequent appointments) a testament was not drafted and the claimant was not named sole heir. The decision protected the future, expected financial situation of the plaintiff. The decision was criticised. Medicus (Medicus JuS, 1974 613) considers that the case did not involve the defective execution of the service contract (by not fulfilling protection duties), but the non execution of the basic contract. See Lonertz "Anmerkung an BGH 6.7.1965-VI ZR 47/64 (OLG Hamburg)"; JZ 1966 142.

BGH 11.1 1977-VI ZR 261/75 (Bamberg); NJW 1977, 2073. The defendant was the advocate of the plaintiff's father. In January 1972 the plaintiff's father and mother signed a divorce agreement drawn up by the defendant. After the divorce decree was granted in February 1972 the mother refused to transfer her interest in the property to the plaintiff and his siblings as provided in the divorce agreement. The plaintiff claimed damages for breach of the defendant's duty as an attorney. The LG rejected and the OLG accepted the claim. The defendant's appeal was dismissed. The BGH noted that it was not a problem to accept that there was a contract with protective effects in this case as the plaintiff was the son of the attorney's client and was entitled to care and protection from him. According to the divorce agreement the children were the sole beneficiaries, and the only people to suffer if the

agreement proved invalid. A stingiest test should be applied in order to allow a claim for damages to the third parties. In this case the direct claim was justified as the children were named in the contract and were represented by the attorney's client. The BGH thought that in this case *Drittschadensliquidation* could be applied as well as it would have been proper for the client to indemnify his son for the loss he had suffered. The court did not pursue the matter further. See Markesinis *A Comparative Introduction*, 1990, 230, for a detailed translation.

LG München I 1.12.1982-25 O 4596/82; NJW 1983 1621 Due to the defendant's (advocate's) mistake in sending a notice of termination of a lease contract the termination delayed and the plaintiff and his family had to lease another flat temporarily and to pay increased removal costs.

In, BGH 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984, 355, an officially appointed sworn expert made a report on the value of some piece of immovable property, at the request of a trader. The expert failed to observe housing restrictions in the area, and gave an overestimated report. The plaintiff, an investor who participated in the first contact with the valuer, relied on the report, and, intending to build housing, he received a loan from a bank, which he had to rescind. The plaintiff claimed that the valuer owed him a duty of care as to the accuracy of the report, and he asked compensation. His claim was denied because the valuer could not be held responsible to an infinite number of prospective buyers who might have different investment purposes. However, the possibility of being liable for damages to the property as a whole was not excluded. The case is referred to again with more details later on. See Markesinis *A Comparative Introduction*, 1990, 221 for a translation.

In BGH 19.3 1986-IV a ZR 127/84; JZ 1986, 1111, an auditor was asked by a business enterprise to prepare a report on its creditworthiness. The enterprise was intending to apply for a loan from a bank. The bank gave a maintenance loan on the basis of the report and received a land charge as security. When, subsequently, after the business's bankruptcy the bank tried to promote the existing building plans with the receiver (*Konkursverwalter*, trustee in bankruptcy), it discovered that the land was under charges which were not mentioned in the report. The claim of the credit institution was rejected. However the consideration of the contract with protective effect *vis-à-vis* third parties, did not exclude the possibility of liability for property losses. See also Ebke and Fechtup "Anmerkung an BGH 19.3 1984-IV a ZR 127/84", JZ 1986, 1112.

Precontractual relationships.

In RGZ 91 21; Sonnenschein *Juristische Arbeitsblätter*, 1979, 227, the daughter of a lessee claimed successfully against the landlord for not having decontaminated the house from tuberculosis.

In RG Recht Nr 16; Heinrichs on §328 BGB 355, the child who broke its arm while the steamship was murring had a claim on the carriage contract his father concluded.

In BGH 13.2.1975-VI ZR 92/73 (Hamburg); NJW 1975 867, the injured child of an employee in the defendant's pigstall had a claim on the complex relationship of employment and lease between his father and the defendant.

In BGHZ 66 51; JZ 1976 776 and NJW 1976 712, a 14-year old girl, slipped on vegetables thrown on the floor, while escorting her mother in a self-service shop, and was injured. The court accepted the child's claim against the entrepreneur. The court established the liability for protection on the reliance between the contracting parties. See also Kreuzer "Anmerkung an BGH 28.1.1976-VIII ZR 246/74 (OLG Koblenz).", JZ 1976, 778.

Creditor's interest in the protection of the third party.

OLG (Hamm) 9 Z S Urt.v.14.2.1976-9 U 216/76; FamRZ 1977 318. Protection was denied because the lessee of the second floor (creditor), was not liable for the protection of the lessee of the first floor who was living with the former, to the knowledge of the lessor, and was injured when a balcony collapsed, since they were not married, and had no legitimate interest for this protection. The decision which was criticised as involving a moral judgment on the free union (Sonnenschein *Juristische Arbeitsblätter*, 1979 225), emphasised on provisions under which a lessee was not allowed to offer the leased thing to another person without the permission of the landlord (§549 BGB).

Advocate's liability.

BGH Urt. v. 13.11.1973-VI ZR 53/72 (München); NJW 1974 134. The plaintiff a financial broker was the only shareholder and manager of a limited liability company. In his personal capacity he had a contract with an advocate. The plaintiff was asked to take an oath of disclosure for certain debts he owed for the expenses of judicial proceeding he had to face regarding a loan he finally paid. (The oath of disclosure, had been imposed on him by his opposing party in the dispute.) Following his advocate's advice the partner did not appear at a hearing in order to take the oath. Neither was his advocate present. A warrant of arrest against the partner was issued, and, according to the relative provisions, his name entered the list of insolvent debtors (*Schuldnerverzeichnis*). As a result a Hamburg bank which had offered the company a loan considered the company not creditworthy and the company had to sell a piece of land it had bought for investment in order to return the loan. The company suffered loss therefore. The plaintiff claimed compensation for personal damage he suffered as the only shareholder of the injured company. The BGH, overruling the OLG decision, noted that the plaintiff is not asking compensation for the damage a third person, the legal person of the company suffered, but for his own personal damages as only shareholder of the company which suffered losses. Although there was a need to take into account the different legal personality of the company, the BGH thought that in cases of one-man companies the property of the company is liable for the financial or other losses the shareholder is burdened with. In this case the plaintiff himself is practically suffering the losses. The BGH could not decide on whether the company had suffered losses or on the causal link between the behaviour of the advocate and the loss or on the argument of contributory negligence. The decision attracted the criticism of lawyers who would have preferred the application of *Drittschadensliquidation*. As regards the list of insolvent debtors (*Schuldnerverzeichnis*.): "When a debtor discloses his assets or when a committal order for his arrest is issued his name is entered in the list of insolvent debtors. This list is open to inspection by the general public.The list serves the purpose of making prospective business partners or customers aware of the financial position of the debtor"; "Litigation in Civil Courts", by von Westerholt in *Business Transactions in Germany* 1992, Rüster (general editor). See §§901,908 ZPO.

LG (München) Urt.v. 1.12.1982-25 0 1596/82; NJW 1983 1621. The advocate made a mistake in delivering a note to quit (he delivered it to one of the lessees while he should have delivered it to both in order to be valid). The house belonged to a client and she had decided to leave it to her daughter to use. Due to the advocate's mistake the house was not available until one year after the prescribed time, and the daughter had to find accommodation elsewhere for herself and her family. The compensation claim included the additional expenses for (higher) rent and the double removal costs.

BGH Urt. v. 11.1.1971-VI ZR 261/75 (Bamberg);NJW 1977 2073. One party promised to the other that certain property assets would be given to the children. When the latter found that due to the advocate's fault they could not enforce the agreement, one sued the advocate. The LG rejected the claim, the OLG granted compensation and the *Revision* of the defendant was unsuccessful. The Federal Court of Appeal (the "*Revision*" court; the court adjudicating appeals against OLG decisions on issues of law only) noted that the child was asking compensation for his own losses on the basis of the contract with protective effects. It was thought that the *Drittschadensliquidation* might have room of application had the

father of the child raised the claim. The case created no problem as to the debtor's knowledge of the circle of protected people. The protective effect in favour of the children was not disputed at any trial level. The Senat of the *Revision* court questioned especially the extend this protection might reach. The applicability of the mechanism was not doubted in principle by the *Revision* court but, contrary to the appellate court, it was more sceptical on this application. It was further questioned whether the liability could be based on the violation of special performance duties.

BGH Urt. v. 6.7.1965-VI ZR 47/64 (OLG Hamm); JZ 1966 141. The case involved a testator who intended to leave as sole heir his daughter and as legatee of certain items his granddaughter, the child of his deceased son. The advocate undertook the obligation to arrange for the drafting of a will with a notary public. Four appointments were cancelled; two because the advocate had not been able to attend. The future testator died suddenly leaving as heirs his daughter and granddaughter on the basis of an older will. The daughter sued the advocate. The LG accepted the claim. Both the appeal and the *Revision* were unsuccessful. The court accepted the extension of particular behavioural duties to third persons and took into account the application of the mechanism to bodily injuries, material harm, and precontractual liability. See the comment on the decision by Lorenz in JZ 1966 143.

Information, Expert opinion.

BGH, Urt. v. 15.5.1979-VI ZR 230/76 (Stuttgard); NJW 1979 1882. The plaintiff and the first defendant were traders. The second defendant had worked as a accountant keeping the books of the first defendant from 1970 until 1973. In 1973 he applied for a job in the plaintiff's business presenting an appraising employment reference by the first defendant. The latter, by the end of 1973 had serious suspicions and later he was given more information that the book keeper had shown seriously dishonest behaviour while he was in his employment. The first defendant did not inform the plaintiff however. The employee was repeatedly dishonest in his new post. He embezzled business money, drew checks on the plaintiff's account without authorisation etc. The plaintiff sued the previous employer. (The employee had no property at the time.) The LG accepted the claim on the basis of the protective effect of the reference but for a smaller amount because of the plaintiff's contributory negligence. The OLG lowered the amount further. The *Revision* by the defendant had no success. The basis for the decision was the reliance on the employment reference.

BGH, Urt.v. 5.12.1972-VI ZR 120/71 (Hamburg); NJW 1973 321. An auditors' firm had been preparing the year-end balances of a company since 1958. The auditor knew that his report might be used by third persons (The 1962 balance was presented to 17 credit institutions.). His 1964 balance was used for the approval of a loan by a bank. When the company ceased payments the bank sued the auditors' firm for compensation on the basis of the inaccuracy of the report. The LG accepted the claim but the OLG rejected it and the *Revision* of the plaintiff was unsuccessful. The decision considered that there was no special link between the auditors and the plaintiff which could justify a protection claim. The interests of the mandator and those linked to him and the interests of the bank where contradictory. The fact that the auditors' were professionally liable to grant honest reports did not alter the situation.

BGH Urt v. 29.9.1982-IV a ZR 309/80 (München); NJW 1983 1053. The auditor was hired by the company from 1947 until 1967. He prepared balances, the statements of corporate income tax of municipal trade tax and of capital tax, and represented the company in investigations with the tax authorities. Before 1964 the company had given loans to its shareholders. In November 1965 the adviser indicated that the amounts of the loans could be considered as hidden distribution of profits by the tax authorities. The adviser suggested that in order to repay loans given by the company to its shareholders and to avoid having these loans considered as distribution of hidden profits, the company should acquire a

proportion of its shareholders' shares. The adviser after his ideas were applied added a relevant report in the 1965 year-end balance. The tax authorities were not convinced; following investigations they considered the loans as hidden distribution of profits and taxed the company's shareholders accordingly. The relation between the company and the auditor-expert, was said to create protective effects in favour of the shareholders too. In the first and the appellate degrees of jurisdiction the claim for compensation was rejected. The appeal on matters of law resulted to the overruling of the decision and the remand of the case to the lower courts.

In OLG Saarbrücken, Urt. v. 13.7.1971- 2 U 127/700; NJW 1972 55 a carpenter business applied for a loan from a savings bank with the mediation of a mortgage broker. The mortgage broker asked the defendant, an architect who was not a sworn and publicly appointed valuator to adjust an 1962 valuation of the property in question. The purpose of the report was for the broker to obtain information on the value of the building. Measurements or *in situ* examinations were expressly excluded. The defendant prepared a report on the basis of which a loan was provided. Later on, the property went into compulsory sales procedure from which the plaintiff received only a part of the amount of the loan. The plaintiff bought the property at a lower than the estimated price two years after. The argument of the claimant was that he suffered losses due to the inexactness of the report. The OLG refused protection whether on the basis of § 826 BGB, which the LG had accepted, or on the basis of a contract. No implied agreement for the protection of the third party could be inferred while it was argued that there should be some limitation in the duties of care of the reporter. The causal link between the wrong valuation and the loss was doubted. The purpose of the report was for the broker to obtain an evaluation, and in such cases the banks would not probably rely on such reports. The reporter had not committed any particular irregularity. There was not enough evidence that the decision for financing had relied heavily on the report.

BGH, Urt. v. 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984 355. A mandate was given to an officially appointed sworn expert for the evaluation of a piece of immobile property. Mandator was a trader who in his first contact with the expert was escorted by the buyer of land and subsequent plaintiff and a qualified bank employee. The report failed to remark that the building in question was under social housing restrictions. The report was based on the presumption that the mandator would make use of the building for personal purposes (himself or his family). The buyer who had financed the purchase by a municipal funds' loan, and was planning to build housing for sale, had to cancel the purchase and return the loan when he was informed of the building restrictions. He sued the expert because he suffered losses by relying on the report which prescribed a lower than the real value for the property. The plaintiff claimed compensation for the commercial broker's commission, for the notarial costs, and for the loan's interest. The LG and the OLG rejected the claim but the *Revision* was successful. The court laid emphasis on the fact that the group of protected persons could be objectively supervised. The reporter should consider that his report would be used as the basis for the decision of a particular group of people and he should have taken their interests into account. A limitation of the protection to the contracting parties would not correspond to the significance and meaning of the particular transactions. See Markesinis *A Comparative Introduction*, 1990, 221 for a translation.

BGH, Urt v.28.4.1982-IV a ZR 312/80 (München); NJW 1982 2431. An officially appointed sworn expert prepared a report for the market value of the land holdings of a KG (*Kommanditgesellschaft*; a limited partnership where at least one of the partners has limited liability). Four months later he was approached by the Danish consulate and was asked (1) whether he was a qualified expert and (2) whether his report was still valid. He answered in the affirmative and, after request, in writing. Three months later the plaintiff bank granted a loan to the company and received some land assets as security. The loan was not repaid, and when the assets were auctioned it was found that their value was considerably lower than reported. The report examined the potential of the area for

development, but did not appreciate the effects of a regional planning scheme which included the particular area. (The company had asked for mediation in order to obtain the loan. The mediating firm had addressed the Danish Ministry for Trade and Commerce which had referred it further to the Danish consulate.). The claim was rejected at the first two degrees of jurisdiction. The *Revision* was successful on grounds similar to the previous decision. The Federal Court of Appeal emphasized on the jurisprudential acceptance of the contract with protective effects. (The *Kommanditgesellschaft*; is a partnership for the conduct of a commercial enterprise under a common firm name consisting of one or more general partners (*Komplementäre*) with full personal liability for the liabilities of the partnership and at least one limited partner (*Kommanditist*) whose liability in respect of the partnership's creditors is limited to the specific amount of his contribution. See §§161-177 HGB.) See for an extended translation Markesinis *A Comparative Introduction*, 1990, 218.

BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1111. The mandator, in order to support his application to a bank for a maintenance loan ordered a report on his credit receiving capacity. A bank (the plaintiff) gave a loan and received as security charges on immobile property. The recipient of the loan went bankrupt. When the bank tried, in cooperation with the receiver, to promote existing building plans it found that the property was under obligations known to the debtor. The bank claimed compensation arguing that it would not have given a loan had the real situation been described in the report. The LG and the OLG rejected the claim. The OLG denied the possibility of a contract with protective effects considering that this could be accepted if the creditor's bank had been responsible for the better or worse of the plaintiff, if, for instance, the creditor had duties of care towards the third party which would justify his interest for the latter's protection. The OLG laid emphasis on the opposition of interests between the mandator and the third party and rejected the claim in line with the prevailing until then approach in case law at least. The appeal on issues of law was successful. The Federal Appeal Court considered the rejection of the contractual protection by the OLG an error in law. The decision did not require the existence of a special creditor's interest. See also Ebke and Fechttrup "Anmerkung an BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1112.

BGH, Urt. v. 26.11 1986-IV a ZR 86/85 (München); NJW 1987 1758. A film director was interested in buying all the shares of a film producing company. For that purpose he applied for a loan submitting an interim balance (from 31.5.81) prepared by the defendant whose auditors' company had been tax advisers to the film producing company for years. The report had been ordered by the only partner and managing director of the company. One copy was sent to the manager and two more following specific request, to the film director. The loan was approved (on 13.8.81), and the company was bought (on 27.8.81). The loan was not repaid. The bank considered that bankruptcy proceedings could have only partial success. It claimed compensation from the tax advisers. The interim report was seriously mistaken (showing profit while there was loss), and there were serious book keeping errors (disorder and backlogs), which the defendants should have noticed and try to repeal. The balance did not have the quality a professional report should have. The claim was again rejected in the first and the appellate degrees. The *Revision* court overruled the appellate decision and remanded the case to a lower court.

Banking contracts.

OLG Düsseldorf Urt v. 6.5.1977-16 U 213/76; NJW 1977 1403, and, after *Revision*; BGH Urt v. 19.10 1978-II ZR96/77 Düss.; NJW 1979 542. In this case one plaintiff had been the supplier of a business with beverages (the other was the carrier). As it had been agreed the buyer was paying the price for the consignment directly from his bank account as he had authorised his bank, the defendant. For some time payments were being effected through the electronic transfers to the debtor's bank. Later and while the supplier and the carrier were filling some special bank formulas which contained an authorisation close (which gave the debtor the right to deny payment) the buyer found himself in financial difficulties

and ordered that some payments, for already delivered goods, which had already been debitted in the plaintiffs' accounts in their bank should be reversed. The debtor's bank did so with delay. The relative amounts were returned from the creditor's bank. Meanwhile the buyer went into bankruptcy and the plaintiffs had only a claim for the goods delivered. The plaintiff sued the debtor's bank for the damage it caused with the delayed transfer of the information on the non payment of the buyer's debts. The OLG's final decision (the LG took an interim one) accepted the claim. An appeal on questions of law was not successful. The decision laid emphasis on the existence of a duty of care of the debtor's bank in giro transactions towards the plaintiffs on the basis of the contract with the creditor bank. The latter's interest is noted.

BGH, Urt. v. 28.2.1977-II ZR 52/75 (Oldenburg); NJW 1977 1916. The plaintiff delivered limestone to a building firm until the latter was declared bankrupt on 7 August 1973. The building firm had agreed that the claims of the plaintiff arising from its sales should be settled by directly debiting its account and had given a revocable instruction to the defendant bank where he kept an account to pay the creditor upon receipt of its invoices, and debit the building firm's account. During the period in issue the plaintiff lodged with another bank where it had a giro account a number of invoices to be collected by directly debiting the building firm's account. The first of the invoices dated from 30 May 1973 and the last from 26 June 1973. When the invoices were received the building firm's account was overdrawn and the defendant bank did not credit the plaintiff. The invoices were returned to the bank acting for the plaintiff only on 29 June 1973. The plaintiff only got to know on the 4 July that the invoices had not been paid, because on this day his account had been debited with the amount of the invoices previously credited to his account. The plaintiff claimed damages for the loss suffered as he continued to supply goods to the building firm on 13, 19 and 26 June. Had the defendant returned the invoices immediately, on the 30 May the plaintiff would have known that they had not been paid by the 8 June, and would have made the subsequent deliveries upon prepayment. The LG and the OLG rejected the claim. The BGH upon appeal by the plaintiff quashed the judgment below and referred the case back. What is of importance is that, there was, it was decided a critical period of time after which the debit could not be reversed. The creditor had an interest in receiving the necessary information by the debtor's bank as soon as possible. It was considered that the creditor and the creditor's bank run not the same but similar risks and were both interested in being informed on the non payment as soon as possible (1917). The interest of the creditor's bank was based on its relationship of confidence, and reliance with the creditor. Not only the creditor's bank had a duty for the immediate return of the not yet paid debit but also the debtor's bank had on the basis of good faith a protection duty towards the creditor. This protection duty was not agreed but was based on the legal relationship, the contractual purpose and the principle of good faith (1917). See for a translation Markesinis *A Comparative Introduction*, 1990, 213.

Contracts for medical treatment.

BGH, Urt. v. 10.11.1970-VI ZR 83/69 (Koblenz); NJW 1971 241. The mother gave birth to a child in the defendant hospital in September 1952. On the first day some scratches were noticed on the baby's back and nose and were treated with a cream by the midwife. Later it was observed that the scratches were caused by an infection which was caused by a staphylococcus virus which did not retreat after peniciline was used and led to the child suffering osteomyelitis. Finally the child lived but with serious limbs. The child turned against the hospital for the violation of its duty to take timely and proper measures in order to avoid the spreading of the infection. The LG and the OLG rejected the claim and the appeal respectively. The appeal on questions of law was successful.

In BGH Urt. v. 18.1.1983-VI ZR 114/81, JZ 1983 447, no measures against German measles the pregnant woman was suffering from were taken and a child with serious health problems

was born (the problem of wrongful life)⁴. It was thought that the doctors were not liable to the child if the wrongful life could have been avoided by interruption of pregnancy only. Plaintiffs were the child and the parents. They sought a declaration that the defendant was liable for compensation in respect of all the damage suffered or were to be suffered as a result of the mother's infection during the pregnancy. The LG rejected the child's claim and accepted the parents' claim. The OLG rejected both claims. Only the parents' *Revision* was successful. The doctor was found liable for the additional expenses of the parents; no claim by the child was accepted. The BGH noted that the doctor had not caused the loss. In fact he was responsible that the child was alive and enjoying legal capacity. The duty to explain the risks in the pregnancy and the possible injury to the foetus was only incumbent upon the defendant in the interests of the second plaintiff, the mother. Regarding the latter's claim, it was noted that the defendant was not obliged to take into account the plaintiff's financial interests but merely to explain the medical and eugenic aspects of the risks related to the pregnancy. The court held that the defendant would not have been acting illegally had he interrupted the pregnancy. It is doubtful, therefore, that he had violated his contract. Regarding the claim of the child, the court noted that the doctor did not cause the child's condition nor could he have prevented it. However, in breach of his obligation to the mother he failed to prevent the deplorable condition through abortion. The court thought there can be no direct duty in tort to prevent the birth of a child with serious defects because it would imply a judgment on what was 'valueless' life, which in dogmatic opinion and from an ethical point of view the doctor could not make. Any breach of duty to render the defendant liable to the child would have to be derived from the contract with the mother. There is no possibility for tortious liability under §823BGB as, among other considerations, there was no uniform ethical evaluation of abortion. The only remaining possibility would be to establish contractual protective effects from the contract with the mother. The court was unable to find that such a protective effect was actually stipulated "since the law in force at present expressly authorizes the mother in her own interest alone to demand an abortion". The court deplored the fact that there was no protection for the child, but noted that the legal regulation of liability for far-reaching fateful and natural developments is "neither reasonable nor acceptable". (The quotations were taken from Markesinis A Comparable Introduction, 1994, 150-151, where a translation of the case is provided.) Fischer notices that in American law even if in some cases the courts of the first instance accept the claim of the child the appellate courts reject it. Fischer NJW 1981 1991-1992.

OLG Celle Urt. v. 8.5.1978 1 U 37/77 (nicht rechtskräftig); NJW 1978 1688. The plaintiffs were parents of four. The wife after the birth of the third child had a sterilisation operation for reasons of health in the defendant's hospital. The operation failed; the woman gave birth to a fourth child. The claim, by the husband too, was for the maintenance costs of the fourth child. The LG rejected while the appeal court accepted the claim.

BGH, Urt. v. 18.3.1980- VI ZR 247/78; NJW 1980 1452. A sterilisation operation for family planning purposes, failed because of a doctor's error and a child with serious health problems was born unexpectedly. It was decided that the doctor owed duties of care to the husband who was burdened with maintenance duties towards his family. Additional costs were claimed successfully as well as costs for a new sterilisation operation. Moral damages

⁴ This issue has attracted the consideration of German lawyers. There is substantial literature in the area often including comparisons to English and, especially, American law. See Laufs "Haftung für Nachkommenschaftsschäden nach § 823 BGB", NJW 1965, 1055-1057, Selb "Schädigung des Menschen von Geburt ein Problem der Rechtsfähigkeit", AcP 166 (1966), 76, especially on 104 et seq., Fuchs "Die zivilrechtliche Haftung des Arztes aus der Aufklärung über Genschäden.", NJW 1981 610-613, Fischer "Schadensersatz wegen unterbliebener Abteulung", NJW 1981 1991-1992.

were accepted by the Federal Court of Appeal) after *Revision* exercised by the first plaintiff, the woman.

OLG Düss. Urt. v. 3.10.1974-8 U 161/73; NJW 1975 596. The son of the plaintiff had an accident and was operated in the stomach by a doctor in the defendant hospital. The patient died. The autopsy discovered injuries which had not been taken care of. The claimant argued that the surgeon, the hospital's employee, caused the death because of negligence and asked maintenance costs. The LG rejected the claim. The contract was for the medical treatment of the insured person alone; no protection duties were owed to the relatives. The appeal called in the delictual provisions speaking of a special duty of the doctor. The OLG rejected the claim.

BGH, Urt. v. 10.5.1951-III ZR 102/50 (Düss); NJW 1951 596. The contract of treatment could in principle have protective effects towards third parties. The court rejected the claim based on the contractual purpose, the possible implied agreements, and the examination of similar situations in the law of lease. Liability, if accepted, would involve the lack of traffic security at the entrance of the hospital.

Transport contracts.

BGH Urt. v. 28.5.1957-VI ZR 136/56 (Stuttgart); NJW 1957 1187. An 8 year-old child took part in a journey organised by a federal youth agency, with the approval of his mother and his tutor. He fell from the open front left door of the vehicle and suffered brain injuries, during an accident caused negligently by the driver of the bus he was travelling with, while the agency's supervising employee was temporarily absent. The child sued the carrier and was partly successful. He argued that the defendant was liable provided no particular insurance scheme would cover the losses. The defendant argued that the liability of the youth agency should be taken into account; the latter's employee had neglected his duties. The LG accepted the evidence as to the 2/5 of the amount claimed, and rejected the claim as to the rest. The youth agency participated in the proceedings on the side of the injured party. The agency appealed asking for the full amount. The appeal and *Revision* were rejected.

BGH, Urt. v. VI ZR 156/76 (Karlsruhe); NJW 1978 1576. The Federal Court of Appeal rejected the claim in a case where the third party ordered a load of heating oil to the second defendant. Due to the negligence of the carrier employed by the supplier to deliver the load a leakage resulted in loss of a quantity and damages to a neighbouring pool. Plaintiff was the owner of the pool. (The carrier was the first defendant). The LG had rejected but the OLG accepted the claim. The appeal on questions of law led to the overruling of the latter decision. This, it can be argued was not a three party but a four party situation.

BGH, Urt. v. 17.11.1980-II ZR 51/79 (Hamburg); NJW 1981 869. The freight included hazardous substances. They were carried along with other goods. It was not forbidden by international regulations for these non hazardous goods to be carried together with the hazardous ones. The charterer was not released from liability because he did something not forbidden. For the claim against the ship owner or/and the charterer to be accepted, those interested in the cargo should show the charterer's lack of care.

Contracts for services.

BGH, Urt. v. 12.11.1979-II ZR 174/77 Düss.; NJW 1980 589. In this case in a *Publikumsgesellschaft* (a company in which less than 75% of the shares are held by individuals) a general partner in a limited liability company, was assigned with the direction and management of the transactions of a limited partnership (*Kommanditgesellschaft*; KG) which participated in the *Publikumsgesellschaft*. The protective effect of the contract of services between the limited liability company and its directors determined by the relative statutory provisions, extended to the KG. Plaintiff

was the KG (a Ltd & Co partnership) which with the cooperation of the defendant was aiming at undertaking the construction of important projects abroad. In 27.11.1970 (million DM were transferred to an account held by a company dependent on the KG, in a Madrid bank for the purposes of capital subscription. The defendant transferred 8.2 million DM to a savings account in order to be used for the fulfilment of a building agreement and the rest 800,000 DM he transferred to an account of the same company in a Zurich bank. This amount was the object of the claim. The KG argued that the defendant had acted unlawfully. In the first and the appellate degrees the claim was rejected but the plaintiffs' *Revision* was successful. The defendant was related to the general partner the Ltd and not to the KG. The view of the LG and the OLG that the defendant owed duties of care to this company only was denied by the Federal Court of Appeal. See Larenz I, 185 et seq., and NJW 1960 81.

BGH, Urt. v. 24.3.1980-II ZR 213/77 (Düss.); NJW 1980 1525. The management of the transactions of a KG had been assigned to a GmbH (Ltd company) which at the same time was a general partner of the KG. Again the protective effect of the contract of services between the latter and its director extended to the KG. The LG and the OLG rejected the claim. The appeal on questions of law was successful for part of the amount asked, the amount of the contribution paid to the KG which the defendant (director) withdrew when he left the company although he had no such right according to the relative statutory provisions. The decision on the *Revision* did not accept a claim for the amount of a loan the defendant had given to the company. The *Kommanditgesellschaft* , KG, is a limited partnership where one at least of the partners has full liability. This is a partnership for the conduct of a commercial enterprise under a common firm name consisting of one or more general partners (*Komplementäre*) with full personal liability for the liabilities of the partnership and at least one limited partner (*Kommanditist*) whose liability in respect of the partnership's creditors is limited to the specific amount of his contribution.

BGH, Urt. v. 20.2.1958-V III ZR 76/57 (KG); NJW 1958 710. The defendant agency was responsible for the construction of a bridge at a particular district. The agency contracted with a company for the construction of a road. During works an explosion of a land mine which had been forgotten from the previous war, caused the death of four workers and injured others. The surviving descendants of the deceased and the injured party asked compensation on the basis of the *Reichsversicherung* (RVO; the Federal State's insurance code) provisions. The LG rejected the claim, while the OLG accepted it. The defendant's appeal on questions of law was unsuccessful.

BGH, Urt. v. 16.2.1971-VI ZR 125/69 (Köln); NJW 1971 752. The architect was ordered to do an inspection of the construction site of a building being erected. The accident was caused by the fall of a scaffolding the architect had actually inspected. The plaintiff was the insurer of the building firm. The LG accepted the claim. The defendant's appeal led to the rejection of the claim. The *Revision* was not successful. The reference to RVO provisions as a basis of §823 BGB liability was not accepted. The architect has no protective duties on the basis of his mandate as the latter was interpreted according to §§133, 157 BGB.

BGH, Urt. v. 13.2.1975-VI ZR 92/73 (Hamm); NJW 1975 867. The three year old child of a defendant's worker was injured when a calf pushed an unlocked door and hit the child's hand between the door and the walls of the animal's box. (The hand had to be amputated.) The father of the child was leaving with his family in a house rented by the defendant. In order to set off part of the amount of the lease he worked in the stable which belonged to the defendant's father. The door in question could have been secured but it was not when the child entered the stable unnoticed. The plaintiff (child) asked damages on the basis of the owner's delictual liability as the owner of the animals (§833 BGB), and compensation for immaterial damage. The LG accepted the claims in part (the amount was reduced) because of the plaintiff's contributory negligence. The OLG took the same view. The *Revision* of the defendant had only partial success. The mixed relationship of services and lease contracts was duly noted. The court was cautious as to the circle of protected people which it is

hopped to be countermanded with the help of the principle of good faith whether as a guideline for the supplementary interpretation of the contract (§ 157 BGB) or with the direct application of § 242 BGB.

Contracts for works.

BGH, Urt. v. 24.2.1954-VI ZR 315/52 Düsseldorf; NJW 1954 874. The contractor with whom the lessee, with the consent of the owner, contracted for repairs on an external wall owed duties of care towards the owner as well, as regards the measures taken for the stability of the wall. The contractor had to inform on the risk of collapse not only his contracting party but the owner too. The owner is thus protected contractually being in a position similar to the lessee, while this does not apply to people passing by.

BGH, Urt.v. 7.11.1960-VII ZR 148/59 (Hamm.); NJW 1961 211. The case concerned the death of an engineer and the injury of a worker after the collapse of a steel roof caused by the buckling of cement plates that kept the construction together. The steel roof had been erected by a contractor in the place of an older roof. The construction was supervised by one of his employees. One month before the accident an explosion had damaged the connecting cement plates. The claimant argued that the defendant is the statutory insurer of his employees. He was liable to compensate according to §§618, and 328 BGB and the relative RVO provisions. The LG rejected the claim while the OLG accepted it. The *Revision* led to the overruling and the remanding of the case on the basis of the contributory negligence of the contractor's mandator which had not been taken into account by the lower courts. The acceptance of the claimant's right to plead contributory negligence was based on §334 BGB which allows objections from the contract for the benefit of a third party to be raised against the third party too. See the Anmerkung of Lorenz on the same case JZ 1961 pp.170-171.

BGH, Urt.v.10.11.1970-VI ZR 104/69 (Schleswig); NJW 1971 194. A professional association could not ask compensation by a second defendant who was working together with the first defendant, beyond the RVO requirements and limits which apply to the first injurer. RVO provisions apply irrespectively of the basis of the particular claim.

In BGH, Gr. Ziv. Sen, Beschl. v. 5.2.1952-GSZ 24/51; NJW 1952 458 a carpenter was working in the house of the defendant on wall panellings. He fell from a non secured cellar staircase while he was on the ground floor which was not lighted. His surviving dependants claimed compensation. The court laying emphasis on the fact that the defendant provided the area of work applied by analogy §618 III BGB. It was noted that the application of the law for works' contract alone would lead to unfair results.

In BGH, Urt. v. 20.2.1958-VII ZR 76/57 (KG); NJW 1958 710. The insurance institution's claim for the injury of workers employed on a road construction project against the ordered, a federal authority was decided on the basis of §618 III BGB which was applied by analogy. Recall BGH, Urt. v. 7.11.1960-VII ZR 148/59 Hamm.; NJW 1961 211 (the case involving the collapse of a steel roof). See the Anmerkung of Lorenz on the same case JZ 1961 pp.170-171.

In BGH, Urt. v. 15.6. 1971-VI ZR 262/69 (Düss); NJW 1971 1931 it was held that the exclusion of liability was not valid towards the contractor's dependant employees and subcontractors, following §619 BGB. A contractor had undertaken to construct steel panels connecting more oil tanks. Only existing scaffoldings were to be used. For the last part of the work's the contractor contracted with a subcontractor with the approval of the owner. At the evening of the first day of the subcontractor in work, the scaffolding collapsed injuring the plaintiff (subcontractor) and three workers. The scaffolding fell because an oil pipeline gave in. The claimant argued that the defendant (owner of the business) should have been aware of the pipeline's situation and should have taken the proper measures. The LG rejected the claim but the OLG accepted it in part. The defendant's *Revision* was unsuccessful. However, the subcontractor's protection must be sufficiently evidenced in the

relative contract and is less likely if no auxiliary statutory basis such as §619BGB can be found.

BGH, Urt. v. 30.9.1969-VI ZR 254/67 (Braunschweig); NJW 1970 38. Claimant was the insurance company of a contractor with the federal government for works in a high technology physics laboratory. A fire that was caused negligently by an employee of the subcontractor destroyed already executed works which had to be redone. The insurance company obtained the first contractor's claim after it gave him compensation. The LG and the OLG accepted the liability of both the subcontractor and the employee. The BGH thought that the indemnification agreed between the Federal Government and the contractor did not extend to the subcontractor. The Federal Government had no duty to offer security to the latter. No contract with protective effect was taken to exist in favour of the subcontractor. The court accepted in principle that the plaintiff's contracting party was under a duty to seek compensation for the damages suffered by the plaintiff due to the subcontractor's negligence.

BGH, Urt. v 11.7.1978-VI ZR 138/76 (Hamburg); NJW 1978 1502. The driver employed by the contractor had to do considerable manourving and while he was in the wrong traffic lane he collided with another vehicle and the car which was being towed away was damaged. The car's owner claimed compensation from the contractor and the driver (as second defendant). The LG and the OLG accepted the claim. The *Revision* by the contractor was rejected while the driver's *Revision* was successful.

BGH. Urt. v. 12.7.1977-VI ZR 136/76 (Stuttgart); NJW 1977 2210. The contract was between the city authority and the defendant and it concerned the construction of a sewer and a sewage collector. In the process of the works a worker operating an excavator destroyed cables supplying electricity to a nearby factory. The factory suffered losses because of the 32 minutes power cut and sued the contractor. The LG and the OLG rejected the claim. The plaintiff's appeal on questions of law was unsuccessful. The reason for the rejection of the claim was that the requirement of the interest of the creditor for the better or worse of the third party was not fulfilled.

Contracts of lease.

BGH, Urt. v. 13.2.1975-VI ZR 92/73 (Hamm); NJW 1975 867. The three year old child of a defendant's worker was injured when a calf pushed an unlocked door and hit the child's hand between the door and the walls of the animal's box . The father of the child was leaving with his family in a house rented by the defendant. See Weimar NJW 1959 1859. The plaintiff (child) asked damages on the basis of the owners delictual liability as the owner of the animals (§833 BGB), and compensation for immaterial damage. The LG accepted the claims in part (the amount was reduced) because of the plaintiff's contributory negligence. The OLG took the same view. The *Revision* of the defendant had only partial success.

OLG (Hamm) 9 Z S Urt.v.14.2.1976-9 U 216/76; FamRZ 1977 318. Sonnenschein *Juristische Arbeitsblätter*, 1979 225. The owner a 12 year old girl leased the first floor to a woman and the ground floor to a man who later developed a relationship and lived both on the first floor. The man was injured when the balcony collapsed. Delictual as well as contractual claims were dismissed. The man was not included in the protective scope of the woman's lease contract. The lessor had no protection duties towards the man from his contract with the woman. The man had not been married to the woman so as to justify the latter's interest in protecting him.

BGH, Urt. v. 16.10.1963-VIII ZR 28/62 Hamm.; NJW 1964 33. In this case the landlord was living on the third floor of a bulding. The claimant who had a carpet selling business occupied the ground floor. The first floor was occupied by a private school for technical training. Various provisions had been made in the lease contracts for the use of the existing

toilets and the construction of new ones. Due to the malfunction of the toilet the owner and the school's students were using on the first floor a flud of water caused damages to the carpets at the ground floor. The lessee of the ground floor sued both the owner and the other lessee. The LG rejected the claim, while the OLG accepted it. The appeal on questions of law was not successful. The OLG accepted the existence of a contract with protective effects. The Federal Appeal Court (BGH) thought that the mechanism had been drawn with narrow limits in the BGH jurisprudence and with strickter requirements as to the protection and care duties involved. It felt that no protective effect should be recognised in lease cases. The lease contract creates a link which is not so close as to say that the landlord is liable for the better or worse of the lessee. The court took account of Gernhuber's views especially.

BGH, Urt. v. 9.10.1968-VIII ZR 173/66 (Köln); NJW 1969 41. In this case one lessee claimed against the other on the basis of the latter's contract of lease with the (same) landlord because due to the negligence of the defendant the plaintiff's water-pipes were damaged (water left in them, froze during the vacation period). Compensation was awarded on a delictual basis. Contractual protection was denied before the need to draw narrow lines of the protective effect of the lease contract and not to blur the dividing lines with delict. The landlord did not owe protection duties to the lessee; he had no interests for the lessee's protection.

BGH, Urt. v. 15.2.1978-VIII ZR 47/77 (Hamm.); NJW 1978 883. The defendant who was the owner of a warehouse had it leased to a lessee who subleased the building to another person with the oral consent of the owner, although the initial lease contract contained the provision that written consent should be given. After heavy rains, water came in the building and caused damages to the sublessee's property. The sublessee claimed compensation by the owner. It was decided that he was not included in the protective scope of the initial lease contract. The LG and the OLG rejected the claim. The *Revision* was unsuccessful. See Krause JZ 1982, 16-19.

BGH, Urt. v. 7.2.1968-VIII ZR 179/65 (Bamberg); NJW 1968 694. This case concerned the borrowing of a small bus by a transport business. A driver was employed to drive the vehicle to another destination. Following an accident the driver was injured and the bus was destroyed. The driver was included in the protective scope of the hire contract and the respective limitation period applied against him. In BGH, Urt. v. 7.7.1976-VIII ZR 44/75 (Düsseldorf); NJW 1976 1843, it was thought that a contract for the lease of a mechanical crane could be a contract with protective effects *vis-à-vis* third parties. The plaintiff contracted with the plaintiff for the demolition of a silo. The contractor subcontracted part of the works. The plaintiff contracted with another firm for a crane with personel to be dispatched to assist the works. Following an accident the crane's driver was injured and the crane was damaged. The company operating the crane sued for compensation. The defendant argued the the limitation period had passed. The LG rejected the claim, and the OLG the appeal. The *Revision* was unsuccessful. However, the contract with protective effects was accepted in principle. The limitation period of §558 BGB applied towards the third party too.

BGH, Urt. v. 19.9 1973 VIII ZR 175/72 (Koblenz); NJW 1973 2059. This case involved damages to a leased building. Plaintiff was the insurance company which compensated the landlord for the losses, and who substituted the latter in his claim on the basis of § 67 *Versicherungsvertragsgesetz* (VVG). The first defendant was the lessee of a building where he used one room as warehouse and, in an open space, he kept a trailer where he produced (using electricity from the building) food and drink for the purposes of his business and in the trailer, among other things, he kept two bottles containing propanium. The lessee's employee forgot the propanium bottles open overnight and an explosion the following morning damaged the building. The LG accepted the claim but the OLG accepted the arguments of the lessee and his employee (second defendant) that he limitation period of §558 BGB had passed and accepted the appeal. The plaintiff's *Revision* was not

successful. It is interesting that as was accepted, the limitation period of 6 months (§558 BGB) applied as far as the leased house and the other objects in it are concerned. The same limitation period applied with regard to the private vehicle (since the latter was included in the contract of lease) and not the one year limitation period of the *Straßenverkehrsordnung* (Road traffic regulation, StVG §14) on the basis of the content of the contract and the risks involved. The assistant the lessee is using with the lessor's consent can also claim the §538 BGB limitation period.

Contracts of sale -- Producer's liability.

BGH, Urt. v. 28.1.1979 VII ZR 246/74 (Koblenz); NJW 1976 712. This is the well known case involving the injury of the 14 year old child who escorted her mother to the self-service shop of the defendant and slipped on vegetables thrown on the floor. The LG rejected the claim because it thought that the limitation period had expired. The OLG accepted the claim for the 1/4 of the amount asked. The *Revision* of the plaintiff was not successful.

BGH, Urt. v. 25.4.1956-VI ZR 34/53 (Düsseldorf); NJW 1956 1193. This is the case involving the purchase of an operationally safe disk bought by a business proprietor in order to be used in his threshing machine. The disk did not function properly and an employee was injured. The employee's claim on the basis of the contract of sale was accepted. The contract had protective effects in favour of the employees of the buyer. Recall BGH, Urt. v. 13.5.1959-VI ZR 109/58 (Braunschweig); NJW 1959 1676, the famous Capuzol 22 case. The contract of sale of a substance to be used in the workplace had protective effects in favour of the injured worker who was not a party to the contract. BGH, Urt. v. 7.11.1960 VII ZR 148/59 (OLG Hamm); JZ 1961 169. See the Anmerkung of Lorenz on the same case JZ 1961 170-171.

BGH, Urt. v. 14.5.1974-VI ZR 48/73 (Bamberg); NJW 1974 1503. The plaintiff bought in 1965 water pipes made of synthetic material, with a certificate mark of The German Association of Gas and Water Experts, which characterised a particular level of quality. In 1966 the pipes were damaged. The plaintiff sued the seller considering that the pipes did not correspond to the Association's standards. The seller argued that the pipes had all the qualities asked and that the best materials had been used in their construction. A minimum quality was guaranteed with the certificate marks. The LG and the OLG rejected the claim. The plaintiff's *Revision* was unsuccessful. There was no special relationship between the producer and the consumer which could justify an interest for the latter's protection on the basis of good faith.

BGH, Urt. v. 28.6.1979-VII ZR 248/78 (Schleswig); NJW 1979 2036. The case concerned the use of glass of a particular quality in the works performed in the plaintiff's house. The glass was produced by the licensee defendant. The latter who was selling to wholesalers was offering guarantee in his prospectuses for 5 years after first delivery. The guarantee covered the glass works against condensation which was what happened to the glass. The claim on the guarantee was the last stage of the dispute. The LG and the OLG rejected the claim because the limitation period had expired. The Federal Court of Appeal took a different view. The 5 years limitation period had not expired because the plaintiff had informed the producers of the problem. This guarantee or advice for the use of the product is often a separate contract which creates a direct link between the manufacturer and the consumer and can justify contractual compensation claims. "Product Liability" by von Hülsen in *Business Transactions in Germany* Rüster (general editor). See Markesinis *A Comparative Introduction*, 1990, 379, for a translation.

BGH, Urt. v. 26.11.1968-VI ZR 212/66 (Düsseldorf); NJW 1969 269. The final consumer has no claim against the producer or initial seller. The producer is only delictually liable to the final buyer/consumer. An in-between purchaser cannot sue on a contract law basis for the compensation of the final consumer (third party). The decision concerns the vaccination of chicken against fowl pest with a product which proved to be defective and did not obstruct

the outburst of the disease leading to the death of thousands of chicken. The decision rejected a third party claim on a contractual basis (the contract of sale). The producer could only be delictually liable. As it was noticed the social understanding of such situations was not contributing to the acceptance of liability. See also the Anmerkung to the decision by Diederichsen NJW 1969 269-271.

***Drittschadensliquidation* and contract with protective effects: Delimitation⁵.**

In OLG Hamm 4.5.1970-11 U 264/69; NJW 1970 1793, a notary public has violated his duties towards a dairy producers' association and the loss had been suffered by the plaintiff, a credit institution which had provided the association with a loan, and to whom the association had transferred its claim. The OLG had doubts as to the application of *Drittschadensliquidation* in cases involving notarial liability; it was doubted whether it would be reasonable from the point of view of the debtor's liability to extent the application of the mechanism to cases of improper behaviour. It was noted that the case did not fall in one of the usual categories of *Drittschadensliquidation*. Professional liability on the other hand was not accepted for mere negligent behaviour. In a case of 1967 (BGH Urt. v. 22.1.1966-VI ZR 49/65 (Schleswig); NJW 1967 930) a third party was protected from the violation of duty of a notary, it was held that a trust relationship existed the plaintiff being the beneficiary of the trust.

In OLG Saarbrücken, Urt. v. 13.7.1971- 2 U 127/700; NJW 1972 55 a carpenter business applied for a loan from a savings' bank with the mediation of a mortgage broker. The loan was secured for part of its value with a registration of an uncertificated mortgage on immobile property belonging to a third person. The mortgage broker asked the defendant, an architect who was not a sworn and publicly appointed valuator, to adjust a 1962 valuation of the property in question. The purpose of the report was for the broker to obtain an estimation of the property's value. Measurements or *in situ* examinations were expressly excluded. The defendant prepared a report on the basis of which a loan was provided. Later on, the property went into a compulsory sales procedure from which the plaintiff obtained only a part of the amount of the loan. (The plaintiff bought the property at a lower than the estimated price, two years after.) The argument of the claimant was that he suffered losses due to the inexactness of the report. The OLG refused protection whether or the basis of §826 BGB, which the LG had accepted, or on the basis of a contract. No implied agreement for the protection of the third party could be inferred while the court felt that there should be some limitation in the duties of care of the reporter. The causal link between the wrong valuation and the loss was doubted. The purpose of the report was for the broker to have a valuation, and in such cases the banks would not probably rely on such reports. There was not enough evidence that the decision for financing was crucially influenced by the report while the reporter had not committed a particular irregularity. (The case is repeated here. It is also referred to in relation to liability for information and expert opinion.)

In BGH Urt. v. 22.1.1966-VI ZR 49/65 (Schleswig); NJW 1967 930, the liability of a notary was based on *Drittschadensliquidation* although in similar circumstances the contract with protective effects had been used. A notary public was found liable for a violation of his duties as to the authentication of certain transaction's documents. A loan for housing was provided by a compensation fund belonging to the public sector. (The Federal Government was the injured party.) The credit institution which contracted with the notary and granted the loan was acting, when concluding the contract, as an undisclosed representative of the

⁵ In many cases, especially those involving contracts for expertise advice, and contracts for services, the BGH overruled OLG decisions which had focused the application of *Drittschadensliquidation*. (See BGHZ 49 350; BGH Urt. v. 22.1.1968-VIII ZR 195/65; NJW 1968 885.). The OLG, focussed exclusively on *Drittschadensliquidation* in a number of cases. There are cases for instance where the contract with protective effects had been applied in the past but the possibility was not considered by the OLG.

Federal Government. The credit institution was handling the loan on a trust basis; it was the beneficiary of the trust in the court's point of view. Due to a mistake of the notary the loan was secured with a charge on immobile property for only a part of the amount of the loan. The compensation fund was left with an unsecured claim. The LG accepted *Drittschadensliquidation* but not the OLG. The BGH took the same view as the court of first instance.

BGH Urt. v. 13.11.1973-VI ZR 53/72 (München); NJW 1974 134. The plaintiff who was the only shareholder and manager of a Ltd company, had a contract for services with an advocate in his personal capacity. Due to wrong advice of the advocate regarding the plaintiff's participation in a procedure of taking an oath of disclosure, a warrant of arrest was issued against the plaintiff and his name entered the list of insolvent debtors. As an effect the treatment of the company by a fund providing bank was changed (the bank ceased to consider the company creditworthy), and the company had to sell a piece of land bought for investment in order to repay a loan. Moreover, certain business plans had to be cancelled. The plaintiff asked compensation in his personal capacity for the losses suffered by the company or by himself as the single shareholder. See Frank NJW 1974, 2313.

Public utility cases, ("cable" cases).

BGH 12.3.1968 - VI ZR 178/66 (Hamm) NJW 1968 1279. The contractor had damaged the cabled leading to power cuts, a Statutory Order which rendered whoever damaged public installations liable to a fine was called upon on the idea that it involved the protection of the electricity consumers too. The argument was rejected by the LG under the view that the Order was aiming at the protection of the public in general and not at the protection of the financial interests of individual consumers. The BGH reversed the decision holding the opposite view on the aim of the Order. Protection was extended to individual consumers and to all typical consequences of power cuts caused when the supply system is damaged. Some decisions followed this approach, but in most cases and notably the BGH in a more recent decision changed this attitude (BGH 8.6.1976, - VI ZR 50/75 (Stuttgart), NJW 1976 1740. See for a translation Markesinis *A Comparative Introduction*, 1990, 154). It considered that a decision accepting such a claim would undermine the legislator's choice.

In BGH 12.7.1977, - VI ZR 136/76 (Stuttgart) NJW 1977 2208 the contractor who damaged the cables was employed by the local administration which had issued a warning to the contractor to watch out for power cables. The contract, argued the plaintiff, had a protective effect in favour of business consumers. The contractor who was in breach of the contract owed compensation. The BGH rejected this view considering that the administrations warning aimed at safeguarding the general interest for the continuation of supply and not a special interest of the plaintiff's business. (There were 1385 consumers affected.). Banakas 268-275. See for a translation Markesinis *A Comparative Introduction* 1990, 158.

BGHZ 41 123; NJW 1964 720, JZ 1964 457, the employees of a contractor damaged an electricity supply cable. The latter supplied the plaintiff's business. As a result of the six hours power cut more than 3,000 eggs were destroyed in the plaintiff's incubator machine. The defendant argued that the plaintiff was only indirect victim, not entitled to recover in delict. The court rejected this argument. The plaintiff was entitled to the recovery of his property loss, even if the causal connection was, so to speak, indirect. The court held the plaintiff's loss was foreseeable; the fact that it could not have been predicted precisely did not refute the existence of an adequate causal link. The loss was a typical consequence of the damage to the cables and therefore it was not too remote. This case is an example of the fact that the courts accept more easily liability for physical loss.

Greek law.

Third parties before the AK.

Efeteivon Aqhnwvn 218-1924, Qem AE 551 - Appellate court of Athens from 1924 . A committee of a small port had agreed with a coal trading company to provide coal to the industries of the area at a set price. The company refused to sell coal to one of the entrepreneurs and he had to buy at a higher price. He sued the company successfully. (In the light of the exceptions to the rule, that the person for the benefit of whom an contract was made cannot exercise a claim on the basis of this contract, it was thought that it is not a public order principle any more, and it could therefore be changed by agreement of the parties.)

Areiob Pavgoß 167-1897, Qem IE 610 - Supreme Court from 1897, - Efeteivon Aqhnwvn 499-1899 Qem IA 13 the Appellate Court of Athens from 1899. A claim by the third party is accepted if it would benefit the contracting party. If the buyer agreed to pay part of the price or all the amount, to a third party if the latter expresses his consent, the promisor is bound. The third party can then claim performance. In other cases he could only exercise the right of the contracting party and ask performance to the latter. Efeteivon Aqhnwvn 975-1904 Qem Iß 24 - Appellate Court of Athens from 1904 -.

Efeteivon Larivsshß 236-1901 Qem IG, 479 - Appellate Court of Larissa from 1901. The interest of the contracting party (stipulator) did not need to have a property character but it could be justified on social concerns or charity intentions. The partners of the deceased had agreed with the latter that in the case of his death a life-long monthly allowance would be paid to his wife or, if the latter remarried to his daughter. The widow sued the partners successfully.

Efeteivon Aqhnwvn 185-1914 Qem KE 536 - Appellate Court of Athens in 1914. The government had agreed for the supply of electricity at a low price for the residents of a designated area. This agreement created a right of the benefited individuals to claim directly against the electricity providing company. The court thought that this was due to the (social) interest of the government that the consumers do pay the lower price

Efeteivon Aqhnwvn 2501-1896 Qem H 187 - Appellate Court of Athens from 1896. A contracting party promised to pay the debt of another person to the third party. The latter derives a right even if at the time of the conclusion he had no legal capacity.

Efeteivon Patrw;n 322-1899 Qem IA 218 - Appellate Court of Patras from 189. Normally in a transport contract the carrier was the manager of the receiver's affairs. The person receiving money or things (movables) to transfer to another person is liable to the claims of the latter person on the basis of the management of others affairs. However there are opposite decisions as well. The claims were not accepted when the relationship in question is a mandate, as in this case. The buyer gave the price for things he bought to his mandatee to give to the seller (supplier of bread). The latter has no claim against the mandatee, because until performance the money was in the possession (meaning possession *animo domini*; the possession with the intention of ownership on the the think -- in the absence of such intention it is only detention) of the mandator.

Efeteivon Qessallonivkhß 47-1922 Q LG, Efeteivon Qessallonivkhß 56-80 /1919 Q LA, Efeteivon Qessallonivkhß 101, 50-1919 Q LA 24. These are three decisions of the Appellate Court of Thessalonika which concerned the contract with the a bank for the sale of merchandise. The bank neglected to notify the transferee for the arrival of the bill of lading. The transferee had his own right to claim compensation from the bank. The bank which accepted the bill of lading was managing the affairs of the receiver. The Supreme Court sitting in full session retreated from its previous decision (also taken in full session), and overuled the appellate decision.

Efeteivon Patrw;n 1228-1896 Qem H 521 - Appellate court of Patras from 1896. The beneficiary claims were accepted on the basis of an assumption of debt. The approval of the

assumption of debt could be implied. There are many examples of assumption of debt. In one case the buyer accepted to pay to the state certain instalments the seller was owing

Efeteivon Aqhnwvn 1587-1891 Qem G 25 - Appellate Court of Athens from 1891. A company was dissolved and one of the partners undertook to pay the debts to the third parties. The latter could turn against the guarantor of the partner. In the latter two as well as in most similar cases the acceptance of the assumption of a debt was required for the creation of the third party right. The fact that the courts considered the raising of a claim as an indication of this acceptance is evidence of their willingness to accept a third party claim.

Areioß Pa;goß 246-1911 Qem KI 339 Areioß Pa;goß 85-1912 Qem KG 369 - Supreme Court from 1911 and 1912. A contract of a parent for a benefit to be given to his children after his death is valid even if the child did not approve, while his parent was alive, even if the child is not a heir. This was the case with an insurance agreement the Supreme Court speaking of equity towards the child.

Areioß Pavgoß 255-1909 Qem K 163 - Supreme Court from 1909. The contract between the deceased husband and the insurer does not create rights for the widow. When the husband dies the insurer is obstructed from paying the widow. The insurance money belong to the heirs.

Efeteivon Aqhnwvn 1171-1903 Qem IE 119 - Appellate Court of Athens from 1903. No contract for the benefit of a third party was accepted in the case of a father contracting with a school for his child's education. The beneficiary was however asking for an amount of money to be returned.

Building contracts.

A;reioß Pa;goß 850-1982 - Supreme Court 1982, The Supreme Court sitting in full session denied the creation of direct right of the future buyers to claim transfer of property. This decision, although no formal principle of precedent exists in Greek law, alarmed Greek lawyers who attacked the conclusion of the court as endangering existing contracts and creating instability.

Delictual protection.

Polumele;ß Prwtodikei;o Qessaloni;khß -Three member district court of Thessalonika, 1159-1980, NomB, v.29, 1306. In this case which involved international carriage by road, no delictual claim could be accepted as long as a contract regulated the particular relationship. This attitude must have been reinforced by advocates' strategy, presumably avoiding to focus on novel contractual mechanisms.

Efetei;on Aqhnw;n 3148-1982 (Appellate Court of Athens), Armeno;pouloß, (1973), 94. The public electricity company had a contract with the owner of a chicken farm. The latter leased the farm to a chicken farm business without informing the electricity company as he was obliged to do by the supply contract. The company's employees failed negligently to notify the owner of a programmed power cut, notification being a contractual duty. As a result of the power cut, several thousands of incubating eggs were destroyed. The court noticed that the lessee was in a position similar to a third party beneficiary of the supply contract, but resorted to delict in order to award damages. The lessee could not turn against the owner because the loss had been caused from a fact the owner had no responsibility for. Kefalas notices that such a case in Germany would have been dealt under a mechanism of contractual protection (the contract with protective effects possibly) Kefavlaß 94 et seq.

A;reioß Pa;goß 350-1982, (Supreme Court) NomB, v.30,1468. The responsible public authority recalled unlawfully the production and distribution license of a pharmaceutical product. A third party, a person who had already contracted with the licensee for the transfer of those rights, suffered losses which he claimed successfully from the state.

According to the decision compensation could be available either under the special provisions on the civil liability of the state or under the general delictual clause (§ 914 AK).

Efetei;on Aqhnw;n [Appellate Court of Athens] 4110-1972, Armeno;pouloß, 1973 34. It was held that every third person injured by the unlawful cause has a claim for compensation. Such a person was the buyer of a car with retention of title (§531 AK). The claimant has an obligational -- relative -- right only. The destruction of the car which still belongs to the seller, is affecting indirectly the property of the buyer. He suffers loss which he can claim from the injurer.

Product liability.

Efetei;on Aqhnw;n, Appellate court of Athens 1039-1979, NomB-27 985. Defective copper pipes were used for the construction of houses. As was emphasised, the unlawfulness can be established on the basis of the violation of rules which concern the interests of the injured party too. A duty can be imposed not only from a special statute, but from the general clauses (§§200, 281, 288 AK). The producer failed to inform the consumers of the dangers the use of the pipes could entail. The existence of a series of sales between the producer and the user of the product, did not abolish the delictual liability of the producer if the injury was causally related to the defectiveness of the product. It was noted in the decision that, as in Germany, the defectiveness did not concern qualities which the product should have according to the contract, it did not concern real defects that is but it involves the existence or the absence of qualities which could render the product dangerous. A defective product is a dangerous product, actually more dangerous than (not defective) products of the same kind. There is therefore a judgment on the limits of danger each time, a judgment which is meant to be objective.

Efetei;on Aqhnw;n, Appellate court of a Athens 671-1979, NomB 28 791. The case involved the sale of beer, a bottle of which contained, due to insufficient washing, acid leading to consumers suffering burns. The producing company failed to apply during production the measures which were indicated for the safety of the beer and was found liable.

American law.

Privity.

Dutton v. Poole, 83 Eng. Rep. 523 (K.B. 1677). A father was preparing to sell wood to raise marriage portions for his younger children, among which was his daughter. The eldest son who stood to inherit the wood, promised to the father that he would pay £1,000 to the daughter were his father not to sell the wood. The court held that the daughter could enforce the contract.

Pigot v. Thompson (127 Eng. Rep. 80 C.P. 1802). The court affirmed in a footnote the "rights of a third person to sue upon a parole promise made to another for his benefit.". The question of third party right attracted little attention in the eighteenth century. See Flannigan 103 LQR (1987) 566-567, for a short discussion.

Schermerhorn v. Vanderheyden, 1 Johns 139, 149, N.Y. Sup.Ct. 1806. The court citing *Dutton v. Poole* asserted the action of a third party based on a promise the defendant made for the benefit of this third person.

Farley v. Cleveland, 4 Cow.432 N.Y. Sup. Ct. 1825. aff'd without opinion 9 Cow. 639, 640 N.Y. 1827. The promisor (buyer of hay in the transaction) promised the promisee (seller) he would pay his debt to a third party who was promisee's debtor. It seems thought that he promised to this third party also.

attached to the defendants conduct, (6) the policy of preventing future harm. The last two factors which seem more distant from the contract are arguably addressed in any civil compensation case. The decision is considered classical although no subsequent case following its example applied the test as a whole.

Third party beneficiary rule.

Lawrence v. Fox, 20 N.Y. 268 (1859), (the trial session dated from 1853), is one example of the so-called creditor beneficiary cases, where the promisee owes the third party an obligation prior to the contract and the performance objective is the discharge of this obligation by the promisor. Holy and Fox were the contracting parties. Holy gave \$300 to Fox, who agreed to pay the same amount to Lawrence, towards whom Holy had a pre-existing debt. (The name Holy appears in the records of the case. In the claim a Samuel Hawley appears. Research in the Buffalo census of 1855, indicates that the claimant is possibly a merchant named Hawles but not Samuel. Waters, Anthony Jon "The Property in the Promise: A Study of the Third Party Beneficiary Rule" 98 (1985)*Harv LR*, 1109 et seq). The action in the trial case was for money had and received, one of the older common counts⁶ -- a form of *indebitatum assumpsit*⁷ -- which had become the functional equivalent to action for debt. In form it was an action for promise but in essence it was closer to a property claim. By the time of *Lawrence v. Fox* however, the action for money had and received was, in New York at least, a residual claim, applied when more tightly organised forms of action were not applicable. The defendant in those cases was treated as a trustee who had no proper business with the money and who had to deliver them to the rightful owner⁸. Changes in procedural requirements at the same period brought the focus on substance instead of form⁹. The plaintiff's attorney concentrated wisely¹⁰ on the delivery of the money to Fox, while the defendant's attorney tried to prove that the money were given as a loan to the defendant. The latter would therefore be a borrower and not a trustee. The courts in the trial and the trial appeal cases rejected the latter arguments and accepted the claim. The legal explanation of Fox's liability changed however between the trial and the final appeals¹¹. Alterations on the bill of exceptions led to the characterisation of the payment

⁶ An older form of pleading by which the pleader sets forth in account form the basis of his claim such as money had and received, goods sold and delivered. Black's Law Dictionary 5th edition, by Nolan & Conolly, 1979.

⁷ Meaning "being indebted, he promised or undertook". It is that form of the action of *assumpsit* "in which the declaration alleges a debt or obligation to be due from the defendant and then avers that in consideration thereof he promised to pay or discharge the same." Black's Law Dictionary. There were two species of *assumpsit*; the special *assumpsit* where the undertaking was express and the *indebitatus assumpsit* where the undertaking might have been implied from the mere existence of a previous debt (Fifoot, C.H.S. *History and Sources of the Common Law: Tort and Contract*, 1949, 360).

⁸ If the plaintiff managed to establish property on the money, a promise "implied by law" was employed in order to permit recovery of the plaintiff's property. If, however the claim was based on the defendant's promise, the plaintiff had to prove that the requirements of contractual liability (privity and consideration) were fulfilled. The case of a defendant receiving money to give to the plaintiff was falling in-between the two forms of action.

⁹ *Lawrence v. Fox* was litigated soon after the introduction of the New York Procedural Code for 1848 (the so-called Field Codification) which abolished the common counts and gave emphasis on the substance (instead of the form) of the claims. The plaintiffs had to prove their cause of action and they would not necessarily fail if they had chosen the wrong form. (Karsten in 9 (1991)*Law & History Review*, 344.).

¹⁰ The action for money had and received was part of a reasonable litigation strategy, as the plaintiff's attorney wanted to avoid focusing on the transactions involved (Holly-Lawrence, and Holly-Fox).

Winterbottom v. Wright from 1842 (10 Mees & W. 109,152 Eng. Rep 402 (Ex.1842), dealt with the liability of a coach manufacturer to an employee of the purchaser for injuries caused by a defect of the coach. The claim was rejected for lack of privity.

Robertson v. Fleming from 1861 (4 Macq. 167 (H.L.Sc. 1861) involved a solicitor who had been hired by a debtor to draft a security agreement for the benefit of his sureties. The solicitor erred and the sureties sued him for failing to provide security. The claim was rejected for lack of privity.

Twedde v. Atkinson (121 Eng.Rep. 762 (K.B. 1861). A and B were the fathers of a newlywed couple. They promised each other to pay certain sums to the husband and expressly agreed that the promise should be enforceable by him. The wife's father died without paying the promised amount and the husband sued the executor to enforce the contract. The court held for the executor on the ground of lack of privity. There are however differing opinions and strong criticism as to the meaning and effect of this case which is accepted as classical for the doctrinal views it advances.

National Savings Bank v.Ward, 199 U.S. (10 Otto) 195, 25 L.Ed. 621 (1879), is classical in american privity law. An attorney was hired by the purchaser of property to furnish a lender with a certificate of title for a mortgage loan. The certificate was erroneous and the lender bank sued the attorney. The suit was rejected because of lack of privity.

Decline of privity.

MacPherson v. Buick Motor Co.(217 N.Y. 382, 111 N.E. 1050 (1916) An injured bystander sued successfully the manufacturer of a vehicle the gasoline engine of which exploded due to negligent manufacturing. The decision accepted a duty of care on a foreseeability test, and referred to the unreasonable risk created for the bystander.

Glanzer v, Shepard, 233 N.Y.236, 135 N.E. 275 (1922). The New York Court of Appeals held liable the public weighers (defendants) who furnished a vendor of beans with a mistaken certificate, and were sued by the vendee. Justice Cardozo emphasised that the use of the certificate by the vendor was known to the weighers; in fact it was the "end and aim" of the transaction.

Ultramares Corporation v. Touche, 255 N.Y. 179, 174 N.E. 441, 74 A.L.R. 1139, 1931. The defendant accountant had negligently certified the accuracy of a corporations' balance sheet on which the plaintiff relied and loaned money to the corporation. The latter turned out to be insolvent. The fear of a far too extended liability, expressed in an often quoted apophthegm by Cardozo, was the reason for the rejection of the claim. The court relied on the assumption that the eventual use of the balance sheet was not known to the defendant. Cardozo was considering the possibility to "expose accountants to liability in an indeterminate amount for an indeterminate time to an indeterminate class". He added that "the hazards of a business conducted on these terms are so extreme as to erskindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences."

Biankanja v. Irving, 49 Cal 2d 647, 320 P.2d 16 (1958). The defendant was a non lawyer who had undertaken legal work in preparing a will. He carried out his task negligently and was sued by the disappointed beneficiary of the invalid will. The California Supreme Court thought that privity was not essential since liability could be established on a duty imposed by public policy. The court went on to give an outline of six factors which should be discussed on a case by case basis, in order to infer the existence of a duty of care; most of these factors were based on the underlying contract. The factors were; (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame

as a loan. The (successful) action for money had and received was converted into an action on the promise by a creditor of the promisee. The decision of the Court of Appeals was "split three ways". Out of the eight judges, two thought that the plaintiff could not enforce the contract, due to the absence of privity, The other six took the opposite view but two considering that holly acted as plaintiff's agent, and four for rather obscure reasons stressing that compliance with the doctrine "should not be made in the face of manifest justice". Eisenberg, M. A. 92 (1992) *ColL R*, 1354. The significance of this reasoning lies more in its potential consequences. As long as the object of the claim was money ("a bag of beans, or a bundle of coins"¹²), it made little difference if the plaintiff had a proprietary right or a right to enforce the defendant's promise. If however the object of the suit broadened to include all benefits, the action would be transformed -- as it did -- to an action on the promise¹³.

Buchanan v. Tilden, 52 N.E. 724, N.Y. 1899. The court accepted the third party claim considering that there was a pre-existing obligation of the promisee towards the third party; more specifically a moral duty of the husband to his wife. The promisor made a contract with the promisee under which he agreed to pay \$50,000 to the latter's wife. In exchange the promisee would obtain a loan for the promisor. The court held that the wife could enforce the promise. The "unity of interests" between the spouses was taken into account.

Seaver v. Ransom 120 N.E.724 (N.Y. 1918). The promisor was Judge Brenan who prepared his wife's will. After he read the will he had drafted under her directions, his wife expressed the wish that the property of a house which she was leaving to Judge Brenan for life, to be transferred after his death to a niece of hers and not to charity as the will provided for. As the wife's strength was waning and there would be no time to draft a new will, Judge Brenan promised that if she signed that will he would leave in his will enough property to her niece to make up the difference. Eventually he left nothing in his will to the niece who turned against the executors of his will. The court allowed the plaintiff to enforce the promise. The ruling, not distinguished for its doctrinal clarity, focused on the moral duty of the wife (promisee) to her niece (plaintiff).

Intended/Incidental beneficiaries.

Hibbs v. K-Mart Corp, 870 F2d 435, 1989. A real estate broker leased his land to a development company for building of a shopping mall. The developer entered into a sublease with a retail store chain. The developer, unable to build, declared bankruptcy and

11 Two inked-in alterations seem to have been inserted on the copy of the bill of exceptions that made its way to the Court of Appeals, The General Term of the Superior Court in Buffalo. (The bill of exception is a formal statement in writing of the objections and exceptions taken by a party during the trial of a cause of action to the decision's ruling or instructions of the trial judge, stating the objection, with the facts and the circumstances on which it is founded, and, in order to attend its accuracy, signed by the judge. The object is to put the controversial ruling or decision upon the record for the information of the appellate court. See Black's Law Dictionary.

The changes were possibly made by Fox's attorney after consulting Lawrence's attorney and with the consent of the trial appeal judge. Both alterations involve the distinction between a "delivery" of money, and a loan of money which could sustain an action on debt or on contract but not by a third party, and not (as delivery) an action for money had and received. The nature of Hole's payment to Fox became the most critical fact.

12 *Waters* 98 (1985)*Harv LR* , 1146.

13 Had the courts continued to resolve such cases on a trust basis the third party beneficiary rule which applies today even for securing the benefits of welfare programmes, would have not attained a wider range of applications.

breached the lease. The broker sued the retailer for breach of lease, intentional interference with the contract under a third party beneficiary theory.

Corrugated Paper Products v. Longview Fibre Co. 868 F2d 908, 1989. The plaintiff ordered a piece of paper manufacturing equipment to a dealer, who bought the equipment but sold it to someone else. The plaintiff turned against the seller whose premises he had visited for the inspection of the equipment.

Vista Co. v. Columbia Pictures Industries, Inc., 725 F Supp 1286, 1989. Limited partnerships and general partners that had acquired ownership sued a movie corporation to recover certain tax losses and to enforce its ownership rights derived from contracts negotiated for the benefit of individual partners. The contracts were for the marketing and distribution of the films by the corporation which engaged in a number of improper acts that effectively reduced compensation in the market for the licensing of the films. The general partners were found to be indented beneficiaries of the contracts..

Hebah v. United States, 192 Ct.Cl. 785. 428 F2d 1334, 1970. The widow of an Indian shot and killed by an officer of the Indian Police force, brought a wrongful death action against the government under an Indian treaty by which the government pledged to "reimburse the injured party for the loss sustained". The court held that the plaintiff was entitled to sue as a beneficiary of the Indian treaty, and remanded the case to the trial commissioner.

Septemertide Pub. B.V. v. Stein and Day Inc 884, F2d 675, 1989. An author sued a hardcover publisher for proceeds from the publication of his novel. The publisher's creditor intervened claiming that as a secured creditor he had a superior right to the funds the publisher had proffered as collateral. The district and the appellate courts held that the author, as an intended beneficiary, had a superior right to the proceeds. The appellate court further held that the author's interests in the two thirds of the proceeds from the paperback sublisence agreements between the paperback publisher and the hard cover publisher, was superior to the creditor's security interest when those proceeds had already been transferred to the creditor at the time the publisher assigned contract rights to its creditor.

6-8 Pelham Parkway v. Rusciano & Son, 170 AD 2d 497,565 NY S2d 843, 1991. An industrial car park tenant who had been cited for shortage of parking spaces on its property, sued the park's developer's, inter alia, for a judgment declaring that it had the right to use an off-street parking area set aside pursuant to an agreement between the defendants and the village in which the park was located. The trial and appellate courts accepted the claimants argument on the idea that he was a third party beneficiary of the respective agreement.

Bush v. Upper Valley Telecable Co., 96 Idaho 83 524 P2d 1055 (1974). The plaintiff, a television cable subscriber, brought a class action against the defendant cable company for damages caused by the violation of a rate schedule filed with the city pursuant to the defendant's franchise with the city. The Supreme Court reversing a judgment for the defendant, held that he plaintiff was an intended beneficiary of the franchising agreement, and was excused for not seeking administrative relief because the latter was unlikely.

Martin v. Edwards, 219 Kan 466 548 P2d 779, 1976. The claimants were found incidental beneficiaries in this case of a plaintiff claiming the status of a third party beneficiary of oil and gas wells' leases between the defendant and the plaintiff's brother. What the plaintiff would receive would come through his brother's interest.

Weems v. Nanticole Homes Inc., 37 Md. App. 544, 378 A2d 190, 1977. A subcontractor claimed that he should be exempted from liability as a third party beneficiary of the building purchaser's insurance contract He was considered an incidental beneficiary.

Port Chester Elec. Const. Co v. Atlas, 40 NY 2d 652, 389 NY S2d 327, NE 2d 983, 1976. An unpaid subcontractor was found to be an incidental beneficiary of the contract between the owner and the general contractor.

Quigley v. General Motors Corp 660 FSupp 499 1987. The court considered that Kansas followed the old rule (from Restatement first) dividing the beneficiaries into three classes, therefore the cross-claim of the co-defendant, the county's government based on a donee beneficiary theory could not be accepted.

Hill v. Sonitrol of Southwestern Ohio, 36 Ohio St.3d 36, 521 NE 2d 780, 1988. Plaintiff was the employee of a bookstore, held at and assaulted in the store after closing, and defendant was the security company who provided the store with a security system. The trial court, the intermediate appellate court and the appellate court held that the plaintiff was only incidental beneficiary of the contract between the bookstore and the security company. The contract was designed to protect property after the employer left and the company could not have anticipated protection of employees after the store closed for business.

Third party beneficiary rule -- Defences.

Moorings Development v. Porpoise Bay Co., 487 So. 2d 60 (1987), review denied 494 So 2d 1152 (1986). A development company and its subsidiary, a licensed real estate company, sued a landowner for breach of contract and for fraud and asked for the specific performance of an exclusive right of sale contract. The landowners and the development company were the parties to the sales contract. The trial and the appellate courts rejected the claim because the development company was not entitled to sell real estate property as required under Florida law. The appellate court stated that even if the subsidiary was a third party beneficiary of the sales contract, if the contract was voidable or unenforceable the beneficiary was subject to the infirmity.

Sears, Roebuck and Co. v. Jardel Co., 421 F2d 1048, (1970). An owner had turned against the subcontractor to recover the loss he suffered due to damages he had to pay to a tenant who claimed loss resulting from the collapse of a building allegedly because of the subcontractor's defective work. The trial and appellate courts held that the general release between the contractor and the subcontractor was binding on the owner and rejected his claim.

Levy v. Empire Ins Co (375, F.2d 860 -5th Cir 1967-). A beneficiary who purchased debentures in reliance of the term of a written contract was allowed to recover although the written contract was subject to conditions precedent not stated in writing. (Calamari & Perillo 712).

McCulloch v. Canadian Pa. Ry. Co. et al, 53 FSupp 434, (1943). The rescission from a traffic agreement whereby the second railroad guaranteed interest on 4 per cent bonds the first rail road was to issue in exchange for its 5 per cent bonds, was not invalid as against the 5 per cent bonds. In the absence of reliance on the contract by the third party donee beneficiary, the contract may be extinguished without his consent. The decision however is rather an exception to the policy of that time.

Thompson v. Commercial Union Ins Co. of New York, 250 So.2d 253,269 Fla (1961). Following an accident the plaintiff won a judgment against a tortfeasor for \$ 89,500. The insurance policy limit was for \$25,000. The plaintiff alleged the insurance company of bad faith. The court thought that in automobile insurance contracts, the third party rule extended to the public at large and allowed the suit in excess of the policy limits based upon the alleged fraud or bad faith. (Jackson & Bollinger *Contract Law in Modern Society, Cases and Materials*, 1980).

Hartman v. Pictorious, 248 Ill 568 94 N.E.131 (1911). The defence on the rescission was allowed. The court considered that creditor beneficiary's rights do not vest while the performances running between the promisee and promisor are still executory unless the beneficiary changes his position in reliance upon the contract.

Cooperland v. Beard, 217 Ala 216 115 So 389 (1928), involved a case where a debtor sold and conveyed real and personal property upon consideration in part that the purchaser shall assume and pay specified debts of the vendor. On the same day and before the creditors for whose benefit the promise was made assented to it, the purchaser sold and conveyed further the property upon consideration that the purchaser shall assume and pay the same indebtedness, and the original vendor released the original purchaser from his promise to pay. The Court of Appeals of Alabama, was faced with the question whether the creditor could maintain an action of assumpsit against the original purchaser. The court held that once the creditor had not assented to the assumption of the debt by the original purchaser his right against him had not become fixed. (This assumption was considered to be an open offer to the creditor.) Such a claim would be allowed in case of fraud. The court stated that: "The ownership of the property is of no concern to the creditor except as it may affect his power to collect the debt." The court examined the different views on the status of the parties to an assumption of debt agreement after acceptance of the assumption by the debtor. Emphasis was laid on the view that: "The person assuming the debt becomes, as between the immediate parties, the principal and the debtor, a quasi surety, and the creditor, upon acceptance of the arrangement may sue either or both." The court adopts the view that the creditor's assent to the assumption of the debt should not release the original debtor from his liability because this might worsen the position of the creditor. The original debtor if sued can turn against the person who assumed the debt. The Court of Appeals reversed and remanded the decision.

Ford v. Mutual Life Insurance Company of New York (283 Ill App. 325 (2d Dist 1936). The claimant was a person who had concluded a life insurance contract naming his wife as beneficiary, (subsequently assigned all he rights to his daughters. It was held that no surrender or modification of the insurance policy would be valid without the consent of the beneficiary. The latter had a vested right in the insurance policy when the contract of insurance took effect.

Salesky v. Hat Corp. of America, 20 A.D. 2d 114, 224 N.Y. S.2d 965 (1963). The plaintiff was the wife of a former president of the defendant corporation, who in November 1959 had entered into an agreement with the corporation for the purpose, among others, of providing for a pension for his wife for a limited period after his death. The agreement was conditional upon ratification by the majority of shareholders at the 1960 general meeting. The agreement was ratified but at a meeting of the Board of Directors in may 1962 a resolution was passed authorising the substitution of the president's sister as beneficiary. The agreement was amended without notice or decision by the shareholders. Following the president's death in 1963 both the wife and sister suit the corporation. The wife argued that because she was donee beneficiary the right vested at he time the contract was executed and she could not be deprived of her rights without her consent. The Supreme Court of New York (Appellate Division) held that no vested rights accrued to the plaintiff. Despite Restatement first the law in the area was unsettled, and there was a divergence of views between different jurisdictions. The court held that this was a case where the promisee continued to exercise certain control over the subject matter of the "gift", albeit not complete control. The right would have been vested on the plaintiff upon the execution of the agreement, and not before. The ratification requirement did not limit the power of the Board of Directors to amend the agreement. The court rejected the plaintiff's appeal.

Defences from the promisee-third party relationship.

Vrooman v. Turner, 69 N.Y. 280 (1877). The Court of Appeals of New York, thought that considering the plaintiff a third party beneficiary of the assumption of debt was "just and

practical". A mortgage was given as security of the loan. The action was actually for the foreclosure of a mortgage. The mortgaged property was subsequently conveyed many times. None of the grantees assumed to pay the mortgage. The defendant however, under a clause in the deed with which he obtained the property, assumed to pay the mortgage. The question the court had to deal with was whether the creditor (plaintiff) was a third party beneficiary of the last purchase. The court stated two requirements in order to accept that the plaintiff was a third party beneficiary; first that the parties intended to benefit the creditor and second that the promisee owed an obligation to the beneficiary. The second requirement was not fulfilled because the promisee had not made a promise on the seller's indebtedness. He had assumed no personal obligation. It was noted that in those cases of a broken chain of subsequent mortgage sales, in terms of Restatement first where the obligation of the promisee to the creditor beneficiary can be a supposed one, the third party beneficiary rule would apply, but not according to Restatement second where the obligation in question must be actual. In *Vrooman v. Turner*, the court thought that the plaintiff was an intended beneficiary or should be treated as one due to his reliance on the contract. Under Restatement second the plaintiff would qualify as a donee but not as a creditor beneficiary. Defences from the promisee-third party relationship could not thus be raised. (Calamari & Perillo 695, and Jackson & Bollinger 587-588.)

Rouse v. United States, 215 F.2d 872 (Ct. App. D.C. 1954). Winston, bought a heating plant from Associate Contractors Inc. He gave the company a promissory note, payable in monthly instalments. The Federal Housing Authority (FHA) assignor of the United States (plaintiff in the first degree), guaranteed the note and the payee endorsed it for value to the lending bank. Winston sold the house to Rouse who agreed to pay the amount due for the heating plant. Nothing was said about the warrantee note. Winston defaulted on the note. United States paid the bank, took an assignment of the note and sued Rouse. The latter's defence was that the plaintiff's assignor had breached his warrantee. The Court of Appeals of the District of Columbia, reversed the trial court's decision for not allowing the purchaser set up as defence the vendor's misrepresentation. The purchaser would not be liable to the U.S. unless his contract with the vendor made him liable. It was held that Rouse's promise to assume liability made him liable to the seller of the plant, only if and so far it made him liable to the vendor. If Rouse had been sued by the corporation which sold the plant he would have been entitled to show fraud on the part of the vendor. He would have the same right if sued by the assignee of the corporation's claim. The trial court's refusal to accept the defences based on the condition of the heating plant was also rejected (the defendant had raised the argument that the selling corporation did not install the plant satisfactorily.). It was considered however that the trial court's striking of a defence based on the promisee-third party relationship, was right. The court quoted often the second edition of Williston's Treatise (1936).

Schneider v. Feringo (Supreme Court of Errors of Connecticut, 1929, 110 Conn. 86, 147 A. 303.), was again a case of a chain of sales of mortgaged property whereby only the defendant had assumed to pay the debt. The basic question presented to the court was "Can the holder of a mortgage make liable one who, upon acquiring title to the premises has assumed and agreed to pay that mortgage.."(Maltbie J.). In deciding whether there was an intent to confer a right of action upon the third party, the court noted that if the grantor of the equity of redemption who had not assumed the mortgage had no objective to protect himself, an intent to confer a right to sue upon the holder of the mortgage, "would be the most natural motive to assign to him in requiring his grantee to agree to pay it.". The plaintiff's right was based on equity and statutory law. The result was not unfair for the owner of the equity of redemption; in fixing the amounts of the considerations for the purchase, the amounts of any mortgage he has agreed to pay were deducted. The appeal court of Connecticut reversed the decision of the trial court which did not hold the defendant liable because of the break in the chain of assumptions.

Donee and creditor beneficiaries.

US ex rel Johnson V. Morley Constr. Co., 98 F 2d 781, writ of certiorari denied in *Maryland Casualty Co. v. US* 305 US 651, 59 Ct 244, 83 L Ed 421 (1938). It was held that labourers working for a construction company under a contract between the company and the United States which provided that labourers shall receive the prevailing wage were donee beneficiaries and could sue the construction company to recover the difference between the prevailing wage and their salaries.

Aetna L. Insurance. Co. v. Maxwell, 89 F2d 988 (1937). It was cited in dictum that a person who has recovered a judgment against a doctor for malpractice, may sue the doctor's insurance company in equity for the recovery of the judgment.

Mutual Ben. Life Insurance Co. v. Ellis 125 F 2d 127, 130, 138 ALR 1478, certiorari denied, 316 US 665 62 S Ct 945, 86 L Ed 1741 (1942). It was held that a valid contract in favour of an insured person's sisters had been created when the beneficiary of an insurance policy informed the insurer that she desired the insurance income to be given to the principal for life, and upon death, if she had not withdrawn the principal, the income should be paid to her sisters.

Heins v. Byers, 174 Minn. 350, 219 N.W. 287(1928). The plaintiff transferred property to the defendant, who promised to pay the plaintiff's creditors. The defendant broke this promise and the plaintiff sued him for the amount of the debts. The trial court held that since the creditors could sue as third parties beneficiaries the suit by the plaintiff should be excluded. On appeal the decision was reversed. The courts suggested that as a means of protection against double liability that it was possible for the defendant to ask for the decision to impose that the money should be paid to the creditors.

Phillips Co. v. Constitution Indemnity Co. 68 F2d 304 (1933). It was held that a contractor who installed a sprinkler system in a new building could recover the price from a surety company which contracted with the owner to "completely pay for said building" if the lessee failed to do so.

Drewen v. Bank of Manhattan Co., 31 N.J. 110, 155 A 2d. 529 (1959). A separation agreement between Stanhope Nixon and his wife Doris contained the promise of the former that he would never reduce the quantity or quality of their children's interests under a will executed the same day. After Doris's death he changed his will and reduced the interests of his son Lewis, providing that any bequest would be void if the legatee called before any tribunal any of the provisions of the will. The plaintiff was appointed administrator of Doris's estate for the sole purpose of suing Stanhope's executor for specific performance of the separation agreement. The court reversed a judgment dismissing a complaint, considering that a donee beneficiary could invoke the aid of a court of equity "for the general reason that his remedy in the law is inadequate, and he should not be denied an effective means of compelling fulfilment of a promise...".

McCulloch v. Canadian Pa. Ry. Co. et al, 53 FSupp 434, (1943). The rescission from a traffic agreement whereby the second railroad guaranteed interest on 4 per cent bonds the first rail road was to issue in exchange for its 5 per cent bonds, was not invalid as against the 5 per cent bonds. In the absence of reliance on the contract by the third party donee beneficiary, the contract may be extinguished without his consent

See *Seaver v. Ransom*, 120 N.E.724, NAY. 1918.

Attorney liability for negligent advice.

Roberts v. Ball, Hunt Hart Brown and Baerwitz, 57 Cal App 3d 104, 128 Cal Rptr. 901 -1976. An attorney was held liable for negligent misrepresentation. The plaintiff had loaned money to the client upon representation that the client was a general partnership. The partnership had been resolved before the attorney's representation to the plaintiff.

Eisenberg v. Gagnon, 766 F.2s 770 (3rd Cir. 1985), cert. denied 474 U.S. 946, 106 S.Ct.342, 88 L.Ed. 2d 290 (1985) In this unique decision lawyers were found liable towards investors for an erroneous tax opinion in an offering memorandum. The court relied upon Restatement (second) of Torts.

Vereins - -Und Weatbank, AG v. Carter, 691 FSupp 704 (S.D.N.Y.1988). The court accepted the claim against an attorney, special counsel to various gas and oil companies, for an erroneous opinion letter issued at the request of his client to the plaintiff lender, calling upon the authority of two decisions concerning accountants; *White v. Guarente* 43 NY 2d 356 401 NY S 3d 474, 372 NE 2d 315 (1977), accepting the liability upon the representation of words, (it focused on the expected and actual plaintiff's reliance and the knowledge of this reliance by the professional) which created a duty to act with care, and *Credit Alliance Corp. v. Arthur Andersen & Co*, 65 NY 2d 362 489 NE 2d 249 (1985), refining the principle in the former case.

Attorney liability for the drafting of wills.

See *Biankanja v. Irving*, 49 Cal 2d 647, 320 P.2d 16 (1958).

Lucas v. Hamm. 56 Cal 2d 583, 364 P 2d 685, 15 Cal Rptr. 821 (1961). The testator employed the defendant in order to prepare his will, whereby he was leaving property to the plaintiffs. The defendant drew the will provisions which were allegedly invalid under the rules relating to restrains on alienation and the rule against perpetuities. After the testator's death, the defendant advised the plaintiffs that the provision under which property was left to them was invalid and they would receive nothing unless they made a settlement with the testator's blood relatives. The plaintiffs settled for \$75,000 less than the will provided and sued the defendant for the loss claiming both tort liability for negligence and breach of contract. The court, having effectively accepted the claim on the third party beneficiary rule, dismissed the claim on the idea that the restrains on alienation and perpetuities have long perplexed the courts and the bar, and that due to the nature of the error, it could not be demanded form the attorney to show skill in excess of the average in his profession. A duty of care could be owed to the person the testator clearly intended to benefit. The attorney was aware that negligent professional conduct could injure a member of a clearly defined and limited class of people. Release from liability would amount to a gap in the law sanctioning the realisation of the client's intent. As said: "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will...", "...and this intent [of the testator] can be effectuated in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognise as a matter of policy that they are entitled to recover as third-party beneficiaries."

Heyer v. Flaig., 70 Cal 2d 223, 74 Cal Rprt. 225,449 P. 2d 161 (1969). The court held that an attorney "realistically and in fact" assumed a relationship, not only with the client but also with the would be legatee whose rights were "clear and foreseeable". In this case the attorney failed to inform the prospective testatrix of the effect her planned marriage would have on her testamentary succession. The court declared enigmatically that the beneficiary rule approach was "conceptually superfluous".

Guy v. Lieberbach, 501 Pa 47 459 A2d 744, 1983. A named beneficiary of a will who was also named executrix turned against the attorney who drafted the will and directed her to witness it, for the loss she suffered due to the invalidity of the entire legacy. The court of common pleads held that the plaintiff could proceed either under a negligence or a contract theory. On appeal the court dismissed the basis of negligence considering that the negligence standard was too broad, and allowed the claim on the basis of the third party beneficiary rule, thinking that the suit involved claims under a contract and referring to the second Restatement.

Hale v. Groce, 304 Or 281, 744 P2d 1289, 1987. The decision characterised the beneficiary of a will who sued the attorney who constructed it, for failing to comply with the testator's instruction that the plaintiff receive a bequest, as a classical intended third party beneficiary of the lawyer's promise to his client who could enforce the duty so created.

Hatbob v. Brown, 394 Pa Super. 234 575 A 2d 607, 1990. A husband and wife hired an attorney to draw up their wills, each leaving his or her estate to the other if he or she survived the decedent by 60 days; if not the estate was to be shared by the wife's two daughters and the husband's daughter. After the wife died the husband changed his will naming his daughter as sole beneficiary. The wife's daughters sued, inter alia, the attorney for negligence in drafting the original wills alleging that they were intended to be irrevocable. The trial court granted the attorney motion for a compulsory nonsuit. The appellate court affirmed, holding that the daughters could not sue the attorney for malpractice because they were not within the attorney-client relationship, but they could sue for breach of contract as third-party beneficiaries. However the court held that there were not sufficient evidence to warrant submission of this issue to the jury.

Beyond will beneficiaries.

Chatterjee v. Due 511 F Supp 183, 1981. The plaintiff, the mother of a seaman killed in a ship collision, turned against the attorneys who represented the settling vessel owner for legal malpractice. The plaintiff argued that there had never been a settlement of her claim, due to the fraudulent acts of her son-in-law, who allegedly falsely presented himself as her representative and forged her name in certain documents including a power of attorney and a general release. The plaintiff sought compensatory and punitive damages from the lawyers, having negligently entered into a settlement agreement without certification of his asserted authority. The court found that the will cases were inapposite. In the representation of a testator there may be indirect privity in the sense that the fulfilment of the testator's wishes after demise depend entirely upon a valid instrument being drawn. In such situations the beneficiaries under the will are the intended and direct beneficiaries of the lawyer's services. The malpractice action in question did not involve the drafting of any instrument which could have been defective through the input of the law firm. The court held that the lawyer could not be held liable on any negligence theory.

Metzker v. Slocum, 272 OR. 313, 537 P 2D. 74,-1974. The attorney failed to perfect the adoption papers, and the supposed adoptee found out that she was not after all a legitimate child of the couple and had no custody claim against the husband. The child sued the attorney and won compensation in tort. It could be argued that the interests of the parents (clients) were contradicting those of the children. This however is not the case if one takes into account the time that the settlement was made; the interests of the children and the husband coincided then.

Pelham v. Griesheimer, 93 Ill App 3d 751, 417 NE 2d 882 (1981). In a claim by the children of a divorced couple, the mother was obliged under the divorce settlement, to make them beneficiaries of her life insurance policy. The attorney, hired by the husband to represent him in the divorce proceeding failed to follow this part of the agreement and was held liable in tort.

Bell v. Manning 613 S.W.2d 335 Tex.Civ.App. 1981). Mallen & Smith 386. The court held that an attorney for a contractor would not be liable to the client's customer concerning the effect of legal documents. This is a case of adversity between the interests of the beneficiaries and those of the client. The adversity should appear at the time the contract between attorney and client is concluded, or when the attorney performs.

Amey Inc. v. Henderson, Franklin, Starnes & Holt, P.A. 367 So 2d 633 (Fla App 1979) cert denied 376 So 2d 68 (1979). In an action by a buyer of property who claimed that the lender's

attorney erred in searching the title the rule was applied even though the lender eventually charged the plaintiff for the lawyer's services. (Normally a seller's, buyer's or mortgagor's attorney is not liable in tort towards third parties, when certifying the title on the sold item for instance. Unlike a will, it is thought, a sales transaction involves two sides.)

Page v. Frazier, 388 Mass 55 445 N.E.2d 148 (1983). The Massachusetts Supreme refused to find a duty from a mortgagee's attorney to a mortgagor- purchaser for a error in the title examination, despite the benefit to the mortgagor and the latter's obligation to pay the legal fees. The court took into account a number of other independent and conflicting duties the attorney owed to his client, as prepayments disclosures and late charge provisions.

McEvoy v. Helikson, 277 Or. 781, 785-86, 562, P.2d 540, 542-43 (1977). The escrow agency was accepted on the basis of a divorce decree stipulating that the wife's attorney was to hold the passports of the wife and child until the wife returned the child to the husband's custody. However since an attorney is primarily an agent for his client and not for an independent third party, it would require an express agreement or overwhelming evidence to accept the theory.

Stewart v. Sbarro 142 NJ Super. 581, 362 A2d 581 (1976). An attorney who was in a position of trust in relation to the third party failed to execute a mortgage as part of a corporate transaction, and was found liable to the seller for breach of a fiduciary obligation. Again it is quite unlikely that the attorney will be in a fiduciary relationship with anyone else but his client.

Construction.

Gjertsen v. Mawson & Mawson, Inc AD 2d 779 522 NY S2d 891, 1987. A dock worker injured at a construction site collected compensation from his subcontractor employer and then sued the general contractor and another subcontractor to recover damages for his injuries. The defendants cross-claimed against the plaintiff's employer's seeking indemnification. The trial court granted the employers motion to dismiss. On appeal the Appellate Division of the New York Supreme Court, reversed the decision considering that a cause of action for indemnity could be based upon either as express agreement or an implied warranty of a reasonably safe place to work. The defendant subcontractor had a right to seek indemnification because it was clearly an intended third party beneficiary of the contract between the employer and the general contractor.

Nomellini Construction Co. v. Harris, 272 Cal App. 2d 353, 77 Cal Rptr 361, Dist Cir App 1969. Procedural considerations dominated this decision on a claim by a prime contractor against a subcontractor where the latter cross complained against his supplier whose breach caused the subcontractors inability to perform. The court considered that since the sole cause of the subcontractor's default was the supplier's breach, it was equitable to "telescope" the claims and permit entry of a direct judgment in favour of the prime contractor against the supplier. Thus a multiplicity of law suits, a circuitry of actions was avoided.

Port Chester Elec. Construction Co. v. Atlas, 40 NY 2d 652, 389 NY S 2d 327, NE 2d 983,-1976. The defendant Atlas had been actively engaged in the acquisition and development of real property. Atlas had organised the various ownership and construction ventures into a complex network of separate corporations. The general contractor had entered into a contract with the owner of an Atlas project for the construction of a shopping centre. Under the terms of the contract the owner was to reimburse the general contractor for the amounts of all subcontracts. The general contractor then entered into a subcontract with the plaintiff for the performance of electrical work. When the plaintiff did not receive payment, arbitration was demanded, in which the plaintiff prevailed but was unable to collect the judgment. As a result of certain financial manipulations, the general contractor was

judgment proof. The plaintiff then sought to enforce its judgment against Atlas, as well as against other corporations allied with Atlas in the venture. The trial court lifted the corporate veil of the various corporate defendants, held that the subcontractor was a third party beneficiary of the contract between the general contractor and the project owner, and granted relief to the plaintiff. The appellate division affirmed. On review the New York Supreme Court rejected the third party beneficiary theory although it agreed with the result reached. The court thought that the ordinary construction contract does not give third parties who contracted with the promisee the right to enforce the latter's contract with another. As there is generally no express intention to benefit the third party, such parties being merely incidental beneficiaries. In the particular case the general contractor and the owner had no intention to benefit the subcontractor.

Flintkote Co. v. Brewer Co.-221 So. 2d 784 (Fla. Ct. App.) (per curiam), cert.denied, 225 So. 2d 920 (Fla 1969). The plaintiff was a prime contractor who had contracted with the Air Force for the construction of an airstrip and then contracted with a subcontractor for the installation of some binding material on the strip. The subcontractor agreed with the defendant to supply the necessary material. The defendant failed to supply material fulfilling the required specifications and the plaintiff had to purchase it elsewhere. The Florida Court of Appeals held that, on the basis of the nature and purpose of the contract, between the subcontractor and supplier the plaintiff was entitled to sue as third party beneficiary. The intent of the parties was not looked at, arguably in order not to reject the third party beneficiary status of the plaintiff. The court seemed to have been cautious about the fact that no primary intention to benefit the third party could have been inferred. As said the failure of the supplier to provide the material did not relieve the subcontractor of his obligation under the subcontract. The plaintiff found the material elsewhere and did not pass the extra expense to the subcontractor but made the material available to him to fulfil his task.

County of Giles v. First U.S. Corp.-445 S.W. 2d 157 (Tenn.1969). The plaintiff was a county in Tennessee which had decided to construct a building for the purpose of leasing it to the private industry and authorised the issuance and sale of bond in order to raise funding. A tenant (also plaintiff) agreed to have the lease determined by the amount necessary to retire the bonds and their interest. The defendant contracted with the county to act as its fiscal agent for the sale of the bonds. The county sued the defendant for breach of a fiduciary duty and wrongly withholding funds. The rental payments had risen as a result of the defendant's breach. The tenant's suit (he was also a plaintiff in the action) was accepted on the basis that he was a beneficiary of the contract between the county and the defendant. Although recovery by the county would accrue to the tenant's benefit accepting his action would release him from having to file another lawsuit after the recovery by the county in order to protect his interests. The decision did not discuss the question of the parties' intent to benefit the tenant. The latter's benefit was actually indirect. Rather, as the previous decision, the focus was on the practical and equitable manner of attaining the indicated result by allowing the plaintiff to sue directly. Avoiding a multiplicity of suits as well as extra expenses and providing an effective remedy for the third party were the basic objectives in the decision's rationale.

Thomas G. Snavelly Co. v. Brown Constructions Co.-16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968). The defendants were the owner and the prime contractor in a contract for the construction of a factory. The contract stated that time was of essence and provided time schedules for different phases which applied to all subtrades. The plaintiffs subcontracted for work which was to be completed in specific dates. Due to delays in the contract between owner and prime contractor the plaintiffs were not able to finish their schedule as planned and sued the defendants for the additional expenses they suffered. The court stated that the owner and the prime contractor knew of the importance of the schedule factor, and it was their duty to afford the plaintiff opportunity to perform as planned. Although the court "discovered" an intent-to-benefit, the focus was on the practical realities which

imposed the acceptance of the third party beneficiary claim and not on the parties' intentions.

Sears, Roebuck & Co. v. Jardel Co.-421 F2d 1048, 3d Cir 1970. A property owner contracted with a prime contractor for the construction of a shopping centre. The prime contractor contracted for some works with a subcontractor. The shopping centre collapsed and the owner sued the subcontractor for having breached his contract with the prime contractor as to the compliance with the specifications of the subcontract. The court accepted that the owner was a third party beneficiary of the subcontract, on the idea that the subcontract explicitly provided for the provisions of the services of the subcontractor to the owner. In the words of the court, the latter was the creditor beneficiary of the subcontract, since the prime contractor, in order to fulfil part of his duty to the owner had designated specific work to the subcontractor. The latter had agreed to "indemnify and save harmless" the owner for any claim of damage which could be asserted against the prime contractor as a result of the subcontractor's performance.

Guardian Constr. v. Tetra Tech Richardson 583 A 2d 1378, (1990). A designer engineer hired by a project owner, made miscalculations with respect to the tidal heights and project benchmark and a contractor and subcontractor who used the errant specifications to formulate their bid on the project sued the engineer, inter alia, for breach of contract. A Delaware court held, upon the defendant's motion for a summary judgment, that the plaintiffs were not third-party beneficiaries of the contract between the defendant and the project owner and could not therefore maintain an action for breach of contract. The court noted that the plaintiffs were not creditors or donees at the time the contract was made.

Claims against the sureties of the prime contractors.

Aetna Cas. & Sue. Co. v. Jelac Corp. 505 So 2d 37, (1987). A subcontractor sued a surety on a performance and payment bond for work done on a construction project. The surety moved to dismiss because the subcontractor's contract with the contractor provided for arbitration of all disputes. Affirming the trial court's denial of the motion, the Florida Appellate court, held that the surety was merely an incidental beneficiary of the construction contract, and had no right to enforce the contract provisions requiring arbitration.

US for use of Valders Stone & Marble V. C-Way 909 F2d 259, (1990). A stone supplier brought suit on a payment bond against a contractor on a federal marine construction project. The defendant had refused to pay the plaintiff for the stone supplied, claiming a setoff due to its obligation to compensate a towing company for damage to its barge. The plaintiff had contracted with an excavating company to load stone. The barge was damaged as a result of the excavating company's alleged negligence. The towing company intervened in the suit seeking recovery from the plaintiff in admiralty. The district court entered summary judgment for the plaintiff against the towing company; the latter had no right to recover compensation from the plaintiff. The appellate court affirmed holding that the towing company had presented no evidence showing that the defendant, when it elicited a promise from the plaintiff to supply stone, had any desire or motivation to benefit the towing company.

Neeham Foundry Co. v. National Supr. Corp., 47 Ill, App 2d 427, 433, 197 Ne 2d 744,748 (1964). The court thought that the acceptance of the supplier's claim on the bond would encourage reputable suppliers to contract more readily and insuring a steady flow of labour and material to construction projects. Reliance by the defendant that he would not face third party claims lead to the rejection of such suits. C.H.N. 54 (1968)VaLR , 1180.

Independent Bridge Co. ex rel. Ainsley v. Aetna Casualty and Surety Company, 316 Pa 266 175 A 644 (1934), concerned a claim the supplier of coal to stoke boilers used in the construction of a county bridge. He sued on the bond between subcontractor and defendant. The Supreme Court of Pennsylvania rejected the claim because the local trade clearly

understood the phrase "[materials] in or about the construction..", as including only materials actually incorporated in the complete structure.

Fidelity & Deposit Co. v. Rainer (Supreme Court of Alabama, 1929, 220 Ala. 262, 125 So. 55, 77 A.L.R. 13). Appellant was the surety on a bond executed by a building contractor as principal payable to appellee Rainer. The beneficiary plaintiff had furnished the contractor with materials for which he had not been paid. The circuit court rendered judgment for the plaintiff and the appellate court ratified that decision. Much of the effort in the reasoning was directed in justifying why should a claim be allowed against a private owner. The decision was based on the wording of the bond, to pay "all persons" who had contracted; the owner could not have been aiming at protecting (by indemnity) himself alone. The relevant clause of the bond would be meaningless "unless inserted for the benefit of the materialmen and labourers". The reasoning was the same to that related to bonds offered to public owners.

Home Indem. Co. v. Daniels Construction Co. 285 Ala 68 228 So. 2d 824 (1969). The language of the bond was held to include all subcontractors of the general contractor but not the subcontractors of the subcontractors. Normally the latter as well as materialmen or labourers are included.

Craybar Elec Co. v John A Volpe Constr Co. F 2d 55 (5th Cir 1967) 387. The court was faced with a payment bond prescribed by the Miller Act (40 USCA §§ 270a-270e). This bond covers only (1) those materialmen, laborers and contractors who deal directly with a prime contractor, (2) those materialmen, laborers and contractors who have a direct relationship with a subcontractor. Those in the second category must give written notice to the contractors within 90 days after the date on which such claimant performed the last of the material for which the claim is made.

Claims between contractors.

See again *Thomas G. Snavely Co. v. Brown Constructions Co.* 16 Ohio Misc. 50, 239 N.E.2d 759 (C.P. 1968).

Leavell & Co. v. Glantz Contracting Corp. of LA., Inc 322 FSupp 779 (ED La 1971). The court held that architects hired by the Port of New Orleans to prepare plans were not liable to a contractor hired by the Port for delays due to improperly prepared plans, late delivery of plans, etc. The decision considered that there was no "stipulation pur autrui" under the Louisiana Civil Code, and no objective for establishing an advantage for a third person in the contract between the Port and the architects. Jackson & Bollinger 591

Broadway Maintenance Corp. v. Rutgers, (90 NJ 253, 447 A 2d 906 -1982-). A university entered into nine separate prime contracts, and selected a general contractor to coordinate and supervise the prime contractors. Each prime contractor promised in his contract that its work would not interfere with or slow the progress of other contractors, and agreed that contractors injured by such delays could recover damages from the offending contractors. Two contractors brought a suit for damages against the university claiming that a failure to coordinate resulted in unreasonable construction delays. The trial court considered that the plaintiffs were the beneficiaries of the contract between the university and the general contractor and had a right to sue the latter. The plaintiffs appealed. The appellate court affirmed holding that the contracting parties intended that the plaintiffs and other prime contractors should benefit from proper performance by their peers, by conferring a right of performance to the prime contractors. The university retained no supervising or coordinating duties which could give rise to a cause of action in the plaintiffs; the plaintiffs' remedies were limited to actions against fellow contractors.

Visintine & Co. v. New York, Chicago & St. Louis RR, 160 N.E. 2d 311 Ohio (1959). The plaintiff, contractor for the State of Ohio, turned, in relation to the eventual elimination of

a grade crossing, against other contractors of different parts of the works, because they allegedly had failed to perform as required by their contract. All contractors had promised to cooperate, by adhering to specific plans and completion dates for their operations. The defendant's objections to the plaintiff's tort and contract actions were sustained by the trial court. The Court of Appeals reversed the dismissal of the contract action. On appeal the Ohio Supreme Court held the decision affirmed. The court examined whether the third party's interests and benefit was among the primary intentions of the parties, by looking at what had been bargained for. It was thought that a third party beneficiary claim could be sustained even though the benefit of the third party was not a primary purpose, which is true for most cases, since parties aim at protecting themselves. The court ignored explicitly a strict application of the intention to benefit criterion and accepted the defendants' liability because performance fell short of an assumed obligation to a third party. The plaintiff qualified although the promisee had the benefit of sovereign immunity; otherwise the decision would be patently incorrect. "Contracts: Third Party Beneficiary - Contractor may recover on contract between railroads and State wherein railroads agreed to cooperate with contractor by meeting work schedule", 45 (1959) *VaLR* 1226.

Dickinson v. McCoppin, 121 Ark 414 181 SW 151 (1915). The defendant contractor had promised the city-owner to indemnify the plaintiff engineer, for losses caused by the contractor's failure to complete his part of the works in time. The court denied recovery on a combination of intent and privity requirements and ignored the reliance of the plaintiff and the profound needs of the construction industry to secure the position of the participants to the extent possible. C.H.N. 54 (1968) *VaLR* , 1178.

Buchman Plumbing Co. v. Regents of the University of Minnesota, 298 Minn. 328, 215 NW 2d 479, 1974. The plaintiff, a mechanical contractor, brought an action against a landowner and a general contractor. The landowner's contracts with the plaintiff and the general contractor had a 200-day time term for the completion of construction. The plaintiff claimed damages because of inability to complete within the time period. He argued that the general contractor was responsible for the delay and that the landowner had violated his duty to create conditions for completion within time. The trial and the appellate court dismissed the arguments of the plaintiff. He was not a third party beneficiary of the landowner-general contractor agreement; there was no intention to benefit the plaintiff and the general contractor's performance would not discharge a duty the landowner owed to the plaintiff. The action against the landowner was dismissed as there was no express warranty that works should be completed within the time limit.

See *Shea-S & Ball v. Massman-Kiewit-Early*, 606 F2d 1245 (D.C. Cir 1979). The relative contract provided that "The authority may undertake or award other contracts for additional works and the Contractor shall fully cooperate with such other contractors as shall other contractors and Authority employees and carefully fit his work to such additional work as may be directed by the Contracting Officer."

Claims of the owner against the subcontractor.

Gilbert Fin. Corp. v. Steelform Contracting Co., 145 Cal Prtr 448. Ct App 1971). It was noted that the promisor (Steelform, the subcontractor) realised he was assuming the promisee's (the prime contractor's) duties for this phase of the construction and that Gilbert (the owner) would be the ultimate beneficiary as the owner of the building. Gilbert would obviously be a creditor beneficiary.

Corporate transactions.

Galdwell v. Ryan, (173 KY 233 190 SW 1078, -1917). Plaintiff and defendant, had a controversy over a fund which was later deposited with a bank. In 1909 the bank directors were ordered to pay an amount to Ryan, but paid only a part because the bank's resources had been exhausted. In agreement between the bank's directors, stockholders and creditors the latter consent to accept 75% of their claims and the stockholders to release the directors

from liability. The directors (one of whom was Caldwell) agreed to assume personally claims against the bank. Ryan was a creditor who did not enter the agreement, but her executors were allowed to recover the full amount in an action against Caldwell on the idea that the directors' assumption of liability was for the benefit of all the creditors and was not limited by the 75% clause.

Mayer v. Development Corporation of America, 396 F Supp 917, 1975. The decision dealt with a consolidation of three actions brought by minority shareholders against a Delaware corporation alleging breach of various contracts as well as violation of federal securities laws in connection with defendant's acquisition of a New Jersey corporation. In one case the plaintiff alleged breach of an employment contract originally entered into by the New Jersey corporation, arguing that he was a third party beneficiary of the acquisition agreement by which the defendant agreed to assume all duties and obligations of the New Jersey corporation. The defendant's motion to dismiss for failure to join the New Jersey Corporation as an indispensable party was denied. The defendant's right to raise certain defences was not contingent upon the third party beneficiary.

Re Edward M. Johnson and Associates Inc. 845, F2d 1395 C.A. 6, 1988. The president and sole shareholder of a company contracted to sell his stock to a larger corporation. An involuntary bankruptcy petition was raised against the company and sustained. The appointed trustee of the company then sued the president under the stock sale contract in order to enforce his obligation to pay certain debts of the company. The bankruptcy court entered judgment for the trustee, agreeing that the company was a third party beneficiary of the president's promise in the stock sale contract to pay the debts. On appeal the district court reversed finding no indication that the company was an intended third party beneficiary. The circuit court reversed and remanded, holding that, although the company's benefit would have been indirect, the promise had been exacted by the intention of benefiting the company and freeing it from past obligations.

Supplies for Industry Inc. v. Christensen, 135 Ariz. 107, 659 P2d 660, 1983. The Court of Appeals of Arizona dealt with a claim whereby a corporate subsidiary sought an injunction ordering its former president not to compete. The defendant who had founded the plaintiff parent company, sold his business to a corporation and entered into an employment agreement with the corporation. The trial court granted the injunction and the court of appeals affirmed. The subsidiary was the intended third party beneficiary of the employment contract between the parent company and the defendant when the latter was president of the company, which provided that the defendant would not compete with the plaintiff or with any other subsidiary which might in the future operate the business conducted by the plaintiff subsidiary. As an intended beneficiary the subsidiary was entitled to enforce the covenant not to compete. A release which the corporation gave to the defendant after the sale of a subsidiary to a second corporation did not discharge the defendant from his duty not to compete, because the employment contract was equably assigned to the second corporation at the time of the sale.

United States v. Industrial Crane & MFG Co., 492 F2d 772 (5th Cir 1974) Billmeier who owned all the stock of Industrial had, as an officer of Industrial's predecessor, a potential liability under Internal Revenue Code §6672, providing that persons responsible for non payment of employment taxes being liable for a penalty equal to the amount of the unpaid taxes. On April 1969 he sold Industrials stock to Quarles. The stock sale contract provided that Industrial was undertaking Billmeier's tax liability up to \$7,500. In 1971 the U.S. government sued Industrial for the tax liability claiming that it was third party beneficiary of the stock-sale contract. The argument was accepted by the court. The Court of Appeals reversed the decision of the trial court and accepted the defence of Industrial to set off against the governments claim damages for Billmeier's breach of his promise not to compete.

Spiklewitz v. Markmil Corporation, 136 Mich. App. 587, 357 NW 2d 721, 1984. The plaintiff loaned money to a businessman who executed a promissory note. The businessman sold his enterprise to the defendants, who executed an assumption in which they assumed the debts of the businessman. The plaintiff was listed as a creditor. The defendants failed to pay the plaintiff, and the latter brought suit, to recover the amount due on the note, alleging that he was a third party beneficiary of the contract between defendants and the businessman. The defendants denied the allegations and argued that the statute of limitations had run on the note. The trial court found for the defendants and the circuit court affirmed. The court of appeals reversed and remanded holding that the plaintiff was a third party beneficiary to the contract and that the defendant's promise to assume the debts created a new obligation which accrued from the date of the new obligation.

Hoge v. Farmers Mkt. & Supply Co., (61 N.M. 138 A. 821, 1926). An exchange of stock took place between two corporations controlled jointly by the same entities. One corporation absorbed control of the other promising to pay specific accounts and general obligations of the acquired. The plaintiff who was an obligee of the acquired, sued the acquirer. The court applied the intent to benefit test, ignoring the fact that the parties to the exchange run both corporations together and denied relief because no intent to benefit was found.

Silver King Coalition Mines Co. v. Silver King Consol Mining Co., (204 F. 166, -8th Cir 1913). The plaintiff company ran a mining claim together with another company as tenants in common. The latter company transferred its interests to the defendant (who undertook to pay all the outstanding debts of the transferor) sold stock to the latter and hired two of its officers as directors. Both the transferor and the transferee extracted and sold ore without the plaintiff's knowledge. The court accepted the claim for the ore extracted illegally, considering that the plaintiff was a third party beneficiary and that the beneficiary intent test did not apply when the court was faced with an honest creditor and a collusive transaction, for reasons of equity.

Re A.C. Becken Co., 75 F 2d 681 -7th Cir 1935. A company (purchaser) wanted to acquire another company and in order to avoid the adverse effect on its capital rating (to avoid that is including the purchase in its balance sheet), the company was purchased by the former's president. The buyer issued to the president, simultaneously with the purchase, preferred stock whose dividend rates and redemption and retirement schedules coincided with the purchase payment schedule. Both companies were small and the purchaser knew of the purchaser's intentions. Many creditors extended credit to the purchaser ignoring its liability. The president later transferred his interests in the company, to the purchaser in return for its assumption of these liabilities. After the purchaser's economic failure the court rejected a claim by the purchased company's shareholders as third parties beneficiaries, against the purchaser because this way they would gain an advantage over the latter company's general creditor's because of their bad faith in a transaction.

R.E.Duvall Co. v. Washington, B. & A. Elec. R.R. (15 F. Supp. 536, 541, D. Md. 1916). The court accepted the enforcement of the guarantee by the bondholder. Such a policy would improve the security in bond sales, and stability in the bond market. In an exchange of corporate assets the reliance of the bond holder on such a specific guarantee would be justifiable.

Sterling v. Victor Cushwa & Sons 170 Md 226, a 593, (1936). The court accepted the enforcement of multiparty agreement to subscribe to stock or to contribute to corporate funds. It was noticed however that the policy was not made explicit in these cases. (54 (1968) VaLR, 1184.).

Black & White Cabs, Inc V. Smith, 370 S.W. 2d 669 (Mo. Ct. App.1963). The trial court entered a decree in favour of the corporation. The decree was affirmed. The court noted the

purpose of the agreement that the same shareholders should retain the management of the company without having to adjust to a new relationship with a stranger. The plaintiff was considered to be a donee beneficiary of the agreement.

Instituform of North America v. Chandler, 534 A2d 257, -Del.Ch. 1987. The Delaware court had to deal with a voting agreement entered by some shareholders of a corporation, agreement which resulted to the removal of the incumbent directors who were not parties. The directors sued the parties to the agreement alleging that the plaintiffs' removal was a violation of the agreement. The court granted the defendants' motion for summary judgment considering that the plaintiffs had no rights under the agreement. The plaintiffs were not creditors or donee beneficiaries of the agreement. The parties to the latter did not intend to create any rights for the incumbent board.

Haran v. Hand, 37 AppDiv 291 324 NY S 2d 556 (1971), dealt with a situation where nine stockholders sold their corporation for a merger into a buying corporation and entered into similar employment contracts with the merged corporation. The purchase price of their stocks was to be computed partly on the basis of success in a three year period following the merger. One stockholder who quit his job within one year was sued by the other eight on the idea that he was important to the business and his departure would reduce the amount payable for the stock. The claim was rejected. Admittedly there was hardly any evidence to support that the other stockholders were in that manner third parties beneficiaries of the employment contract of the person who left. Jackson & Bollinger 591.

Hufsmith v. Weaver, 285 Ark 357, 687 SW 2d 130, (1985). The president and major shareholder of a concrete company brought an action for tortious interference with a contract of sale against competitors who had filed suit to block one of the concrete company's sales, causing financial ruin to the company and forcing the president as guarantor to use his own assets to pay all obligations of the company. The district court affirmed the trial court's judgment granting the competitors' motion for summary judgment, holding that since the president was not a third party creditor beneficiary of the contract of sale he lacked standing to bring the action.

Financing.

Carson Pirie Scott & Co. v. Parrett, (346 Ill,252 178 N.E.498, 1931). A creditor agreed to finance the construction and furnishing of a hotel corporation but later refused to issue more funds because the corporation seemed to lack the capital to meet its obligations. Two corporation officers promised to the creditor to pay specific obligations. The court found that due to this specific listing the plaintiff, who was debtor of those obligations, could enforce this promise against the corporation offices. The decision is remarkable because the promise was not actually aiming at improving the position of the plaintiff, but to benefit the corporation in the light of funding difficulties. The benefit of the plaintiff was "incidental". The court by focusing on the listing of the specific debt circumvented in effect the examination of intention. Restatement first would have led to a different result. The decision responds to market needs in protecting the reliance of the debtor upon the promise and holding the promisors accountable for their statements. The debtor would otherwise have to sue the heavily indebted corporation.

California Cotton Oil Corp. v. Radd, 88 Ariz. 375,357 P.2d 126 (1960). The defendant's planed to give loans to a farmer, and to purchase his crop. The farmer was a tenant to the plaintiff, who in reliance upon this plan agreed to help finance farming by not placing any lien on the crop. The defendant in the presence of the plaintiff stated that the plan would be strictly followed. The level of lending exceeded the plan's limits and the farmer was unable (with the income from the sale of the crop), to pay the rent to the plaintiff after repaying the loans. The court held that the plaintiff was an incidental beneficiary. The plaintiff's reliance on the promises, and the defendant's irresponsible behaviour were not taken into account. The defendant was indeed to blame in the light of the vulnerability of

the farming business. If the plan made sense as an attempt to finance farming, the plaintiff seems indeed worthy of protection since he is offering the commodity, land which is fundamental to farming and he is indeed exposed to the failure of the promise.

Reeves v. Better Taste Popcorn Co (246 Iowa 508, 66 N.W.2d 853, 1954). A farmer rented land from the plaintiff and agreed to sell his crop to the defendant. The plaintiff had consented to the sale agreement on writing on the document. Although nothing was said about rental payment, the court, based on the fact that past dealings had always provided for payments to the plaintiff, construed the contract as made for the landlord's benefit in part and awarded him a share of the crop.

Banker v. Breaux 128 S.W.2d 23-Tex.Comm.App., 1939. The defendant was conveyed property by the plaintiff's grantee and made a number of payments directly to the plaintiff on the note which had financed the original transfer. Later the defendant conveyed the land to a buyer to whom he expressly promised to discharge the note. The appeal decision, reversing a previous judgment, found for the appellant (the defendant in the lower court), considering that the plaintiff was an incidental beneficiary. There was no intent in the promise to benefit the plaintiff. The decision ignored the justifiable reliance of the plaintiff, reliance based on the previous behaviour of the defendant, and which was essential for the operation of the relevant transaction.

Gilmore v. Century Bank and Trust Co., 20 Mass App Ct 49 477 NE 2d 1069, 1985. When a bank breached a construction loan contract delaying the completion and sale of condominium units, the trustee for the subcontractors-creditors sued and won a judgment in the trial court. Both the trial court and the Court of Appeals, rejected the bank's argument that the plaintiff could not recover for a breach of the agreement between the borrower owner and the lender bank because he was not a party to the contract. It was held that the trustee had a right to sue on behalf of the subcontractor as a third party beneficiary of the loan agreement. The owner was a surety for the bank, the loan agreement was an asset of the owner and a direct action by the beneficiary-trustee was appropriate to carry out the intention of the parties. The promisee-owner intended to pay the trustee with funds from the loan agreement breached by the bank.

Twin City Construction Co. v. ITT Industries Credit Co. 358, NW 2d 716, Minn. App. 1984. A contractor contracted with a partnership to build a hotel, but stopped the work when the partnership failed to make progressive payments, and resumed when the partnership obtained a loan. The contractor receiver payment from the lender until the last one was due after the work was completed. The contractor sued and was awarded summary judgment. The Court of Appeals (in Minnesota) affirmed considering that the contractor was a third party beneficiary of the agreement between the partnership and the lender and that the latter's refusal to make payments constituted unjust enrichment.

Banque Arabe et International D'Investissement v. Bulk Oil 726 FSupp 1411, SDNY 1989. A bank that provided financing to a gasoline seller, which contracted to sell gasoline to a gasoline buyer and then repurchase it, sued the gasoline buyer after the seller filed for bankruptcy, and claimed that it was a third party beneficiary of the purchase agreement between the buyer and the seller and the assignee of the rights of one dealer under that purchase agreement, alleging breach of contract, fraud and fraudulent conveyance. The court denied the defendants motion for summary judgment stating that whether the plaintiff was a third party beneficiary depended on the terms of the contract between the buyer and the seller, and the purchase/payment confirmation sent by the defendant which was not obvious from their face. The court said that a jury could reasonably conclude from the evidence presented that the parties intended the plaintiff to be a third party beneficiary.

Re Valley vue Joint Venture 123 B.R. 199, ED VA Bkrtcy. Ct. 1991. A corporation reimbursed a bank that honoured a standby letter of credit issued to the corporation's account, which

had been drawn upon by a second bank to repay a debtor real estate development partnership's bankloan after the debtor defaulted on the loan. The debtor objected to a proof of claim filed by the corporation. Denying the objection the court held that the corporation was entitled to be surrogated to the rights of the second bank with respect to the bank's lien on certain real property owned by the debtor. The court rejected the debtor's argument that the guarantors of the debtor's obligations were third party beneficiaries of the agreement between the debtor and the corporation pursuant to which the standby letter of credit had been issued, stating that the waiver-of-subrogation promise in the agreement was not intended to benefit the guarantors as it related to real property.

Government contracts.

J.I. Case Co. v. Borak, 377 U.S. 426 (1964). Borak was a stockholder in the J.I. Case Company who claimed that the management had participated in the issuance of false and misleading proxy statements in contravention of section 14(a) of the Securities Exchange Act of 1934 and that the misleading proxies lead to a merger with the American Tractor Company. The Supreme Court held that the legislature aimed at protecting investors such as Borak and effective enforcement of the act required recognition of a private right of action for damages.

Stock exchange cases.

Baird v. Franklin, 141 F.2d 238 (2d Cir), cert. denied, 323 U.S. 737 (1944). The case dominated the relative field for a period of 26 years. Investors, who had lost money as a result of embezzlement by a senior partner in a stock brokerage firm, and a member of the New York Stock Exchange (NYSE), turned against a NYSE treasurer, on the statute¹⁴ and as beneficiaries of the contract between NYSE and the Securities and Exchange Commission (SEC) -- governed by s.6 (a)(1) of the Securities Exchange Act of 1934 -- under which NYSE promised to comply with the provisions of the act and to enforce compliance by its members. The majority held that the plaintiffs did have a right of action to enforce s.6 of the Securities Exchange Act of 1934. However it was held that the plaintiffs had failed to prove damage cause by the breach. The beneficiary rule basis was discussed in a partially dissenting opinion, by Judge Clark, whose speech became an authoritative statement in finding a private right of action, and rejected as unnecessary. The statute would be effective only if an individual right for investors to enforce it were acknowledged¹⁵.

Weinberger v. New York Stock Exchange, 335 F. Supp. 139 (S.D.N.Y.1971). The court had to decide whether the claim by a beneficiary had been filed within the prescribed limitation

14 For failing that is to comply with the provisions of the Securities Exchange Act of 1934. The plaintiff argued that the NYSE was liable because it failed to execute its duty under s.6(b). The act has now been amended in a manner that it invalidates the possibility to refer to the third party beneficiary on that basis, to insure fair dealing and protect investors. Section 6(b) conferred an implied private right of action on members of the investing public. The original s.6(b), referred to an "agreement ... to comply and to enforce, so far as is within its powers compliance by its members, with the provisions of this rule..."

The amendment removed the reference to the agreement and left s.6 with a mere specification of NYSE's duties with regard to the registration of an exchange (contained in s. 6,a, of the 1934 act).

See the Securities Exchange Act of 1934 in its amended (by Securities Amendment Act of 1975) form 15 U.S.C.A. §78f, "National Securities Exchanges".

15 Section 6 (b) could be effective only if it was construed as creating an individual right of the injured investors to ask for its enforcement. Common law would provide a remedy for the members of the class once a duty was acknowledged. The absence of an expressly provided mechanism of protection was not an obstacle therefore. The statutory rationale and the legislative background were looked at, assuming the parties intended to comply with the statute which ordered the contract, thus promoting an examination of the intentions involved.

period. Under New York law an action on the statute should be brought within three years while a contract claim had a six years period. The court had to decide whether the plaintiff had legitimately stated a claim as an intended beneficiary of the contract between the defendant and the SEC, under s.6. The defendant argued that the statute's three years limitation period should apply, because the agreement in s.6 was not a contract in the ordinary meaning of the word. Referring to Restatement first the court held that the plaintiff, a former partner of a defunct brokerage house, was neither a member of "the general public" nor "a member of the investing public" (Restatement first forbid claims from "the general public", §145). He had an independent cause of action on the contract and was entitled to the six years limitation period as a third party beneficiary; otherwise, if, that is, the class of protected people did not expand beyond that referred to in *Baird v. Franklin*, 141 f. 2d 238 (2d Cir), cert. denied, 323 U.S. 737 (1944), he would be left unprotected. He was, as said, "more than an incidental beneficiary" and should justifiably be protected.

New York Stock Exchange v. Sloan, 394 F.Supp 1303 (S.D.N.Y.1975). The question was for the standing of the plaintiff, the defendants argued successfully that NYSE "insiders" were not (contrary to "public investors") intended beneficiaries of the contract which served as the basis for the claim. Limited partners and subordinate lenders were protected by the Securities Exchange Act; the court held that contractual obligations could not extent the statutory duty under s.6.

Collin's v. PBW Stock Exchange Inc. 408 F Supp 1344, E D Pa 1976. The trustee of a bankrupt stock exchange member brought an action against the stock exchange and the members of a business conduct committee of the exchange, charging violation of the Securities Exchange Act, and The Securities Investor Protection Act. The defendants filed motion to dismiss for lack of standing. The first cause of action rested upon the allegation that at the time the defendants became aware that the liability limit on the fidelity bond of the debtor member of the Exchange, was \$100,000 below the amount required by the rules of the Exchange, the defendants had known for a long time of the managerial and financial difficulties of the debtor and of the incompetence and inexperience of its employees, but, nevertheless failed to require compliance. The second cause of action rested upon the allegation that when the defendants concluded that the management of the debtor was inadequate to administer the existing affairs of the debtor, they forbade the opening of new offices, but they did nothing to prevent the opening of the debtor's New York branch. As a result, a loss was sustained which immediately caused insolvency. The court stated that although not necessary to the resolution of the issue in this case, individual liability also exists, because by accepting membership of the committee the individual members impliedly, if not expressly, promised the exchange to administer the relevant duties imposed on it by the both Securities Exchange Act and by its own rules. Since the policy behind the Securities Exchange Act is the protection of investors, such a promise must be interpreted not only for the benefit of the promisee Exchange, but also for the benefit of the members of the Exchange, creditor beneficiaries under the terminology of the Restatement first, §133, and intended beneficiaries under the terminology of the Restatement second §302. Such a promise therefore is an asset of the bankrupt brokerage house and therefore available to the trustee in bankruptcy. The defendants' motion to dismiss was rejected.

Public welfare programmes.

H.R. Moch Co. v. Rensselaer Water Co, 159 N.E. 896 (N.Y. 1928). A waterworks company (the defendant) had agreed with the City of Rensselaer to supply water for a number of public uses including fire hydrants. Due to inadequate (not in compliance with the contract) supply of water in the hydrants a warehouse owned by the plaintiff was destroyed by fire. The New York court (following Justice Cardozo's opinion) rejected the action brought on the third party beneficiary rule. Since the city did not owe its inhabitants a legal duty to provide them with water for the purpose of extinguishing fires, the contract between the city and the waterworks company could not be construed as an agreement to discharge a duty of the city to its inhabitants. In any case no intention was discernible that the promisor was

to be held liable to individuals members of the public for breach of his duty to the city. In order to accept the application of the third party beneficiary rule the benefit to the members of the public should be "primary and immediate" and not "incidental and secondary" as in this case. Fuller & Eisenberg 768.

Shubitz v. Consolidated Edison Co. of New York, Supreme Court of New York, Special Term, Kings County, Part I, 1969, 59 Misc.2d 732, 301 N.Y.S.2d 926. The defendant was a company supplying current to the owner of a building under an implied contract. The plaintiff was a tenant of the building. The claim concerned damage suffered after a blackout caused from the negligent upkeep of a defendant's substation. The decision relied heavily on the previous cases law; especially on *H.R. Moch Co. v. Rensselaer Water Co.*

Data Proc. Fin. & Gen. Corp. v. IBM, 430 F.2d 1277 (8th Cir 1970). The plaintiff claimed to be a third party beneficiary of a consent decree agreed between the United States government and the defendant (I.B.M.) for the purpose of assuring users or prospective users of electronic data processing machines the possibility of economically owning such machines as well as leasing them. Obviously there could be so many claims as to make the agreement unviable. Jackson & Bollinger 597.

Davis v. Nelson-Deppe Inc., (Supreme Court of Idaho 1967, 91 Idaho 463. 424 P.2d 733). The plaintiff was the owner and operator of a tractor-trailer combination. He sued to recover damage to his equipment occasioned when it went off a portion of the U.S. highway No.93, then under reconstruction and repair by the defendant. The latter had entered into a contract with the State of Idaho department of Highways to recondition and resurface a portion of the highway. The court held that in the absence of manifest intent to the contrary the contracts between a contractor a state or other public body are not considered to be for the benefit of third persons, but are for the benefit of the State and the contractor.

Costa v. Callahan Road Improvement Co., 15 Misc 2d. 198, 184 N.Y.S.2d 534 (Ulster County Court 1958). A direct action by a third party was rejected because of a specific clause dismissing any intent to give third parties that right.

Compagnie Nationale Air France v. Port of N.Y. Authority, 427 F.2d 951 (2d Cir 1970). The Second Circuit denied the third party beneficiary status to an airline whose plane was damaged. The suit was based on a contract between the Airport Authority and a contractor to improve the airport.

Matternes v. Winston-Salem, 286 NC 1, 209 SE 2d, 481, (1974). A City had a contract with a state board of transportation to do works and repairs within the city in a part of the highway system. The plaintiff brought actions against the city for wrongful death, personal injuries to a minor, property damage and medical expenses resulting from an accident in which the plaintiff's deceased wife's car went out of control on a bridge upon which there was an accumulation of ice and snow. On appeal the court affirmed the granting of a summary judgment to the defendant, holding that the plaintiff was merely an incidental beneficiary of the contract between the city and the state board, and therefore could not sue for the city's non performance.

Gallo v. Division of Water Pollution Control, 374 Mass, 278, 372 N E2d 1258, (1978). The plaintiffs landowners brought an action against the Division of Water Pollution Control's District Commission for towns and cities seeking injunctive relief and damages alleging that the defendants' acts and omissions resulted to the plaintiffs' inability to make sewer connections between their lots and the municipal sewage disposal system. The trial court granted the defendants' motion to dismiss and the plaintiffs appealed. On appeal the court affirmed the holding that the landowners who were prevented from making sewer connections by breach of contracts between the towns and the Commission were not

authorised by the statutes permitting such contracts to bring actions to enforce contractual provisions or to seek declarations as to rights against the contracting parties, nor did the plaintiffs had a right of action as third party beneficiaries.

Kornblut v. Chevron Oil Co 62 A.D. 831, 407 N.Y.S. 2d 498 (1978). After waiting for two and a half hours on a hot day for road assistance to change a tyre, a driver in New York state thruway, changed the tyre himself and subsequently suffered a fatal heart attack. His children suit the defendant who under a contract with the thruway authority was to provide roadside service within 30 minutes. The Appellate Division Court reversed the lower courts judgment for the plaintiff. Even though the deceased could be a third party beneficiary of the contract in question, his children could not, as no proximate cause could be established in the absence of foreseeability.

Hayrynen v. White Pine Copper Co, 9 Mich.App.452 157 NW 2d 502 (1968). A claim was made by the children of a man injured in an car collision against a company an employee of which was responsible for the accident. The claim focused on the promise the employee-driver had given to the state, when passing his driving exams, to comply with the rules and be a good driver, the children being third party beneficiaries. The claim was rejected.

Henderson v. Griggs, 672 FSupp 1126, ND Iowa, 1987. Juveniles who were arrested and detained under a state plan for dealing with juvenile offenders filed a class action against state, county and individual defendants alleging that their rights under the federal Juvenile Justice, Delinquency and Prevention act, had been violated. The court found for the plaintiffs considering that the Congress had created an enforceable right under the Act. The court noted that it must reject the urge to analogise civil rights legislation to the rights of third party beneficiaries in contract law, because in most states third party beneficiary rights exist only when both contracting parties intended to create a remedy enforceable in court by third parties.

Turkel v. Fiore, 62 Misc 2d 210, 308 N.Y.S.2d 432 (Cit.Ct.N.Y.C.1970), involved a claim by the owner of an automobile which was towed away by the defendant who had a contract with the city for towing away abandoned cars. The defendant stripped the car, in preparation of its being crushed, within two days from towing it away. The contract with the city required the defendant to hold the cars for five days before destroying them. The plaintiff's claim that he was third party beneficiary of the contract was accepted.

Miree v. US 526 F2d 679 5th Cir 1976 reversed en blanc, 538 F2d 643 (5th Cir 1976), vacated and remanded, *Miree v. DeKalb County* 433 US 2S, 97 SCt 2490 53 2Ed2d 557 (1977), Certificate of State Law Issue, *Miree v. US* 242 GA 126 249 S E2d. 573 (1978). An aeroplane crash was caused by the ingestion of birds swarming on a garbage dump adjacent to the airport. The County operated the airport and the dump. The suit by the victim's survivors was for negligence, nuisance and breach of the terms under which the airport was operated. The Court of Appeals of the Fifth Circuit rejected the claims for negligence and nuisance but accepted that the plaintiffs were third party beneficiaries of the contract between the county and the Federal Aviation administration for the safe operation of the airport. This decision was later reversed. .

New York Citizens Committee v. Manhattan Cable TV 651 F Supp 802, SDNY 1986. An association of cable television subscribers sued a cable franchise for violation of antitrust laws. The court denied the defendant's motion for dismissal on the idea that the association of subscribers had standing to sue as third party beneficiaries of the contract between the cable franchise and the city. The court stated that even though all government contracts benefit the public, members of the public are usually not classified as third party beneficiaries, However in this case the court found that the cable franchise intended to confer the benefit of the contract to the subscribers making them third party beneficiaries.

Orchards v. United States, 4 Cl. Ct. 601, judgment affirmed 748 F.2d 1571 (Fed. Cir. 1984). Members of irrigation districts brought an action against the United States Bureau of Reclamation to inform the irrigation districts accurately as to the total quality of water it expected to be able to supply them for irrigation purposes. The parties filed cross-motions for summary judgment. The Claims Court held that the Bureau of Reclamation did not have any express or implied contractual obligation to make accurate water supply forecasts. The irrigation districts which entered into the contract with the Bureau of Reclamation were not mere agents of their members but could sue the United States for breach of contract, while their members could not bring an action as third party beneficiaries of the contracts between the irrigation districts and the United States merely because the members were the ultimate beneficiaries of the contract. Summary judgment was entered for the United States.

Berberich v. United States, 5 Cl. Ct. 652, affirmed 770 F.2d 179 (Fed. Cir. 1985). Residents and owners of small businesses in a small town in Massachusetts sued as third party beneficiaries of a contract between the town and the Corps of Engineers. The Claims Court was given jurisdiction under the Bonneville Project Act. On a motion for summary judgment the court dismissed the first two claims. Stating that every contract made by a government unit is made for the benefit of its inhabitants, the court held that only when the contract manifests a specific intent to give individual inhabitants enforceable rights to compensation for its breach may an individual sue the governmental unit. The court concluded that the plaintiffs were not intended third party beneficiaries.

La Mourea v. Rhude, 209 Minn. 53, 293 N.W. 304 (1940), concerned a contract between the defendants and the city of Duluth, for sewer construction. The construction would involve blasting, and the contract stipulated that the contractor would be liable for damages to public and private property and injuries to people caused by the operations. The plaintiff sued for the damage of his nearby real estate. The defendant's argument that the stipulation was aiming at indemnifying the city only were rejected. Fuller & Eisenberg 769.

Pacific Northwest Bell Tel. Co. v. DeLong Corp., 246 Or. 368, 425 P.2d 498 (1967). The plaintiff, a telephone company, was considered a third party beneficiary of the contract between the defendant (a contractor) and the state highway commission for the erection of a bridge. The contract stipulated that the contractor would avoid damage to private property and would be responsible for all such damage. The defendant sued for compensation for damage caused when, during the works, a telephone cable was cut.

Beverly v. Macy, 702 F.2d 931, CA 11, 1983. An action was brought against the National Flood Insurers Association seeking compensation for the loss of the plaintiff's house due to flooding. The house had been insured under a lapsed policy issued by the Association. The plaintiff contended that she was a third party beneficiary of an agreement between the Association and the insurer and that the Association breached that agreement by failing to send renewal and expiration notices as required by the manuals expressly incorporated into the agreement. The district court granted summary judgment in favour of the Association. On appeal the decision was reversed and remanded holding that the plaintiff was an intended third party beneficiary of the agreement and thus had standing to challenge the Association's failure to notify her that her policy had expired. Because the obligation to send renewal and expiration notices arose from the express language of the service agreement and manuals incorporated therein, and because the obligation referred to a specific class of individuals clearly contemplated by the contract and identifiable at the time the obligation arose, policy holders were entitled, as third party beneficiaries, to receive renewal notices 45 days before the expiration of their policies. Additionally the plaintiff relied on the Association's prior practice of notifying her that her policy was about to expire. She had reasonably expected that this practice would continue.

Shell v. Schmidt 126 Cal.App.2d 279, 272 P.2d 82 (1954). The defendant was a building contractor who entered a contract with the national government under which he received

priorities for building materials and undertook to build with these materials houses to be sold to war veterans at or below ceiling prices. It was held that the plaintiffs, 12 war veterans, claiming compensation because the houses did not comply with the agreed specifications, had a right to sue as third parties beneficiaries of the agreement with the government. Acceptance of the plaintiff's status was based on the clear manifestation of the parties' intention and the evidence from the legislation, that the purpose was the benefit of the beneficiaries, as, for instance it empowered the government to obtain compensation for the former.

H.B.Deal & Co. v. Head, 221 Ark. 47, 251 S.W.2d 1017 (1952), involved a contract between the government and Deal for the construction of an ordnance plant. Deal was obliged under the contract to pay his labourers time-and-a-half for overtime. The Fair Labor Standards Act, laid down a similar requirement with regard to certain classes of employment. Deal's employees turned against him under the act or, alternatively, the contract, The act was found inapplicable to the specific construction job but the claim was accepted under the contract's provision which aimed at benefiting the employees.

Martinez v. Socoma Companies, Supreme Court of California, 1974, 11 Cal.3d,113 Cal.Rptr.585,521 P.2d 841. The defendant companies had entered into an agreement with the Secretary of Labor pursuant to the federal Economic Opportunity Act, to benefit the residents of Special Impact Areas, meaning areas with "especially large concentrations of low income persons and suffering from dependency, chronic unemployment and rising tensions". The companies received federal funds and promised to train and employ a number of unemployed East Los Angeles residents characterised by the government as disadvantaged. The plaintiffs, who had been certified as disadvantaged claimed lost wages and other benefits on the basis of the companies' failure to perform. The court held that they were not entitled to damages either as creditors or donee beneficiaries because the parties had no intention to create such a cause of action. The decision, calling upon §145 of Restatement first, focused on the authorising statute, which did not aim at benefiting individuals but the community: "The congressional declaration of purpose of the Economic Opportunity Act as a whole points up the public nature of its benefits at a national scale. Congress declared that the purpose of the act was "to strengthen, supplement and coordinate efforts in furtherance of [the] policy" of "opening to everyone the opportunity to work and the opportunity to live in decency and dignity" so that the "United States can achieve its full economic and social potential as a nation".(42 U.S.C.A. §2702,...). Thus the contracts were designed not to benefit individuals as such but to utilise the training and employment of disadvantaged persons as a means of improving the East Los Angeles neighbourhood." (Chief Justice Wright, contemplating on the enabling legislation.)

Housing cases.

Zigas v. Superior Court, 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (1981), cert. denied, 455 U.S. 943 (1982). The builders of a San Francisco apartment house agreed to abide by maximum-rent schedule in return for construction financing by the Department of Housing and Urban Development (HUD), pursuant to the National Housing Act. The act was promoting a policy of facilitating the production of rental accommodation at reasonable rents. HUD was authorised to direct the benefit of mortgage insurance primarily to those projects "in which every efforts had been made to achieve moderate rental charges". See 12 U.S.C.A. §1713. The plaintiffs, tenants of the flats, argued that the builders had charged rents in excess of those permitted by HUD (without the latter's approval as required by the contract), and claimed damages in excess of 2 million dollars. The Court of Appeal, applying Californian law and construing the contract on the basis of the statutory objectives, held that the plaintiffs were beneficiaries of the contract between the builders and HUD and allowed the claim. The court felt the need to distinguish its decision from *Martinez v. Socoma Companies*. In *Zigas* the claim was for moneys paid by the plaintiff to the defendant in excess of the agreed rent schedule. Restatement first did not apply. §145 is referring to consequential damages, and to contracts with the government for the benefit of

the public. The defendants were not members of the public in the sense of §145 but specific persons who had paid the rent. In *Martinez* the claim was for benefits not obtained (which were also difficult to calculate) and it was reasonable to protect the contractor.

Schillman v. Hobsetter, 241 A2d 570, 249 Md 678 (1968). The purchasers of homes in a real estate development based their claim on an agreement between the Federal Housing Authority (FHA) and certain shareholders of the real estate development company under which the company guaranteed to refund deposits of purchasers if the company failed to complete the building. The claimants were considered donee beneficiaries of the agreement and the claim was accepted.

Town of Ogden v. Earl R. Howarth & Sons, 58 Misc 2d 213 294 NYS2d 430 (1968). The defendants' counterclaim was accepted on the basis of the third party beneficiary rule. The defendants were purchasers of homes and sued the builder-vendor who constructed the houses under a contract with the City for the subdivision and improvement of land. The builder had violated the specifications and regulations of the contract.

Holbrook v. Pitt, 643 F. 2d 1261 (7th Cir. 1981). The owner of a housing project was entitled to receive rent subsidy payments under contract with HUD on behalf of eligible tenants. In contrast to *Zigas* the money had not been received but would be provided upon request by each eligible family. The owner was responsible under the contract for determining the eligibility of applicants and computing the assistance payments. He was obliged under the contract to apply to the HUD for the rent subsidies on behalf of the eligible tenants. The plaintiffs, tenants in the project, sued the owner claiming compensation for the amount lost due to his failure to assess and certify their eligibility for cheaper rent in a timely fashion. The successful claim was not of a restitutionary character (for money had and received) but was based on the promise. The court also allowed a third party beneficiaries' claim against HUD for accepting deficient computations by the owner. (Although formally the plaintiffs could not recover more than they lost, they could recover all from either defendant.) The claim resembled one based on the welfare entitlement than on HUD's undertaking. Although the court rejected a claim based on the constitutional right, in effect it protected this right by relying on the third party beneficiary rule.

Perry v. Housing Authority, 664 F. 2d 1210 (4th Cir 1981). It was held that tenants have no enforceable rights under Annual Contributions contract between local housing authority and HUD. In *Falzarano v. United States*, 607 F.2d 506 (1st Cir 1979), it was considered that tenants in subsidised housing projects were not third party beneficiaries of the contract between landlords and HUD.

Price v. Pierce, 823 F 2d 1114 1121, cert. denied 485 US 960 108 S Ct 1222, 99 L Ed 2d 422, CA 7, 1987. Applicants for low income Housing who were informed that no vacancies existed and that they would be put on waiting lists sued the Secretary of HUD, the head of Illinois Housing Development Authority, and developers for breaching their contract to set aside a percentage of apartments for low income families. The trial court awarded the defendants summary judgment on the ground that the contracts had been lawfully executed. On appeal the court affirmed, holding that the developers had not assumed contractual liability to the plaintiffs and that the plaintiffs as mere applicants for subsidised housing did not have third party beneficiary status to the contract between the developers and the state housing authority, and therefore had no right to sue for the defendants' breach.

Angleton v. Pierce, 574 FSupp 719 736 judgment affirmed 734 F 2d 3 (3rd Cir 1984), certiorari denied-US-105 S Ct 245, 83 L Ed 2d 183 (1984), rehearing denied-US- 105 S Ct 551, 83 L Ed 2d 483 (1984). Certain tenants of an apartment project the mortgage of which was insured by HUD under the provisions of the National Housing Act, brought an action to enjoin the Secretary of HUD from consenting to the transfer of the projects physical assets to a new corporation. This transfer was sought by the project's owners as part of a plan to convert the

apartments from rental units to a cooperative ownership. Dismissing the complaints the court ruled that the plaintiffs did not have standing to raise statutory and constitutional challenges to HUD's proposed action, that the action would not violate applicable statutes or the due process clause of the Fifth Amendment and that while plaintiffs might have been incidental beneficiaries of a regulatory agreement between HUD and the project owners, the agreement did not give enforceable contract rights to the tenants as third parties beneficiaries.

Ayala v. Boston Housing Authority, 404 Mass 689, 536 NE 2d 1082, (1989). A mother and her two children who suffered lead poisoning sued a housing authority for failing to inspect and enforce elimination of lead paint hazard that resulted in the children being poisoned. The trial court granted the defendant summary judgment. On appeal, after granting direct appellate review, the court reversed and remanded, holding that the housing authority had a duty to inspect for lead hazards and to report the results of its inspections pursuant to the Housing Assistance Payments Contracts, and that they were entitled to recover damages from the defendant's breach of its obligation under those contracts to inspect for lead paint hazards.

Other welfare cases.

City & County of S.F. v. Western Air Lines, Inc 22 Cal.Rptr 216 (Ct App. 1962) cert denied 371 U.S. 953 (1963). Under a contract between the City and the federal government, the City received federal funds (pursuant to the Federal Airport Act) for the operation of an airport, as promised, in fair and reasonable terms and without unjust discrimination. Western Air Lines raised the argument that the City had discriminated against Western in its rate charging policy. The court interpreted the Federal Airport Act in order to infer the goal of the contract since "the contract made pursuant to the Act had the same objectives". The objective of the Act was to promote a nation-wide system of public airports and not to regulate airport operations. There was no evidence of intent in the contract between the City and the government to compensate third parties for non compliance. There was only a provision enabling the federal authorities to recover "where there has been any misrepresentation. The court rejected the defendant's objection.

Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir 1967)aff'g 240 F Supp 709 (W.D.La) cert.denied 388 U.S.911, 87 SCt 2116, 18 L.Ed 2d 1350 (1967). The Lemon were "federal children" (they lived on a federal air force base) and could only attend the Bossier Parish public schools as third parties beneficiaries of the contracts under which federal funds were provided for the construction of the schools. The contract provided that school facilities would be made available to federal children on the same terms they were available to other children in the State in question. The Lemon children were allowed to attend the school but not on the same terms. The school the Lemon children were attending was racially segregated contrary to the provisions of the Civil Rights Act 1964 which prohibits racial discrimination in all programmes receiving federal funds for their operation, and the equal protection clause of the fourteenth amendment. (See 42 U.S.C.A. §2000 d; "Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programmes on grounds of race, colour or national origin."). Both the district court and the Fifth Circuit accepted the statutory and constitutional claims. Furthermore the courts accepted that the Lemon children had a cause of action as third parties beneficiaries of the funding contract which entitled them to ask for injunctive relief. The third party beneficiary claim was treated not as an auxiliary means of protection (as in the stock exchange cases), when a private right of action was not available, but as a separate ground for injunctive relief, additional to the other theories proposed (statutory and constitutional claims). Even more, the contract not only provided the basis for the independent beneficiary claim, but defined the relationship and obligations referred to by the statutory and constitutional claims. (In the stock exchange cases there was no constitutional claim involved.)

Guardians Association v. Civil Service Com'n of City of N.Y., 463 U.S. 582, 103 S Ct. 3221, 3233 77 LE2d 866 (1983), certiorari denied 463 US 1228, 103 SCt 3568 77 LE2d 1410, 1983. The plaintiffs were black and Hispanic members of a city police department. They brought a class action alleging that layoffs made pursuant to the police department's "last-hired, first-fired" policy, violated their rights under, inter alia, the Civil Rights Act 1964. The district court accepted a private rights of action, and granted relief. The granting of relief was reversed by the appellate court because of the absence of discriminatory intent. The Supreme court granted certiorari and affirmed the appellate court's decision; the plaintiff recovered injunctive relief only.

Technicable Video Systems Inc v. Americable of Greater Miami Ltd, 479 So 2d 810, Fla App 1985. The plaintiff, minority business enterprise sued a cable television licensee on a third party beneficiary theory and under a civil rights statute, claiming that the defendant was in violation of its agreement with the city to make good faith efforts to use minority business enterprises in 20% of all contracted expenditures. The trial court granted the defendants motion to dismiss. Affirming in part, reversing in part and remanding, the appellate court stated that the plaintiff had stated a valid cause of action on the third party beneficiary theory. Both under the contract and by application of the Restatement, the circumstances indicated that the promisee city intended to give the beneficiary the benefit of the promised performance. The plaintiff had not however sufficiently stated a cause of action under the civil rights statute.

Gilliam v. City of Omaha, 388 F.Supp. 842 (D.Neb. 1975); *affidavid* 524 F2d 1013 (8th Cir 1975). In this case a black woman brought a claim against the City of Omaha for discriminatory employment practices. She failed to prove she was among the persons intended to be benefited under the Economic Opportunity Act of 1964 or that she was a third party beneficiary of a contract between the city and a community action organisation.

Nguyen v. United States Catholic Conference, 548 F Supp 1333, 1348, affirmed 719 F 2d 52 (3rd Cir 1983). The plaintiffs were Indochinese refugees bringing a class action against a private social service agency, alleging a breach of the agency's contract with the federal government (the Department of State), for the provision of grants. They claimed to be third party beneficiaries of the contract. The district court rejected the claim and the plaintiff's appealed. The appellate court affirmed the decision on the ground that the defendant could not be held liable for language absent from the agreements. The Supreme Court granted a certiorari and stated that individual members of the public who were benefited by a public contract should be treated as incidental beneficiaries unless a different intention was manifested at the time the contract was made. In this case there was no contractual provision evidencing an intent that the defendants should be liable to the plaintiffs if they failed to perform their duties. The plaintiffs were only incidental beneficiaries of the grant agreements.

Fuzie v. Manor Care Inc., 461 F.Supp. 689 (ND Ohio 1977). The claim of a resident in a nursing home owned and operated by the defendant, was for the enforcement of certain regulations of the Medicaid programme. Manor Care, by contract with the Ohio Department of Public Welfare, agreed to abide by Ohio's federally approved "state plan". The plan had been designed by Ohio as a condition for receiving federal funds and was intended to ensure that Ohio would observe federal Medicaid regulations. The latter conditioned federal and state subsidies on the provision of a number of services by private health care providers such as the defendant. The plaintiff sued both on a private right of action and as a beneficiary of the defendant's promise to abide by Ohio's federally approved state plan. A private right of action was rejected. It was thought that the Medicaid programme provided for administrative rather than judicial resolution of disputes, that the legislative history of the programme indicated that there was no intent to create a private right of action, and that the plaintiff had substantial remedies under state law as a beneficiary of his agreement with the state for the provision of services. The

court accepted the status of the plaintiff as a beneficiary of the defendant's contract with the state which incorporated the relevant federal regulations. The public benefits were secured on the beneficiary rule. The private right was not accepted due, among other reasons, to the availability of a beneficiary claim; a contractual claim was treated as the basic alternative for protection. The decision, important in advancing the less wealthy as regards medical treatment, did not contemplate on the congressional intent to benefit individuals but focused on the contract's content.

Cook v. Ochner Foundation Hospital, 319 F.Supp. 603 (E.D.La.1970), dealt with class action by persons unable to pay for hospital services, seeking to compel a hospital to abide with the terms under which it received federal funds on the basis of the "Hill-Burton" Act (42 U.S.C.A. §291), for the provision of such services. The court accepted that the plaintiffs were third party beneficiaries of the hospital's undertaking. The decision focused on the purposes of the act "to benefit persons unable to pay for medical services" who might not be "the sole beneficiaries of the act but they certainly are the object of much of the Act's concern". Jackson & Bollinger 597. The act provided in the relevant section: The purpose of this subchapter is (a). to assist several States in the carrying out or their programmes for the construction and modernisation of such public or other non profit community hospitals and other medical facilities...(b), to stimulate the development of new or improved type of ...facilities...(c), to promote research experiments and demonstrations relating to the effective development and utilisation of hospital, clinic or similar services.

Pure economic loss.

See again *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931).

Adams v Southern Pacific Transportation 50 Cal App 3d 37 123 Cal Rptr 216, 1975. The claim of an employee for lost wages against the defendant who transported negligently a load of bombs, caused a massive explosion which lead to the temporary closure of the plant where the employee was working, was rejected despite the foreseeability of the harm. This is one example where no compensation was awarded for clearly foreseeable damage. These examples usually concern situations of physical harm or personal injury to a third person which results to the financial loss of the plaintiff.

Texas Tunnelling Co. v. City of Chattanooga, (294 F Supp 821 District Court 1962). The plaintiff was a building company which had entered a construction contract with the City of Chattanooga for the construction of a sewer. The plaintiffs claimed that the defendants had given a negligent evaluation of the geological barriers involved in the project and the plaintiffs had thus offered a low price and had suffered loss. The court criticised the *Ultramares* decision (*Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441, 1931) stating that in the thirty years which had passed since that decision society had become more business oriented and reliance on specialists' statements was essential in transactions.

M. Miller Co v. Central Contra Costa Sanitary District, 18, Cal Rptr 13, Distr. C.A. (1962). The defendant, an engineering company hired a specialist to prepare a soil report which, as the defendant knew, was going to be available to all bidders for works on the sewer system. The plaintiff was a successful bidder who used the inaccurate report.

Granberg v. Turnham, 333 P.2d 423 (Cal. C. A.), 1962. The defendant negligently supplied information to a real estate board, which, as the defendant intended, circulated the information in its multiple listing to prospective buyers. The defendant was held liable for misrepresentation to the ultimate buyer. Although the class of potentially affected people seem large, it is actually one, the ultimate buyer who could suffer loss. The crucial issue therefore was the knowledge of the intended use of the statement and not the foreseeability of the large class of prospective buyers.

Rusch Factor, Inc. v. Levin (284 F Supp 85, D. Rhode Island, 1968). The defendant prepared a statement on the financial position of a corporation which had applied for a loan to the plaintiff (a bank). The corporation soon became bankrupt although in the statement he was shown to be solvent by a substantial amount. The plaintiff sued for the part of the loan it had not been able to recover. The court noted that no accountant has been found liable to a party not in privity, but thought that an accountant should be liable in negligence "for careless financial misstatements relied on by actually foreseen and limited classes of persons". However the court did not elaborate further on the extent of this liability.

Rozny v. Marnul (43 Ill 2d 54, 250 N.E. 2d 656, 1969), dealt with the liability of a surveyor for a mistaken survey of a vacant lot. The defendant was, surprisingly held liable to a sub-subcontractor. Recognising the opposing previous trend, the court thought that there was only a limited class of potential benefits and no overwhelming potential liability as injury would occur only once.

Tarasoff v. Regents of the University of California 17 Cal 3d 425, 551 P.2d 334, 131 Cal Rptr 14 (1976). A therapist who failed to warn a victim of death threats communicated by his client was found liable; the duty of care was thus extended.

J'Aire Corp. v. Gregory, 24 Cal 3d 799 598 P. 2d 60, 157 Cal Rptr 407, 1979. Damages were awarded against a building contractor for losses caused to an owner's tenant (plaintiff) due to the delay of improvement works in the plaintiff's business. The claimant's advocate abandoned in the appeal the contractual basis of his claim (third party beneficiary rule) because contract was never his strong point in the law school.

Robins Dry Dock v. Flint, 275 US 303 (1927). The time charterers of a ship sued for lost profits when the defendant dry dock company negligently damaged the ship's propeller and extended dry docking time by two weeks. The time charterers were under no obligation to pay rent for the time the ship was dry docked. The claim was rejected by the Supreme Court which considered that a tortfeasor who had caused property damage or personal injury to someone was not liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong" (Holmes J.).

Amoco Transport Co. v. S/S Mason Lykes and Others (768 F2d. 659, 1985) involved a claim of the cargo owners against the owners of a ship which collided with the one transporting their cargo, that was subsequently unloaded and transported by another vessel, the claim being for additional freight. (The claim was accepted on the basis of the existence of a "community of venture").

Domar Ocean Transportations Ltd. V. M/V Andrew Martin (754 F. 2d. 616, 1985). The plaintiff owner of a barge and charterer of a tug disputed the magistrate courts method of calculation of the damage caused to the barge due to negligent navigation of the tug. The courts considering it was not restricted by the "bright line rule", accepted the argument that barge and tug should be regarded as a unit and that compensation for not using the tug should be given as well.

Venore Transportation Company v. M/V Struma (583 F2d 708 4th Cir, 1978). The plaintiff, charterer of a ship was allowed compensation by the defendants owners of a vessel which collided with the chartered one, for the loss suffered while the latter was out of service. Under the charter the plaintiff was paying rent for that period.

State of Louisiana v. M/V Testbank, 752 F.2d 1019, 5th Cir.,1985). Following a collision between two ships in the Mississippi River Gulf outlet, and the fear of widespread contamination by a container loaded with highly toxic waste, the River Gulf outlet was closed to navigation, residents within a ten miles radius were evacuated, fishing shrimping and associated activities were suspended, while seafood and shellfish caught in the area

were embargoed. The measures lasted for four weeks. Forty-one legal actions were submitted, by a variety of injured parties, including fishermen, seafood enterprises, marinas operators, boat owners, cargo terminal operators, seafood restaurants, bait and tackle shops, vessel owners seeking expenses, lost profit and demurrage. The Federal District Judge, and the Court of Appeals for the Fifth Circuit, rejected the claims. The appeal decision was affirmed by the full Fifth Circuit sitting *en banc*.

Defences.

Blake Construction Co. v. Allen, 353 S.E. 2d 726 (1987), involved a triangular setting in the construction industry, where the tort claim of the plaintiff contractor against the architect for breach of the latter's duties from his contract with the owner, was dismissed. Had the action succeeded the architect's contract with the owner, containing the usual limiting provision, would not have availed themselves against the plaintiff.

Bryant Electric v. City of Fredericksburg, 762 F.2d 1192 (1985). The plaintiff was a contractor with the City, who turned against the latter and an architect who had breached his contract with the city, leading to the plaintiff's financial loss. The claim was dismissed but had it been accepted the plaintiff would have evaded the strict forum selection clause contained in his contract with the City.

Misrepresentation.

See again *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922), *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931), *Texas Tunnelling Co. v. City of Chattanooga*, (294 F Supp 821 District Court 1962), *M. Miller Co v. Central Contra Costa Sanitary District*, 18, Cal Rptr 13, Distr. C.A. (1962), *Granberg v. Turnham*, 333 P.2d 423 (Cal. C. A.), 1962, (the crucial issue was the knowledge of the intended use of the statement and not the foreseeability of the large class of prospective buyers), *Rusch Factor, Inc. v. Levin*, 284 F Supp 85, D. Rhode Island, 1968, (the possibility of extensive damage is minimal, the court however does not make clear why contrary to precedents the claim is accepted) and *Rozny v. Marnul*, 43 III 2d 54, 250 N.E. 2d 656, 1969, (although the liability of the surveyor was extended to the sub-contractor in fact the amount of loss as limited; only one person could be injured).

State Street Trust Co. v. Ernst, 278 NY 104, 15 NE 2d 416 (1938). The defendant accountant had provided a factory business with certified balance sheets showing a totally false picture (the business was insolvent), and sent a letter to their client alone to which they underlined their observations as to the real situation. The court holding that accountants "may be held liable to third parties even when there is lacking deliberate or active fraud", and that "heedlessness and reckless disregard of consequences may take the place of deliderate intention", allowed the claim upon deceit.

Duro Sportswear Inc. v. Cogen, 131 NY S 2d 20 (Sup Ct 1954) Affdavit mem., 285 App Div 867, 137 NY S 2d 829 (1st Dep't 1955). The court held that an accountant who prepared a report which he knew would form the basis of the decision of a stockholder to purchase the interests of another in a corporation, was liable for gross negligence. Fraud was rejected.

Fischer v. Kletz, 266 F Supp 180 -SDNY 1967, did not involve affirmative misrepresentation but nondisclosure. In the course of special studies on the finances of a corporation, a firm of accountants undertook in 1964, they discovered that figures they had used in their previous certified statement for the same corporation were false and misleading. The defendants did not disclose these facts to the exchanges on which the corporation was traded, or to the public at large, until may 1965 when the special studies were released. The court accepted the claim for deceit, acknowledging the potential policy issues involved as to the extent liability might reach.

Shonts v. Hirliman, 28 F Supp 478 (SD Cal 1939)The court, on a claim by purchasers of registered securities to recover damages against the accountants who certified the financial

statements in the registration statement, found for the defendants, considering that on the basis of the evidence available there was no omission of anything existing when the certification was made. Section 18 of the Securities Exchange Act 1934 renders those preparing the statements defined in the act liable to any person, not knowing that the statement was false or misleading, who in reliance upon the statement purchased or sold a security at a price affected by such statement. The defendant could be exonerated if he acted in good faith and without knowledge that the statement was false or misleading.

Product liability.

Hennigsen v. Bloomfield Mottors Inc. 32 NJ 358, 161 A 2d 69 (1960). The plaintiff sued in implied warranty for personal injuries she suffered when a car, manufactured by the defendant and given to her by her husband who bought it from a retailer, made an unscheduled turn into a wall. The court upheld the plaintiff's action without proof of negligence and invalidated the defendant's disclaimer because of its unfair and unbargained-for quality.

Greenman v. Yuba Power Prods., Inc., 59 Cal 2d 57, 27 Cal Rptr 697, 377 P.2d 897 (1963). A husband was allowed to recover for personal injury caused by a defective home carpentry outfit made by the defendant and given to the plaintiff by his wife who had bought it from a local retailer, without requiring negligence. Justice Traynor first granted recovery on implied warranty grounds and then announced that the obligations could more accurately be viewed as a form of strict liability.

Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La 919, 60 So. 2d 873 (1952). The court, on a claim by a plaintiff who became ill after drinking a gift bottle of cola which contained the remains of a house fly, held that the consumer of defective goods whether purchaser or not, has a tort action based on implied warranty and independent of any requirement of proving negligence. (Until then Louisiana decisions wavered between contract and tort principles.)

Santor v. A&M Karagheusian, Inc., 44 NJ 52, 207 A 2d 305 (1965). The plaintiff who had purchased a carpet for his home from a retailer, was allowed to recover directly from the manufacturer for the reduced value of the carpet caused by the appearance of unusual lines. The decision in *Santor v. A&M Karagheusian, Inc.*, followed that in *Hennigsen v. Bloomfield Mottors Inc.* 32 NJ 358, 161 A 2d 69 (1960). The court in *Santor v. A&M Karagheusian, Inc.*, admitted that the decision in *Hennigsen v. Bloomfield Mottors Inc* had emphasised on personal injury (as the defendants had argued), but on the basis of justice to the ultimate consumer it invoked again implied warranty. Once in existence, the field of operation of the implied warranty remedy should not be limited to personal injury cases. However the court, considering that the implied warranty disposed the case in the plaintiffs favour, it also stated that the liability could be based on tort directly. The court invoking the public interest demands for consumer protection, held that if the goods were not suitable and safe for the intended use, the burden should be borne by the manufacturer than by the injured or damaged persons. (The appearance of goods on the market was treated to be a representation that they were suitable and safe for the intended use.)

Seely v. White Motor Co., 63 Adv. Cal. I, 45 Cal Rptr. 17, 403 P. 2d 145 (1965). The plaintiff sought recovery from a truck manufacturer for money he had paid to a retailer (the purchase price) and for profits lost in his business when he was unable to make normal use of the truck. Recovery was allowed (Justice Traynor speaking for the majority), under an express warranty given by the manufacturer. Although that express warranty was limited to making good any defective parts at the factory, the courts disregarded the limitation because the manufacturer had repeatedly failed for over eleven months to correct the defects. Since the warranty was express, privity of contract was not required. Justice Traynor emphasised that while it was for tort law to treat physical injuries, it was the sales law which was suitable to govern the relations between suppliers and consumers. In his views physical property damage came within the protection of the product liability doctrine, as

personal injury did; it was part of the tort tradition. He thought that the decision in *Santor v. A&M Karagheusian, Inc.* 44 NJ 52, 207 A 2d 305 (1965), was correct because of an express warranty a reason not used by the court in that decision. Economic loss did not fall under the product liability doctrine. The decision in *Seely v. White Motor Co.* was related to *Greenman v. Yuba Power Prods., Inc.*, 59 Cal 2d 57, 27 Cal Rptr 697, 377 P.2d 897 (1963). In *Seely v. White Motor Co.* Justice Traynor rejected the idea that the tort philosophy of *Greenman v. Yuba Power Prods., Inc.*, had superseded the legislative warranty scheme. Judge Traynor was concerned with holding a manufacturer liable for not having met the plaintiff's business needs or the plaintiff's economic expectations.

Louisiana in Media Products Consultants Inc. v. Mercedes-Benz of North America Inc. 262 La 80 262 So 2d 377 (1972). The purchaser of a Mercedes car discovered that his purchase was a disaster and turned against the North America Mercedes distributor as the manufacturer. In a situation which resembled more *Santor v. A&M Karagheusian, Inc.*, the court held that on expectation losses the express warranty approach was prevailing, nevertheless implied warranty could suffice as well. It was after this case that the requirement of privity was abolished in Louisiana. The decision followed *Seely v. White Motor Co.* (Robertson 50 TulLR 1976, 78).

Price v. Gatlin, 81 Ore Adv 169 405 P 2d 502 (1965). An action against the wholesaler for damages suffered because a purchased Ford tractor did not perform adequately was rejected. It was thought that the extension of liability for economic losses could not be supported in the same manner as for the victims of physical injury. (Franklin 18 StanfLR 1966. 978).

Scots law.

Jus Quaesitum Tertio.

Wood v. Moncur (1591) Mor 7719. Tenants were held able to enforce a provision in an excambion of lands that they should not be removed during the currency of their leases. According to T.B. Smith the earlier JQT case dates from 1627 (Smith *Studies* 185). McBryde, W.W. "Scots and English Contract Laws", in *The Frontiers of Liability*, Birks, Peter (ed), vol.2, 1994, p.151, footnote 77, thinks that the second reported case, following *Wood v. Moncur*, was *Irving v. Forbes* (1676) Mor. 7722.

Finie v. Glasgow and South Western Railway Co., (1857) 20 D (HL) 2. Two railway companies had agreed to keep their freight charges low. This agreement did not produce a JQT in favour of a customer as it had been made for the benefit of the companies.

Carmichael v. Carmichael's Executrix, 1920 S.C. (H.L.) 195. A father had entered an insurance contract over the life of his son. The father would pay the premiums until the son's majority. If the son died before reaching majority the premiums were to be repayable to the father. If the son attained majority and took over the payments of the premiums the sum assured would be payable on his death to his estate or assignees. The son reached majority but was killed before taking over the payments. The father had paid all the premiums up to the son's majority and had retained custody of all the policy documents. (The son had been aware of the existence of the policy.). The House of Lords held for the executrix, reversing the Court of Session's seven-judge decision. Lord Dunedin thought that the majority of the court below had approached the question of JQT from the narrow point of view of donation only. There were two meanings in the phrase *jus quaesitum tertio*; that referring to the third party's interest in a contract between others and that related to the third party's right to sue the debtor of the contract. He agreed with the Court of Session that the crucial test was that of the irrevocability of the benefit. After the date of majority "the whole scheme alters, the grantee no longer engages to pay the premiums, but the life assured is given several options.". An irrevocable JQT had been constituted in the son's favour. Lord Shaw noticed that " what happened after the son's majority was amply sufficient to constitute an investiture of the son with the right to the sum assured."

Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland, 1912 S.C. 1078. The rules of a union provided for benefits for the relatives of an insured member. The agreement in under which these rules were established was revocable but had not been revoked when the pursuer's claim arose, when, that is, a relative claimed a benefit. Thus a third party can acquire a right under a revocable contract; the fact that the JQT is under a resolutive condition does not affect the validity of the third party right if it crystallises before the condition takes effect.

Dunnett v. Dunnett's trs. 1985 SLT 382, involved the execution by a pursuer of a deed of settlement in 1949, which she expressly declared irrevocable. The pursuer purported to revoke the deed in 1980 by letter sent to the defenders trustees. She then sought declarator that she was entitled to revoke the deed. She argued that the deed was simply a will (some purposes appeared testamentary) with a declaration of irrevocability. The defenders argued that the declaration disclosed an intention to create a JQT than to confer a *spes successionis* upon them. The existence of a power of appointment was a strong indication of irrevocability. The deed was not a universal settlement but largely covered acquirenda. The Lord Ordinary (Stewart) held that, as a practical matter, if the beneficiaries of the trust were prepared to renounce any future claims, the trust could be treated as if its non-testamentary purposes were spent, and he would be prepared to grant the declarator sought. He continued the cause in order that such renunciations may be made in probative form.

Allan's Trustees v. Inland Revenue 1971 SC (HL) 45, 1971 SLT 62. A weakly old lady was concerned about the amount of duty to which her estate would be liable on her death. At first she drafted a will in which she bequeathed legacies of £ 20,000 to two of her friends and was appointing a third friend as a residuary legatee. Subsequently, trying to reduce the duty her estate would be liable for, she revoked the will and arranged with an insurance company for an endowment policy, which was to be held in trust to the extent of £20,000 value for each of the two friends, and to the extent of the remainder for the residuary legatee. The insured was the trustee. During the negotiations with the insurance company the residuary legatee was consulted and kept informed. On the old lady's death the Inland Revenue conceded that the interest of the residuary legatee under the policy should be treated as property in which the deceased never had an interest since the benefit was vested in her, to the exclusion of the deceased from the moment the policy came into being. The Inland Revenue held that the sums accruing to the other two beneficiaries should be aggregated with the remainder of the deceased's estate, since the deceased did not inform them of the insurance policy and the right was not vested in them when the policy was effected. The House of Lords, reversing the judgment of the Second Division held that no *jus quaesitum tertio* had been created in favour of the two trustees who had not been informed for the trust. However a person could validly appoint himself as the trustee of his own property provided that something was done equivalent to delivery or transfer of the trust fund. The intimation was equivalent to delivery. The whole trust came into operation with the intimation to the residuary legatee, notwithstanding the fact that no intimation was made to the other two beneficiaries. The sums received by all three beneficiaries should be treated as "property in which the deceased never had an interest".

Inverloch Castle Ltd. v. Lochaber Power Co., 1987 SLT 466, involved the liability of an electricity supply company, which had agreed with the proprietor of heritable subjects at Inverloch Castle for the supply of electricity to the pursuers who had inherited a part of this land. The pursuers turned against the electricity company which ceased to supply electricity. Lord Ross held that the benefit was inextricably linked to the lands at which the transformer was located, and if the pursuers were the owners they were entitled to the benefit of the defender's obligation. No assignation of intimation was necessary for the pursuers to acquire the benefit.

Cumming v. Quartzag Ltd 1980 SC 276; 1981 SLT 205, involved an agreement for a lease between the purchasers and a person who signed "for and on behalf of a company ... under

the name Quartzag Ltd or some such other name", from January 1965. The defenders began to extract minerals from February 1966. In 1978 the pursuers successfully applied to the sheriff to halt the extraction of minerals. The defenders argued that the aforementioned agreement created a *jus quaesitum tertio* in their favour, and in any case, on the basis of the actings of the pursuers and defenders an agreement with the same terms has been set up. The court of first instance considered that the person who signed the agreement acted as an agent and not as a principal. The agreement was thus null and did not give rise to a *jus quaesitum tertio*. The other arguments of the defenders were rejected as well. Their appeal was not successful.

Kaur v. Lord Advocate, 1980, SC 319, 1981 SLT 322. An individual claimed he had acquired rights under the European Convention on Human Rights. The claim was rejected as no intention to benefit specific individuals could be inferred.

Blumer & Co. v. Scott & Sons, 1874, 1 R 379. The purchasers of a new ship sued the sellers' subcontractors for damage caused due to the delayed delivery of the ship engines supplied by them to the sellers. The purchasers were not named in the subcontract, and the main contract and subcontract were not interdependent because they contained different provisions. According to the main contract the engines should be to the satisfaction of the purchasers, and according to the subcontract the engines should be to the satisfaction of the main contractor.

Scott Lithgow Ltd. v. GEC Electrical Projects Ltd, 1989 SC 412, 1992 SLT 244. The Ministry of Defence was employer under a contract between the ministry and a company of shipbuilders for the construction of a vessel. The shipbuilders subcontracted the design and manufacturing of certain parts of the vessel to subcontractors. who subcontracted certain work. The wiring of the surveillance and propulsion systems was allegedly defective and the ministry and the shipbuilders sought damages in delict and contract respectively against the subcontractors and the sub-subcontractors (three of whom lodged defences). The ministry further argued that they had a *jus quaesitum tertio* from the contract between the shipbuilders and the subcontractors by reason of their being referred to in that contract and the contract being a subcontract for the advancement of their interests in the vessel being built. With regard to the JQT the defenders argued that the ministry had not relevantly averred any such *jus* and that in any case the ministry's claim could refer to damages for non-performance but not to damages for defective performance. Lord Clyde held with regard to the JQT, that while a mere interest of the third party to the performance would not suffice as an intention to create a *jus* to the third party's benefit, the averment that the third party was named in the subcontract was enough to plead a relevant case. He found no reason why a tertius should not be entitled to sue for damages for defective performance, provided this was the intention of the parties. This intention could be implied. The actions against the sub-subcontractors were dismissed. Proof before answer was allowed against the subcontractors for the pursuer's contractual case. (The case was finally settled out of court.)

Magistrates of Dunbar v. Markersy 1931 SC 180. An action for the payment of rates was brought by the magistrates of a burgh against a person who's name entered the Valuation Roll as bondholder in possession of certain subjects. The defender relied upon a letter granted by the pursuer's predecessors in favour of a former owner of the subjects in which he undertook "to free you and your successors ... of all cess, feu-duty and other public taxations payable ... to the Town from the date hereof for ever". (The actual owner of the subjects was the heir of the grantee of the letter. The defender was receiving the rents from the subjects under the instructions of the bondholders and the owner.) The court rejecting the pursuer's arguments held that the rule applicable to obligations of relief undertaken by the granter of a feudal conveyance (that such obligations do not extend to burdens imposed by subsequent legislation), did not apply to such an obligation as that contained in the letter, and that, on its terms, it extended to rates imposed by subsequent legislation. (It was further held that, as the obligation was not collateral to another contract, the owner, as successor in

the tenement, would have been entitled to found on it without a special assignation, and the defender as representing the owner had the same rights.)

Melrose v. Davidson and Robertson, 1993 SLT 611. A court of the First Division held that the property valuer employed by a building society to which the pursuer, a prospective buyer of a house, made an application for a loan, could claim against this prospective borrower the benefit from the exclusion of liability clauses of a mortgage application. In the court's view, with the return of the declaration contained in the application form for a loan (and which contained the exclusion clause) the pursuers had concluded a contract with the valuer. It was observed that there was no need to invoke the Unfair Contract Terms Act 1977 in order to accept the existence of such a contract.

Aberdeen Harbour Board v. Heating Enterprises (Aberdeen), 1990 SLT 416. The claimant was a building owner who had leased part of his premises to tenants who employed contractors to work on the building, on the basis of a Standard Form of Building Contract. Due to negligence of the employees of a subcontractor a fire broke out causing extensive damages to the building. The defender subcontractor claimed the benefit of the indemnity the tenant had offered to the contractor. The decision referred to established case law on Standard Forms of Building Contracts which placed the risk of fire on the employer (main contractor), and that the latter's immunity was extended to the subcontractor causing fire if the contract and subcontract contained similar terms. In the present case the subcontractor, an outsider to the indemnity agreement, claimed that the employer was burdened with covering his liability. An Extra Division rejected his claim to an indemnity. However the view taken by the decision clearly supports the possibility of an exclusion clause benefiting a third party.

Defences.

In *Love v. Scottish Amalgamated Society of Lithographic Printers*, 1912 SC 1078, 1912 2 SLT 50, the rules of a union provided benefits for the relatives of an insured member for the case the member would become insane. The agreement in those rules was revocable but had not been revoked when the pursuer's claim arose, when, that is, a relative claimed a benefit.

Applications.

Donative intent.

Morton's Trustees v. Aged Christian Friend Society of Scotland, (1899) 2 F 82, Morton wrote to a provisional committee which was promoting a charitable society, offering, under certain conditions regarding the creation of the society, to help it with a subscription of £1,000 payable in ten annual instalments of £100 each. The offer was accepted and the society was formed in accordance to the conditions. Morton paid £100 annually to the society, down to the time of his death at which date two instalments were unpaid. It was held that Morton had undertaken an obligation which conferred a *jus quaesitum tertio* on the society when formed which transmitted against his representatives, and that the society was entitled to enforce the implementation of the obligation. (There was an additional claim for subscriptions, which did not concern the JQT mechanism.) See *Love v. Amalgamated Society of Lithographic printers of Great Britain and Ireland*, 1912 SC 1078, 1912 2 SLT 50.

Insurance contracts.

See *Allan's Trustees v. Inland Revenue* 1971 SC (HL) 45, 1971 SLT 62.

Kelly v. Cornhill Insurance Co Ltd 1964 SC (HL) 46, 1964 SLT 81, involved an insurance policy by the owner of a car who had stated that the car would be driven by his son *inter alios*. The policy insured any person driving the car with the owner's permission. The owner died and his death was not intimated to the insurance company. Later the car, being driven by the owner's son got involved in an accident. The son brought an action against the company to have declared that he was the beneficiary of the policy. The court, reversing *interlocutor* of the First Division, dismissed the defender's arguments, holding that the

deceased's permission to the son to drive the car was not revoked after the owner's death, and that the son had a title to sue.

Banking contracts.

Dickson v. National Bank of Scotland Ltd 1917 SC (HL) 50. A sum forming part of a trust-estate was deposited with a bank on a consignment receipt, bearing that the money was received from the trustee's executors, and was to be repayable on the signature of a legal firm who were the law agents to the trust. The firm was subsequently resolved and some years afterwards one of the former partners endorsed the receipt with the firm's name and embezzled the money. The beneficiaries under the trust turned against the bank. The House of Lords affirming the judgment of the Second Division, held that as the uplifting of the deposit was necessary either "to wind up the affairs of the partnership" or a to complete transactions begun but unfinished at the time of the dissolution of the firm, the former partner who endorsed the receipt was entitled to exhibit the firm's signature, and the bank was warranted in paying over the money deposited. The action was dismissed as irrelevant. (In banking contracts JQT could be met in "deposit receipts and savings and other accounts taken out in the name of third parties", and it is generally accepted that a third party does acquire a right to sue on such a contract. Third party rights from negotiable interests are governed by statute. A banker's documentary credit to pay a seller of goods, provided for in a banker-buyer contract is rather an independent promise in Scots law.).

Partnerships.

Thomson v. Thomson, 1962 SC (HL) 28, 1962 SLT 109. A contract of co-partnership provided that each partner could "by will or otherwise nominate his widow, son or daughter to his share of the partnership". A partner died leaving in his will his entire property to his wife. His widow claimed that she was entitled to become a partner in the firm. The court, affirming the decision of the Second Division, held that the wife was entitled to the sums payable to the will's executor under the partnership agreement but was not entitled to become a partner as the deceased had not exercised his right of nomination.

Restrictive covenants.

Group 4 Total Security Ltd v. Ferrier, 1985 SC 70, 1985 SLT 287. A company presented a petition to interdict one of their former employees from being directly or indirectly interested in any business activities which were in direct or indirect competition with those of the petitioners or any subsidiary or associated company for one year after the termination of the respondent's employment within a 50-mile radius of the petitioner's place of business at Aberdeen, and from being interested in two named companies insofar as their business was directly competing that of the petitioners. The respondent's employment contract had contained a restrictive covenant in those terms. The Lord Ordinary rejected the respondent's arguments and held that a clause seeking to protect the interests of a group of third parties was reasonable. On appeal the Second Division held, allowing the reclaiming motion, that it would be wrong to reach a concluded view on the parties legal arguments which had not been adjusted and closed and only a *prima facie* view could be reached on these. It also held that the arguments for the respondent had *prima facie* merit but the Lord Ordinary had rejected them. Having regard to the fact that the restriction had little more than two months to run it was equitable to recall the interim interdict, particularly as the petitioners had a remedy in damages if they established that they had sustained loss by the respondent's breach of contract.

WAC Ltd v. Willock, 1990 SLT 213. A company sought and obtained two orders for interim interdict of a shareholder and former director from carrying on business in competition with the company and from using confidential information concerning the company. The shareholders agreement obliged the shareholder not to carry on business in competition with the company so long as he remained a shareholder. The company alleged that the shareholder had been instrumental in setting up a rival business in direct competition with

them. The shareholder sought recall of the order. The Second Division held that *prima facie* the agreement subsisted notwithstanding the death of one of the parties. A clear distinction fell to be drawn between an individual carrying on business and a company carrying on business. The complaint related to the defender's company (which was not regulated by the agreement) rather than the defender. It was finally held that an interdict in the terms sought would not prevent the defender's company from competing with the pursuers; the balance of convenience did not favour a grant of interdict. The reclaiming motion was allowed in part; the interdict was recalled as far as it related to the restrictive covenant.

Solicitor's liability.

These cases are dealt with in delict. It is doubtful whether the case of *Robertson v. Flemming*, (1861) 4 Macq 167, the basic precedent for rejecting solicitor's liability to third parties, is a valid authority for JQT cases on solicitor's liability for negligent drafting of a will. The JQT was not discussed in the decision. There have been suggestions that the policy to reject JQT for will drafting cases should change. (T.B. Smith *Short Commentary*, 653 et seq). This is unlikely in view of the attachment of Scottish courts to delict for such cases. *Robertson v. Flemming*, sets a precedent for liability for other solicitor's services. In MacQueen's view this exclusion of liability has been superseded by the development of the modern law of negligence. (MacQueen *Title* 28) The question of solicitors liability will be discussed later in relation to delict.

Co-feuers.

MacDonald v. Douglas, 1963 SLT p.191, involved a claim by a superior and certain of co-feuars neighbouring the defender. The feu contract contained building restrictions which created servitudes on the plot of land, which were thus in favour of the neighbouring feuars and disponees of the remaining portions of land. The heir of entail in possession of the estate executed an instrument of disentail which was recorded in 1928 and thereafter disposed the estate in favour of himself by a disposition recorded in 1929. Two of their Lordships held that the superior had a title to sue because according to section 32 of the Entail Amendment Act 1848 (which enabled entailed estate to be disentailed and held in simple fee), everything which he had previously held as heir of entail in possession was held by him in fee simple as soon as the instrument of disentail had been recorded. Lord Strachan recognised the superior's title to sue because the disentail did not alter the fact that he was a heir designated by the limitations of the entail and that he had not succeeded to the estate as a heir to the estate. The co-feuars had a title and interest to sue conferred upon them by their feu contracts.

Delict -Pure economic loss.

Alan v. Barlay, (1864) 2 M 873. A claim by an employer for damage sustained as a result of injuries to one of his employees the claim was rejected on grounds of remoteness; liability for secondary loss was not possible.

Simpson & Co v. Thomson, (1877) 5 R (HL) 40. The pursuer's claim was rejected for lack of title to sue; only those with a proprietary or possessory title on the chattel injured could sue. the same view was taken in *Reavis v. Clan Line Steamers*, 1925 SLT 386, on a claim by an employer for loss of his employee's services.

Cameron v. Young, 1908 SC (HL) 7, where the family of a tenant of property was barred from suing the landlord for reparation if they are injured because of his negligent upkeep of the premises. The decision followed *Cavalier v. Pope*, [1906] AC 428

Donoghue v. Stevenson, 1932 SC (HL) 31. The case involved a claim by the consumer of a bottle of ginger beer bought in an opaque bottle who was allegedly poisoned by a decomposed snail in the ginger beer against the manufacturer. The court acknowledged the manufacturer's liability. The defender sent out the product intended for consumption and in the form that

was meant to reach the consumer and there was no possibility for intermediate examination by the retailer or consumer. He could have averred the injury had he shown reasonable care during production, a duty he had violated. Lord Atkin assessed the common principles between the Scottish and the English system with regard to the rationale of liability: "The liability for negligence whether you style it as such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.". The legal expression of this moral wrongdoing would be found in the standards of a reasonable man. (p.41)

Dynamco Ltd v. Holland and Hammen and Cubitts (Scotland) Ltd, 1972 SLT 38, 1971 SC 257. The defender's excavator damaged an underground electric cable belonging to the South of Scotland Electricity Board. The damage resulted to a power cut in the pursuer's factory which lasted 15 1/2 hours. The pursuer sought compensation for the profits he lost while the factory was closed. The decision rejected the claim consolidating the law of pure economic loss that far. Lord Migdale's epigrammatic statement is often quoted: "The law of Scotland has for over a hundred years refused to accept that a claim for financial loss which does not arise from damage to the claimant's property can give rise to a legal claim for damages founded on negligence.". The case is one example of what Feldthussen describes "The Utility Cases", being one category where recovery is precluded for "negligent interference with contractual relations between the plaintiff and the victim of physical damage" (in this group of cases the plaintiff has a contract with the party who suffers physical damage. The principle example in English law is *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd*, [1973] 1 QB 27, [1972] 3 All ER 557 (CA). Feldthussen, *Economic Negligence*, 235.

Junior Books Ltd. v. Veitchi Co., [1983] 1 AC 520, [1982] 3 All ER 201, [1982] 3 WLR 477 (HL).. The House of Lords allowed a building owner's claim against a sub-contractor for defective but not dangerous flooring. The fact that the defender was nominated in the contract between the pursuer's architects and the main contractor as well as the pursuer's reliance upon the defender's expertise which was to the defender's knowledge, were treated as mere evidence of the defender's awareness that his careless behaviour would result to the pursuer suffering economic loss. Crucial was the defender's awareness that his careless behaviour would result to the pursuer suffering economic loss. In order to establish proximity. Lord Roskill considered eight points in order to establish proximity were; (1) The appellants were nominated sub-contractors. (2) The appellants were specialists in flooring. (3) The appellants knew what products were required by the respondents [*Junior Books*] and the main contractors and specialised in the production of those products. (4) The appellants alone were responsible for the composition and construction of the flooring. (5) The respondents relied on the appellants' skill and experience. (6) The appellants as nominated subcontractors must have known that the respondents relied on their skill and experience. (7) The relationship between the parties was as close as it could be, short of actual privity of contract. (8) The appellants must be taken to have known that if they did the work negligently (as it must be assumed that they did) the resulting defects would at some time require remedying by the respondents expending money upon the remedial measures as a consequence of which the respondents would suffer financial or economic loss.", 1982 SC (HL) at 277.

Nordic Oil Reserves v. Berman, 1993 SLT 1164. The case was for claims of the owners and lessors of an aircraft against the directors of the lessee company for the charges the owner paid to the Civil Aviation Authority and the British Airports Authority, charges which according to the lease contract burdened the lessee-defender, and which the contract provided the lessor might meet. Lord Ordinary (Osborne) held that in determining the existence and scope of a duty of care, in a claim for economic loss the court had to have regard of the traditional categorisation of situations in which duties might or might not have been recognised in particular circumstances as in *The Aliakmon*, or *Caparo Industries v. Dickman* [1990] 1 All ER 568, cases. The directors would be liable in negligence only under

particular circumstances and nothing amounted to these circumstances had been averred by the pursuer, particularly as the latter could have equipped itself with contractual guarantees by the directors of the performance of the company's obligations. The idea that instead of the two-stage *Anns* test, the imposition of the duty of care should depend upon analogy to precedents, in an incremental approach similar to that promoted in *Murphy v. Brentwood District Council*, was expressly accepted.

Middleton v. Douglas 1991 SLT 726, concerned claims by the owner of a house evicted by the local authority in order to have the house demolished, against the property agents and an architectural technician who had acted for them. There were two claims, one in delict in 1984, and one in contract by minute of amendment in 1990. The second claim was rejected as being in violation of the Prescription and Limitation (Scotland) Act 1973. What is to our concern here is the judgment that the alleged delictual duty of the property agents could not arise independently of the contract as there was no relationship averred which involved the giving of advice. It was tantamount to saying that there was a duty to take reasonable care to perform the contract.

Comex v. Houlder Diving Ltd v. Colne Fishing Co Ltd (No 2), 1992, SLT 89. A diver instructed by the pursuers to perform certain diving operations in an oil rig in the North Sea perished. His widow raised an action against the pursuers and certain associated companies in the USA, for their omissions which allegedly had led to the diver's death. The action was settled in the USA. An assignation was granted in favour of the pursuers by a co-defender in the USA action. The pursuers then raised the present claim against the company providing the safety ship, the owner and the manager of the ship which had failed to pick up the diver. The pursuers sued in their own right and as assignees. The Lord Ordinary (Prosser) held that the pursuers had not relevantly averred the existence of a duty of care of the company providing the safety ship towards the diver, as was necessary, and they had not demonstrated the foreseeability by the defenders of the fact that the pursuers and the cedents would have to accept liability towards the diver's widow. The claim could not exist separately from any duty of the defenders to the diver and, that not being the duty averred, the claims in reparations were irrelevant as being derivative and secondary. The action was dismissed. It is interesting that the court thought that the existence of a contractual relationship could create sufficient proximity to lead to delictual liability and that there was no fundamental difference between claims arising from physical damage and claims where the damage was monetary or economic. Lord Prosser refused to dismiss as irrelevant the pursuers' averment based on *Junior Books*. He went on to interpret the circumstances where a *Junior Books* duty of care would arise.

Norwich Union Life Insurance Society v. Covell Matthews Partnership, 1987 SLT 452. The owners of land entered into a lease with a company tenant wherein the tenant undertook to have a warehouse build on the site. The construction specifications were not followed and the roof leaked causing loss to the owners as heritable proprietors in respect of repair works and loss of rental income. The owners turned against the architect employed by the tenant (first defender) whose study of the warehouse was incorporated in the lease, the main contractor (second defender) and against the subcontractors (third and fourth defenders), arguing that they owed to the pursuers the same duties *ex delicto* that they owed the tenant *ex contractu*. The Lord Ordinary (McCluskey) held that the action against the defenders was relevant, because the architect, main contractor and subcontractor can owe a duty *ex delicto* to the ultimate owner of the heritage. Proof before answer was allowed. It is doubtful whether this decision survives *Simaan Contracting Co v. Pilkington Glass Ltd*, [1988] 1 All ER 791, [1988] 2 WLR 761, *Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd*, [1988] 3 WLR 396, and *D&F Estates v. Church Commissioners for England*, [1988] 2 All ER 992, HL, [1989] AC 177. See Logie, 1989 JR 12-15.

Weir v. National Westminster Bank plc, SLT 1994, 1251. The pursuer, a solicitor, held an account with the defender, in his own name but on behalf of a client under a power of attorney and as the sole signatory of the account. A pursuer's employee, a cashier, forged a check which the bank processed through the account. The solicitor sued the bank for a violation of its duty of care to inform him of the forgery. As a result of the bank's behaviour the cashier was able to commit further frauds. The Inner House held that a bank did not owe a duty to inform a customer who was a signatory to an account other than his own, that a forged cheque has been presented. However such a duty was owed to a person who was the sole signatory of an account and acted as agent of a disclosed principal under power of attorney. It could thus be argued that the bank assumed responsibility towards the pursuer accepting him as an agent of a disclosed principal and the sole signatory of the account. The bank is thus responsible for the same reason it would be responsible towards a customer, namely because it presents itself as having the relative professional qualifications and experience thereby assuming responsibility over the account.

Negligent misstatements.

Robinson v. National Bank of Scotland, 1916 SC (HL) 154. The defenders were held not to be liable for careless information on the pursuer's creditworthiness. The defenders were bankers and they had provided the information to another bank which was the recipient of an application for funding by the pursuer. The relationship between the banks was not such as to impose a duty to be careful.

Fortune v. Young, 1918 SC 1. A cautioner was held liable for financial loss sustained by the pursuer. Although the defender had not addressed his letter of guarantee to the pursuer, he had contemplated that it would be shown to the pursuer in connection to the transaction which had caused loss.

Martin v. Bell-Ingram 1986 SLT 575 dealt with the liability of a firm of surveyors which was instructed by a building society to prepare a valuation survey and report for a dwelling-house. The pursuers had approached the building society in order to obtain a loan to purchase the house. The reports's contents were communicated by phone by the building society to the prospective purchasers. The latter bought the house. When, later, they tried to sell it, a defect of the roof which reduced the building's value came to light. The pursuers claimed the cost of repairs and the loss of profit as the house was sold at a lower than expected value. The sheriff court held that the surveyors were under a duty of care towards the purchasers to bring to the attention of the building society any defects they reasonably should have detected, since they knew that their report would materially affect the purchaser's decision to buy the house. The surveyors appealed against the decision. They did not deny that there was a *prima facie* duty of care but they called upon a disclaimer of liability contained in a written advance of funds sent to the purchasers by the building society, after the purchasers had entered into missives for the purchase of the subjects. The Court of Session held that the surveyors could not rely upon the disclaimer. No disclaimer had been communicated to the purchasers when the surveyors had communicated their report to the building society. The surveyors could not have known that an advance of funds would even be made, or that the purchasers would be aware that the surveyors were performing their duties against the background stipulated.

Norwich Union Life Insurance Society v. Covell Matthews Partnership, 1987 SLT 452, where the owner of land turned against the architect employed by the tenant, and the main contractor and subcontractors who had undertaken to build a warehouse on his land. Lord McCluskey thinks that the case is indistinguishable from *Junior Books*. He followed the basic principles of *Donoghue* and rejected the English decisions trimming the foundations of *Junior Books*. He held that although reliance was important in some cases of pure economic loss, it was not indispensable for the recovery of economic loss. He held that the nomination of the subcontractor in *Junior Books* was not essential to the decision. He sought to establish proximity on the basis of whether the pure economic loss was a foreseeable consequence of

the defender's negligence. It is doubtful whether this decision survives later decisions which diminished the effect of *Junior Books*.

Subcontractor's liability.

Blumer & Co v. Scott & Sons from 1874 (1874 1 R 379). It was thought that since the main contract and the subcontract were wholly different there was no JQT. (See in previous footnote for details.) In an action by the shipbuilders and the purchaser of the vessel against the engineers for damages sustained by them severally due the defender's delay in supplying the engines, it was held that the purchaser had no claim against the defenders. The purchaser was not a party to the contract for the supply of the engines and the terms of the contract were not such as to confer on him a *jus quasitum tertio*. The Lord President noticed with respect to JQT, that according to the main contract (for the provision of ships' engines) the engines had to be to the satisfaction of the beneficiary (pursuer), while according to the subcontract they had to be to the satisfaction of the main contractor (shipbuilder). No intention to benefit could be implied as the main contract was different from the subcontract.

Aberdeen Harbour Board v. Heating Enterprises (Aberdeen), 1990 SLT 416. Due to negligence of the employees of the subcontractor, a fire broke out causing extensive damages to the building. The defender subcontractor claimed the benefit of the indemnity the tenant had offered to the contractor. The decision referred to established case law on Standard Forms of Building Contracts which placed the risk of fire of the employer (main contractor), and held that the latter's immunity was extended to the subcontractor causing fire if the contract and subcontract contained similar terms. (In the particular case the subcontractor, an outsider to the indemnity agreement, claimed that the employer was burdened with covering his liability. An Extra Division rejected his claim to an indemnity.) (The case is repeated here.)

Scott Lithgow v. GEC Electrical Projects Ltd, 1982 SLT 244.

Solicitor's liability.

Goldie v. McDonald, 1757 Mor. 3527. The court found a solicitor liable to the widow of his client, in relation to a failure to expedite a confirmation.

Lang v. Struthers 1826 4 S 418, 1827, 2 W & S 563. It was noted that "The liability of the agent does not depend on who gives the order, but for whose behoof it is given."

Goldie v. Goldie, 1842, 4, D. 1489. Some of the judges considered that although the solicitor was in principle liable, he was not in the case in question for reasons of remoteness of damage. See Blaikie J. "Negligent Solicitors and Disappointed Beneficiaries" 1989 SLT pp.321-323.).

Webster v. Young (1851)13 D. 752, A solicitor had delayed for two years present the will he had prepared to his client for signature, and his client died. The court doubted whether the pursuer would be able to prove his claim, but allowed the claim. However the decision, in which the averments are mixed averments of negligence and fraud cannot be used as persuasive precedent, and it seems that it has been overruled by *Robertson v. Flemming*.

Robertson v. Flemming, (1861) 4 Macq 167. The appellant, a law agent (Robertson), was alleged by the respondents to have been employed by them, or rather 'for their behoof' in his professional capacity to complete a transaction, which he negligently failed to complete. The respondent sought indemnification for their loss. The House of Lords dismissed the claim for lack of privity between the appellant and the respondents.

Murray v Reilly 1963 SLT (Notes) 49. In this case the claim was by a client of the defender solicitor. The pursuers claimed that he had sustained loss as a result of the negligence

manner in which the defender handled an action. The defender failed to inform the client on the fact that the other litigant was not prepared to conduct proof at a set date, and failed to precognose a witness. Lord Johnson allowing proof thought that this was a case of professional negligence, whereby, however, a professional could not be held liable for errors in judgment whether in matters of law or of discretion. His Lordship allowed proof as he was not prepared to make a conclusion as to the discretion the solicitor actually had.

Midland Bank v. Cameron, Thom Peterkin and Duncans 1988 SLT 611. It was held that it was possible to owe a duty not only to his client but also also to a third party who relies on the advice the solicitor gives to him, provided the solicitor assumed responsibility by the offer of advice. This is the case when the solicitor presented himself as having the requisite professional skills and when he could foresee the possibility of the third party being injured. The third party must have relied on the advice. (In this case a bank lent an amount of money to a solicitor's client on the basis of information on the client's financial position supplied by the solicitor. The information was wrong and the money was lost. Lord Jauncey thought that in this case there was nothing more than the passing on of information provided by their clients.)

Bolton v. Jameson & Mackay, 1989, SLT 222. The ex-wife of the defender solicitor's client, turned against the solicitor who remitted the whole of the net free proceeds from the sale of a matrimonial house to his client, although there was a minute agreement before the divorce that the husband would make over to his wife one half of the price received for the sale of the house. The first division of the Court of Session, reversed the decision of the Lord Ordinary, and held that there were no relevant averments capable of demonstrating that the solicitor owed the wife, at the time he remitted the whole of the net free proceeds from the sale to his client, any of the duties on which her action depended.

Kyle v. P&J Stormmouth Darling WS, 1993 SCLR 18 (affirming 1992 SLT 264). The defender failed to lodge the pursuer's appeal in time and the pursuer lost the opportunity to appeal. The claim was rejected as it could not be proven on the balance of probabilities that the appeal would be successful. (These cases do not concern third party loss.)

Weir v. J.M. Hodge 1990 SLT 266, a husband and wife had purchased heritable property, taking title in joint names and to the survivor of them. The husband died leaving in his settlement a liferent of the residue of his estate and providing that, on the death of the longer liver of the two of them, his executors were to pay the residue to his nieces and nephew, vesting being postponed until the date of the survivor's death. A former partner of a firm of solicitors advised the wife negligently that the nieces and nephew would become entitled to estate including an one-half share in the heritable property. On this understanding the wife excluded the pursuers from any benefit under her settlements. In fact the special destination in the heritable property had never been evacuated by the husband's settlement, and on his death it had become the absolute property of his wife. The pursuers as residual beneficiaries, were not entitled to any share of the heritable property on the wife's death. It was condoned by the solicitor's firm that the advice of the former partner had been negligent. The nieces and nephew turned against the solicitors on the bases of professional negligence. The Lord Ordinary (Weir) rejecting the pursuers argument that the House of Lords authority in *Roberston v. Fleming* ought not to be followed, in the light of the developments in the law of negligence, held that under the latter authority it was clearly established that a professional lawyer employed by one person to do an act for the benefit of another could not be liable in damages to that other for loss of that benefit through negligence, and that in these circumstances the defenders owed no duty of care to the pursuers.

MacDougall v. MacDougall's Executors, 1994 SLT 1178, involved a claim against a solicitor for failing to arrange for a will to be validly executed. Claimant was the person (son) to whom the property of a house was conveyed by will subject to a liferent. At the time of the

testatrix's death the title to the house was in the name of an aunt under an uncle's will and would then pass to the son. A dispute arose over a charter of novodamus which the liferentix of the house and her three sisters obtained, and then granted a disposition of the house to a third party. To the beneficiary's attempt to have the charter of novodamus and the disposition reduced, the defenders answered that the testatrix's uncle's will was not valid since witnessing requirements had not been fulfilled. The beneficiary maintained a claim against the solicitor who drafted a void will. Lord Ordinary (Cameron of Lochbroom) held that a solicitor who was careless in arranging execution of a will owed no duty of care to a party whom the testator intended to benefit thereunder and, even if he did, the ambit of that duty would not extend to one who was not an intended beneficiary under that will but a mere successor in title to an intended beneficiary. The decision followed *Roberston v. Fleming* (1861) 4 Macq 167 and *Weir v. J.M. Hodge* 1990 SLT 266.

Secondary economic loss (loss as a result of personal or property damage suffered by another person).

Dynamco v. Holland, 1971 SC 257, 1972 SLT 38.

Nacap v. Mofat Plant Ltd, 1987 SLT 221. The pursuer had contracted with the British Gas for the laying of a pipeline owned by the British Gas in the North Sea. The defendants damaged the pipeline and the pursuers were unable to complete the contract in the agreed time. They sued for their economic loss. The court held that the pursuers had no title to sue since they were not owners of the pipeline. The fact that they had lawful possession of the pipeline was not sufficient to give them a title to sue. The same approach was taken by the Privy Council in *Candlewood Navigation Corp'n v. Mitsui OSK Lines Ltd*, (the *Mineral Transporter*), [1986] AC 1, [1985] 2 All ER 935 (appeal from the Supreme Court of New South Wales)

Reavis v. Clan Line Steamer, 1925 SC 725. The claim was for loss suffered by the head of an orchestra when, after a ship's collision negligently caused by the defender, several members of the orchestra were drowned. The claim was rejected.

Construction.

McLeod v. Scottish Special Housing Association 1990 SLT 749. The internal insulation of a SSHA house has been replaced in 1080. McLeod, a tenant, bought the house in 1984, and in 1987 it became apparent that the steel cladding of the house was deteriorating because condensation was building up behind the insulation. The claimant argued that the cladding was 'other property'. The claim was rejected on other grounds but Lord Coulsfield thought plausible to distinguish between the outer skin of a building and an insulation system subsequently installed which was not part of the original design. The concept of 'complex structures' might be of considerable importance as regards extensions renovation or improvement in a building, something quite common in Scotland. The concept was not used in either *Parkhead Housing Associations v Phoenix Preservation Ltd*. 1990 SLT 812, involving the installation by a subcontractor of an allegedly defective damp proof course, or *Sutherland v. MacTaggart & Mickel Ltd.*, Glasgow Sheriff Court 14 June 1990, (McQueen 1990 SLT 340) involving defective foundations, due to its natural indefinability.

Parkhead Housing Association v. Phoenix Preservation Ltd. 1990 SLT 812 involved the liability of a specialist subcontractor to the employer in a building (renovation) contract for defective damp proof course installed in the pursuer's property. Lord Proser makes a number of points focusing on the proximity created by the contractual nexus and the validity of *Junior Books*.

Armstrong v. Moore 1996 GWD 14-803. The proprietor of a building in Glasgow sued the builders of an adjacent building for damage caused from rainwater flowing from an inappropriately positioned gutter pipe. He also sued the local authority because it issued a completion certificate for the work done which amounted to negligence to prevent the

damage. Lord Cameron of Lochbroom held that the local authority had no duty of care beyond its statutory duties; the decision thus followed *Murphy*. The fact is that unlike *Murphy* there was nothing intrinsically defective about the building, and the judge argued that he could not find some special relationship between the plaintiff and the local authority to justify the establishment of a common law duty of care. The possibility of delictual liability is not excluded.

Taylor v. City of Glasgow District Council, 1996 GWD 14-804. The owners of properties in Glasgow claimed damages from the local authority in respect of the issue of completion certificates to an impetuous development company who subsequently sold the properties to the pursuers. The certificates, issued fraudulently by building control officer, stated works had been performed when they had not. Lord Johnston accepted the claims considering (unlike *Murphy*) that a local authority carrying out statutory duties could be held liable to common law to the persons who may be affected by the performance or lack of it of these duties.

Defective products.

North of Scotland Helicopters Ltd v. United Technologies Corpn (No 2), 1988 SLT 778. Liability for the manufacturer's carelessness was in principle acknowledged, as the second pursuers, lessees of a helicopter, were deemed to be owners in substance, due to the onerous terms of the helicopter lease. They had more than lawful possession. (In *Nacap v. Mofat Plant Ltd*, 1987 SLT 221 it was held that the pursuers who had mere lawful possession of the damaged pipeline had no title to sue.) Under agreement with the helicopters owners, a finance company, the second pursuers undertook to maintain the helicopter, indemnify the finance company in case of damage or destruction of the helicopter, and replace or repair the helicopter. The helicopter was to be flown by the first pursuer a subsidiary company of the second pursuer. The finance company was under no duty to provide replacements for the case the helicopter was not operational. Due a manufacturing fault in the brakes, the helicopter caught fire and was destroyed. The pursuers turned against the helicopter manufacturers (first defenders) and the designers and manufacturers of the brakes (second defenders). The Lord Ordinary (Davidson) accepted the pursuers' title to sue. The claim was rejected, because the fire was not a reasonably foreseeable consequence of the design of the brakes. The pursuers sought to rely upon evidence led by the first defender to establish fault against the other defender. It was held that the pursuers had no averments relative to this evidence. It is doubtful whether the decision survives *Murphy v. Brentwood District Council*, [1990] 2 All ER 908..

Wimpey Construction (UK) Ltd v. Martin Black And Co (White Ropes) Ltd, SLT 1982, 239, the defenders supplied equipment to Hersent Offshore Ltd which was engaged in a joint venture with Wimpey Construction Ltd and Gem Hersent Ltd for the construction of a tanker terminal on the River Forth. The equipment failed, causing property damage and pure economic loss, the latter due to the delay to the construction programme. The defendant had been negligent in informing Hersent Offshore Ltd on the way the equipment should be used. Hersent Offshore Ltd was awarded compensation for its property damage and the consequential losses. The claim by Wimpey Construction Ltd was rejected as the company had neither a possessory nor a proprietary interest in the damaged equipment. There was no attempt to allow recovery on the idea that Wimpey Construction Ltd had a joint venture with Hersent Offshore Ltd, while the consequential damages awarded to the latter did not concern the damage to the joint venture.

Commonwealth systems.

English law.

Pure economic loss.

Home Office v Dorset Yacht Co. Ltd. [1970] AC 1004. Seven Borstal boys working on an island under the supervision of three officers left the island and boarded, cast adrift and damaged the plaintiffs yacht. The trial court and the Court of Appeal considered that the Home Office was liable in negligence to the plaintiffs. The House of Lords rejected the appeal from the Home Office. It thought that the Borstal officers owed the plaintiffs a duty to take view, as it was reasonable under the circumstances, to prevent the boys under their supervision from causing damage to the plaintiff's property, if that was a happening of which there was a manifest risk if they neglected that duty. Public policy did not require that there should be immunity from an action such as the plaintiffs.

Anns v. Merton London Borough, [1978] A.C. 728. The decision found that a local authority, empowered to make and enforce bylaws on building construction, was under a duty of care in relation to the inspection of foundations. The lessees were allowed to recover the cost of repairing a defect. In *Anns*, it is often said a "two phased" approach was developed by Lord Wilberforce's opinion. Markesinis 103 LQR, 1987, 388 argues that this is not precise, and that this two stage approach was formed in *Home Office v Dorset Yacht Co. Ltd.* [1970] AC 1004. The test required a "prima facie sufficient proximity for a duty of care" if the defendant should have reasonably foreseen that his carelessness is likely to cause damage to the plaintiff, and there is no policy consideration which would lead to the rejection or reduction of the scope of the duty.

Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd. [1973] 1 QB 27, [1972] 3 All ER 557 (CA). The plaintiff were manufacturers of stainless steel in a factory working 24 hours a day, requiring continuous power to maintain the temperature in a furnace where the metal was melted. The defendant's employees who were working in a near-by road damaged the cable supplying power to the factory whilst using an excavating shovel. The electricity board shut off the power supply to the company for 14 1/2 hours. The plaintiffs, to avoid further damage had to pour oxygen on the 'melt' of metal in the furnace and remove it reducing thus its value by £362. They would have made £400 profit from that 'melt', and £1,767 on four more 'melts' if the power had not been cut off. They turned against the defendants claiming damages for all these sums. The court held that the defendants were liable for the physical damage to the 'melt' and for the loss of profits on this 'melt' as it was consequential to the physical damage. The defendants were not liable for the loss of profit on the other four 'melts': No remedy was available in respect of economic loss unconnected with physical damage. Moreover, as was emphasised, there is no principle of 'parasitic' damages in English law. These are heads of damage which if stood alone would not be recoverable, but would if they could be annexed to some other claim for damages, as a 'parasite'; the loss. Lord Denning laid emphasis on the fact that, in the last extent the question of recovering economic loss is one of policy.

Junior Books Ltd. v. Veitchi Co., [1983] 1 AC 520, [1982] 3 All ER 201, [1982] 3 WLR 477 (HL).

Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] 2 AC 210. The decision involved the liability of the local authority to building contractors who had certain drainage plans approved, later they changed them to the knowledge of the local authority's inspector who did nothing, but later the drainage was found defective and had to be reconstructed causing loss to the plaintiff. The Court of Appeals that it was a question of proximity whether the particular defendant owed the particular plaintiff a duty of care. The decision developed a three stage test, namely that the loss must be reasonably foreseeable, that there should be a close relationship between the defendant and that the plaintiff and that it must be fair and reasonable in order to impose a duty of care. It was noted that the plaintiffs following the advice of their architect changed the approved drainage plans, being statutorily responsible for the drainage, and could not reasonably impose a duty upon the local authority to indemnify them. It was finally held that the legislative mandate of the local authority did not involve avoiding pure economic loss to the plaintiffs even if the loss was foreseeable.

Muirhead v. Industrial Tank Specialities, [1986] QB 507, The case involved the claim by a farm business against the manufacturer of electric motors for the oxygenation of the water in the tanks where the plaintiff kept lobsters. The Court of Appeals held that the manufacturer would be liable to the ultimate consumer if there were specific proximity to justify the reliance of the purchaser of the product on the manufacturer which was not found to exist in this case. The defendant would be liable for the foreseeable physical damage (loss of lobsters) and the foreseeable pure economic loss (loss of profit) consequent upon the physical damage.

Simaan Contracting Co v. Pilkington Glass Ltd, [1988] 1 All ER 791, [1988] 2 WLR 761. The plaintiffs were the main contractors to build a new palace for a sheikh. The latter's architect stipulated that the defendant's glass would be used in the curtain walling of the building. The subcontractor who undertook the erection of the curtain walling used the defendant's glass with great reluctance. The glass proved defective and the sheikh refused to pay the main contractors until the glass was replaced. The main contractors who suffered economic loss turned against the defendant. The Court of Appeal found that the defendant did not owe a duty of care to the plaintiff, although it was foreseeable that they would suffer loss if the sheikh was not satisfied with the curtain walling, since the plaintiffs had not relied on the defendant and were not the ones who nominated the defendant.

D&F Estates v. Church Commissioners for England, [1988] 2 All ER 992, HL, [1989] AC 177. The Church Commissioners owned a block of flats built by the main contractors who subcontracted the plaster work. The latter was defective but not a source of danger. The person who leased the flat after construction, turned against the main contractors, among others. The Court of Appeal reversing the decision of the court of first instance held that the main contractor and the subcontractor owed no duty of care to the lessee to prevent economic loss caused by the defective plaster.

Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd, [1988] 3 WLR 396. The plaintiffs engaged contractors in their premises. The piling work was subcontracted. The plaintiffs however entered a separate agreement with the subcontractors for the exercise of all reasonable skill and care, and to avoid an extension of the completion time by the contractors. The drilling operations caused damages to an adjoining restaurant. Following a dispute on the redesign of the piling works the completion of the works was delayed. The plaintiffs sought the additional expenses they had to pay to the contractors. The official referee found for the plaintiffs, but the Court of Appeal reversed the decision, arguing that there is no general liability in tort for pecuniary loss dissociated from physical damage." See Logie, 1989 JR 5.

Hill v. Chief Constable of West Yorkshire, [1989] AC 53. (The case involves physical damage.) The personal representative of the last victim of a serial murderer known as the Yorkshire Ripper brought a suit against the Police for carelessly failing to apprehend the murderer. The House of Lords dealt with a preliminary point of law. Lord Keith applied his three-stage test and decided in favour of the Police on the basis of "proximity" claiming that the general rule is against liability as can be seen by the narrow exception in the *Home Office v. Dorset Yacht Co. Ltd*, [1970] AC 1004. He does not explain the general rule and, to add to the confusion, he lays a number of policy reasons which in effect amount to the arguments favouring an immunity of the police or public authorities in general.

Murphy v. Brentwood District Council, [1990] 2 All ER 908. In this case a builder had laid the foundations of a house in accordance with the designs approved by the local authority and the foundations were proved to be defective. The owner who could not afford the cost of repairs sold the house at less than the market value it would cost, had the foundations been sound and sued the local authority for the loss of value. The House of Lords held that *Anns*

was wrongly decided, the local authority owed no duty of care in respect of pure economic loss for defective construction of property. The court held that the local authority should not have greater liability than a primary tortfeasor. The House of Lords was not convinced from the "complex structure" argument, according to which different parts of a complex structure, as a building, can be considered as other property. The foundations could thus be regarded as a separate part of a house and economic loss suffered, by a reduction in the value of the rest of the building for instance, was damage to other property. It was held that the source of damage must be distinctively separate in order to consider there is damage to other property.

Department of the Environment v. Thomas Bates and Son Ltd. [1990] 3 WLR 457. The case involved the liability of builders, who had contracted with the lessees of a building for certain construction works, towards the underlessees who had to pay for remedial works to make good deficient construction and sought the expenses of seeking alternative accommodation for the period of the remedial works. The claim was accepted to the extent it related to the flat roof of a two storey building but not in relation to strengthening the pillars of a tower. The Courts of Appeal and the House of Lords rejected the plaintiff's appeals. The House of Lords held that since the tower block had not been unsafe by reason of the defective construction of the pillars, but the defects of quality simply made the plaintiff's lease less valuable, the loss was purely economic and was not recoverable in tort against the defendants. The builders thus were under no liability for making the building fit for the intended use, if there is no danger to health and safety.

Henderson v. Merrett Syndicates Ltd., [1994] 3 All ER 506, [1994] 3 WLR 761. The case concerned the delictual liability of Lloyd's members agents and managing agents of syndicates towards names. The managing agents were not employed by the names as the member agents were, but by the latter. Lloyd's names (members of the Merrett, Gooda Walker and Feltrim syndicates) turned against the firms which were the managing agents of their syndicates. The names had signed agreements with an underwriting agent who had to place them with a syndicate. The underwriting agents were either "managing agents" who themselves run the syndicates with which the principals were placed, or "member's agents" who placed their principals with syndicates run by others or "combined agents" who run syndicates themselves but placed some clients elsewhere. Where an underwriting agent placed a client with a syndicate run by some other firm, the agent signed a sub-agency contract with the managing agent of that syndicate. The name was then an "indirect name" not in contractual relations with the managing agent of a syndicate of which he was a member. In the case of "direct names" the underwriting agent run the syndicate (under provisions in the contract of agency) and there was a direct contractual relationship with the name both as a member and as principal. The agents were authorised under contract by the names with the exclusive right to undertake rights and reinsure on the names' behalf. The members agents would perform the task themselves or delegate them to managing agents, who were sub-agents, under a sub-agency contract. The names in the latter case were indirect names. There were claims against both the members' agents and the managing agents. The contractual claims against the members' agents were time barred: The limitation period which in contractual claims runs from the time of the breach had expired. The limitation period in delict begins to run when the delict is completed, when the loss has been suffered that is. The claims were accepted.

Privity-- Third party beneficiary claims.

Dutton v. Poole, 83 Eng. Rep. 523 (K.B. 1677).

Pigot v. Thompson (127 Eng. Rep. 80 C.P. 1802).

Winterbottom v. Wright from 1842 (10 Mees & W. 109, 152 Eng. Rep 402 (Ex.1842)).

Robertson v. Fleming from 1861 (4 Macq. 167 (H.L.Sc. 1861)).

Twedde v. Atkinson (121 Eng.Rep. 762 (K.B. 1861)).

Cavalier v. Pope, [1906] AC 428. The owner of a dilapidated house contracted with his tenant to repair it but failed to do so. The tenant's wife, who lived in the house and was well aware of the danger, was injured by an accident caused by want of repair. The House of Lords held that the wife, being a stranger to the contract, had no claim for damages against the owner.

Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd, [1915] AC 847 (HL). The plaintiffs, motor tyre manufacturers, provided a motor accessory factors company, D&Co, with tyres, at a reduced price with the agreement not to sell at a lower price than that in the plaintiff's price list, but only to genuine trade customers and then as agents of the plaintiff to extract a similar agreement as regards the price these traders could sell the tyres at. The defendants were such traders. The plaintiffs sued them for the violation of their agreement with D&Co on the price they could charge private customers for the tyres. It was held that the plaintiffs were undisclosed principals but no consideration moved from them to the defendants and, therefore, the contract in question was unenforceable by the plaintiffs.

Les Afféteurs Réunis SA v Leopold Walford (London) Ltd, [1919] AC 801 (HL). The respondents, who acted as brokers for the charterers in a charterparty, according to which a commission (3% of the gross amount of hire) was due to the respondents, claimed this commission from the appellants, the shipowners. It was held that the charterers as trustees for the brokers could enforce the clause against the shipowners. A custom regarding the commission could not be set up by the shipowners as an answer to the brokers' claim as it was inconsistent with the terms of the clause.

Urquhart Lindsay & Co. Ltd v. Eastern Bank Ltd. [1922] 1 KB 318. The plaintiffs agreed to sell machinery to buyers in Calcutta at fixed prices but subject to increases if labour costs rose. The defendants were the buyers' bankers who paid the invoices for the instalments of machinery. After two instalments the buyers directed the defendants not to pay in excess of the original price in the next invoices. The defendants refused to pay a bill on the next shipment, the plaintiffs cancelled the contract, and turned against the bankers as on a repudiation by the buyers. It was held that the credit being irrevocable, the defendants' refusal to pay constituted a repudiation of the contract as a whole and the plaintiffs were entitled to damages. The basis of this banking facility is that the buyer is taken as between himself and the banker to accept the seller's invoices as correct.

McEvoy v. Belfast Banking Co Ltd, [1935] AC 24 (HL). The plaintiff was a co-depositor of a sum by the defendant bank, when he (the plaintiff) was a minor. The amount was payable to the survivor. The other co-depositor died ordering by his will his executors to hold his property in trust for the minor (plaintiff) until he attains the age of 25. The executors withdrew the amount in question and redeposited it in their own name. When the beneficiary became 25 due to the executors' handling of his affairs the sum was exhausted. The beneficiary turned against the bank to recover what had been paid to his executors without his authority. The court held that the executors were entitled to receive the money. Lord Thankerton based his decision on the idea that the plaintiff was a third party beneficiary of the deceased-bank contract. The decision is an example of the cases where the possibility to transfer benefits from a contract to a third party was acknowledged.

Scruttons Ltd v. Midland Silicones Ltd, [1962] AC 446. The appellants engaged by a carrier damaged a drum when delivering to the consignees, the respondents. It was held that the stevedores could not rely on the limitation of liability contained in the bill of lading issued by their carrier. The bill incorporated the relevant U.S. statute. It was held that 'carrier' in the latter did not include the stevedores. Moreover, there was nothing in the bill of lading to state or imply that the parties intended such an extension of the limitation, the

carrier had not acted as an agent for the stevedores, there was no contract between the litigants, and the stevedores were not bailees of the drum. Only a party to a contract can sue upon it, and a stranger to the contract cannot take advantage of contractual provisions, even if it is clear that some provision was intended to benefit the stranger.

Beswick v. Beswick [1968] AC 58. The defendant entered in March 1962 an agreement with his uncle according to which the uncle would transfer his business to the defendant and the latter would employ him as a consultant for a set salary until the end of his life and thereafter the defendant would have to pay to the uncle's wife £5 per week for life. After the uncle's death the defendant paid £5 once to his wife and stopped payments after that. The widow brought an action against the nephew in her capacity as administratrix of her late husband's estate and in her personal capacity asking (inter alia) for specific performance of the agreement. It was held that as an administratrix of a party to a contract was entitled to specific performance of the promise and not merely entitled to nominal damages. He was not entitled to enforce the obligation in her personal capacity. The relevant property act did not alter the law as to allow a third party to enforce a contract.

Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd., and St Martins Property Corporation Ltd. v. Sir Robert McAlpine and Sons Ltd, [1994] 1 AC 85. Both cases involved building contracts where the standard form of the contract forbade any assignment of a right under the contract without the contractor's consent. In the first case the lessee of a part of a building had contracted in 1975 with the defendants for the removal of blue asbestos. The second defendant subcontracted the work to the first defendant. Asbestos was discovered after the removal works. In 1985 the lessee contracted with the third defendant for the same purpose. The lessee assigned his leasehold interests to the plaintiff, and submitted a writ on 3/7/1985 seeking damages. In January 1987 he assigned to the plaintiff the right of action as pleaded and rights incidental to leasehold interests. The second defendant was not asked for and did not consent to the assignment. Subsequently more asbestos was found and additional works at the plaintiff's expenses had to be carried out. The Court of Appeal reversing the previous decision held that the assignment was effective and that the plaintiff could recover. The House of Lords thought that because it was to the knowledge of the parties that the building might be occupied or purchased by third parties, the damage to the latter was foreseeable. The first plaintiff was entitled to enforce contractual rights on behalf of those third parties who would suffer losses from the building's defects. The first defendant was awarded substantial damages.

Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai ["The Nicholas"], (1994) 1 Lloyd's LR 492, CA, [1994] 3 All ER 686. See under "Misrepresentation".

Darlington Borough Council v. Wiltshier Northern Ltd. [1995] 1 WLR 68. Darlington Council wished to build a new recreational centre, but under the rules on local authority borrowing it could not undertake financing. A construction company entered into two contracts with a financing company to build a recreational centre for the Council which owned the site. The financing company assigned to the Council all rights and causes of action against the builders to which the company was entitled under the contracts. In an action by the Council for breach of contract the judge held on a preliminary issue that the Council as assignee was not entitled to claim damages other than nominal damages. On appeal by the Council, the Court of Appeal held that since the building contracts to the knowledge of both parties were entered into for the benefit of the Council and it was foreseeable that damage caused by a breach of a contract would cause loss to the Council, the latter as an assignee could claim substantial damages for the loss caused by the breaches of the contracts and the damages should be assessed on the normal basis as if the Council had been the employer of the contracts. The Appeal Committee of the House of Lords had granted leave to appeal but the case was settled out of court, depriving the House of an opportunity to review basic principles of law.

Williams v. Roffey Brothers and Nicholls (Contractors) Ltd [1991] 1 QB 1. The plaintiffs were subcontractors for the defendants who were the main contractors for the construction of 27 flats. The plaintiff went into financial difficulty as the agreed price was too low to cover operational costs and the defendant, whose (main) contract contained a time penalty clause, promised orally an additional sum at a specific rate for each of the flats on which the works (carpentry) would be performed. After the plaintiff finished work on certain flats the defendant had paid less than he has agreed to. The plaintiff ceased work and sued the defendant for the additional sum. The trial court held the agreement for the additional sum enforceable. The Court of Appeal dismissed the defendant's appeal. The court held that the advantage secured by the promise to make an additional payment constituted consideration provided that it was not secured by economic duress or fraud. The defendant's promise to pay the additional sum resulted to a commercial advantage for the defendants. The benefit accruing to the latter constituted sufficient consideration, and the agreement for the payment was enforceable. By incorporating a 'practical benefit' into the definition of consideration the decision seems to redefine the boundaries of considerations and with these those of contractual liability, as 'practical' might mean unenforceable, may be simply a promise.

Misrepresentation.

Cann v. Wilson, (1888), 39 Ch.D.39. An intending mortgagor at the request of the solicitors of an intending mortgagee appointed the defendants valuator who issued a valuation of the property to be mortgaged that later proved to be wrong. The plaintiffs who became mortgagees sued the valuator for loss suffered from a default in payments. The court noted that the defendants knew that the valuation was for the purpose for an advance and that in fact it was not a valuation at all, and held that independently of contract owed a duty to the plaintiff which they had failed to discharge and had made reckless statements on which the plaintiffs had acted.

Derry v. Peek, [1889] 14 AC 337 (HL). The defendants who were directors of a tramway corporation and had issued a prospectus to induce the public to subscribe for stock, which erroneously stated that the company had the right to use steam or mechanical motive power instead of horses, the defendants were acquitted because they honestly believed the truth of their statement. The court stated that for deceit there must be proof that a false representation was made knowingly or without belief in its truth, or recklessly, carelessly whether it is true or false.

Le Lievre v. Gould, - [1893] 1 QB 491 (CA). Plaintiffs were mortgagees who advanced money from time to time to a builder under a building agreement on the basis of the defendant surveyor's false certificates that certain stages of the construction had been reached. The plaintiff had no contract with the surveyors, who had committed no fraud. The court held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificate and they could not maintain an action against him by reason of negligence.

Nocton v. Lord Ashburton [1914] AC 932, [1914-15] All ER Rep 45 (712). It was held that the defendant solicitor had breached a fiduciary duty owed to the plaintiff who was his client. (There was no need of proof of the solicitor's fraud as the Court of Appeal had requested.). In the words of Viscount Haldane LC "Whether such a duty has been assumed it is a must depend on the relationship of the parties...". Viscount Haldane LC referred to the same point in *Robinson v. National Bank of Scotland Ltd* 1916 SC 154. at 157.

In *Chandler v. Crane Christmas and Co.*, [1951] 2 KB 164, CA, the defendants accountants were hired to prepare accounts with the express purpose of encouraging the plaintiff to invest money in the company. The defendant knew the plaintiff's name and the accounts were shown to the plaintiff in the presence of the defendants. In Lord Denning's words the duty of care extended to the transaction for which the accountants knew their accounts

required..". Lord Denning referred to the American cases of *Ultramares Corp. v. Touche*, 225 NY 170, 174 NE 441 (1931) and to *Glanzer v. Shepard* 233 N.Y.236, 135 N.E. 275 (1922).

Hedley Byrne & Co. v. Heller, & partners [1964] AC 465, [1963] 2 All ER 575, HL. The plaintiffs (appellants before the House of Lords), advertising agents, were clients of a bank that inquired by telephone at first and latter by requesting a written confidential statement by the defendant bank on the financial position and business trustworthiness of a firm for which the defendants were bankers. The defendants assessed the good financial position of the firm in question and the inquiring bank communicated the information of their clients (the appellants). The latter relying on this information and placed orders for advertising time for the firm in question which soon entered into liquidation, causing loss over advertising contracts. The advertising agents sued the defendant for making a statement giving a false impression of the firms financial position. The House of Lords found that for the respondent's disclaimer of liability the circumstances might have given rise to a duty of care on the part of the respondents.

Anns v. Merton London Borough , [1978] A.C. 728.

Trident Const.Ltd. v. W.L. Warlop & Associates Ltd., [1979] 6 WWR 481. A contractor and an engineer had different contracts with a city. A bid by the contractor for a project was based on an inaccurate study of the engineer. The latter was liable towards the contractor, although in his bid the contractor seemed to have exculpated the city from liability from any inaccuracy of the study. The engineer could not take advantage of that clause.

Pirelli General Cable Works Ltd v. Oscar Faber & Partners, [1983] 2 WLR, 6. The plaintiffs turned against the firm of consulting engineers they had employed to advise on and design an addition to their factory premises, after they had to undergo expenses for the repair of a chimney which was one of these additions. The claim was in tort. The trial judge found for the plaintiffs and the Court of Appeal dismissed the defendants' appeal. On appeal by the defendants the House of Lords held opposite to the lower courts that the date of accrual of a cause of action in tort for the damage caused by the negligent design or construction of a building was the date the damage came into existence and not the date it was discovered or should with reasonable diligence have been discovered. The claim was statute barred.

Yianni v. Edwin Evans & Sons, [1981] 3 WLR 843. The plaintiffs wanted to buy a house for £15,000 and applied to a building society for a loan. The society employed the defendants, a firm of valuers, who valued the property at £15, 000. The society offered a maximum loan of £12, 000. Later cracks were caused by subsistence and the plaintiffs had to undergo costly repairs. They turned against the defendants who admitted having been negligent but argued that they owed no duty of care to the plaintiffs. It was held that the defendants could foresee that their valuation would be passed to the plaintiffs and be relied upon by the latter. There was a sufficient relationship of proximity such that in the reasonable contemplation of the defendants, carelessness on their part might cause reasonable damage by the plaintiffs. The latter's failure to take independent advice was due to their reliance on the defendants. The argument of contributory negligence was rejected.

Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. [1986] 1 AC 80, [1985] 3WLR 317, [1985] 2 All ER 947 (PC), In this case involving the liability of three banks to their client company for paying a number of forged cheques and debiting them to the company's account, the Privy Council reversing the decision of the Court of Appeal of Hong Kong, held that, on the basis of the contractual relationship the company was not in breach of any express or implied duty and the banks did not have any authority to pay the forged cheques and debit the company's account. *Per curiam* the courts remarked that although delictual liability between parties to the same contract cannot be excluded, it is correct in principle and necessary for the avoidance of confusion in law to adhere to the contractual liability.

Caparo Industries plc v. Dickman and others, [1990] 1 All ER 568, concerned a claim by a public limited company which had purchased another company and turned against the latter's directors for negligent misrepresentation, and against its auditors for negligent auditing and reporting which they were required to do under the Companies Act 1985 (sections 236 and 237). The court held that liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of which the maker was aware and upon which the recipient had relied and acted to his detriment. The purpose of the statutory requirements for the audit was to enable the shareholders to exercise their class rights in general meeting, and did not extend to the provision of information to assist shareholders in the making of decisions and to the future investment in the company. Since, additionally, the auditors had no special relationship with non-shareholders contemplating investment, they did not owe any duty of care to their plaintiffs in respect of their purchase of public limited company on which they reported.

Smith v. Eric S Bush and Harris v. Wyre Forest District Council [1990] 1 AC 831, [1989] 2 WLR 790, The first of these cases concerned the liability of a firm of surveyors instructed by the building society, to whom the plaintiffs had applied for a mortgage for the purchase of a house, to do a visual survey of the latter. The report failed negligently to suggest repairs. It was suggested that the purchaser should ask independent professional advice. The defendants were not found liable for damages following the collapse of a chimney which they failed to notice that was not supported well. The judge found for the plaintiffs and the Court of Appeals dismissed the defendant's appeal. In the second case the first defendant was the council to which the plaintiff had applied for a mortgage for the purchase of a house. The council decided on the basis of a confidential survey of the second defendant a valuer in their employment, who suggested minor repairs. The survey was not communicated to the plaintiff but the mortgage was approved on such terms. When, three years later, the plaintiff tried to sell the house a valuer for the council suggested that an independent structural survey should be made. The survey indicated the need for extensive, costly repairs. The judge found for the plaintiffs. The Court of Appeal allowed appeal by the defendants. The court held that in such cases a valuer owes a duty of care to the prospective mortgagor since he presents himself as having the required professional capacity, and knows that possibly the mortgagee will rely on his survey and will not seek other advice. It is the same whether the valuer is the employee of the prospective mortgagee or an independent contractor, and even if his report is confidential. The valuer could disclaim his liability contractually provided the disclaimer conforms with the Unfair Contract Terms Act of 1977.

Mariola Marine Corporation v. Lloyd's Register of Shipping ("The Morning Watch"), [1990] 1 Lloyd'sLR 547 (QC), dealt with the liability of a classification society which had carried out a special survey of a yacht for the owners, towards the purchasers of the yacht. The court held that the classification society did not owe a duty of care to the plaintiffs as to decide otherwise would amount to a substantial advance in the law of negligence. The court held that the surveyor was not negligent in any case.

Marc Rich & Co. AG and others v. Bishop Rock Marine Co. Ltd Bethmarine Co. and Nippon Kaiji Kyokai ["The Nicholas"], (1994) 1 Lloyd's LR 492, CA, [1994] 3 All ER 686. This was a claim by the cargo owners of a ship that sunk, against the classification society a surveyor of which recommended that the ship could continue her voyage, after temporary repairs were made. The Court of Appeals reversed the decision of the court of first instance and rejected a claim of cargo owners against a classification society for negligent advice. The decision of the Queen's Bench ([1992] 2 Lloyd'sLR 481 QB) held as a preliminary question of law that the society owed a duty of care to the cargo owners. An appeal was made by the third defendants NKK. The Court of Appeal thought that there is no distinction in law between liability for physical damage and that for pure economic loss. The requirements would be the same; the surveyors would be under a duty of care towards the defendants if

the loss had been foreseeable and it was just and reasonable to place the surveyors under a duty of care. The Court held that foreseeability of damage was not enough to establish a duty of care. Provided the cargo had been loaded under a bill of lading incorporating the Hague-Visby Rules which place the burden on the ship owner, it would not be just and reasonable to hold the surveyors liable in the same manner as ship owners under the Hague-Visby Rules but without the exceptions from and limitation of liability provided for in those rules. As was noticed, the Hague-Visby rules which applied in this case were referring to the relationship between shippers and shipowners, and that if the plaintiff's arguments were accepted, then a duty identical to those provided for in the Hague-Visby Rules would be imposed on the defendant, without the protection provided for the latter in the Hague-Visby Rules. The relationship between the cargo owners could not support the existence of a duty of care. Furthermore, as there were no dealings between the classification society and the cargo owners there was no relationship which could justify a duty of care by the classification society. The case however might be limited to its own facts. The fact that tort and contract are interwoven in such cases is indeed acknowledged. The decision of the Queen's Bench ([1992] 2 Lloyd's Law Reports 481 QB) held as a preliminary question of law that the society owed a duty of care to the cargo owners.

Spring v. Guardian Assurance plc, [1994] 3 All ER 129, [1994] 3 WLR 354, concerned the liability of the plaintiff's former employer who in a reference described the plaintiff as dishonest and lacking integrity and thus prevented him from continuing his career in life insurance. The trial judge found the reference's content as untrue, but rejected all heads of the claim for malicious falsehood, defamation and negligence. The question before the House of Lords was whether the defendants could be found liable for negligence. The House of Lords found the defendant liable. The court dismissed the arguments of the defendants that a finding for the plaintiff would undermine the torts of malicious falsehood and defamation, and eventually would be against the public interest with respect to the unrestricted expression of opinion in references.

Williams v. Natural Life Health Foods Ltd, [1996] 1 BCLC 288, Walters 17 (1996) *The Company Lawyer* 247-248. The second defendant was the effective owner and managing director of the first defendant Natural Life Health Foods Ltd. The latter was formed to franchise the concept of a health food shop which the first defendant operated prior to the company's existence. The plaintiffs entered into a franchise agreement with Natural Life. They never came in contact with the first defendant and never visited his pilot shop. They dealt only with intermediaries who had been engaged by the company on a commission basis. The plaintiff's said they were encouraged to enter the agreement by financial projections prepared by the intermediaries, by statements in the company's brochure and the reputation of the company and of the first defendant in their field. After 18 months of trading the franchise was operating at a considerable loss. The plaintiffs had to sell the business and sought to recover the resulting capital loss from the defendants. Natural Life had been wound up and dissolved before the trial date. Langley J. decided that the first defendant was personally liable in negligence to the plaintiffs. He did assume, or it was reasonable to suggest that he assumed a personal duty, as the company was practically selling his expertise and experience as borne out in its brochure. Langley J. thought that the company could have been held liable in negligence.

Solicitor's liability.

Midland Bank Trust Co Ltd and another v. Hett, Stubbs & Kemp (a firm), [1978] 3 All ER 571. The plaintiff's father let a farm to the plaintiff. In March 1961, the plaintiff and his father went together to the defendant solicitor's firm, who had been acting for both and who drew up a formal agreement wherein the father agreed to give to the son an option to purchase the freehold reversion of the farm at a set price at any time during the next ten years. The solicitors however failed to register the agreement as an estate contract according to the Land Charges Act 1925. In June 1967 the plaintiff consulted the solicitors about the agreement. The solicitors informed on when he could exercise his option but failed to inform

him on the fact that the agreement had not been registered. In August 1967 the plaintiff's father transferred the farm to his wife. In October 1967 when the plaintiff attempted to exercise his option he found out the the option had never been registered and that the farm had been sold. A claim against the plaintiff's wife for specific performance was rejected. He then turned against the solicitors who argued that their duty was contractual only and the limitation period had elapsed. The court held that the solicitors were under no general retainer when consulted by the plaintiff in June 1967. They were however liable in tort. The general law of relationship between solicitors and client gave rise to a duty on a solicitor to exercise that care and skill on which he knew that his client would rely. There was no rule that limits the solicitors under a retainer to contractual duties alone. Furthermore, even if the solicitor's duty was contractual it was a continuing duty to register the option until the a third party acquired an interest in the land.

Ross v. Caunters, [1980] Ch 297, [1979] 3 All ER 580. The defendant solicitor prepared a will for the testator and sent it to him for execution but failed to warn him that the will should not be witnessed by a spouse of the beneficiary. One of the witnesses was the husband of a residuary beneficiary. The court held that the solicitor could be liable for the tort of negligence not only to his client but to others if a prima facie duty towards them could be shown. The claim was accepted.

Al-Kandari v. J.R. Brown & Co., [1988] QB 665. The solicitor's duties do not include a duty of care towards the buyer when the seller is acting for the seller of land.

Clarke v. Bruce Lance & Co., [1988] 1 WLR 881. A solicitor was found not liable to a prospective beneficiary under a will regarding collateral lifetime dispositions which could prejudice his interest.

Gran Gelato Ltd. v. Richliff (Group) Ltd. [1992] Ch. 560. The solicitor's duties do not include a duty of care towards the opponent of his client in litigation.

White and Carter v. McGregor, [1962] AC 413. The testator in March 1986 executed a will cutting off the plaintiffs, his daughters, from his estate. In June he was reconciled with his daughters and sent a letter to the solicitors giving instructions for the drafting of a new will. After considerable delay a meeting was arranged between the testator and the managing clerk for the 17 September. However, the testator died on the 14 September. The plaintiffs sued the solicitor for damages. The trial judge held the solicitors owed no duty of care to the plaintiffs. The Court of Appeal allowed the appeal of the plaintiffs and awarded damages. The House of Lords held that the solicitors were liable for the loss of the legacy. Lords Goff and Nolan justified the decision on the solicitor's assumption of responsibility. Lord Browne-Wilkinson, spoke of an incremental approach based on the established categories of relationships giving rise to a duty of care. They referred to *Hedley Byrne, Caparo* and *Henderson v. Merrett Syndicates*, all decisions relying on an assumption of responsibility criterion.

Carriage cases.

Morison Steamship Co. Ltd. v. Greystoke Castle [1947] AC 265. Although the cargo had not been damaged, the owners of the cargo were held to have a claim against the owners of the colliding ship (which was party to blame for the collision, for general average expenditure incurred).

Margarine Union G.m.d.H. v. Cambay Prince Steamship Co. Ltd., [1969] 1 QB 219. The plaintiffs accepted delivery orders relating to a quantity of copra, thereby acquiring title thereto when the goods were unloaded at the port of discharge, but not earlier. Before the beginning of the loading the defendant shipowners had been negligent in failing to adequately fumigate the vessel with the result that the copra was seriously damaged by cockroaches. In an action in tort for damages the court held that it was essential to support

such a claim that the plaintiffs were owners or entitled to the possession of the goods at the time when the negligence occurred and that since the plaintiffs had no title at that time the action was not sustainable. On the assumption that the risk passed from their sellers to them when they accepted the delivery orders, the fact that the plaintiff had taken delivery of damaged goods gave them no remedy in tort against the defendants.

Leigh and Sullivan v. Aliakmon Shipping, 2 [1986] 2 All ER 145, [1986] AC 785. In this case involving carriage of steel coils under a c&f contract, the buyers were not to become owners of the cargo until actual payment. Their claim in delict for the damaged cargo was rejected because they were not owners of the coils at the time of the damage. The case was distinguished from *Junior Books v. Veitchi*, because in the latter the pursuers were owners of the floor when it was carelessly led.

Exemption/limitation clauses.

Elder Dempster & Co v. Paterson, Zochonis, [1924] AC 522, established, according to one view, the vicarious immunity of the charterer for damage to cargo. The defendants, were the charterers of a ship belonging to the second defendants, that carried casks of palm oil on top of which casks with palm kernel bags were loaded from a West African port to England. The bags with the palm kernels crushed the bags with the palm oil and on arrival in England the greater part of the oil was lost or damaged. The bill of lading protected the charterers from damage due to bad stowage. The court held that the damage was the result of bad storage (and not, for instance, of unseaworthiness of the ship), and consequently the charterers were protected by the exceptions in the bill of lading. In the circumstances the shipowners were entitled to the same protection. The decision was later interpreted as resting on the ground of a bailee having accepted the goods under the terms of the bill of lading and the idea of vicarious immunity was abandoned.

Adler v. Dickson and Another [1954] 3 WLR 696. The exclusion clauses in favour of the plaintiff's contracting party, a shipping company, were not accepted as valid defence by the shipping company's employees. The exclusion clauses were contained in a sailing ticket issued to the plaintiff for a Mediterranean cruise. Lord Denning, requested assent of the injured party to the extension of the exemption clause to the employees, assent which should be expressed or inferred by necessary implication. Jenkins L.J. held that the servants could not have relied on the clauses even if the intention was to exclude liability for the servants as well because they were not parties to the contract. Morris L.J. thought that unless a company contracts as agents for its servants, they cannot claim immunity under the contract for their personal torts.

Southern Water Authority v. Carey, [1985] 2 All ER 1077. The plaintiff was a water authority whose predecessor, a sewage board, had entered into a contract with the second defendants for the construction of sewage works under a standard form of contract, providing liability in lieu of any condition or warranty implied by law as to the quality and fitness of the material used, after completion and required certificate had been issued by the first defendant consulting engineers. Neither the main contractors nor subcontractors were to be liable in tort, contract or otherwise in respects of defects of the work or loss attributed to the latter. The main contractor employed the third, fourth and fifth defendants, subcontractors. The contract with the fourth was identical as regards the indemnity clause to the contract of the contractor with the water authority. The third defendants included their own limitation clauses. The plaintiffs brought an action against all the defendants claiming damages. They alleged negligence on the part of third defendants in providing the materials. The court held that as a matter of contract the third and fourth defendants were not entitled to the benefit of the liability clause in the main contract because (a) they were strangers to the contract, (b) they could not be deemed beneficiaries under a trust attaching the benefit of a clause as this would involve extending trust beyond conventional limits, (c) the fact that the contract was under seal did not enable the fourth defendants to invoke the relative provisions of the Law of Property Act 1925 to their protection, (d) it would be

artificial to construe the contract as being a unilateral contract promising immunity on the fulfilment on certain conditions by the fourth defendant, namely the completion of the works, and (e) the fourth defendants could not argue that the main contractors had acted as their agents in contracting with the plaintiff as there was no relative prior authorisation. However, the third and fourth defendants were not liable in tort as the contractual setting and the acceptance of the limitation clause in the contract by the plaintiff, negated the duty of care which would have otherwise be owed by the third and fourth defendants. Although prima facie the defendants should be liable the area of the risk was defined by the building contract and there was no reason why the limitation should not be honoured provided the condition in the contract, namely the issuance of a valid taking-over certificate had been fulfilled. Moreover, the fourth defendants were not liable according to statute law to the other tortfeasor as they were protected by the issuance of the valid taking-over certificate. The fourth and fifth defendant owed no duty in contract or tort as regards the quality and fitness of their work as no such terms could be implied in the subcontracts. If the fourth defendant had been liable to the plaintiffs, he was protected after the issuance of a valid taking-over certificate. If the first defendant were found liable for damages they could not recover sums from the fourth and fifth defendants even if they were able to establish breach by the fourth and fifth defendants of a duty of care owed to them.

Norwich City Council v. Harvey, [1989] 1 All ER 1180. The defendants were subcontractors who undertook certain roofing works for the main contractors who had contracted with the plaintiffs, owners for the extension of a swimming pool under standard local authority building contracts that placed the risk of fire upon the employers (the owners). One of the defendant's employees while using a blowtorch set fire to both the existing building and the new extensions. The owners brought an action against the subcontractors and their employee claiming damages for negligence. The trial court dismissed the action. On appeal by the owners the Court of Appeal held that the clauses on risk of fire in the building contract reflected the intention of the building owner and the contractor that the former would accept the risk of damages by fire to his premises. It would not be just and reasonable to exclude the subcontractor from the protection of that provision in the main contract. Furthermore in such circumstances there was not such a close and direct relationship between the building owner and the subcontractor for the latter to owe a duty of care to the former. The decision is doubtfully calling upon the authority of *Southern Water Authority v. Carey*, [1985] 2 All ER 1077. The fact is that they do not involve similar situations.

Pacific Associates Inc and another v. Baxter and others, [1989] 2 All ER 159 CA, [1990] 1 QB 993. The action was in negligence in the face of exemption clauses in the contract of the main contractor. Claimant was the successful tender of dredging and reclamation works in Dubai, against the engineer appointed by the employer to supervise the works. The information provided at the tender stage was inaccurate, the works were costlier and thus the plaintiff suffered loss. The Court of Appeal held that the engineer had no duty of care coterminous with the contractor's rights against the employer.

Subcontractor's liability.

Southern Water Authority v. Carey, [1985] 2 All ER 1077.

Simaan Contracting Co v. Pilkington Glass Ltd, [1988] 1 All ER 791, [1988] 2 WLR 761.

D&F Estates v. Church Commissioners for England, [1988] 2 All ER 992, HL, [1989] AC 177.
Greater Nottingham Co-operative Society Ltd. v. Cementation Piling and Foundation Ltd, [1988] 3 WLR 396.

Norwich City Council v. Harvey, [1989] 1 All ER 1180.

Liability of local authorities.

Anns v. Merton London Borough Council, [1978] AC 728, [1977] 1 All ER 492 HL

Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co Ltd [1985] 2 AC 210.

Curran v. Northern Ireland Housing Association [1987] AC 718, emphasized on the nature of the statutory duty in question, and giving approval to the High Court of Australia decision on *Council of Shire of Sutherland v. Heyman* (1985) 157 CLR 424, which, on facts similar to *Anns*, rejected the claim on the idea that the statutory authority of the local authority did not cover such a duty of care.

Murphy v. Brentwood District Council, [1990] 2 All ER 908.

Australian law.

Pure economic loss.

Trident General Insurance Co. Ltd. v. McNiece Bros. Pty. Ltd., (1988) 62 *Australian Law Journal Reports* 508. A company, operating a limestone crushing plant, took out in respect of that operation a policy of insurance with the appellant. The policy was expressed meant to extend to that company, all subsidiary, associated and related companies, all contractors, subcontractors and suppliers. The respondent, principal contractor of the plant, was held liable for injuries sustained by one of its subcontractors at the plant. The appellant declined to indemnify the respondent under the policy, on the grounds that he was not a party to the contract and had provided no consideration. The Supreme Court of the New South Wales and (on appeal) the Court of Appeal held that the respondent could compel the appellants to indemnify it. (The respondent was not permitted to raise an alternative case based on trust.). The High Court, with a majority of four (out of seven) held that the appeal should be dismissed because it was established that the intention of the contracting parties was that the third party should benefit from performance of the contract. The court thought that the common law rule as to privity operated unsatisfactorily and unjustly in this case, especially in the light of the changes in the law by the Insurance Contracts Act (1984) of Australia and other pieces of legislation, and, in any event the common law rule had stood for a little more than a century and had attracted much criticism. Caudron suggested that a promisor who had accepted agreed consideration for the promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled.

Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad", (1976-1977) 136 CLR 529. The dredge "Willemstad", in the course of its operations fractured an oil pipeline connecting an oil refinery with an oil terminal. The refinery and the pipeline were owned by a refining company. The terminal was owned by Caltex which, under agreement with the refining company, supplied crude oil to the refinery for processing. The refined product was delivered to the terminal. Caltex was the owner of the oil throughout, but the risk of loss or damage rested with the refiner. The damage to the pipeline was attributable to the negligent navigation of the dredge. The refiner recovered for the physical damage done to both the oil and the pipeline. Caltex sought to recover the expenses incurred in transporting refined oil from the refinery to the terminal while the pipeline could not be used. The High Court of Australia held that Caltex was entitled to recover damages from the dredge and the marine surveyor. The decision is a comprehensive authority from the point of view of the quality of the speeches made. Three of the judges noticed that although the case was for pure economic loss and, as a rule, damages are not recoverable unless consequential upon injury to person or property, in a case where the defendant had knowledge or the means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, damages are recoverable. Another member of the court held that where foreseeable economic loss arises from a physical effect on the plaintiff's property there is no bar to recovery on the ground only that the loss is economic. In MacGrath's view the case seems to stand in the middle of the

torts of intentional interference with a contract and that of negligence. There is no knowledge requirement as in the tort of intentional interference. (MacGrath, 3 (1985)*OxfJLSt* 358). The judges went through extensive examination of the relative case law, in England, Canada and the USA, and being aware of the practical problems involved tried "to develop a more restrictive formula than foreseeability, yet one that could be applied with certainty". (Feldthussen, *Economic Negligence*, 241.). However the five judges failed to agree as to the principles which should govern recovery for pure economic loss. The approach in *Caltex* was not followed by the Privy Council in *Candlewood Navigation Corpn v. Mitsui OSK Lines Ltd, (the Mineral Transporter)*, [1986] AC 1, [1985] 2 All ER 935 -- appeal from the Supreme Court of New South Wales. (See in Feldthussen 235 et seq for the related case law.)

Liability of local authorities.

Sutherland Shire Council v. Heyman, [1985] 60 ALR 1, 59 ALJR 564 (HC), 157 CLR, (1984-1985), 424. The respondent bought a house in Sutherland Shire in 1975. Serious defects appeared in the structure of the house in 1976. They turned against the appellant Council, that had approved plans and issued a building permit in 1968, arguing that the inspecting officers in the course of erection failed to notice that fewer footings were installed than contemplated by the plan. In the District court and, on appeal, in the Supreme Court of the New South Wales, it was held that the Council was in breach of its statutory duty and liable to damages. The High Court held that the appellant Council was not in breach of any duty. The reasons varied; either there was no negligence or no inquiry made and no reliance placed by the respondents on the Council, therefore no duty was owed to them. Brennan J suggested that the law should develop incrementally and not by the development of a *prima facie* duty. The decision was cited with approval by three Law Lords in *Caparo Industries plc v. Dickman*, namely Lords Roskill, Oliver and Bridge, [1990] 2 AC 605, respectively at 628, 633, and 618). The High Court rejected *Anns* as the House of Lords would do later in *Murphy*.

Secondary economic loss.

Candlewood Navigation Corpn v. Mitsui OSK Lines Ltd, (the Mineral Transporter), [1986] AC 1, [1985] 2 All ER 935 (appeal from the Supreme Court of New South Wales) , where the plaintiffs, charterers of a ship which was damaged by the defendants, sued for the loss they suffered having to pay hire charges while the ship was being repaired. The Privy Council held that the defendants did not owe a duty of care to the plaintiffs for their secondary loss.

Construction.

Bryan v. Maloney, HCA March 23, 1995, 11 (1995) 11 *ConsLJ* 274 (Burr, Franklin, Ramsey, eds). Bryan built a house for Maloney's predecessor in title. After Maloney purchased the house cracks began to appear in the walls, caused from the fact that the footings were inadequate to withstand the seasonal changes in clay soil. Maloney turned against Bryan in negligence. She succeeded both at first instance and before the Full Court of the Supreme Court of Tasmania. Bryan appealed to the High Court of Australia. The High Court held dismissing the appeal holding that the relationship between builder and subsequent owner with respect to the economic loss of repairing the defect is marked by the assumption of responsibility and known reliance commonly present in such cases, where a relationship of proximity exists. In normal circumstances a builder undertakes to erect a house with adequate footings to last for a period which is likely to be owed by subsequent owners, who will have less opportunity to inspect the house than the first owner. The court noted that, as a matter of principle policy or common sense, it was difficult to see why a negligent builder should be liable for the collapse of a building due to the inadequacy of the foundations, but not be liable to the owner of the building for the costs of remedial works to avert such damage.

Solicitor's liability.

Hawkins v. Clayton, (1988) 78 ALR 69 (HC). A solicitor/custodian of a will has a duty to inform the executor of a will of the testator's death. As Hogg notices, the decision of the High Court shows how the proximity concept can be used to extend liability for economic loss. It is an example of the divergence between the English and the Australian courts from the point of view of developing novel categories of liability for economic loss, something which Australian courts have promoted on the basis of proximity.

Canadian law.

Privity.

Vanderpitte v. Preferred Accident Insurance Corp of New York, [1933] AC 70 (PC). The appellants had obtained a judgment against B's daughter for damages and personal injuries caused by the daughter driving negligently B's car. The respondent had agreed by their policy to indemnify the insured against third party risks and had taken charge of the defence in that action. The judgment was unsatisfied and the appellant sued the respondents considering that B's daughter was insured and that the respondents were liable to her according to the relative legislation. It was held that the relevant provisions applied when the person in question is insured by an actual contract in law, and there was no evidence that B had contracted for anyone else but himself. Even if this was not the meaning of the provisions, there was no evidence that B intended to create a beneficial interest for his daughter.

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 SCR 228. The appellant was the owner of a shopping center and the respondents employees of a lessee company. The lease included provisions for arranging for insurance, which burdened the lessor or if the latter was unable to provide insurance the lessee on the lessor's behalf. They were meant to arrange with their insurers not to grant subrogation rights against for loss caused by fire cause by the other. Neither party took steps to apply the agreement. A fire which started at the lessee company's premises due to the respondent's fault destroyed part of the centre. On behalf of the owner an action was raised against the employee for the uninsured loss and by the insurer for the insured loss. The trial court held the company/employer vicariously liable in damages, but was not liable for the uninsured loss nor for the subrogated claim. The employees could no more be sued than the company. The Court of Appeal dismissed the appeal. The landlord's covenant in the lease covered the employee. The Supreme Court of Nova Scotia, on appeal, held that privity applied in this case and there was no evidence that it could be sidestepped on an agency or trust construction. Courts could not decide upon vague and scanty evidence. Whatever may have been in the minds of the parties to the lease agreement, the employees were not parties to the contract and could neither enforce it nor benefit from it. They were not entitled to the protection of the clauses on insurance.

Misrepresentation.

Haig v. Bamford, (1977) 72 D.L.R. (3rd) 68. The plaintiff gave a loan relying on the negligent financial statement the defendants accountants had drawn on behalf of the recipient of the loan. (The recipient was in need of the loan in order to raise an amount of equity capital which was the precondition for receiving a loan from a government agency.) The decision was, it seems based on the fact the plaintiff was foreseeable but it is fair to say that crucial was the fact that the loss was suffered in precisely the transaction for which the accounts were required.

V.K.Mason Construction Ltd. v. Bank of Nova Scotia et al., 16 (1985) DLR (4th) 598. The plaintiff was a construction company to whom the defendant bank had given an express assurance that sufficient financing would be provided to a developer for a particular project. The company, in reliance on this assurance, entered a construction contract completed the work but was not paid. The bank did not advance sufficient funds and exercised its power of sale as mortgagee and sold the development asserting a priority over the plaintiff's mechanics lien claim. The Supreme Court held that the bank was not liable in contract as

its obligations were insufficiently specific, but it was liable for negligent misrepresentation because it knew that its assurance would be relied on. The measure of damages included the plaintiff's expected profit, because in the absence of the assurance the plaintiff would have made a similar profit elsewhere. Critics thought it was absurd to seek compensation in tort once it was thought that the defender's bank letter to the pursuer giving assurance of finance, was not a letter of guarantee, and thus the bank had no contractual liability.

Manufacturer's liability.

Rivotow Marine Ltd. v. Washington Iron Works, [1974] 40 DLR (3rd) 530. The loss suffered by the plaintiffs, charterers by demise of a barge against the manufacturers of cranes fitted on the barge, which had to stop operations when, following an accident crack were discovered in the mountings of both its cranes, was recoverable exceptionally because this was the busiest season of the year and the loss could have been avoided by a warning of the defect enabling repairs in time, by the manufacturers who knew of the defect. In principle the manufacturer is not liable to a non contracting party for damage for the cost of repair of the article itself or loss which would have been sustained in any event as a result of the need for repairs.

Liability of local authorities.

City of Kamloops v. Nielsen et al. 10 DLR 1984 (4th) 641. Claimants were the subsequent purchasers of a house, the construction of which the defendant city failed to prevent although it was aware of the house's defective foundations through its building inspectors. (The foundations subsided.) The trial court found for the plaintiff. The Court of Appeal and the Supreme Court of Canada dismissed the city's appeals. The Supreme Court of Canada held that the council had breached the by-law it had passed on the construction of buildings. The city was obliged to take care in the discharge of its operational duty, not to injure persons such as the plaintiff whose relationship to the city was sufficiently close that the city ought reasonably to have contemplated of the plaintiff. The city breached its duty by failing to protect the plaintiff against the builder's negligence. Recovery of economic loss was permitted on the basis of the statute regulating the city's duties. The court however did not find negligence on the part of the city inspectors in their inspection and subsequent actions. The city was liable for failing to enforce a "stop-work" order.

Co-lessees.

In the Canadian case *Re Spike et al and Rocca Group Ltd et al*, (1979) 107 (3d) Dominion Law Reports 62, it was held that in a case where tenants of a shopping centre had agreed with the landlord to restrict their activities in respect of a particular business, one of the tenants had a right to seek an injunction to prevent a violation of the agreement from another tenant, on the basis of the community of interests which had been created.

Solicitor's liability.

Whittingham v. Crease & Co (1978) 88 DLR (3d) 353, one year before *Ross v. Caunters*, the agent responsible for the drafting of a will for the plaintiff's father invited the wife of the sole beneficiary, the plaintiff, as a witness. The will was void and the plaintiff had to share in his father's estate with three brothers and a sister. The solicitor was found liable. By inviting the wife as a witness he impliedly represented that the will would be valid. He could foresee that if the will was void the plaintiff would suffer loss.

Secondary economic loss.

Canadian National Railway Co. v. Norsk Pacific Steamship Co., The "Jervis Crown", [1992] 91 DLR (4th) 289 (Supreme Court), [1990] 65 DLR (4th) 321 (Federal Court of Appeal). The defendants were the owners of the tug which, navigated negligently by its captain, damaged a bridge spanning over the Vancouver river owned by the Department of Public Works of Canada. As a result the plaintiff, who accounted for 86% of the use of the bridge, had to re-route traffic, incurring considerable expense. The plaintiff by agreement with Public Works Canada provided certain maintenance services for the bridge. The trial judge

held the defendants liable for the loss claimed and an appeal to the Federal Court of Appeal was dismissed. The Supreme Court dismissed a further appeal. The majority held the defendants liable. According to three judges, in addition to negligence and foreseeable loss, there was also sufficient proximity between the act and the loss. Stevenson J. focused on the fact that the defendants could foresee that a specific individual, as distinct from a class of people would suffer loss. According to the dissenting two judges, there should generally be no liability for contractual relational pure economic loss. Loss that is suffered as a result of damage caused by the defendant to someone else's property. Contrary to the opinion of the majority, they held that the plaintiff and Public Works Canada were not engaged in a common adventure. They thought that, as between the parties to the dispute the plaintiff was in a better position to predict and bear the loss.

Exemption/limitation clauses.

London Drugs v. Kuehne & Nagel International Ltd. [1992] 3 SCR 299. The Supreme Court extended the protection of a contractor's liability limitation clauses to the contractor's employees, at the expense of privity. A transformer was delivered to a warehouse company for storage under a standard form contract including a clause limiting the warehouseman's liability on any one package to C\$40. Two employees of the warehouse company tried to remove the transformer using two forklift vehicles contrary to safe practice. The transformer toppled over and causing extensive damages. The trial judge found the employees personally liable for the full amount of damages and limited the company's liability to C\$40. The Court of Appeal reduced the employees liability to C\$40. The appellants appealed this decision to the Supreme Court and the respondent employees cross-appealed arguing that they should be completely free from liability.

Edgeworth Construction Ltd. v. N.D. Lea & Associates [1993] 3 SCR 206, 107 DLR (4th) 169. A leave to appeal was granted on July 1992, while *London Drugs v. Kuehne & Nagel International Ltd.*, was still under consideration. In the place of the individuals claiming protection of a limitation of liability clause as third party beneficiaries, as in *London Drugs v. Kuehne & Nagel International Ltd.*, there were both the firm and individuals. Edgeworth Construction Ltd., tendered successfully on a project to build a section of highway in the Revelstoke area. N.D. Lea & Associates had designed the project and prepared the plan and specifications under contract with the Ministry of Highways. The latter incorporated those plans in a contracts with Edgeworth Construction Ltd., along with a clause disclaiming responsibility for errors in the plans. Edgeworth Construction Ltd. did not proceed against the ministry mainly because it wanted to do business with the ministry, (it would be difficult of course to sustain such a claim). McLachlin J, speaking for the majority, held that the firm did owe a duty of care to the plaintiff on the basis of the liability for negligent misstatements as expressed in *Hedley Byrne*. The individual engineers escaped liability. The fact that each of them affixed his seal to the design documents was not enough to establish a duty of care. The decision was brief and seemed to be motivated by the intention to protect the individual employees. The distinction between the firm and the employees was no made explicit. The decision seems to be nearer the suggestion made by La Forest J, in *London Drugs v. Kuehne & Nagel International Ltd.* for the acceptance of a presumption of immunity in favour of individual employees. As Siebrasse puts it, the decision is explained as an attempt to determine (and impose) the optimal contract terms, from an economic analysis point of view.

Construction.

Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Limited, [1995] 1 SCR 85, 11 (1995) *ConsLJ* (Burr, Franklin, Ramsey, eds) 306. The Supreme court of Canada accepted the claim of subsequent purchasers against contractors for inadequately fixed cladding. The Supreme Court reversed the decision of the Manitoba Court of Appeal which had relied heavily on *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177. The Supreme Court refused to follow the latter case on the grounds that in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Company Co.*, negligence posed "a real

and substantive danger" to the occupants of the building. The court left open the question for liability in tort for non-dangerous defects. The Supreme Court followed *Hedley Byrne*, rejecting the broad exclusionary rule and stating its preference for *Anns*.

Negligence - Contribution.

Giffels Associates Ltd. v. Eastern Construction Co., [1978] 2 SCR 1346. The plaintiff Dominion claimed against Giffels and Eastern for damages for a defective roof on a new building. Eastern was the general contractor and Giffels, under contract with the plaintiff, engineer to prepare specifications and supervise the construction. The trial judge found that both were responsible for the defective roof, but Eastern has not brought himself in the contract and the action against him would have to be dismissed but for The Negligence Act. This reservation concerned Eastern's liability not to the plaintiff but to Giffels for contribution. Eastern was liable to bear 75% of the damages. The Court of Appeal dismissed Giffel's appeal but accepted Eastern's counterappeal. The Supreme Court of Canada dismissed Giffel's appeal. Even if the plaintiff could sue in negligence (as Giffels argued), still Giffels had no right to contribution because he gave the final certificate in terms of Eastern's contract and because of the finding at trial that the guarantee period in the contract had run in Eastern's favour. A contractor cannot in these circumstances be said to have contributed to any actionable loss by the plaintiff and that followed whether the result was based on liability in tort or contract.

New Zealand law.

Misrepresentation.

Diamond Mfg. Co. v. Hamilton, [1969] N.Z.L.R. 609 (C.A.). An accountant was held liable to a party who purchased shares in their employers company relying on a negligent balance sheet, it was accepted that the defendant knew that the accounts were wanted by the plaintiff for the purpose of making an offer and that he would rely on the accounts.

Solicitor's liability.

Gartside v. Sheffield, Young & Ellis [1983] NZLR 37, a solicitor delayed by a week to present the will he had prepared to his client for signature. During this week the testatrix died. The Court applied the *Anns* test and held the solicitors liable the prospective will beneficiary.

Exemption/limitation clauses.

NZ Shipping Co v. Satterthwaite (The Eurymedon) [1975] AC 154. The exception clauses in charterparties were extended to intermediate carriers, stevedores or other third parties who were expressly included if it could be inferred that the carrier contracted also as agent for the others. The case involved carriage from Liverpool to Wellington of a drilling machine and the bill of lading incorporated the relative Hague Rules clauses discharging the carrier from all liability for loss or damage unless suit was brought within one year. The bill further contemplated that the immunity extended to the carrier's servants or agents including independent contractors. The carrier was a wholly owned subsidiary of the stevedores who acted as its agents in New Zealand and the carrier has the authority to enter into contract on behalf of the stevedores. The drill was damaged in loading as a result of the stevedores' negligence. The stevedores pleaded the time limit when suit was brought under the bill of lading. The Supreme Court upheld the defence. The Court of Appeal allowed the appeal considering that at the time the bill was signed the shipper and the stevedores were not *inter se* in contract because no consideration moved from the stevedores. The Privy Council, on appeal by the stevedores, held that the time limit in the bill applied to the stevedores' liability as it expressly extended to servants, independent contractors, etc and covered the whole carriage. The bill could become mutual between the shipper and the stevedores made through the carrier as agent. It became a full contract when the stevedores performed, performance in benefit of the shipper being the consideration for the agreement by the shipper that the stevedores should have the benefit

of the exemptions of the bill of lading. This precedent was followed elsewhere in the Commonwealth. In American law express intent to extent the benefit to third parties is sufficient and the pretence of agency is not required. *The Eurymedon* technique was not available in *London Drugs Ltd v. Kuehne & Nagel International Ltd*, because the employees were not expressly mentioned in relation to the \$40 per package limitation.

Construction.

Bowen v. Paramount Builders, [1977] 1 NZLR 394. The plaintiffs had purchased a house which since the time of purchase was subsiding due to insufficient foundations. The first respondents were building contractors under agreement with the second respondents the sellers. A subdivider had undertaken to construct necessary subfoundations. The works were stopped by the acting building inspector. The first respondents submitted revised plans and with the false impression that they had been approved recommenced works. When the building was near completion cracks appeared in the brickwork. The Court of Appeal, reversing the decision of the trial court, held for the appellants, purchasers. The court considered that contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work. The decision was the first in New Zealand to follow *Anns*..

Lester v. White, [1992] 2 NZLR 483. The plaintiffs were owners of flats. The first defendant was the local builder the second defendant was a foundation engineering specialist and the third defendant was the borough council that approved the building plans. The flats were built on land formerly used as a rubbish tip from the third defendant. All defendants consulted on the foundation requirements and the second defendant made specific suggestions. The first defendant followed most of these suggestions and ordered the materials required which were provided by the second defendant. However, the first defendant made certain alterations to the initial plans deleting a central longitudinal beam and placing reliance on a lateral beam alone. The plaintiffs claimed that the foundations were inadequate resulting to the buildings having damaged and distorted internal walls, doors, roofs, garage doors etc. The building was, they argued unsaleable and the only remedy was demolition and rebuilding anew. The High Court found that the first and third defendants had violated a duty of care towards the plaintiffs, the former in deciding to alter the foundation plans although he could foresee the risk, the latter for approving the plans. The second defendant was obliged to build the foundation piles according to the builder's instructions and was not liable to the plaintiffs. The court awarded the plaintiffs the additional and consequential costs of replacement, disruption relocation and loss of use.

Hamlin v. Bruce Stirling Ltd. [1993] 1 NZLR 374 (HC). In this case, where the first crack to the foundation appeared 2 years after completion of the building and the claim was filed 18 years after completion, it was held that the limitation period started only in the last year when the plaintiff had to seek specialist advice. The decision focused on the public authority, the Council whose building inspector had approved the foundations, and not on the builder who was insolvent. The court thought that even if there could be no precise measure of damage, a reasonable sum should be awarded to the plaintiff. .

Liability of local authorities.

Stieller v. Porirua City Council [1986] 1 NZLR 84. The case concerned a case by purchasers of a house who after entering the house and carrying out certain finishing interior work themselves after agreement with the builders, found the house being flooded. The reason for the flooding was that a storm water drain had not been connected to an outlet. It was also found that no gutter or spouting had been provided for parts of the house. The plaintiffs turned against the local authorities who had approved the building plans and its inspectors carried out inspections during constructions. The High Court of New Zealand held that the Council had been negligent and awarded damages. The Privy Council upheld the

decision considering that the Council had been negligent in failing to ensure its bylaws were observed. There was no basis for interfering with the High Court's award for damages.

Craig v East Coast Bays City Council [1986] 1 NZLR 99. The plaintiffs valued highly the view of his house and had checked with the Council that new building in adjoining property had to be six metres away from an existing building there which would not obstruct his view. In an application for a building on this adjoining property in order to clear the sewer line, affected if the distance from the existing building were six metres, the Council's assistant planning officer suggested that the distance was reduced to 3.8 metres. No written application for the dispensation from the building schemes involved was considered necessary. The Council's planning committee approved the plan. The plaintiff's complaints to the Council during the building were ignored. He brought an action in negligence against the Council. The High Court held that the Council had been negligent in not requiring a notified application for departure from existing schemes, and awarded damages, far lower than claimed. The plaintiff appealed and the defendant cross-appealed. The Court of Appeal held that the Council owed a duty to the plaintiff to take reasonable care that it acted within its powers. A prudent planning officer should have realised that a dispensation with existing schemes would have affected the plaintiff negatively, or at least that legal advice was required. The Council had been negligent therefore. The damages were increased.

Brown v. Heathcote City Council, [1987] 1 NZLR 70, Privy Council [1987] 1 NZLR 720. The City Council when approving applications for a building permits relied on the Christchurch Drainage Board for information on flooding dangers and referred all applications to the Drainage Board. The plaintiffs had built a house in a patch of land inherited by the wife between her parents house and Heathcote river, land which had been flooded in the past. They required building permission for building on a position they thought to be above flood level. The Drainage Board inspected the site and approved the application with no comment on flood dangers. Later the plaintiffs asked for dispensation from the City Council's bylaws on the minimum distance the house should be built from neighbouring property in order to be further ensured against flooding. Dispensation was approved without reference of the application to the Drainage Board. The House was flooded in 1975, 1976 and 1977. The Drainage Board's records showed a possibility of flooding every five years. The trial judge found the Drainage Board liable for damages and dismissed the claim against the Council. The appeal of the Drainage Board was unsuccessful. The question in the Privy Council was whether there was a sufficient degree of proximity between the Board and the Browns to justify a duty of care. Although the statutory function of the Board and its mandate did not bring the Board in proximity with individual landowners, the Board could have assumed a duty of care if expressly asked by the Council to check flood level in relation to the Browns' application. The evidence was that habitually the Board acted without an express request by the Council in relation to building permissions. In those circumstances the duty of care of the Board could not be any less than the duty it would have assumed if it has been expressly asked.

Invercargill City Council v. Hamlin, [1994] 3 NZLR 513, 11 (1995) *ConsLJ* 286 (Burr, Franklin, Ramsey, eds). The court held a local authority liable for the negligent inspection of a building's foundation by one of its inspectors. The decision followed *Kamloops (City) v. Nielsen* [1984] 10 DLR (4th) 461, and refused to follow *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners* [1983] 2 AC 1, and *D&F Estates Ltd v. Church Commissioners for England*, [1989] AC 177. It was upheld by the Privy Council *The Times*, February 15 1996. The Privy Council, rejected the appeal acknowledging that "The common law adapted itself to the differing circumstances of the countries in which it had taken root." although "It was regrettable that there should be any divergence between English and New Zealand law on a point of fundamental principle." The Privy Council laid emphasis on the fact that *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*, [1983] 2 AC 1, was not valid law in New Zealand, and on a succession of cases in New Zealand in the past 20 years. In

these cases it was decided that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws. New Zealand judges were in a much better position to decide on the questions of the case than the Board of the Privy Council, irrespectively of whether the circumstances in New Zealand and England were in fact so very different; "What mattered was the perception.". The Privy Council did not give an opinion on whether *Pirelli* was valid in England.

Honk Kong.

The Pioneer Container, [1994] 2 AC 324. (Privy Council, on appeal against a decision of the Court of Appeal of Hong Kong). A sub-bailee was not allowed to set up the terms of the sub-bailment against the original bailor. Two groups of plaintiffs had engaged carriers under a bill of lading enabling the latter to subcontract the carriage. The carriage was subcontracted. The subcontract contained a clause providing for the exclusive jurisdiction of Taiwanese courts on claims against the subcontractors. Following a collision the ship and cargo were lost. An action in rem against a sister ship was submitted in Honk Kong. The Privy Council held that when goods are sub-bailed with the owners' consent, the sub-bailee was obliged as the bailee. The owner could sue directly. The clauses for exclusive jurisdiction would be valid only if the owners had expressly or impliedly consented to them.

South Africa.

The uneasiness in having a contract determine liability in negligence was expressed in a legal environment comparable to that of Scotland in the South African case of *Lilicrap, Wassenaar and Partners v. Pickington Brothers (SA) (PTY) Ltd*, South African Law Reports, 1 (1985), 475, which raised issues of concurrent liability. It was held that a breach of a contractual duty to perform professional work with due diligence was not *per se* a wrongful act for the purposes of Aquilian liability. The examples of a *concursum actionum* in SA law were limited to cases where contractual and Aquilian actions were independently satisfied. Grosskopf, A.J.A. noted that it would be difficult to combine the standards of a *bonus paterfamilias* with that found in the contract in question. He thought that it would be anomalous if *culpa* was governed by what has been agreed in a contract. See Rodger, in Birks 68.

Quebec.

Bank de Montréal and Gilles Tremblay v. Commission Hydroélectrique du Québec (Hydro-Québec), Bail Ltée (Bail/Sotrim), et Travelers du Canada, compagnie d' indemnité, [1992] 2 SCR 554. In May 1977 Hydro-Québec called for tenders for a construction and engineering work on a substation. Several documents were made available to the tenderers including a geotechnical report prepared for the company in 1974. The works for the construction of an access road were awarded to the respondents Bail Ltée and Sotrim Ltée for a fixed price. The respondents subcontracted part of the works to a subcontractor. The latter confirmed the poor soil conditions from the outset. Experts sent by Hydro-Québec confirmed the subcontractor's assertions and suggested a solution. In late August Hydro-Québec accepted the suggestions and agreed to alter the plans by means of an amendment or change order, but the subcontractors disagreed with the contractor on the way of calculating the payment under the change order. The subcontractors were not informed of the letter of the experts and their new geotechnical report received by Hydro-Québec by the end of September. It was only after the contractor had waived all claims against it that Hydro-Québec agreed to assume the cost of the major amendment to the works that it had approved. The contractor obtained a similar waiver from the subcontractor. Upon the completion of the works the amount pertaining to the change order remained in dispute. In 1980 the subcontractors went into bankruptcy and the Bank of Montreal the assignee of the subcontractors' accounts receivable invoking the change order commenced an action in contractual liability against the contractor and its surety the Travelers of Canada. In 1983 the subcontractors received a copy of the plans appended to the 1977 geotechnical report and alleged that it could be seen from these plans that the selection of the site was wrong.

Following that development the Bank of Montreal bought an action in delictual liability against Hydro-Québec, The action in contractual liability against the subcontractor became subsidiary. The Superior Court allowed the Bank's delictual action. It thought that Hydro-Québec had been aware from 1977 of the fact that major changes would be required. The Court of Appeal dismissed the bank's action. The Supreme Court allowed in part the appeal by the Bank of Montreal, and reversed the Court of Appeal decision as being unsubstantiated. The Court highlighted that failure to perform a contractual obligation, as a juridical fact, may form the basis for an action in delictual liability by a third party against the contracting party who is at fault. A subcontractor may therefore invoke in its favour a failure by the owner to fulfil its obligation to inform the contractor in so far as the owner failed to meet the standard of conduct of a reasonable person. The trial judge was correct in imposing an onerous obligation to inform on Hydro-Québec. The latter has a duty to act reasonably towards subcontractors particularly as regards informing errors in the tender document. The delictual action had been prescribed.

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¹⁶ *Dritt.* stands for *Drittschadensliquidation*, and CwPE for contract with protective effects. The references in the parentheses are indicating the basic direction of the decision from the point of view of the two German contractual mechanisms.

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Construction.

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Cumulative index of cases.

A;reioß Pa;goß 850-1982.
Aberdeen Harbour Board v. Heating Enterprises (Aberdeen), 1990 SLT 416.

Adler v. Dickson and Another [1954] 3 WLR 696.
Anns v. Merton London Borough, [1978] A.C. 728.
Anns v. Merton London Borough, [1978] A.C. 728.
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Bank de Montréal and Gilles Tremblay v. Commission Hydroélectrique du MQuébec (Hydro-Québec), Bail Ltée (Bail/Sotrim), et Travelers du Canada, compagnie d'indemnité, [1992] 2 SCR 554.
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 BGH 2.11.1983-IV a ZR 20/82 (Nürnberg); NJW 1984, 355. (CwPE)
 BGH 11.1.1977-VI ZR 261/75 (Bamberg); NJW 1977, 2073. (CwPE)
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 BGH 15.5.1959, VI-ZK 109/58 (Braunschweig); NJW 1959 167. (CwPE)
 BGH 19.3.1986 IV a ZR 127/84; JZ 1986, 1111. (CwPE)
 BGH 24.2.1954; NJW 1954, 874. (CwPE).
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