NEGLIGENCE, ECONOMIC INTERESTS AND THE ASSESSMENT OF DAMAGES

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The years since 1964[1] have seen a very considerable expansion of liability for negligent invasion of economic interests.[2] A considerable body of case law concerned with the assessment of damages for such invasions is now also developing and this article will discuss what appear to be some of the more important issues of assessment. A preliminary general point worth making is that the distinction between questions of liability including, and in particular, issues of remoteness of damage, on the one hand and questions of assessment of damages on the other is less easily drawn and maintained in relation to economic interests and economic loss than in relation to physical injury and damage. Because of the pecuniary nature of economic interests and economic loss the assessment of compensation frequently presents less difficulties than the question whether the plaintiff ought to be entitled to compensation for his loss even if it is the result of conduct otherwise tortious. The quantum of the plaintiff's compensation often depends crucially on the extent to which his loss is seen as a proper subject of compensation. In this article, therefore, no attempt has been made to confine the discussion strictly to the mechanics of quantification or the measurement of loss.

Before discussing rules applicable to particular cases of injury to economic interests, it will be useful to discuss a matter of general importance.

A. Pre-Trial Inflation, Mitigation, Impecuniosity and the Date for Assessment of Damages

The question of the date at which damages are to be assessed has two aspects which it is important to keep distinct. The first issue arises out of the fact of inflation: if the plaintiff is to be compensated for loss of the

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1 *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 (H.L.).

2 An economic interest, as the term is used in this article, is one for the invasion of which a finite sum of money can provide complete recompense — *restitutio in integrum* in the fullest sense. Economic interests are interests based on exchange: if there is no market in what the plaintiff has lost then his interest in that thing is, by definition, not an economic one. This notion of economic interest to some extent cuts across the law's distinctions between physical injury, property damage and economic loss. In particular, a plaintiff's interest in damaged or destroyed property, whether real or personal, will often be simply economic.

value of some item or for the cost of some service, with reference to which point of time should the nominal amount of his compensation be calculated? There has been a rash of recent litigation dealing with this matter as it relates to building costs but the question is of wide relevance throughout the law. For example, in an action for conversion, which of the parties should bear the risk of inflation of the value of the goods converted (or deflation of the real value of the face value of a negotiable instrument)? The second aspect of the date of assessment question concerns the point at which the loss for which compensation is to be given is treated as having crystallized. For example, in personal injury cases the vicissitudes principle dictates that, subject to the doctrine of mitigation, changes in the plaintiff's condition up till the date of the trial are relevant to the assessment of damages. Where compensation is to be awarded for the value or cost of goods or services, this type of date for assessment question (and hence an issue of mitigation) can arise if there are fluctuations in the market price of goods or services, which fluctuations are the result of factors other than inflation, for example, changes in the balance of supply and demand. Where the issue is compensation for consequential losses a question of mitigation, and hence of date for assessment, will arise if those losses increase after the date when the cause of action accrues.

So far as mitigation is concerned, the most important issue for present purposes is the extent to which the plaintiff's financial position, and in particular lack of funds, ought to be taken into account in assessing his reaction to mitigation opportunities. In *Owners of Dredger Liesbosch* v. *Owners of Steamship Edison*[3] the plaintiff's dredge was sunk by the negligence of the defendants. Because all the plaintiff's funds were tied up in the contract for dredging on which their vessel was engaged, they could not afford to buy a new dredge immediately but only to hire a replacement. The total costs associated with hiring were considerably greater than would have been the costs of buying a new dredge. The House of Lords held that the plaintiff could not recover damages for the loss attributable to its impecuniosity. The decision is open to two interpretations. One is that the plaintiff's impecuniosity was an extrinsic factor which broke the causal chain between the defendant's negligence and the plaintiff's loss;[4] the other is that the principle that a defendant must take his victim as he finds him does not apply to business losses.[5]

3 [1933] A.C. 449.

4 The result can be justified in modern terms by saying that it was not foreseeable that the plaintiff would be put in the difficulties he was by the defendant's act: *Perry* v. *Sidney Phillips & Son* [1982] 1 W.L.R. 1297, 1307 per Kerr L.J.

5 It applies, of course, to economic losses consequential on personal injuries. An interesting recent example is *Fox* v. *Wood* (1981) 55 A.L.J.R. 562.

The validity of the *Liesbosch* principle has been doubted;[6] but it was recently applied in *Compania Financeria 'Soleada' S.A.* v. *Harmoor Tanker Corporation Inc.*[7] The plaintiff's ship was wrongfully detained; in order to obtain its release the plaintiff borrowed money on disadvantageous terms which it was forced to accept because of its weak financial position. It was held that the interest charges were too remote a loss to be recoverable. But the principle has not always been applied. In *Martindale* v. *Duncan*[8] it was held that a taxi driver who could not afford to have his taxi repaired was justified in waiting until he had an authorization from an insurer for the repairs and that he could recover for profits lost in the period before repairs were begun. More recently, in *Perry* v. *Sidney Phillips*[9] the plaintiff was induced by a negligently prepared surveyor's report to purchase a house which needed major repairs. The repairs had not been done by the date of the trial and the plaintiff claimed, *inter alia*, damages for anxiety and inconvenience. The defendant argued that since the only reason the repairs had not been done earlier was the plaintiff's lack of funds, the *Liesbosch* principle prevented his recovering such damages. Lord Denning M.R. met this argument by saying that in the circumstances the anxiety and inconvenience was a foreseeable result of the defendant's negligence and so damages for the effects of this on the plaintiff were recoverable. His Lordship said that *The Liesbosch* was to be restricted to its own facts, but it is not entirely clear what this means for the future of the principle embodied in it. *The Liesbosch* was clearly a very different case from *Perry* with which it is perhaps reconcilable by saying that where the plaintiff is a private individual rather than a business concern, impecuniosity and its associated effects are foreseeable. This explanation would probably fit *Martindale* v. *Duncan* where the plaintiff was a small self-employed businessman. It would also accommodate the *Harmoor Tanker* decision.

The Liesbosch was distinguished in *Dodd Properties Ltd.* v. *Canterbury City Council*[10] where the plaintiff's building was damaged in the process of the building of a multi-storey car park next door. The plaintiff decided not to repair the building immediately partly because the cost of repair would have strained its resources and partly because it wanted to await the outcome of its claim against the defendant. By the time of the trial the cost of building had risen considerably because of inflation. The question was whether the damages were to be assessed as at the date of trial or at some earlier date when it would have been reasonable for the plaintiff

[6] *Taupo Borough Council* v. *Birnie* [1978] 2 N.Z.L.R. 397, 409 per Cooke J.; *Bevan Investments Ltd.* v. *Blackhall & Struthers* (No. 2) [1978] 2 N.Z.L.R. 97, 119 per Richmond P.; *Clearlite Holdings Ltd.* v. *Auckland City Corporation* [1976] 2 N.Z.L.R. 729, 743 per Mahon J.

[7] [1981] 1 W.L.R. 274 (C.A.).

[8] [1973] 2 All E.R. 355 (C.A.).

[9] Fn. 4 supra: see also P.J. Davies, "Economic Stringency and the Recovery of Damages" [1982] J.B.L. 21.

[10] [1980] 1 W.L.R. 433 (C.A.).

to do the repairs. The Court of Appeal refused to apply *The Liesbosch* on two grounds. The first ground was that lack of funds was only one of the reasons why repairs had not been done earlier; and anyway, it was not that the plaintiff could not have afforded the repairs earlier but rather that repair at that time would have been commercially imprudent in the light of the plaintiff's liquidity position. The second ground for distinguishing *The Liesbosch* was that the question was not one of remoteness of damage but one of whether the plaintiff had acted reasonably to mitigate his loss and that he could not be expected to do what he could not afford to do in order to reduce his damages.[11]

Dodd Properties is a difficult decision viewed from the point of view of mitigation principles. In essence it decides that the plaintiff acted reasonably in waiting, until the outcome of the trial was known, to do the repairs. This might be objected to on two grounds. First, the court seems to have been influenced in reaching this decision partly by the fact that the increase in the cost of repairs was caused by inflation. This confuses the two questions about date of assessment which I distinguished earlier. It is not clear that the prospect of inflation provides a sound reason for allowing the plaintiff to sit around and allow inflation to take its course at the expense of the defendant. Second, the idea of *reasonable* mitigation of loss should not be judged solely in terms of the plaintiff's position but also in terms of fairness to the defendant. It is arguably less fair to the defendant to allow a plaintiff to defer repairs or other action when his inertia is the product of prudent commercial unwillingness to pay than when it is the result of sheer inability to pay. The plaintiff with resources should be encouraged to repair as soon and at as little cost as possible. The other difficulty with the decision in *Dodd Properties* arises out of the distinction between remoteness of damage and mitigation of damages. If the cost of repairs (etc.) is dealt with in terms of remoteness the rule is that the defendant is entitled to plead the plaintiff's impecuniosity; but not if the cost is classified as expenditure in mitigation of damage. But the cases give no criteria for classifying the cost in one way or the other and the decisions fall into no apparent pattern. The use of the distinction seems to beg the very question in issue, namely whether impecuniosity ought to be taken into account. There is a strong argument for saying that the questions of remoteness and mitigation are merely two sides of the

[11] Cf. *Perry* v. *Phillips* fn. 4 supra at p. 1305 per Oliver L.J. (plaintiff who had exhausted all his funds in buying a house which needed major repairs had acted reasonably, in face of denials of liability, in awaiting outcome of trial to do repairs). This distinction between remoteness of damage flowing from an act and amounts spent in mitigation of such damage is well entrenched in the law: *The Liesbosch* fn. 3 supra at p. 461; the *Harmoor Tanker* case in fn. 7 supra at p. 281 per Lord Denning M.R. (in both of these cases the issue was treated as one of remoteness, not mitigation); *Bevan Investments* v. *Blackhall* fn. 6 supra at p. 116 per Richmond P.; *Coffey* v. *Dickson* [1960] N.Z.L.R. 1135, 1146 per Richmond J.; *Robbins of Putney Ltd.* v. *Meek* [1971] R.T.R. 345 (Q.B.D.); *Fox* v. *Wood* fn. 5 supra; *Clearlite Holdings* v. *Auckland C.C.* fn. 6 supra.

same coin and that the result ought to be the same regardless of the concepts in terms of which it is reached.[12] There are a couple of cases which support this considerably preferable approach.[13]

It might be noted incidentally that the *Liesbosch* principle has been held not to apply where the impecuniosity instead of pre-existing the tort, is generated by it. In *Taupo B.C.* v. *Birnie*[14] the plaintiff's hotel was flooded and damaged as a result of the negligence of the defendant in constructing a pool upstream of the hotel. As a result, the hotel's trade suffered and the hotel had to be sold at a mortgagee's auction. The amount realized was less than the market value of the hotel because of the forced nature of the sale. It was held that the *Liesbosch* principle did not prevent the plaintiff recovering the capital loss suffered on the forced sale.

The basic rule which emerges so far is that if the plaintiff ought, in the light of all relevant factors including his financial position, reasonably to have taken action to mitigate his loss then the date at which he ought so to have acted will be the latest date for determining the losses for which he is to be compensated. The inflation question is whether damages for those losses should be assessed according to price levels at the "mitigation date" or whether they can be assessed according to price levels at the date of judgment (assuming these two dates are different — if the plaintiff reasonably remained inactive until trial the two dates will coincide). In other words, which party bears the risk of inflation? In some of the cases[15] the fact that the defendant denied liability is taken as justifying delay by the plaintiff, until the date of trial, in going into the market to purchase goods or services. This argument might be thought to go to mitigation, but this can hardly be right since a denial of liability is a feature of the vast majority of cases which go to trial.[16] It is, in some cases anyway,[17] just a way of saying that the plaintiff is entitled to cast the burden of inflation on the defendant.[18]

The main argument for assessing damages according to currency values at the date of judgment is that any increase in the nominal amount of the award between the mitigation date and the date of judgment is no loss to the defendant because he is theoretically in a position to invest funds

12 Cf. the comments of Oliver J. in *Radford* v. *De Froberville* [1978] 1 All E.R. 33, 44.

13 *Perry* v. *Phillips* fn. 4 supra; *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, 829 per Ormrod L.J.; cf. *Bevan* v. *Blackhall* fn. 6 supra at pp. 108–9 on quantum and 113–4 on mitigation.

14 Fn. 6 supra.

15 E.g. *Dodd Properties* fn. 10 supra; *Perry* v. *Phillips* fn. 4 supra per Oliver and Kerr L.JJ.; *Radford* v. *De Froberville* [1977] 1 W.L.R. 1262 (Ch.D.) (contract).

16 But query whether the "small" litigant may not be treated more sympathetically in judging his reaction to denials of liability. *Perry* v. *Phillips* fn. 4 supra might suggest so.

17 But not in *Perry* v. *Phillips* fn. 4 supra in which damages were assessed as at the date of acquisition of the property. In that case impecuniosity was relevant to mitigation of damages for anxiety and inconvenience.

18 For decisions to this effect see cases in fn. 15 supra; also *Bevan Investments* v. *Blackhall* fn. 6 supra (contract); *Cory (William) & Son Ltd.* v. *Wingate Investments London Colney Ltd.* (1980) 17 Build. L.R. 104 (C.A.) (contract) (all these cases concerned damages for cost of building).

equal to the amount of his liability in such a way as to mitigate or eliminate the effects of inflation. On the other hand, if the plaintiff goes into the market to buy goods or services at the mitigation date and is only awarded the nominal cost of that intervention in the market, then he suffers a real loss because he has had to use his resources in the market and so is not able to invest them to counter the effects of inflation.[19]

There are a number of possible answers to this line of argument.[20] First, if the "asset" which the plaintiff purchases in the market will itself increase in value in line with inflation then he does not suffer by spending his money early to invest in it; so he should recover only the nominal cost of his investment. Second, even if the "asset" does not increase in line with inflation, the plaintiff can in theory be compensated for the effects of inflation by being awarded pre-judgment interest at a rate which incorporates the rate of inflation. The basic rule governing the choice of a rate of interest, at least in commercial cases, is that the rate should reflect the commercial cost of borrowing money in the relevant period.[21] Commercial rates for borrowing may or may not provide a real return depending on particular circumstances of time and place and to the extent that they do not there is an argument for assessment in currency values as at the date of judgment. Another advantage for the plaintiff of judgment date assessment over mitigation date plus an award of interest is that in some cases his lump sum award might be non-taxable while interest on it is. On the other hand, while judgment date assessment will counteract the effects of inflation, it will not, without an award of interest at a low rate, compensate the plaintiff for being kept out of his money. But subject to these qualifications it may be argued that the debate over the "judgment-date" rule really concerns the choice of a technique for compensating the plaintiff for the effects of inflation.[22] A danger of the judgment date rule appears to be that it leads to confusion between issues of mitigation and issues of inflation. The mere fact that the defendant has denied liability or the

[19] D. Feldman and D.F. Libling "Inflation and the Duty to Mitigate" (1979) 95 L.Q.R. 270; Duncan Wallace, "Cost of Repair and Inflation" (1980) 96 L.Q.R. 101.

[20] S.M. Waddams "The Date for the Assessment of Damages" (1981) 97 L.Q.R. 445.

[21] *Cremer* v. *General Carriers S.A.* [1974] 1 W.L.R. 341; *Tate & Lyle Food and Distribution Ltd.* v. *Greater London Council* [1982] 1 W.L.R. 149 (negligence and nuisance) (reversed on liability by C.A. [1982] 1 W.L.R. 971; leave to appeal to H.L. granted [1982] 1 W.L.R. 1137). Forbes J. held that the rate of interest chosen should be appropriate to the general characteristics of the plaintiff (such as size and prestige) but disregarding any special characteristic of the plaintiff which might affect its personal borrowing capabilities. In this case the appropriate rate was held to be 1% above minimum lending rate (now abolished). In calculating the amounts on which interest was to be awarded the judge took account of the fact that the expenses for which the plaintiff was claiming damages were set off against its liability to corporation tax during the period for which interest was being awarded. Interest was therefore not payable on an amount of the judgment equal to the tax saving for the part of the interest period during which that saving was enjoyed. This was so even though the case was not one to which the *Gourley* rule applied so that tax was not to be taken into account in assessing the quantum of damages (apart from interest) and even though the rate of corporation tax prevailing when the deduction was claimed was lower than that at the date of trial.

[22] I.N. Duncan Wallace "Inflation and Assessment of Construction Cost Damages" (1982) 98 L.Q.R. 406; cf. *Perry* v. *Phillips* fn. 4 supra at p. 1302 per Lord Denning M.R.

fact that the cost of mitigation will inflate before the date of judgment should not in themselves be relevant to the question of the reasonableness of the plaintiff's reaction to mitigation opportunities. In this sense, the risk of inflation should rest indifferently on the plaintiff and the defendant.

These arguments only seem relevant to the assessment of damages for past economic loss. Damages for post-judgment economic losses will be calculated on the basis of currency values at the date of judgment.

B. THE VALUE OF LAND OR CHATTELS: MISREPRESENTATIONS INDUCING CONTRACTS OF SALE

The basic measure of damages for misrepresentation, whether fraudulent or negligent, inducing a contract for the purchase of land or chattels is the difference between the price paid and the value of the property received at the time of the sale.[23] Value in this context is usually measured by market purchase price[24]: what a willing purchaser would pay to a not unwilling seller. In assessing value care must be taken, of course, to eliminate any effect of the misrepresentation on the market price. This may be particularly difficult to do in the case of purchase of shares given the complexity of the factors which affect the stock market value of shares.[25] For this reason it is often said that the value of shares ought to be calculated with reference to the value of the assets of the company as a going concern (as opposed to the value of the assets judged according to the price they would fetch if sold off in a liquidation).[26] So if the company fails completely the plaintiff will recover the whole of the purchase price.[27] But if there is good evidence of value which is not tainted by the effects of the misrepresentation then it, rather than evidence of asset value (which is a last resort) should be used. In *Cleave* v. *McDonald*[28] the misrepresentation was to the effect that a company was buying property worth £50,000 for £50,000 whereas in fact the property was worth only £24,000 and the balance of the £50,000 was to be paid to a promoter of the company. On the strength of the representation the plaintiff bought shares in the company at their par value of £1. The truth was then revealed and after that time no more shares were allotted by the company and the only sales of shares were at a price of 3s. 6d. This was taken as the value of the shares. A plaintiff is not required to mitigate his loss by selling his shares at the

23 *Perry* v. *Phillips* fn. 4 supra (negligence); *Doyle* v. *Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158 (fraud); *Holmes* v. *Jones* (1907) 4 C.L.R. 1692.

24 Market purchase price and market selling price will sometimes be the same but very often the addition of middleman's costs and charges will make the price at which goods can be sold lower than the price at which they can be purchased.

25 *Twycross* v. *Grant* (1877) 2 C.P.D. 469, 489; *Peek* v. *Derry* (1888) 37 Ch. D. 541, 592–3; *Potts* v. *Miller* (1940) 64 C.L.R. 282, 299 per Dixon J.

26 *Fawcett* v. *Johnson* (1915) 15 S.R. (N.S.W.) 51 (F.C.); *Lamb* v. *Johnson* (1915) 15 S.R. (N.S.W.) 65 (F.C.).

27 *McConnel* v. *Wright* [1903] 1 Ch. 546 (C.A.); *Haig* v. *Bamford* (1977) 72 D.L.R. (3d.) 68; *Candler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164 (C.A.) per Denning L.J. (dissenting on issue of liability). This rule is, of course, a general one: if the property purchased is worthless at the time of sale the basic measure of damages is the price.

28 [1925] N.Z.L.R. 311 (C.A.).

artificially inflated market price; he is entitled to wait and see if the company is a success and then claim damages on the basis of the value of the shares at the date of allotment.[29]

The onus of proof of value rests, of course, on the plaintiff. The starting point is the prima facie presumption that the property acquired is worth what was paid for it and that the statements made by the defendant were true.[30] It is then for the plaintiff to prove that the statements were not true and that the prima facie presumption ought to be abandoned. In relation to sales of shares this approach will only be useful where the misrepresentations relate to the value of the shares or the nature or quality of the assets or business of the company.[31] Where the plaintiff has paid calls on the shares subsequent to allotment these have to be added to the price; but even then the question remains whether this total price was greater than the value of the shares at the time of allotment.[32]

A particular difficulty in valuing shares arises in the context of takeovers.[33] In such a case, leaving aside the Stock Exchange price as being potentially unreliable because it is possibly affected by the misrepresentations, it is possible to argue that the measure of value should not be the asset-backing of the shares but, as Woodhouse J. thought in *Scott Group Ltd.* v. *McFarlane*[34] the takeover bid value defined as the price a willing takeover bidder, knowing the true facts relevant to the value of the shares, would pay to a not unwilling seller. This may be different both from the Stock Exchange value (even assuming it to be undistorted by the misrepresentations) and from the asset value (even if, as in *Scott Group*, the company being taken over is attractive for its assets rather than its earnings).[35] In such a case there seems little reason to start with a presumption that price equals the value in either the Stock Exchange or asset-backed sense. The objections to treating the takeover-bid value as determinative are, firstly, that if, as is quite possible, both it and the price paid are less than the asset value then even if the plaintiff paid more than the takeover bid value he has suffered no loss recognized by the law of torts because the assets he has bought are worth more than he paid for them. The second objection is that takeover-bid value is a measure of value tied to the period of negotiations before and up to the point of sale; it is not a measure of value at the date of sale. On the other hand, if it is a function of the nature of takeover transactions that even a bidder who knew the truth about the company's assets would not offer to pay the asset value but only some

29 *Twycross* v. *Grant* fn. 25 supra at p. 490 per Lord Coleridge C.J.; *Lamb* v. *Johnson* fn. 26 supra.
30 *McConnel* v. *Wright* fn. 27 supra; *Potts* v. *Miller* fn. 25 supra.
31 *Potts* v. *Miller* fn. 25 supra.
32 Ibid.
33 For a more detailed discussion see P. Cane, "The Valuation of Shares in the Law of Tort" [1982] J.B.L. 79.
34 [1978] 1 N.Z.L.R. 553 (C.A.). Cooke J. opted for asset value.
35 In *Scott Group* both parties agreed that the takeover bid value was less than the asset value.

lesser figure, then it can be argued that if the plaintiff pays more than this lesser figure as a result of misrepresentations, he should recover the difference between the price and this lesser figure even if both are less than the true asset value.

The prima facie presumption that price equals value may also, it has been said, be discarded, even if the plaintiff cannot produce precise evidence of value, if it is apparent that the property is worth less than the price. The court must then be content with such less substantial indications of value as can be found in the evidence.[36] This may, however, only be true in cases of fraudulent misrepresentation; in cases of intentional wrongdoing generally the courts seem prepared to take a somewhat relaxed attitude to matters of proof.[37]

The basic rule that the measure of damages is the difference between price and value is, however, only a rule of practice[38] and in some cases the plaintiff can recover consequential losses.[39] The relevant rule of remoteness in cases of fraud appears to be that the plaintiff can recover all losses which were intended, whether direct or not, and all losses which are a direct result of the fraud, whether intended or not.[40] The rule of remoteness in respect of negligent misrepresentations is foreseeability.[41] In *Esso* v. *Mardon*[42], for example, the defendant was induced by negligent misrepresentations as to potential sales, to take out a lease on a petrol station. He lost all the capital which he put into the business and worked up a large overdraft. He was awarded compensation for these capital losses and for interest paid on the overdraft. Lord Denning M.R. (with whom Shaw L.J. agreed on this point) thought that the defendant should also recover for loss of income (that is, profits) for the period he owned the lease and for a reasonable period thereafter to enable him to mitigate his loss by finding another business to invest in. These damages would be calculated not on the basis that the representation was true but on what might be called an "opportunity cost" basis, that is on the basis that if

36 *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247 (C.A.); Cf. *De Vries* v. *Wightman* [1961] Qd. R. 196 (H.C.).

37 See e.g. *Jack* v. *Peters* [1941] N.Z.L.R. 153, 164.

38 *McAllister* v. *Richmond Brewing Co. (N.S.W.) Pty. Ltd.* (1942) 42 S.R. (N.S.W.) 187 (In Banco).

39 *Toteff* v. *Antonas* (1952–3) 87 C.L.R. 647, 650 per Dixon J. Where the only losses compensated for are consequential, the measure of damages in tort for misrepresentation would be the same as that in contract for breach of warranty subject to differences arising from the different remoteness rules: *State of South Australia* v. *Johnson* (1982) 42 A.L.R. 161, 175 (H.C.).

40 *Doyle* v. *Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158 (C.A.); *McAllister* v. *Richmond* fn. 38 supra; *New Zealand Refrigerating Co. Ltd.* v. *Scott* [1969] N.Z.L.R. 30. It now appears that damages for anxiety (short of any clinically recognized psychological illness) discomfort and inconvenience are recoverable both in deceit and in negligence: *Mafo* v. *Adams* [1970] 1 Q.B. 548 (C.A.) (fraud); *Perry* v. *Sidney Phillips* fn. 4 supra (negligence); *R. A. & T. J. Carll Ltd.* v. *Berry* [1981] 2 N.Z.L.R. 76 (negligence).

41 *South Australia* v. *Johnson* fn. 39 supra at p. 170; but see *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, 820 per Lord Denning M.R.

42 Ibid.

the plaintiff had not invested in the garage he would have invested in some other income earning venture.

Normally the purchaser of land or a business would not be entitled to recover conveyancing costs[43] unless as a result of the misrepresentation these were higher than they would otherwise have been.[44] The reason for this is that these costs would have been incurred even if the false misrepresentations had not been made, and since the plaintiff is compensated for the difference between price and value and so has received property plus damages equal to what he paid he should not be entitled to damages as if he had not received full value. This argument is sound where the defendant is the vendor and the plaintiff has chosen to affirm the contract and keep the property rather than to rescind it and seek *restitutio in integrum*. But where the defendant is a third party and the plaintiff can show that if the misrepresentation had not been made he would not have purchased the land or business, he is entitled to recover the reasonable costs of acquisition and retention for a reasonable time in addition to damages for shortfall in value.[45]

If the purchaser of a business incurred expenses in moving his home and family to the place of the business he could recover these.[46] In *Hornal* v. *Neuberger Products*[47] the plaintiff who purchased a machine fraudulently misrepresented as being reconditioned, was allowed to recover damages for seven weeks delay while he had it reconditioned even though there was no evidence that he paid for the machine more than it was worth. On the other hand, in *Foster* v. *Public Trustee*[48] the plaintiff who was fraudulently induced to buy a tractor, was not allowed to recover the cost of bringing in a contractor to do the work which could not be done by the tractor, or for loss of farm profits, on the ground that these would be recoverable only in a contract action. Nor could the cost of the contractor be recovered as the reasonable cost of mitigating loss of profits since if loss of profits were irrecoverable so were the costs of mitigating such loss.

There is some confusion in the cases as to whether losses suffered in carrying on a business bought as a result of a misrepresentation are recoverable as consequential on the misrepresentation. One view is that they are not recoverable as such but are only relevant to assessing the

43 *Selman* v. *Minogue* (1937) 37 S.R. (N.S.W.) 280, 284.

44 *Raeburn* v. *Murphy* (1874) 5 A.J.R. 23,41.

45 *Shaddock & Associates* v. *Parramatta C.C.* (1981) 36 A.L.R. 385 (H.C.). In *South Australia* v. *Johnson* fn. 41 supra the High Court of Australia said that the aim of damages in deceit is to put the plaintiff in the position he would have been in if the transaction had not taken place. But this would be the right thing to do only if, had the plaintiff known the truth, he would not have made the contract at all (as opposed to making it on different terms). Certainly the damages awarded in the case (which concerned negligent misstatements) did not return the plaintiff to his pre-contract position.

46 *Doyle* v. *Olby* fn. 40 supra at p. 169 per Winn L.J.; but contrast *Pilkington* v. *Wood* [1953] Ch. 770 (contract).

47 Fn. 36 supra.

48 [1975] 1 N.Z.L.R. 26.

value of the business at the time of acquisition.[49] If the plaintiff chooses to keep the business rather than rescind the contract then he cannot complain of business losses which he could have thrown onto the vendor by rescinding.[50] But there are two qualifications to this. First, if the plaintiff is, as a direct result of the misrepresentation, induced to assume a financial burden over and above those resulting from simple trading losses then he can recover for the cost of discharging such burden. So if the plaintiff was induced to enter into some transaction with a third party which makes rescission impossible or from which he could not obtain release without the payment of damages, he can recover for this.[51] Another example is *Canavan* v. *Wright*:[52] the plaintiff was fraudulently induced by representations as to carrying capacity to buy a farm and to give to the defendant in return for a loan a security over the farm one of the terms of which obliged him to carry a greater number of stock than the farm could bear. Normally losses suffered as a result of a farm not being able to carry as many stock as represented would not be recoverable but here the value of the stock lost (and Adams J. stressed that the compensation was for stock lost, not profits lost) was a loss directly flowing from the misrepresentation because the plaintiff would not have agreed to carry so many stock if he had known the truth.

The second possible qualification to the alleged rule of no recovery for trading losses is given by Davidson J. in *McAllister* v. *Richmond*: if the evidence showed, for example, that if the takings were £120 a week the business would be worthless, but that in fact they were only £80 per week, this additional loss would be recoverable over and above the purchase price paid.

On the other hand, there is a view which says that provided the plaintiff takes reasonable steps to mitigate his trading losses by disposing of the business as soon as practicable then trading losses suffered as a result of reasonable efforts to make the business a success are recoverable.[53] On this view, since the plaintiff can elect whether to affirm or rescind, he is not to be penalized for choosing to affirm. In *JEB Fasteners Ltd.* v. *Marks Bloom & Co.*[54] the plaintiff took over a company, which was in financial difficulties, for a nominal sum in order to obtain the services of its directors. It was held that the plaintiff had not been induced to buy the company

[49] *Selman* v. *Minogue* fn. 43 supra.
[50] *McAllister* v. *Richmond* fn. 38 supra at p. 193 per Jordan C.J.
[51] *McAllister* v. *Richmond* fn. 38 supra.
[52] [1957] N.Z.L.R. 790 (C.A.).
[53] *Doyle* v. *Olby* fn. 40 supra; *Canavan* v. *Wright* at p. 806 per F. B. Adams J. criticising *Hopkins* v. *Easterbrook* [1918] N.Z.L.R. 428 in which the purchaser of a business was awarded £265 in damages on account of non-existent goodwill but nothing in respect of £150 trading losses. His Honour said that even if the plaintiff had found out about the worthlessness of the business as soon as she took possession she would still presumably incur some trading loss before she could dispose of it and this would be a direct result of the fraud; she could not have escaped from her difficulties sooner or with less loss.
[54] [1981] 3 All E.R. 289 (result affirmed but reasoning on reliance and causation disapproved by L.A. *Times* 24th July 1982).

by the false accounts negligently prepared by the company's auditor; but Woolf J. did make some obiter comments on the issue of damages. The plaintiff on discovering the truth had not liquidated the company but, being confident of being able to change its fortunes, injected substantial funds into it which were lost. The judge held that the plaintiff had not acted unreasonably in trying to save the company but that against the loss thus suffered would have to be set off an allowance for the fact that if the plaintiff had not bought the company they would have spent money in setting up a business of their own in the area of business in which the company operated. This case is similar to *Shaddock*[55] in that the defendant was not the vendor and so the plaintiff did not have, as against him, an option of rescission. In *Shaddock*, too, it was held that the plaintiff had not acted unreasonably in hanging on to land (which it had been induced to buy by a negligent misstatement that the property was unaffected by road-widening proposals) while it considered what to do with it and how to make the best of what had turned out to be a disastrous investment. It could, therefore, recover the costs of retaining the land for a reasonable period.

It is not entirely clear what these cases add up to, but it may be that the principle underlying them is this: if it can be said that the plaintiff would have purchased the property even if he had known the truth but that he would have paid less for it, then all he can recover is the shortfall of value and not any additional losses suffered by retaining the property. But if it can be said that he would not have purchased the property at all if he had known the truth then he will not be properly compensated by being awarded the shortfall of value; he will also need to be compensated for losses suffered by keeping the property provided he acts reasonably to mitigate those losses. He cannot be required to rescind the contract because the law gives him an election between remedies, but he can be expected to dispose of the property if this is a reasonable way of mitigating his loss, and if he does dispose of it the price he obtains will, in the absence of evidence that he failed to take reasonable steps to obtain the best possible price, be a good indication of value as at the date of purchase provided the market has not risen or fallen in the meantime.[56]

Finally on the question of value it is worth noting that there are a few cases involving the purchase of land or goods in which no direct

[55] Fn. 45 supra and text.
[56] *Selman* v. *Minogue* fn. 43 supra at p. 285.

attempt is made to ascertain the value of the property at the time of sale. Rather the cost of repairing or modifying the property to make it conform to the defendant's false description of it is taken as the measure of the difference between price and value.[57] Where the non-conformity relates to a feature of the thing bought which affects its safety for use, a court would no doubt be particularly willing to grant the cost of repairs as "preventive" damages: it is preferable to award the cost of remedying defects now to awarding greater damages later when an accident occurs.[58]

In *Perry* v. *Phillips*[59] it will be recalled that the plaintiff was induced by a negligent surveyor's report to purchase a house which needed major repairs which he could not afford to do. The trial judge held that as an alternative to the difference between price and value the plaintiff could recover the cost of repairs. This decision was reached partly on the ground that the plaintiff could not afford to move and actually intended to do the repairs. Then between trial and appeal the plaintiff sold the house for an amount considerably more than what he had paid for it even though he had not done the repairs. The Court of Appeal held, understandably, that he was entitled under the changed circumstances to recover only the difference between price paid and the market value *at the date of purchase*[60] plus interest at commercial rates from the date the cause of action arose until the date of judgment. Lord Denning M.R. seems to have taken the view that the difference between price and value is always the proper measure of damages in cases of negligent surveys. The other two judges confined their decision to the circumstances of the case; but Kerr L.J. expressed doubt about the judge's approach.

The cost of repair may, of course, exceed the shortfall of value or even exceed the total value of the property. In fact a court would, in the normal case, probably only choose this measure either if there was no good evidence of value or if it did not lead to a larger award than the shortfall of value method. There would need to be some good reason to justify awarding the cost of "uneconomic" repairs such as, for example, that the purchaser of a house was financially in no position to and did not intend to sell the property but to go on living in it. So, for example, in

57 *Rutherford* v. *A.-G.* [1976] 1 N.Z.L.R. 403 (cost of repairing a truck to make it qualify for issue of certificate of fitness); *Van den Esschert* v. *Chappell* [1960] W.A.R. 114 (F.C.) (cost of eradicating white-ants); *Snarski* v. *Barbarich* [1969] W.A.R. 46 (cost of attempting to remedy defects in, then of replacing, an irrigation system). *Foster* v. *Public Trustee* [1975] 1 N.Z.L.R. 26. The measure of cost of repair was apparently contemplated in *Yianni* v. *Edwin Evans & Sons* [1981] 3 W.L.R. 843 (Q.B.D.).

58 *Rutherford* v. *Attorney-General* [1976] 1 N.Z.L.R. 403.

59 Fn. 4 supra.

60 Contrast *Wollongong City Council* v. *Fregnan* [1982] 1 N.S.W.L.R. 244.

Phillips v. *Ward*,[61] an action against a surveyor, the plaintiff purchased for £25,000 a house which the official referee found to be worth only £21,000 but which needed repairs costing £7,000 to bring it up to the standard which the surveyor's report said that it met. It was held that the plaintiff could only recover the difference between price and market value. Romer L.J. considered what the plaintiff would have done if he had received an accurate report: he might have decided not to buy at all in which case he is now £4,000 out of pocket; or he might have decided to buy for £21,000 and do the repairs, in which case he would still be only £4,000 out of pocket. So the maximum he could recover was £4,000.

C. PROFESSIONAL NEGLIGENCE

(1) Contract or Tort?

The first point which needs to be mentioned arises in cases where a client tries to sue his professional in tort for negligence and in contract for breach of a contractual duty of care. In New Zealand the rule is that if there is a contract between the plaintiff and the defendant which imposes an obligation of reasonable care on the defendant, the plaintiff's only cause of action is in contract; he cannot sue in tort even if the conditions for an action in negligence are met.[62] In England, the position appears to be the opposite: both actions will lie.[63] The position in Australia is unclear.[64] The issue is of importance in three respects: first, in contract the limitation period begins to run at the date of breach but in tort only from the date the damage occurs; second, the rules of remoteness in tort are more

61 [1956] 1 W.L.R. 471 (C.A.). (1) It might seem strange that the cost of repairs and the shortfall of value should be so different but it could come about, for example, if the house was set on a large block of land and so represented only a relatively small proportion of the market value. (2) This was, strictly, an action in contract. But where the contractual term breached is one to take reasonable care in making a survey the difference between the basic measure of damages in contract — such damages as will put the plaintiff in the position he would have been in had the defendant performed the contract, that is, if he had taken care, and the basic measure in tort — such damages as will put him in the position he would have been in had the tort not been committed, that is, if the defendant had taken care, is of no importance. See *Perry* v. *Phillips* fn. 4 supra at p. 1302 per Lord Denning M.R. In *Ford* v. *White & Co.* [1964] 1 W.L.R. 885 a solicitor negligently told the plaintiff that the property he was buying was not subject to building restrictions. If it had not been affected it woud have been worth more than what he paid for it but it was held that he could not recover this difference even in contract. The price reflected the fact that the property was subject to restrictions.

62 *Bevan Investments Ltd.* v. *Blackhall & Struthers* (No. 2) [1973] 2 N.Z.L.R. 45 (architect); *McLaren Maycroft & Co.* v. *Fletcher Development Co. Ltd.* [1973] 2 N.Z.L.R. 100 ("professional men"); *Rowe* v. *Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550 (solicitor); but question left open in *Sutherland* v. *Public Trustee* [1980] 2 N.Z.L.R. 536.

63 *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp* [1978] 3 All E.R. 571 (solicitor); *Batty* v. *Metropolitan Property Realisations Ltd.* [1978] Q.B. 554 (C.A.) (building developer); *Esso Petroleum Ltd.* v. *Mardon* [1976] Q.B. 801, 820 per Lord Denning M.R. ("a professional man"); *Ross* v. *Caunters* [1979] 3 W.L.R. 605; *Macpherson & Kelly* v. *Kevin J. Prunty & Associates* [1983] V.R. 573.

64 Concurrent liability in contract and tort: *Voli* v. *Inglewood S.C.* (1963) 110 C.L.R. 74, 84 per Windeyer J. (architect); *MacPherson & Kelley* v. *Kevin J. Prunty & Associates* [1983] V.R. 573; *Aluminium Products (Qld.) Pty. Ltd.* v. *Hill* [1981] Qd.R. 33 (solicitor). But there is an inconclusive discussion in *Simonius Vischer & Co.* v. *Holt & Thompson* [1979] 2 N.S.W.L.R. 322.

generous to the plaintiff than those in contract;[65] and third, the basic aim of damages in contract is to put the plaintiff in the position he would have been in had the contract been performed whereas the basic aim in tort is to put the plaintiff in the position he would have been in had the tort not been committed. As we will see in due course, this last distinction is sometimes of importance, sometimes not.[66] The issue does not, of course, arise where the plaintiff is a third party who had no contract with the defendant.

(2) Financial Transactions

In this section we will deal with cases in which the professional has been engaged to carry through some financial transaction for or to further or protect some financial interest of the plaintiff. A straightforward example is that of the insurance broker who negligently fails to renew the plaintiff's policy or to notify the plaintiff that it has not been renewed. In such cases the measure of damages is the sum the plaintiff would have received under the policy if it had been in force.[67] He may also recover for consequential losses. In *Osman* v. *J. Ralph Moss Ltd.*[68] the plaintiff was involved in a car accident at a time when his insurance was not current. He recovered from his negligent broker, not only damages he was ordered to pay to the other party (plus an amount on account of costs), but also the amount of a fine which he had to pay for driving without insurance plus the costs of the prosecution and the insurance premium. It is arguable that he should not have recovered the premium, or at least not all of it, because he could not have had both the premium and the pay-out under the policy.

There are several cases[69] in which the plaintiff has sued for negligence in effecting or failing to effect an insurance policy which would anyway have been voidable at the suit of the insurer or void by law. The principle which emerges seems to be that if the policy is voidable, then whether the plaintiff can recover depends on the chance that the insurer would have avoided it and, if he would have paid, how much of the claim he would have met. If the policy would have been void the plaintiff cannot recover.

There are a number of cases in which auditors have been sued for negligent failure to discover the defalcations of an employee of the plaintiff. Here the measure of damages is the money which could have been saved if the defendant had not been negligent. So if the plaintiff can show that if the defendant had made a proper report or made his suspicions known

65 See P. Cane, "Physical Loss, Economic Loss and Products Liability" (1979) 95 L.Q.R. 117, 124–5.

66 See also fn. 61 supra.

67 *Cherry Ltd.* v. *Allied Insurance Brokers Ltd.* [1978] 1 Lloyd's Rep. 274; *Morash* v. *Lockhart & Ritchie Ltd.* (1979) 95 D.L.R. (3d) 647.

68 [1970] 1 Lloyd's Rep. 313.

69 *Fraser* v. *B.N. Furman (Productions), Ltd.* [1967] 3 All E.R. 57; *Everett* v. *Hogg, Robinson & Gardner Mountain (Insurance) Ltd.* [1973] 2 Lloyd's Rep. 217; *L. B. Martin Construction Ltd.* v. *Gaglardi* (1979) 91 D.L.R. (3d) 393; *Thomas Cheshire & Co.* v. *Vaughan Brothers & Co.* [1920] 3 K.B. 240.

when they formed, the employer would have been alerted to the defalcations and could have taken steps to put an end to them, then the auditor will be liable for amounts lost after the date when, if the auditor had done his job properly, the employer would have known of the irregularities.[70] But the auditor is entitled to have taken into account in the assessment of damages any amounts realized by the plaintiff from collateral sources which reduce its loss.[71] If an auditor negligently certifies that a company is operating profitably the company could recover such amounts as dividends, directors fees and bonuses which would not have been paid if the truth had been known.[72]

If, by the negligence of a professional adviser the plaintiff is induced to make a loan or invest money which is then lost, he can recover the amount of the principal sum lost (after making allowance for all receipts and for expected future payments discounted to offset any delay in payment) plus the interest on such amount at the current rate of investments.[73] Similarly if a solicitor fails to register a mortgage and the land is sold free of it.[74]

In several cases the plaintiff has advanced money to the purchaser of real estate on the basis of a negligent survey or valuation of the subject property. In *Baxter* v. *Gapp (F.W.) & Co. Ltd.*[75] the plaintiff was allowed to recover the difference between the amount advanced by him and what he recovered on resale; the amount of the interest the mortgagee had failed to pay; the cost of insurance and maintenance while the plaintiff was in possession prior to sale and legal charges during that period; the cost of abortive attempts to sell; and agent's fees and legal costs on the eventual sale. In *London and South of England Building Society* v. *Stone*[76] the plaintiff society had been induced in 1976 to lend the purchaser £11,880 on the strength of a negligently prepared surveyor's report. The house was found to be in a gradually deteriorating state such that it could be described as worthless. The plaintiff went ahead and repaired the house on the basis of an original quote of £15,000, and they eventually spent over £29,000 on repairs and the cost of alternative accommodation for the occupants. Despite a clause in the mortgage entitling them to do so, the society did not seek to recover any of this expenditure from the borrowers feeling that they were the innocent victims of the society's own surveyor.

70 *New Plymouth Borough* v. *R.* [1951] N.Z.L.R. 49; *Hardie (Qld.) Employees' Credit Union Ltd.* v. *Hall Chadwick & Co.* [1980] Qd. R. 362. The auditor is entitled to his fee if his report is nevertheless of value but not to a fee for extra time spent in investigating the fraud since this should have been done as part of the auditor's ordinary duties: *International Laboratories Ltd.* v. *Dewar* [1933] 1 D.L.R. 34.

71 *Canadian Woodmen of the World* v. *Hooper* [1933] 1 D.L.R. 168.

72 *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1887) 36 Ch. D. 787.

73 *Holmes* v. *Walton* [1961] W.A.R. 96. The compensation was awarded for breach of fiduciary duty. It was argued by the defendant that in an action based on negligence interest could not be awarded, but this seems wrong.

74 *Crowder* v. *Horgan* (1901) 3 W.A.L.R. 31.

75 [1939] 2 K.B. 271.

76 (1982) 261 E.G. 463 (Q.B.D.).

The repairs did not add to the value of the house but only restored it to the state it was described as being in by the surveyor. When later the house was sold for £26,500 the society recovered the whole of its advance.

The plaintiff society claimed as damages the cost of repairs but Russell J. held that the society had not under the circumstances acted reasonably in having the repairs done considering the known initial cost of the repairs, the size of their stake in the property and their morally laudable but commercially unwise decision not to seek *any* contribution to the repairs from the purchaser. The damages recoverable were such as could fairly and reasonably be considered as resulting naturally from the failure of the defendant to report as he should have done. The cost of repairs could not be described as the natural result of the surveyor's negligence. The most the society could recover was the amount of the advance, but from this the judge deducted £3,000 as an amount which it would have been reasonable to recoup from the borrower. This deduction was the subject of a successful appeal to the Court of Appeal which held, as a matter of fact, and applying established principles of mitigation, that the society had not acted unreasonably in not seeking recourse against the borrowers. The defendant at one stage argued that the plaintiff had suffered no loss because it had recovered the whole of its advance on resale. This argument is in line with both *Baxter* v. *Gapp*[77] and *Holmes* v. *Walton*,[78] but Russell J. held that the plaintiff's loss had to be assessed as at the date of the report. In the Court of Appeal both parties agreed that the proper measure of damages was the amount of the advance less any capital repayments made by the borrowers. The amount recovered on resale was not set off "because in effect the lenders were being repaid with their own money".[79] The basis of this reasoning must be that before the house was repaired it was worthless and in the end it was sold for less than the cost of the repairs done by the plaintiff. But since it was accepted that the cost of repairs was irrecoverable (because it was unreasonable to do uneconomical repairs) it is not easy to see why the plaintiff should have been given partial credit for the cost in this way.

Moving to actions against solicitors, where a solicitor (or a barrister, as in *Saif Ali* v. *Sydney Mitchell & Co.*[80]) negligently fails to commence (or to advise the commencement of) an action within the limitation period the court in assessing damages has to take into account not only what the plaintiff would have recovered if he had been successful but also his chances of success. If the plaintiff would certainly have won he can recover everything he would have recovered in the action; if there was only a

[77] Fn. 75 supra.
[78] Fn. 73 supra.
[79] *Times* 9th June 1983 (C.A.).
[80] [1980] A.C. 198.

chance he will recover an amount proportioned to the chance. Damages are to be assessed at the date of delivery of judgment against the solicitor.[81]

In some cases, even in this context, the measure of the plaintiff's *loss* might be related to the *value* of property. In *Pilkington* v. *Wood*[82] a solicitor acted negligently in effecting the plaintiff's purchase of a property with the result that the plaintiff acquired a property in which the beneficiaries of a trust had an interest. The basic measure of damages was held to be the difference between the price and the value of the plaintiff's limited title. This case also held that a plaintiff could not be expected to undertake difficult and complex litigation to mitigate his loss.[83]

In *G. + K. Ladenbau (U.K.) Ltd.* v. *Crawley & de Reya*[84] the defendant solicitor was held liable for failure to ensure that land which the plaintiff was purchasing for development or resale was free of encumbrances in the form of rights of common. It was agreed by the parties that the plaintiff could recover the legal costs of having the commons register rectified (the rights of common had been registered by mistake). The most contentious claim was for damages for loss of interest on the profit from resale, the completion of the resale being delayed while the register was rectified. Mocatta J. held, this being a claim in contract, that since the defendant knew that the plaintiff intended to develop or resell the land, this loss fell within the second limb of the rule in *Hadley* v. *Baxendale*. There seems little doubt that the loss would also fall within the remoteness rules in negligence; the only difficulty in the way of recovery in negligence would be the extent to which loss of profits is compensable in a tort action. It might be argued that such loss of profits should *only* be recoverable in a contract action. But if the plaintiff was purchasing the land for resale, especially if the defendant knew this, there seems no reason why loss of profits should not be compensable in tort just as it is in a case involving wrongful detention or conversion of goods which the plaintiff intended to sell.

Subject to this query about liability for lost profits, it seems that in none of the cases discussed so far would it make any difference to the basic measure of damages whether the plaintiff sued in contract or tort. Where the plaintiff seeks to recover only consequential losses then the only relevant questions relate to rules of remoteness and the distinction between expectations not realized and losses actually incurred. And as to the first, since rules of remoteness in tort will usually produce a result more generous to the plaintiff than those in contract the problems, if any, in this

[81] *Tutunkoff* v. *Thiele* (1975) 11 S.A.S.R. 148; *Appo* v. *Barker* (1981) 50 F.L.R. 298. If the delay by the solicitor has caused the plaintiff more anxiety or worsened his litigation neurosis he could recover additional damages for this and any effect on his income: *Malyon* v. *Lawrence & Co.* [1968] 2 Lloyd's Rep. 539.

[82] [1953] Ch. 770 (contract).

[83] Cf. *Treloar* v. *Henderson* [1968] N.Z.L.R. 1085.

[84] [1978] 1 W.L.R. 266.

respect will afflict plaintiffs who sue in contract, not those who sue in tort.[85]

It may be that even in cases where the measure of damages is based on the value of property there would be no relevant difference between an action in tort and an action in contract.[86] The issue did not arise in *Pilkington* v. *Wood*[87] because the purchase price was held to equal the value of the property with a good title. But it did arise in *Powys* v. *Brown*[88]: as a result of a solicitor's negligence the plaintiff acquired land subject to a building covenant of which he was not aware. It was held that all the plaintiff could recover was the difference between the price and the value of the land with the burden attached. He could not recover in addition the loss of his bargain, that is the amount by which the value of the land unencumbered exceeded the purchase price. But with this should be contrasted *Stinchcombe & Cooper Ltd.* v. *Addison Cooper Jesson & Co.*[89]: the plaintiff contracted to buy some land from a local authority in 1964 for £2,250. Under the contract completion was to take place within fourteen days of building on the site being substantially commenced; but if this did not happen within twelve months of the date of the contract the vendor was entitled to rescind. The defendant failed to inform the plaintiff of exchange of contracts until almost twelve months after it had taken place; during all this time the plaintiff who was at all times ready and willing to commence building, had made ineffectual attempts to discover what was happening. The authority rescinded. The court awarded the plaintiff the difference between the value of the land at the date of rescission — £6,500 — and the purchase price and not just, as one might have expected, the purchase price. It is not clear how much of the increase in value was merely inflationary. It is suggested that the weight of authority, if the cases we considered earlier in the context of misstatements inducing purchases are taken into account, is in favour of the proposition that in an action based on negligence, whether in contract or tort, brought by a client against a professional, the measure of damages will normally be the same.

Next let us consider such authority as there is involving situations in which the plaintiff was not the client of the defendant. In *Coleman* v. *Myers*[90] the defendants, a father and son, were the chairman and managing director of a family company. The son made a takeover offer of $4.80 per share through another company of which he was unrevealed sole owner. The defendants recommended acceptance of the offer and when the 90% acceptance required to allow compulsory acquisition was achieved, the plaintiffs reluctantly accepted. It was held that the value of the shares at

85 See e.g. *Inder Lynch Devoy & Co.* v. *Subritzky* [1979] 1 N.Z.L.R. 87 (contract).
86 See further fn. 61 supra.
87 Fn. 82 supra.
88 (1925) 25 S.R. (N.S.W.) 65.
89 (1971) 115 Sol. J. 368 (Ch. D.).
90 [1977] 2 N.Z.L.R. 225 (C.A.).

the time of the takeover was $7 and that the defendants were liable to pay damages to the plaintiff on the basis of breach of fiduciary duty (unanimously), breach of a duty of care in advising acceptance of the takeover offer (Woodhouse and Cooke JJ., the latter on the basis that the defendants had a financial interest in the transaction) and fraud (Woodhouse and Casey JJ.). The measure of damages was the difference between the value and the takeover price. The majority (Woodhouse J. dissenting) declined to allow rescission of the contract of sale on the basis that if the plaintiffs had known the truth they still would have sold but for a higher price. It is worth noting in passing that in a sense the damages awarded in this case were given on account of an expectation not realized rather than on account of a loss actually suffered. This is no doubt because the very content of the defendant's duty was to give sound advice as to whether the takeover bid accurately reflected the value of the shares.

Just as in the case where a client receives bad investment advice from his adviser, so where a plaintiff loses an investment as the result of negligence on the part of some person who owes him no contractual but only a tortious duty of care, he can recover the value of that lost investment. This, no doubt would have been the appropriate measure of damages in *Hedley Byrne* v. *Heller*[91] and in *Ministry of Housing and Local Government* v. *Sharp*[92] where the negligence of a land registry clerk in issuing a certificate which failed to alert a purchaser of land to the plaintiff's charge over the land extinguished the latter's rights over the land.

An interesting case in which the defendant's[93] duty of care arose only in tort is *J. & J. C. Abrams Ltd.* v. *Ancliffe*.[94] Abrams quoted for the building of some home units for Ancliffe. It soon became clear to Abrams that the job would cost very considerably more than his original quote but despite repeated requests by Ancliffe to be told the final cost, which was well above the maximum that Ancliffe was prepared to spend on the project, Abrams did not tell him the truth until it was far too late for Ancliffe to pull out of the project. It was held that the builder, knowing that Ancliffe was relying on him for accurate financial estimates and that there was a limit to how much Ancliffe was prepared to spend, was under a continuing duty to keep the latter informed of the financial position. The basic measure of damages was the total cost of the project less the value of the units and rents received by Ancliffe from leasing of the units for a reasonable period before they were able to be sold. A further deduction was made for the fact that even on best projections and if all had gone to Ancliffe's plans, he would have suffered an overall loss on the construction and sale of the units.

91 [1964] A.C. 465.
92 [1970] 2 Q.B. 223 (C.A.); cf. *G. J. Knight Holdings Pty. Ltd.* v. *Warringah Shire Council* [1975] 2 N.S.W.L.R. 796.
93 In the case the negligent party was actually the plaintiff, a builder who was suing for the balance owing to him for work done.
94 [1978] 2 N.Z.L.R. 420; affirmed [1981] 1 N.Z.L.R. 244 (C.A.).

Perhaps the most controversial of the recent developments in this area is that in *Ross* v. *Caunters*.[95] There the gift to a named beneficiary in a will was rendered invalid by reason of the fact that his spouse had witnessed the will. The testator's solicitor had negligently failed to prevent this happening. The measure of damages was the amount of the legacy not received. In *Ross* v. *Caunters* the argument was raised, but summarily rejected by Megarry V-C., that the plaintiff could not recover because he had suffered no actual loss but had only been deprived of an expectation, a *spes successionis*: expectations not realized might be recoverable in contract, but not in tort. This line of argument was, however, successful in the recent Victorian case of *Seale* v. *Perry*[96] where, on very similar facts, the Full Court refused to allow the disappointed beneficiary to recover. The arguments in this case deserve close attention; amongst other things, they illustrate the close connection between questions of liability and assessment of damages in the area of economic loss.

The main arguments against recovery in *Seale* v. *Perry* were these: first, since the testator could at any time before his death have altered his will so as to exclude the plaintiff, the solicitor could owe no duty to the plaintiff to secure the gift for him. But this argument does not seem particularly strong where the testator has made no attempt to alter his will and the plaintiff's disappointment is due solely to technical negligence of the solicitor in giving effect to the testator's declared wishes. Second, since the plaintiff had, until the testator died, only a *spes successionis*, he had suffered no loss recognized by the law of torts. Two answers could be given to this argument: it begs the very question in issue, namely whether the plaintiff's loss *ought* to be recognized as a proper subject for compensation in the law of torts; and also, there is no reason, once the testator has died without changing his will, to ignore the fact that if the will had been properly executed, the intended gift would have crystallized. A third argument is that to allow the beneficiary to recover would be to circumvent the rules of privity of contract by allowing the plaintiff to sue on the contract between the testator and the solicitor to which he was not a party. The technical answer to this is that although the duty to the beneficary is built onto the solicitor's contractual (and possibly also tortious) duty of care to his client, it is not the same as that duty. More substantively, it can be argued that this point takes advantage of the so-called contract fallacy which was exploded (so far as physical injury to third parties is concerned) in *Donoghue* v. *Stevenson*.[97] It has also been rejected in relation to economic loss arising out of deterioration in the

[95] [1980] Ch. 297 (Ch. D.); applied in *Watts* v. *Public Trustee* [1980] W.A.R. 97. See P. Cane, "Negligent Solicitors and Disappointed Beneficiaries" (1980) 96 L.Q.R. 182.

[96] [1982] V.R. 193 (F.C.). McGarvie J. supported the sort of reasoning adopted in *Ross* v. *Caunters* but found for the defendant on a curiously technical point of precedent. The following comments on this case also appear in P. Cane, "Negligent Solicitors and Doubly Disappointed Beneficiaries" (1983) 99 L.Q.R. 346.

[97] [1932] A.C. 562.

condition of a defective product.[98] On the other hand, it could be argued that where the loss is purely one of expectation the principles of contract should prevail since there should be no duty to confer benefits apart from agreement. This argument could be met by pointing out that the solicitor is not being burdened with a duty to confer a benefit but only with a duty to take care in performing his professional functions; and the very aim of consulting the solicitor in this instance was to procure a benefit for the plaintiff. But still, there is a basic issue of legal policy at stake here. One question which exercised the minds of the judges in *Seale* v. *Perry* was whether, if an action in tort were allowed, the plaintiff would be bound by any limitations or exclusions of liability contained in the contract. The *Donoghue* principle does not allow the defendant to rely on the terms of the contract as against the third party plaintiff, and McGarvie J. in *Seale* v. *Perry* saw no reason for a different rule in the case of the beneficiary. There must, however, be some doubt as to whether, in the normal case where a person engages a solicitor to draft a will, a court would allow him to exclude or disclaim his liability for negligence in doing so. Except in special circumstances it should not be open to a person who holds himself out as prepared to exercise a particular skill to disclaim responsibility for negligence in the exercise of that skill. And if this is so as against a client, it must be the case, *a fortiori*, against a third party.

A fourth argument against liability involves asking whether a solicitor or other negligent person could be liable to the donee of an *inter vivos* gift. Suppose that a gift is damaged in transit; could the donee sue the carrier? Or suppose that a solicitor delays in preparing a deed of gift so that the donor dies before it can be executed; or that a donor decides to tear up an improperly executed deed of gift; in either case could the disappointed donee sue the solicitor?[99] The cases posited do not seem to be identical in all relevant respects. In the last case the cause of the loss is the donor's revocation of the gift which has superseded the solicitor's negligence just as would a decision by a testator to change his (invalid) will. In the first and second cases, if the solicitor's delay or the carrier's conduct was truly culpable, why should the donee not recover? Some of the arguments against recovery rest on positing cases where the solicitor has not been technically incompetent but has, for example, given the testator bad advice as to how, as a matter of substantive law, to achieve his desired intentions. The implication is that such cases ought not to raise a duty. But if the solicitor has been negligent, it is hard to see why he should not be liable. Of course, in the case of a will there may be a difficulty in deciding what the testator's true intentions were, but even this problem is not insuperable.[100] If a solicitor can be liable for failure

98 *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1982] 3 W.L.R. 477, 493–4 per Lord Roskill (H.L.). See further infra.

99 See *Seale* v. *Perry* fn. 91 supra at pp. 223–5 per Murphy J.

100 See *Sutherland* v. *Public Trustee* [1980] 2 N.Z.L.R. 536.

to give sound advice on the need to begin an action within a limitation period, why should he not be held liable to intended beneficiaries if, for example, he fails to advise a client that if he wants to be sure of benefiting his stepchildren in his will he should name them as residuary legatees.[101]

In fact, it seems difficult to justify *Seale* v. *Perry* by recourse to traditional tort concepts. But even if we appeal to loss allocation arguments it seems clear that the solicitor is in a better position to take out insurance than the beneficiary. The only way of attacking the result in *Ross* v. *Caunters* seems to be to point not to its effect so far as the plaintiff or defendant are concerned — which seems fair and desirable — but to note its effect on the persons who receive the testator's unintended largesse.[102] In *Ross* v. *Caunters* and *Seale* v. *Perry* someone received an unexpected windfall because of the operation of the law of wills. In one sense the solicitor's negligence did not cause a loss but simply a transfer of benefits from one person to another. Perhaps, then, the proper solution would be to give the disappointed beneficiary a right of action against the unintended beneficiaries to force a retransfer of the benefit. There are two major objections to this: first, it achieves through the backdoor major changes in the law of wills and succession; and second, it does not give the solicitor any incentive to be more careful in the future. The aim of deterrence could, perhaps, be achieved by quasi-criminal disciplinary proceedings against the solicitor, but this has the disadvantage of stigmatizing the solicitor's carelessness as more culpable than it was: there is a difference between criminal incompetence and mere culpable inadvertence.

On the whole, then, it would seem that the question whether third party beneficiaries ought to be compensated for expectations not realized is not an easy one to answer. It is very closely tied up with our view of the relationship between liability in tort and contract and the proper role of remedies allowing restitution of benefits in both of these areas.

(3) Reasonableness of Reliance, Contributory Negligence and the Assessment of Damages

A question which arises in cases where the plaintiff's cause of action is based on reliance on some statement of the defendant or on his general professional expertise is this: what is the relationship between saying that it was not reasonable for the plaintiff to rely on the defendant and saying that the plaintiff was contributorily negligent? The answer would appear to be that whereas a finding of unreasonable reliance completely debars recovery by the plaintiff, a finding of contributory negligence would allow damages to be apportioned between the parties. This was done in the

101 Example based on *Sutherland* v. *Public Trustee*, previous note, assuming the testator had wanted to benefit his stepchildren and the solicitor had failed to advise him that because of his age, if his wife predeceased him, the estate would go to his nephews and nieces.

102 This line of attack was put to me by Professor Harold Luntz; he intends to elaborate it in a forthcoming note in the *Oxford Journal of Legal Studies*.

Canadian case of *Morash* v. *Lockhart*[103] (where the plaintiff was held contributorily negligent for having failed to check with his insurance broker when he did not receive his annual renewal notice), and such a course would seem fairer to the plaintiff. On the other hand, in *JEB Fasteners Ltd.* v. *Marks, Bloom & Co.*,[104] an action by the purchaser of a company against the company's auditor, Woolf J., while seeing no reason why the apportionment legislation should not apply to negligent misstatements, treated reasonableness of reliance as different from and prior to any question of contributary negligence, so that if it was reasonable for the plaintiff to rely there would be little room for a finding of contributory negligence. While this is perhaps a sound approach, the converse should not be accepted, namely that if it was not reasonable for the plaintiff to rely this should be a ground for denial of liability as opposed to apportionment of damages. In *Yianni* v. *Edwin Evans & Sons*[105] Park J. assumed that contributory negligence was relevant under the *Hedley Byrne* principle but held that since the failure of the purchasers to get an independent survey was the result of reliance on the defendant's valuation, which reliance had not been shown to be unreasonable, their failure could not be called contributorily negligent. This case, too, supports identifying reasonableness of reliance with absence of contributory negligence but says nothing about whether contributory negligence ought to be equated with reasonableness.

(4) Defective Premises and Products[106]

The basic measure of damages in respect of the construction of a defective building is the cost of repair or restoration. But this basic proposition does require considerable refinement.

If the action is against a builder for negligent failure to execute plans or to use proper materials or techniques the measure of damages in *contract* is the cost of reasonable and necessary work to make the building conform with the contractual specifications, plus consequential losses flowing from the breach and not too remote in law.[107] The test of reasonableness and necessity is not, however, whether the cost of repairs is less than diminution in value resulting from the failure to comply with the contract or, in other words, whether the cost of repairs is "economic waste", since a plaintiff is entitled to have work done on a building perfectly satisfactory as a structure if it is different from what is called for by the contract.[108]

[103] Fn. 64 supra; cf. *West Coast Finance Ltd.* v. *Gunderson, Stokes, Walton & Co.* (1974) 44 D.L.R. (3d) 232.
[104] [1981] 3 All E.R. 289 (Q.B.D.); this point not discussed by C.A., *Times* 24th July 1982.
[105] [1981] 3 W.L.R. 843 (Q.B.D.).
[106] See P. Cane, "Physical Loss, Economic Loss and Products Liability" (1979) 95 L.Q.R. 117.
[107] *East Ham Corporation* v. *Bernard Sunley & Sons Ltd.* [1966] A.C. 406 (H.L.).
[108] *Bellgrove* v. *Eldridge* (1953–4) 90 C.L.R. 613. But if the cost of restoration exceeds the cost of demolition and rebuilding, the latter would be awarded: *Applegate* v. *Moss* [1971] 1 Q.B. 406 (C.A.).

In *tort*, if the negligence of the builder results in physical damage to the structure the plaintiff can recover the cost of repair and restoration.[109] If the defect in the house constitutes a danger to the safety of the occupants then "preventive damages" can be recovered to repair the premises and remove the defect before it causes damage.[110] This may be so even if the premises have not as at the date of trial yet suffered any damage, although in all the cases so far there has been some physical damage to the property. The danger may be imminent[111] but need not be, provided there is a high probability that damage or injury will occur in the future.[112] If the premises are a constructive total loss the "cost of removing the danger" measure will justify an award of damages equal to the value of equivalent premises to which the plaintiff can move.[113]

In *Carosella* v. *Ginos & Gilbert Pty. Ltd.*[114] it appears that there was no allegation that the premises, which had been designed by an engineer, approved by a council and built by a builder, with inadequate foundations, presented any danger. The court considered four possible measures of damages: demolition and rebuilding: substantial underpinning; "cosmetic" rectification and loss on sale "as is". The court treated the last two as being more or less equivalent, the only difference being that the last alternative contemplated that the purchaser rather than the plaintiff would do the cosmetic rectification. The judge had rejected underpinning as uneconomic and so the choice was said to be between diminution in value and the cost of demolition and rebuilding. It was held that the former was the prima facie measure and that the latter could only be the proper measure if reinstatement was reasonable. Here it was not reasonable because the cost of reinstatement exceeded the diminution in value; there was nothing unique about the property;[115] the plaintiff had not lived in the house very long; there was no good evidence that the plaintiff actually intended to do the repairs; and the action was one in tort, not contract. On appeal to the High Court it was held, reinstating the decision of the trial judge, that as a matter of fact the plaintiff's determination to demolish and rebuild was reasonable.[116] But the Court seems not to have rejected the principle of law laid down by the Full Court.

109 *Mount Albert Borough Council* v. *Albert* [1979] 2 N.Z.L.R. 234 (C.A.).
110 *Anns* v. *Merton L.B.C.* [1978] A.C. 728 (H.L.); *Batty* v. *Metropolitan Property Realizations Ltd.* [1978] Q.B. 554 (C.A.); *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394 (C.A.)
111 *Anns* v. *Merton L.B.C.* [1978] A.C. 728 (H.L.).
112 *Batty* v. *Metropolitan Property Realizations* [1978] Q.B. 554.
113 *Ibid.* See P. Cane, op. cit. fn. 2 supra at pp. 127–8. The plaintiff was awarded the market value of a sound equivalent house *now* even though the need to vacate might not have arisen for some years. This is appropriate in a case where as in *Batty*, the exact date when the house will have to be vacated cannot be predicted. But if it could be, then it might be appropriate to discount the award for early receipt.
114 (1981) 27 S.A.S.R. 515 (F.C.).
115 The plaintiff had been attracted by the house, not the land.
116 [1983] A.C.L.D. 35. 553.

It may be that even where the defect presents a danger to occupants the market value of the premises would set an upper limit on damages except in special circumstances where it could be shown that the premises bore some special value unique to the plaintiff. Sometimes, as in *Batty*, there may be no real alternative to abandoning the premises because the land as well as the building is threatened. But where the building can be saved, but only uneconomically, a court would require the plaintiff to make a compelling argument to justify an award greater than (diminution in) market value.

It seems clear that the plaintiff could recover consequential losses such as the cost of alternative accommodation or loss of profits while repairs were done;[117] he can also recover residual diminution in the value of the property after the repairs have been effected.[118]

The measure of damages recoverable against a local authority for negligent passing of plans or negligent inspection of (or failure to inspect) premises will depend heavily on the exact terms of the statutory provisions under which the council was required or empowered to act. The emphasis on health and safety in *Anns* v. *Merton L.B.C.*[119] was read out of the relevant statute. More recently, the terms of the legislation there in issue have been used to justify a holding that a builder might be liable in tort or defects for which a local authority could not be held liable.[120] On the other hand, where the negligence of the authority consists in failure to enforce or comply with building regulations which are not specifically designed to protect health or safety, the council may be held liable for defects which are not dangerous[121] or to an onwner who is not in occupation and so not in physical danger.[122]

The position of an architect or engineer who is guilty of negligent design work is perhaps more problematic. Let us consider the position in *contract* first. *Auburn Municipal Council* v. *A.R.C. Engineering Pty. Ltd.*[123] was an action against a design engineer for negligence in designing a building without providing for adequate foundations. The case was argued on the basis that the proper measure of damages was that adopted in *Bellgrove* v. *Eldridge*[124] namely the cost of making the building conform to the contract. In this case the contract, being one to design a satisfactory structure, required the creation of a structure with adequate foundations and on the facts the only way to achieve this was to demolish the building completely and start again. Hutley J.A. obiter, had misgivings about this

117 *Rivtow Marine Ltd.* v. *Washington Iron Works* (1974) 40 D.L.R. (3d) 530.
118 *Bowen* v. *Paramount Builders (Hamilton) Ltd.* [1977] 1 N.Z.L.R. 394 (C.A.). See Cane, op. cit. fn. 106 supra at pp. 126–7.
119 [1978] A.C. 728 (H.L.).
120 *Dennis* v. *Charnwood B.C.* [1982] 3 W.L.R. 1064, 1072 per Templeman L.J.
121 *Mount Albert B.C.* v. *Johnson* [1979] 2 N.Z.L.R. 234 (C.A.).
122 *Acrecrest Ltd.* v. *W. S. Hattrell & Partners* [1982] 3 W.L.R. 1076. But there was evidence here that the premises were or were likely to become unsafe.
123 [1973] 1 N.S.W.L.R. 513 (C.A.)
124 (1953–4) 90 C.L.R. 613.

approach.[125] His Honour drew a distinction between contracts to achieve a specified result and contracts to exercise proper professional skill:

> "It is of the very nature of contracts of professional employment that they are not contracts to achieve a result. The doctor does not promise that he will get a patient well. The lawer does not promise that he will recover damages, and, similarly, the consultant engineer does not ordinarily promise that he will design a structure which will produce a result desired by the client. He may do so, but this is most unusual . . ."[126]

Where the contract is one to exercise professional skill, his Honour thought, the limit of the designer's liability was the cost of demolition and reinstatement of the site: he could not be required to give the client a properly designed structure.[127] Similarly a doctor could not be required to pay the cost of a major operation having negligently recommended a futile minor operation; nor could a solicitor be required to pay the cost of preparation of a new deed having negligently prepared one ineffective to achieve the desired result.

Hutley J.A.'s reasoning was considered and rejected by Richmond P. in *Bevan Investments Ltd.* v. *Blackhall & Struthers*.[128] Richmond P. said that Hutley J.A. had approached the issue on the assumption that the only possible measure of damages in a case involving a useless building[129] was such a sum as would put the plaintiff in the position he would have been in if he had never embarked on the building project; but that while this would be the proper measure in tort, there was no reason why the plaintiff in a contract action should not be put in the position he would have been in if the contract had been performed, provided that he could prove that if the sound plans would have cost more to build he would actually have still gone ahead with the project. If he could not prove this then the cost of demolition and reinstatement of the site would be the proper measure. If he could prove that he would have gone ahead he could recover the full cost of making the building conform to the contract subject to an allowance for the amount by which the sound design would have cost more than the actual design; and also subject to it being shown that it was not unreasonable for the plaintiff now to want to press on with the project rather than to abandon it.

What is the position in a tort action? In both *Auburn* and *Bevan* it was said that the position of a builder who negligently executes plans is different from that of an architect or engineer who designs a building. In *Bevan*

[125] Which Hardie J.A. apparently shared.
[126] [1973] 1 N.S.W.L.R. 513, 531.
[127] It was conceded by the plaintiff that the extra cost of proper foundations should be substracted from its damages because it would have to have paid these anyway. All the judges held, but for different reasons, that the plaintiff's concession correctly represented the law.
[128] [1978] 2 N.Z.L.R. 97.
[129] The building in *Bevin*, unlike that in *Auburn*, was not completely useless, but part of it needed to be demolished. Clearly in such a case the "Hutley option" is less attractive than in a case where the building is totally useless because it leaves the plaintiff with a partly completed building.

Richmond P. saw the distinction as residing in the fact that only in the case of the designer was the question of whether the plaintiff would have gone ahead with the "sound project" relevant to the measure of damages. And it may be that in relation to actions against design contractors this, rather than the distinction between actions in tort and actions in contract, is the real nub of the issue. Richmond P. in *Bevan* clearly states that in an action in contract this is the relevant criterion for choosing the quantum of damages as between cost of demolition and restoration of site on the one hand and completion to sound design on the other. As for an action in tort, Richmond P. was not right, I think, in saying that the first measure always provides the appropriate quantum in a tort claim. To start with, the principle applicable in tort (in this context, at least) is not that the plaintiff should be put in the position he would have been in if the project had never been begun, but rather the position he would have been in if the tort, that is the negligence in design (*not* the design itself), had never happened. And what that position would have been depends, once again, on how the plaintiff would have acted if presented with a sound design. Of course, if the measure of damages adopted were related to the value of the building then the contract and tort measures might produce different results: the market value of a well-designed building would, no doubt, be more than that of a badly-designed one and the contract price would often be somewhere between these two figures. But where the measure adopted is cost of repairs it probably makes no difference to quantum whether the claim is in contract or tort.

It is worth noting, too, that Huntley J.A.'s distinction between building contracts and design contracts was not adverted to in *Carosella* v. *Ginos*[130] in which there were claims against a builder, a design engineer and a local authority, and the measure of damages question was discussed in relation to all of them without distinction.

Related to the position of the design contractor is that of the local authority in *Wollongong City Council* v. *Fregnan*.[131] The council was held liable in negligence for having failed to warn the plaintiff that the block of land he intended to build on was subject to the risk of slippage. For reasons apparently unconnected with the geology of the block, the council also refused to allow the plaintiff, as was his wish, to build the house as close to the road as possible where, as it happened, it would have been unaffected. The house, as affected by the slippage, was useless and irreparable; but because of lack of funds the plaintiff had spent about $16,000 in rendering it habitable and was apparently living there at the date of trial. The case supports the approach adopted above in that the way the

130 See fn. 9 supra.
131 [1982] 1 N.S.W.L.R. 244 (C.A.).

court approached the question of damages was to ask what the plaintiff would have done if he had been told of the slippage. There is, unfortunately, some unclarity in the judgments as to the answer to this question, but it seems to have been accepted that if he had known the truth the plaintiff would probably have ended up building, but close to the road. Thus the majority adopted as the basic measure of damages the value at the date of judgment which the house and land would have had if it had been built close to the road, less the residual value of the land.[132] The other important point in the case is this: the majority held that since the plaintiff had been living in the house for six years there ought to be set off against his damages for the cost of repairs done to make the house habitable the rental value of the house. The justification for this set-off is clearly the argument that if the plaintiff had not been living in the house he would have to have found somewhere else to live. But this argument ignores the fact that if the defendant had not been negligent the plaintiff would neither have had to do repairs nor find alternative accommodation. And if the plaintiff had, instead of repairing, elected to go into rented accommodation he could have recovered the cost of this. The effect of this part of the decision is that even though the plaintiff was held to have acted reasonably he had to bear the cost of his reasonable action.

Perhaps the most difficult issue in this area arises out of the dogma that a plaintiff cannot recover in a tort action merely because he has acquired something which is worth less than what he paid for it, something which is merely "shoddy" but not unsafe. If the defendant by his fraudulent or negligent misstatements induced the plaintiff to buy the property at an inflated price the plaintiff may, of course, recover in tort the difference between price and value; but the limits on the scope of this principle considerably reduce its usefulness to consumers.[133] This dogma is not strictly an outworking of the basic principles governing assessment of damages in tort since all the plaintiff seeks to recover is the difference between price and value. Rather it is based on an argument that legitimate expectations that goods will be of a particular *quality* can arise only out of and be measured by contracts or actionable misstatements. All the cases examined so far are compatible with the dogma in that they all involved more than mere shoddiness: in every case there was danger to health and safety by occupants or physical damage to the premises either actual *or potential*.

[132] Hutley J.A. refused to award anything for the value of the land because the negligence of the council had not affected the plaintiff's decision to buy it. This seems to clash with his Honour's acceptance that if the defendant had not been negligent they would now have had a valuable property. His Honour also found it unnecessary to decide whether the judgement date was the right date for assessment.

[133] See *Lambert* v. *Lewis* [1980] 1 All E.R. 978, 1003 per Stephenson L.J. (C.A.); see also further Cane, *op. cit.* fn. 114 at pp. 138–140.

In *Junior Books Ltd.* v. *Veitchi & Co. Ltd.*[134] the House of Lords has made an attack of uncertain effect on the dogma. The defenders,[135] specialist flooring contractors, were engaged as sub-contractors to lay a floor in a factory being built for the pursuers by a building company. There was no contractual relationship between the pursuers and the defenders and the reason why the pursuers chose to sue the sub-contractor rather than the head contractor was not explained to the House. The pursuers alleged that the floor was defective due to the negligence of the defenders on whose skill, as the defenders well knew, the pursuers had relied. It was not alleged that the floor constituted a hazard to the health or safety of workers in the factory. The pursuers claimed as damages the cost of relaying the floor plus consequential damages such as the cost of removal of machinery and loss of profits while the floor was being relaid. The defenders argued that (in English terms) the pursuers' allegations disclosed no cause of action. The House of Lords held by majority (Lord Brandon of Oakbrook dissenting) that under the circumstances the defenders owed the pursuers a duty to take care not to cause them economic loss, that they had breached that duty, and that therefore the pursuers could recover the cost of remedial work.

All of their Lordships were aware of the basic dogma discussed above. Lord Fraser of Tullybelton[136] noted that it would not be often, in the absence of a contract between supplier and consumer, that the supplier would know enough about the exact requirements of the consumer to enable a court to say that he had produced and supplied a defective article or product unless that article or product was also dangerous. It was only the fact that here the defenders were, to all intents and purposes, in a contractual relationship with the pursuers that it was fair to hold the defenders liable.

Lord Keith of Kinkel[137] dealt with the dogma directly in terms of the measure of damages. Damages were to be awarded, his Lordship said, not as the cost of installing a good floor in place of a bad one. It was only because the defectiveness of the floor had caused the pursuers extra expense in running their operations and hence loss of profitability that they were entitled to damages in tort; the cost of replacing the floor was simply the best way of quantifying the expense and loss of profits which they had incurred. If their only loss had been paying out too much for an inferior article, they could not have recovered. In order for a defect of quality to give rise to an action in tort it must cause or threaten physical

134 [1982] 3 W.L.R. 477 (H.L.).

135 It must be one of the most fitting coincidences of modern legal history that a torts case of such importance should arise in Scotland on the fiftieth anniversary of the greatest Scottish case of them all — *Donoghue* v. *Stevenson* — and, more than that, should concern the answer to a question left open by the earlier case, namely liability for the cost of the defective article.

136 [1982] 3 W.L.R. 477, 483.

137 Id. at p. 485.

damage to the property itself or physical damage to persons or their property or consequential economic loss. The distinction Lord Keith draws does not appear to be particularly strong. It seems to depend rather fortuitously on the way the defect affects the plaintiff's operations. Suppose that the floor had required no more maintenance than the sort of floor the defenders knew was needed, but just wore out much sooner than would a suitable floor. It would seem that under Lord Keith's approach the pursuer would not be entitled to recover damages for the fact that he would have to replace the floor earlier than would have been the case if the supplier had not been negligent; but it is not clear why there should be this difference.

For Lord Roskill[138] the required limitation on the inroad on traditional dogma was to be found in the notion of reliance: in this case the pursuers had relied on the skill of the subcontractor who was nominated by the pursuers. This, in his Lordship's view, would rule out an action in tort in most cases where the consumer has no direct dealings with the ultimate supplier or manufacturer since in most cases the consumer will rely on his immediate vendor, not on the manufacturer. This is a highly questionable assumption. Indeed, the moves made in Britain and Europe to introduce strict products liability against manufacturers are based on the more plausible view that both consumers and retailers now look to manufacturers to make good any defects, either of quality or safety, in their products. It is interesting to observe, however, that by introducing the concept of reliance directly on the defender Lord Roskill has arguably sought to antagonize this case to cases of negligent misstatements in which difference between price and value is recoverable. The analogy is achieved by a certain amount of sleight of hand in that reliance in this context does not perform the same function as in other contexts we have examined: the pursuers did not rely on the defenders in the sense that reliance was a necessary link in the causal chain leading to damage. The damage would have occurred even if the pursuers had not known who the defenders were. Nor is it used as a means of establishing a continuing professional relationship between the parties: it does not create that peculiar nexus of dependency and trust which marks out client/ professional relationships. The reliance here is really very little more than that which an ordinary consumer shows to a big-name manufacturer, but the consumer's reliance would apparently not found a cause of action.

Lord Brandon of Oakbrook, who dissented, saw the issue quite clearly as whether the rules of privity of contract ought to be abandoned to the extent required to allow the pursuers in this case to recover.[139] He saw two difficulties in so doing: one was the problem of defining the proper standard of quality by which to judge the defendant's conduct in the

[138] Id. at p. 495.
[139] [1982] 3 W.L.R. 477, 499–500.

absence of a contract; it is only if reference is made to a contract to which the defenders were not party that the standard can be fixed. But second, if this is done, the defender ought to be allowed to rely on terms of the contract, exclusions and limitations, which affect the liability defined by reference to the contract.

It may be that *Junior Books* is properly viewed from this privity perspective. There has for a long time been dissatisfaction with the doctrine of privity, expressed most recently by the House of Lords itself.[140] It may be that the House of Lords is saying that in situations where the commercial reality is that the sub-contractor is working directly for the plaintiff, the technical details of the arrangements between them should not be used by the sub-contractor to avoid liability for negligence or by the plaintiff to deny to the sub-contractor the benefit of exclusions which were meant to cover the doing of the contracted-for work by whomever it was done. The emphasis in this case on how close to contractual was the relationship between the plaintiff and the defendant is reminiscent of *Hedley Byrne* and is perhaps indicative that *Junior Books* is only the first stage in the development of the principles laid down in it. It will be interesting to see if the contractual analogy dies off as it has done in the *Hedley Byrne* context.

D. NEGLIGENT ACTS

Finally, we must consider those cases in which an economic interest is interfered with negligently but in which there is no damage to property of the plaintiff of which the economic loss can be called an immediate causal consequence, no special relationship of a professional kind between the parties and no supply of defective goods or services to the plaintiff.

There are very few such cases and it has often been argued that in these cases there should be no liability for purely economic loss caused by negligent acts but that such loss should be borne and spread by means of loss insurance or other spreading techniques on the part of the plaintiff.[141] There are two relevant Canadian cases. In *Yumerovski* v. *Dani*[142] the defendant by his negligence caused the death of a member of a family bound for an overseas trip. As a result the two other members of his family could not go on the trip and were allowed to recover the cost of their charter tickets for which they were not entitled to a refund from the airline company. This is an interesting case because the plaintiffs were held entitled to recover even though, under the terms of their contract with the airline company, they could not recover the cost of the tickets from the company. Thus the defendant was not allowed to rely on the terms of the contract. Two factors support this result: first, the defendant

140 *Woodar Investment Development Ltd.* v. *Wimpey Construction U.K. Ltd.* [1980] 1 W.L.R. 277.
141 See, e.g., J.A. Smillie, "Negligence and Economic Loss" (1982) 32 *U. of Tor. L.J.* 231.
142 (1977) 83 D.L.R. (3d) 558.

knew that if the plaintiffs did not take the flight they would have no recourse against the airline company; and second, whatever the rule should be in cases, such as *Junior Books*, involving the supply of goods or services, as to whether the defendant can take advantage of terms in the supply contract against the ultimate consumer, there seems little reason in a case such as *Yumerovski*, where the defendant's negligence is unrelated to the contract, why he should be able to plead any limitation or exclusion of liability in the contract. In *Trappa Holdings Ltd.* v. *District of Surrey*,[143] a road onto which the plaintiff's shop fronted was blocked to public access while sewerage works were carried out; as a result the plaintiff lost business. It was held that the defendant was liable either in nuisance or negligence and that the plaintiff's economic loss was a direct result of the wrong. The plaintiff was therefore allowed to recover profits lost during the period of the road-closure.

The leading case on this topic is, of course, *Caltex Oil (Australia) Pty. Ltd.* v. *Dredge "Willemstad"*.[144] There, it will be recalled, the plaintiff incurred extra expense in transporting petroleum products from an oil refinery to its depot as a result of the defendant's negligence in damaging a submarine pipeline belonging to the proprietor of the oil refinery. The High Court awarded Caltex compensation consisting of the amount of these extra expenses. There are certain dicta in the case, which Robert Hayes has discussed at length,[145] which support the view that damages can be recovered for economic loss resulting from damage to the property of a third party only if that loss consists of expenses actually incurred as opposed to profits not realized. I have made a detailed answer to Professor Hayes' argument[146] and there is no point in repeating the arguments on either side here. It is, however, worth considering *Trappa Holdings* in the light of the suggested rule. Should it be crucial to recovery whether the plaintiff in a case such as *Trappa* claims for loss of profits or, instead, rents alternative premises on a different street, forestalls loss of profits, and claims for the cost of renting the premises?

Suffice to say that the central issue is how best to limit liability for purely economic loss caused by negligent acts which damage the property of a third party. One view is that recovery for such loss should be denied entirely but this seems ruled out, at least in Australia for the present, by *Caltex*; a second view, that of Professor Hayes, is that the distinction between expenses incurred and profits not realized provides a clear and principled way of limiting liability; a third view, which I have put forward, is that the principles of specific individual foreseeability expounded by a majority in *Caltex* provide a satisfactory means of restricting the lia-

143 (1978) 95 D.L.R. (3d) 107.
144 (1976) 136 C.L.R. 529.
145 R. Hayes, "The Duty of Care and Liability For Purely Economic Loss" (1979–80) 12 M.U.L.R. 79.
146 P. Cane, "Economic Loss and the Tort of Negligence" (1979–80) 12 M.U.L.R. 408.

bility.[147] The main technical defect in this third approach is its uncertainty. Whereas in the cases involving professional relationships it is possible to define the requisite relationship between the parties with some degree of particularity (for example, solicitor and third party beneficiary), in the *Caltex* type case all that can be said is that liability depends on foreseeability assessed in the light of all the facts of the case. However, I do not understand Professor Hayes' approach to overcome this difficulty in that his suggested limitation is in addition to, not in substitution for, the "*Caltex* test". The difficulty is inherent in the sort of case we are dealing with in that there is no pre-existing relationship between the parties on which a duty can be based. This problem is not, of course, peculiar to this area of the law of negligence, and a great deal more could be said about it but to do so would stray too far from the concerns of this article.

E. CONCLUSION

Can any general conclusion be drawn from this rather diffuse survey? I think so. It has been noted how in quite a few cases it appears to make no difference to the measure of damages for negligence whether the action is framed in contract or tort. It has also been noted in several contexts that the idea that damages for expectation losses and for defects of quality are recoverable only in contract is breaking down. Although the thesis needs to be developed in much greater detail to be properly assessed, I would suggest that so far as liability for damages for negligence is concerned, the law is moving towards a position in which the distinction between tortious and contractual liabilities will not as such be of crucial importance in determining the measure of damages or the losses for which recovery may be allowed. Instead the court will examine and determine the exact content of the defendant's duty in the light of all the circumstances of the case (for example, was it a duty just to prevent loss or also a duty to secure benefits; was it a duty just to prevent harm or also a duty to provide goods of a particular quality) and assess the damages accordingly.

This trend in the law is a result, I would suggest, of the continuing expansion of the tort of negligence at the expense of a strict application of the doctrines of consideration and privity of contract (beginning in 1932 in *Donoghue* v. *Stevenson*[148] and most recently in 1982 in *Junior Books* v. *Veitchi*[149]) and of the increasing pressure being put on the rule that in some cases a cause of action in contract for breach of a duty of care ousts a cause of action in tort for the same breach.[150]

147 There are yet other approaches. See, for example, Bishop (1982) 2 O.J.L.S. 1.
148 [1932] A.C. 562.
149 [1983] 1 A.C. 520.
150 See Fnn. 62–4 supra and text.