

TOUCHSTONES OF TORT LIABILITY REVISITED

J.A. (Tony) Jolowicz*

In considering how best to respond to an invitation to contribute to a volume in memory of a man as much beloved on the eastern as on the western side of the Atlantic Ocean, it occurred to me to look again at one of Ferd Stone's best known shorter pieces, "Touchstones of Tort Liability," published by the Stanford Law Review in 1950.¹

Needless to say, to reread "Touchstones" was rewarding. It will be recalled that the article first traces the development of the earlier touchstones of liability--unlawfulness, intention and negligence--and then goes on to propose that the emerging touchstone is "legal fault," in short, "a falling below the standard of conduct set by the forces in society which have the powers of social control."

With proper caution Ferd suggests that it may never be advisable to state the precise content of the touchstone of legal fault save that it contains but goes beyond those recognised in the past. He does, however, stress the importance of both words in his phrase. The fault must be *legal* fault to indicate both that not all fault carries the obligation to compensate for harm done and that the content of legal fault can grow by the increase of duties or obligations primarily fixed by law. But the word *fault* itself is retained, though fault no longer means solely moral blameworthiness, to maintain continuity with the older law and to facilitate comparison with the non-common-law world.

There are, of course, difficulties with this formulation. Some may think that it involves *petitio principii*: there is legal fault if a court finds the defendant liable, otherwise there is not. Some may object to the continued use of the word *fault* itself to include cases where liability is imposed without blameworthiness on the part of the defendant, for what is "fault" if it does not exclude conduct which is blameless? Some may object to the phrase "legal fault" as such on the ground that neither it nor Ferd's explanation of it carry the matter further forward.

* Q.C., Professor of Comparative Law in the University of Cambridge, Fellow of Trinity College.

1. *Touchstones of Tort Liability*, 2 STAN. L. REV. 259 (1950).

I have to admit to having been amongst the skeptics.² In particular, it seemed to me that continued insistence on "fault" was inappropriate in the days when even in a "negligence" case the nominal defendant³ is, more often than not, liable only on the ground that the defendant's employee was negligent, and in the days when "strict" liability has become widespread. I have come to realise, however, that even if the touchstone of legal fault is not capable of use as a tool for the decision of individual cases⁴ it does provide in encapsulated form a description of the conceptual basis of modern tort liability in England that would be hard to beat.

It is the purpose of this article to demonstrate the accuracy of Ferd's perception by reference to developments in two aspects of the English law of "negligence," but the terminology adopted by the "Pearson" Commission⁵ provides too good an illustration of the persistence of "fault" to be omitted, and I begin with that.

The Pearson Terminology

It was a principal purpose of the Commission's Report to propose a redistribution of the burden of personal injury compensation between "Tort" and the State's social security system. In addition it proposed the introduction of certain new forms of strict liability in tort while, of course, recognising that strict liability already attached in a number of cases.⁶ So, for example, in its Chapter on *Products*⁷ the Report proposed that producers should be strictly liable in tort for death or personal injury caused by defective products, giving the usual reasons of liability insurance and cost distribution. Yet it grouped together all forms of liability under the head of "Tort,"⁸ reserving the phrase "No-Fault" for "compensation which is obtainable without proving fault and *is provided outside the tort system*. No-fault compensation is a system of obtaining payment from a fund instead of

2. *E.g., Compensation for Personal Injury and Fault* in Allen, Bourn and Holyoak (eds.), (1979) ACCIDENT COMPENSATION AFTER PEARSON, 35, 38 and n. 8.

3. Let alone his liability insurer.

4. It is not suggested that its inventor thought otherwise.

5. *Royal Commission on Civil Liability and Compensation for Personal Injury* (Chairman: Lord Pearson) Cmnd. 7054-1 (1978).

6. See para. 71.

7. Chapter 22, vol. 1, p. 255. See also Chapters 19 (Air), 21 (Rail), 25 (Vaccine Damage), 31 (Exceptional Risks). Few of the recommendations of the Report have been implemented, but for Product Liability, see now Consumer Protection Act 1987, Part I, introduced following a Directive of the European Community.

8. Including even cases in which liability is founded on breach of contract. See, e.g., Chapter 22 at paras. 1206, 1207.

proceeding against the person responsible for the injury."⁹ It would be difficult to find clearer evidence of the conviction that "fault" lies behind all liability in tort even where liability does not actually depend on proof of fault against the defendant.¹⁰

Negligence

The legal concepts of negligence and duty emerged, as Ferd himself pointed out, "at a time in social history when right and wrong morals and manners were subjects of general agreement, as in Victoria's England." Yet, as he also pointed out, negligence did not gain recognition as a "separate tort" in England until the well-known decision of the House of Lords in *Donoghue v. Stevenson*¹¹ in 1932. Since then, as one exclusionary bastion after another has fallen,¹² negligence has become not only the residual, but the principal, ground of tortious liability in England.

In his famous speech in *Donoghue v. Stevenson*, Lord Atkin based the rule of liability for negligence firmly on the moral plane. Though the practicalities of the law demand some limitations, the principle "is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay."¹³ This way of thinking, coupled with its apparent but false corollary that where there is no fault, then, special cases apart, the injured person must bear his own loss or turn to such insurance, public or private, as may be available to him, probably gives negligence its special place in English law even today. Strict liability, though in practice quite common, is still regarded as exceptional, in some way "unjust," and is confined to particular categories of case.

The result is that the traditional formulae of negligence doctrine continue to be deployed by the judges and, save for expansion of the scope of negligence liability,¹⁴ there has been relatively little change in the law itself. The most important, perhaps, for present purposes, is the increased emphasis placed on the objective nature of the standard by

9. Para. 34. Emphasis added.

10. Mention may also be made of the Report's apparent acceptance of the idea that the victim of "fault" is more deserving of compensation tailored to his particular circumstances than is the victim of "pure accident." See Jolowicz, *supra* note 2, at 39.

11. [1932] A.C. 562.

12. See, e.g., Odgers, *As a Matter of Fact . . .*, [1972B] C.L.J. 176.

13. [1932] A.C. at p. 580.

14. For the particular case of "economic loss," see below.

which the defendant's conduct is to be judged.¹⁵ This is not to say, however, that the product of the law of negligence--actual decisions in actual cases--has remained unchanged. On the contrary, if it is still true in some classes of case that negligence on the part of the defendant will not be found if all that can be said against him, even with hindsight, is that he was guilty of an error of judgment, in others a finding of negligence against the defendant amounts to little more than a necessary *ex post facto* justification of his liability rather than a reason for it.

It is not, in the nature of things, easy to prove what has just been said. If the legal standard is always the same--the "reasonable man"--everyone agrees that the standard of care required in each case depends on the circumstances. Even more important, the question of negligence *vel non* is regarded as a question of fact¹⁶ and so normally within the province of the judge of fact, formerly a jury, now almost invariably a judge alone.¹⁷ Nevertheless, it is suggested that certain trends can be observed and that those trends lend support to the validity of "legal fault." This can be illustrated by reference to two broad categories of case, those in which the court is still prepared to make a finding of negligence only if it is satisfied that the defendant really should have done better and those in which it is prepared, in effect, to make a finding of negligence only because such a finding is a legal prerequisite to liability; the finding of negligence comes close to a legal fiction used to justify a decision shifting the loss from the plaintiff to the defendant and so into the channels of distribution.

The first category is, today, largely represented by cases of alleged professional negligence, especially cases involving the legal or medical profession.¹⁸ In both kinds of case it is constantly reiterated

15. *E.g.*, *Nettleship v. Weston* [1971] 2 Q.B. 691 (learner driver liable even to his amateur instructor for accident caused by the learner's failure to reach the standard of "a driver of skill, experience and care, who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity," *per* Lord Denning M.R. at p. 699.) The decision has been criticized in Australia: *Cook v. Cook* (1986) 68 A.L.R. 353. *See also* *Roberts v. Ramsbottom* [1980] 1 W.L.R. 823 (driver liable for collisions after suffering a cerebral haemorrhage unknown to himself while at the wheel). Lord Denning in the first case, but only Lord Denning, drew attention to the fact that, as was compulsory, third-party liability insurance existed.

16. *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] A.C. 743. One result of this is that cases in which the only question is whether the defendant was negligent or not usually go unreported.

17. English appellate courts are, as a matter of law, also "tribunals of fact" (*S.S. Hontestroom v. S.S. Sagaporak* [1927] A.C. 37, 47 *per* Lord Sumner), but they do not hear witnesses and must rely on a transcript of the evidence given at first instance.

18. For a case in which an architect's negligence caused personal injury to a third party, see *Clay v. A.J. Crump & Sons Ltd.* [1964] 1 Q.B. 533. There have been

that negligence will be found only if a real failure to meet the proper professional standard is established and the facts are meticulously examined,¹⁹ often, in medical cases, with the aid of expert witnesses. There is no suggestion that a policy of loss-shifting is in operation.²⁰ In medical cases the test given in 1967 by a trial judge to a jury²¹ has been adopted by the courts at all levels,²² including the statement that a practitioner is not guilty of negligence "if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art [A] man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."²³

In cases of alleged legal professional negligence the judges, it seems, consider themselves capable of deciding the question of negligence without help and, perhaps, take a rather more severe view than in cases of alleged medical negligence. It is easier to find reported cases in which lawyers rather than doctors have been held negligent, and in one case of a lawyer in which expert evidence was actually called by both sides, the judge had no hesitation in deciding for himself between the competing experts and finding that negligence was established.²⁴ In *Maynard v. West Midlands R.H.A.*,²⁵ a medical negligence case, on the other hand, the House of Lords insisted that "a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of

important cases recently concerning surveyors, but the question of negligence itself was not in issue at the appellate level. See, e.g., *Smith v. Eric S. Bush* [1990] A.C. 811.

19. Appellate courts, emphasising, in these cases, their power to deal with the facts, are also generally more ready to intervene than in other classes of case. See, e.g., *Whitehouse v. Jordan* [1981] 1 W.L.R. 246; *Maynard v. West Midlands R.H.A.* [1984] 1 W.L.R. 634.

20. For a case in which it might be thought that the trial judge found medical negligence in order to shift the loss from the injured party and in which his decision was reversed by a majority of the Court of Appeal and by a unanimous House of Lords, see *Whitehouse v. Jordan*, *supra* note 19.

21. *McNair J. in Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 587, following the Scottish case of *Hunter v. Hanley* 1955 S.L.T. 213.1

22. E.g., *Whitehouse v. Jordan*, *supra* n. 19; *Maynard v. West Midlands R.H.A.*, *supra* note 19. The direction in the *Bolam* case has even been applied in an action for negligence against a lawyer: *G.+K. Ladenbau Ltd. v. Crawley & de Reya* [1978] 1 W.L.R. 266.

23. *McNair J.*, *ubi supra* note 21.

24. *G. +K. Ladenbau Ltd. v. Crawley & de Reya*, *supra* note 22.

25. *Supra* note 19.

approval of those whose opinions, truthfully expressed, honestly held, were not preferred."²⁶

In cases involving "ordinary" rather than professional negligence, matters seem to stand differently, and the desire to shift the plaintiff's loss seems to become almost paramount. Strict liability for defective products came, as a matter of law, only with the Consumer Protection Act 1987²⁷ but, for most practical purposes, it has been with us since a decision of the Privy Council in 1937,²⁸ where the producer of a defective pair of underpants was held liable notwithstanding that his system of production was so good that he had sold nearly five million pairs without complaint.²⁹ The technique there was, in effect, to cast on the defendant a burden of disproving negligence which it was impossible for him to discharge. A similar technique is used in traffic accident cases, at least where only one vehicle is involved.³⁰ It is not, however, only in well-defined categories of case that the courts are willing to find negligence even in the absence of any fault, objectively determined, let alone moral blameworthiness. One striking, and probably unique, example suffices to show that they may do so in more or less any circumstances provided that personal injury or damage to the plaintiff's property is involved.

In *Rigby v. Chief Constable of Northamptonshire*³¹ the plaintiff's gunsmith shop was burned out when police fired a canister of CS gas into it. This dramatic action was taken because the shop had been occupied by a young psychopath who had armed himself and had fired a number of shots out of the premises. The judge found that there was no negligence in the actual use of the canister, but that the police had been negligent in firing it at a time when no fire-fighting equipment was standing by. If that had been all, the finding of negligence might be plausible in conventional terms,³² but it was not. The incident took place when the fire service was on strike and only a limited number of military fire-fighting vehicles, known as "Green Goddesses," were available. One of these had been standing by for a time, but had

26. [1984] 1 W.L.R. at p. 639, *per* Lord Scarman.

27. *Supra* note 7.

28. *Grant v. Australian Knitting Mills* [1936] A.C. 85.

29. *See* WEIR, A CASEBOOK ON TORT, ed. 6 (1988), 27 and, *e.g.*, *Hill v. James Crowe (Cases) Ltd.* [1978] 1 All E.R. 812.

30. *Henderson v. Henry E. Jenkins & Sons* [1970] A.C. 282. This is in addition to insistence on the "objective test" already mentioned, *supra* note 15 and accompanying text.

31. [1985] 1 W.L.R. 1242.

32. Even so, the presence of fire-fighting equipment would not have prevented the fire. At best, it might have reduced the extent of the damage. For the judge's somewhat cavalier treatment of this point, see [1985] 1 W.L.R. at p. 1256.

unfortunately been called to an actual fire at the critical moment. It seems, to say the least, hard to say that the police were negligent on these facts, but the judge held that all forms of strict liability were ruled out in the circumstances--if liability were to be attached to the police it had to be on the ground of negligence--and, of course, if the police were held liable the plaintiff would be compensated out of public funds: if ever a victim of property damage merited compensation out of public funds, it was this plaintiff.³³

If it is right that the judges do indeed treat cases of alleged professional negligence differently from more mundane cases where negligence must also be found if liability is to be established, then it must be asked why this should be so. The answers are, no doubt, many and various, and they include such factors as, for medical cases in particular, anxiety about the cost of extensive liability and fear of "defensive medicine."³⁴ One of the few things that is certain, however, is that no one, least of all the judges, supposes that a professional man, as distinct from, say, a car driver, will have to pay any damages for which he is held liable out of his own pocket: liability insurance is commonly required of any professional practitioner, and the negligence of many of them, especially medical practitioners under the National Health Service, will trigger the vicarious liability of an employer.

There is, however, one factor which, it is believed, may influence the judges, and that is the distinction from the social point of view between a decision that, say, a vehicle driver was guilty of negligence and a similar decision against a professional practitioner. For better or for worse, traffic accidents and their aftermath are taken for granted as part of modern life, and a finding of negligence against a driver is seen as the luck of the draw having no adverse consequence of significance for him.³⁵ A finding of negligence against a professional, on the other hand, may well have an adverse effect on his reputation and his career. Such a finding should not be made unless the practitioner in question truly merits the criticism of his conduct which is seen to be and so is involved.

33. There is nothing in the Report to indicate whether the plaintiff's shop was or was not insured.

34. At the time of writing there is considerable pressure, so far resisted by Government, for the introduction of a system of "no-fault" compensation for medical "accidents," but there is no suggestion that negligence should be more readily found against individual practitioners.

35. A criminal sanction, and especially the penalty of disqualification, is another matter.

On this basis, the value of Ferd's formulation of "legal fault" is clear. Though the law of negligence recognises but one standard, that of the reasonable man, the standard of conduct actually set by "the forces in society having the powers of social control," taking account, consciously or subconsciously, of a variety of factors, is something else. So, a police officer who has done all that could reasonably be expected of him in extremely difficult circumstances is held to have fallen below the standard set (by the judge) because that was the only way in which justice could be achieved, and no real harm was done to the police officer.³⁶ But, such is the harm that a professional practitioner may suffer if held guilty of negligence, the standard is set in such a way that, rather than risk that harm where it is not justified, the victim of injury is left uncompensated.

"Pure" Economic Loss

So far as the law of tort is concerned, compensation for "pure economic loss," that is, economic loss suffered by the plaintiff without personal injury to him or damage to his property, is, traditionally, regarded as the exclusive province of the so-called "intentional" torts:³⁷ such loss is, of course, primarily and typically recoverable in contract. In the well-known case of *Hedley Byrne & Co. v. Heller & Partners Ltd.*,³⁸ however, the House of Lords opened the door to liability in negligence in a case in which the plaintiff had relied, to his financial detriment, on a negligent misstatement by the defendant.

The principle established in that case is not without its difficulties, but, on its face, it is relatively limited.³⁹ Nevertheless, an expansion of liability was probably inevitable even to cases in which the plaintiff could not be said to have relied on the defendant. So, for example, a solicitor who had negligently failed to ensure that his client's will was properly witnessed has been held liable to a disappointed beneficiary.⁴⁰ Such a decision also has its difficulties,⁴¹

36. It would, of course, have been more elegant if the judge had been able to pray in aid the principle recognised by French administrative law, whereby compensation may be made out of public funds on the ground of *égalité devant les charges publiques*. The police officer acted for the general good, and the plaintiff suffered disproportionate harm as a result.

37. See, e.g., *Derry v. Peek* (1889) 14 App. Cas. 337.

38. [1964] A.C. 465.

39. There must be a "special relationship" between the parties virtually equivalent to an undertaking of responsibility, express or implied, and the plaintiff must have relied, reasonably, on the defendant's statement.

40. *Ross v. Caunters* [1980] Ch. 297.

41. See, e.g., *Weir*, *supra* note 29, p. 50.

but it makes no great inroads into traditional principle. Trouble does come, however, where the plaintiff's loss is attributable to damage to property not belonging to the plaintiff or to the defective quality of property acquired by the plaintiff.

In 1971 the Court of Appeal was faced with a claim by a lady who had bought a house from its first purchaser and then found that it had been built on insecure foundations.⁴² She claimed damages from the local authority for its negligence in approving the foundations while the house was under construction, and it was held that she was entitled to succeed. The decision was for all practical purposes approved a few years later by the House of Lords in the similar case of *Anns v. Merton London Borough Council* in 1978,⁴³ when Lord Wilberforce took the opportunity to restate the test for the existence of the duty of care in words which, for a time, seemed likely to oust the famous formulation of Lord Atkin in *Donoghue v. Stevenson*.⁴⁴ For Lord Wilberforce the test of duty was twofold: first it must be asked whether there was a sufficient relationship of proximity or "neighborhood" such that in the reasonable contemplation of the defendant carelessness on his part would be likely to cause damage to the plaintiff and, secondly, if this was answered in the affirmative, "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."⁴⁵

At first it seemed that *Anns* had opened the floodgates, and not only for cases concerning houses.⁴⁶ Reaction then set in, probably beginning in 1985,⁴⁷ and confirmed a year later.⁴⁸ Finally, in 1990, in

42. *Dutton v. Bognor Regis* U.D.C. [1972] 1 Q.B. 373. The faulty foundations were revealed when cracks developed in the walls of the house, and Lord Denning M.R. was prepared to regard the case as one involving physical damage to the house: [1972] 1 Q.B. at p. 396. This analysis, also adopted in *Anns v. Merton London Borough Council* [1978] A.C. 728, is repudiated in *Murphy v. Brentwood D.C.* [1990] 3 W.L.R. 414.

43. *Supra* note 42.

44. [1932] A.C. 562, 580.

45. [1978] A.C. at pp. 751-752.

46. *See, e.g., The Irene's Success* [1982] 2 Q.B. 481. The high point, probably, was the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Vo. Ltd.* [1983] 1 A.C. 520 (floor in factory defective because of negligence of subcontractor; no danger to person or property but considerable cost in making it fit for its purpose).

47. *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson Ltd.* [1985] A.C. 210.

48. *Leigh and Silavan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785 (overruling *The Irene's Success*, *supra* note 46). *See also* *Candlewood Navigation Corp. Ltd. v. Mitsui O.S.K. Lines* [1986] A.C. 1 (P.C.); *Simaan General Contracting Co. v.*

Murphy v. Brentwood District Council,⁴⁹ the House of Lords turned the clock back by overruling its own decision in *Anns*, a decision which, in the words of Lord Keith of Kinkel, "constituted a remarkable example of judicial legislation" which had not proceeded "on any basis of established principle but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place."⁵⁰

For present purposes the interest of this curious and unedifying episode lies less in the substance of the decisions themselves than in the attempts to keep the product of the *Anns* decision within bounds until the House of Lords was prepared to expunge it from English jurisprudence.⁵¹ In fairness to Lord Wilberforce, it should be said that he apparently considered that liability for a defective building would arise only where there was "present or imminent danger to the health or safety of persons occupying it,"⁵² but such a limitation can, by its nature, apply only in cases involving buildings and, perhaps, chattels.

The search therefore began for possible limitations to the general duty of care, the assumption being made that there was, indeed, a single principle to determine whether such a duty existed or not. So, at one time, it was suggested that a "voluntary undertaking of responsibility," express or implied, was necessary,⁵³ and the need for

Pilkington Glass Ltd. (No. 2) [1988] Q.B. 758; *D. & F. Estates Ltd. v. Church Commissioners* [1989] A.C. 177.

49. [1990] 3 W.L.R. 414; *Department of the Environment v. Thomas Bates and Son Ltd.* [1990] 3 W.L.R. 457.

50. [1990] 3 W.L.R. at p. 432, *per* Lord Keith.

51. Not all the effects of *Anns* are removed from the law. *Smith v. Bush*, *supra* note 18, for example, is still undoubtedly good law (surveyor employed by mortgagee of ordinary dwelling house liable to mortgagor).

52. [1978] A.C. at p. 760. This was treated somewhat cavalierly in the early days: *Batty v. Metropolitan Realisations Ltd.* [1978] Q.B. 554, 571-52, *per* Megaw L.J.; *Acrecrest Ltd. v. W.S. Hattrell & Partners* [1983] Q.B. 260. The latter case was overruled in the *Peabody* case, *supra* note 47.

53. *E.g.*, *Banque Keyser Ullmann S.A. v. Skandia (U.K.) Insurance Co. Ltd.* [1990] Q.B. 665, 794, *per curiam*. This related back to the reasoning in the *Hedley Byrne* case, *supra* note 38, but the usefulness of the test has been doubted: "The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice:" *Smith v. Bush*, *supra* note 18, *per* Lord Griffiths; *Caparo Plc. v. Dickman* [1990] 2 A.C. 605, 628, *per* Lord Roskill; *ibid.* at p. 639, *per* Lord Oliver.

"proximity" between the parties is often emphasised.⁵⁴ Perhaps the most remarkable and the most far-reaching requirement is, however, that in determining whether a duty of care of a particular scope was incumbent on the defendant "it is material to take into consideration whether it is just and reasonable that it should be so."⁵⁵ Although some support for this can be found in Lord Atkin's words in *Donoghue v. Stevenson*,⁵⁶ it is difficult to see that use of this test does not, in practice, mean that the court can decide in each case, and *ex post facto*, whether it is, indeed, "just and reasonable" that the defendant should be required to compensate the plaintiff.

Be this as it may, although the decisions first indicated that the new formulae, developed while liability for economic loss was expanding, could certainly not be used to overturn specific categories of case in which earlier authority denied the existence of a duty of care,⁵⁷ the very idea that a single statement of principle can indicate in every case whether a duty of care exists or not now seems to have been abandoned, at least in cases of pure economic loss. So, for example, Lord Bridge, having first refrained from reviewing the authorities because they spoke with so uncertain a voice that they yielded no clear and conclusive answer,⁵⁸ subsequently concluded that the law now attached greater significance to the "more traditional categorisation of distinct and recognisable situations as guides" to the duties of care which the law imposes.⁵⁹ Lord Oliver could find in the cases no "common denominator by which the existence of the essential relationship can be tested . . . 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists."⁶⁰ Both judges paid tribute to the opinion of the Australian judge, Brennan J., in preferring that the law should develop new categories of negligence "incrementally and by analogy with established categories" rather than by an extension of a *prima facie* duty

54. *E.g.*, *Caparo Plc. v. Dickman* [1989] Q.b. 653, 679, *per* Bingham L.J. and cases there cited. For proceedings in the House of Lords, see [1990] 2 A.C. 605.

55. *Peabody case*, *supra* note 47, at p. 241, *per* Lord Keith of Kinkel.

56. [1932] A.C. at p. 1039, cited by Lord Keith *ubi supra* note 55.

57. *Leigh and Sillavan Ltd. v. Aliakmon Shipping Ltd.*, *supra* note 48, at p. 815, *per* Lord Brandon.

58. *D. & F. Estates Ltd. v. Church Commissioners* [1989] A.C. 177, 210.

59. *Caparo Plc. v. Dickman*, *supra* note 54, at p. 619.

60. *Ibid.* at p. 633.

of care restrained only by indefinable considerations to reduce or limit its scope.⁶¹

On this basis it seems not only that the actual decision in *Anns* has been overruled but also that Lord Wilberforce's attempt to enunciate a modern version of a general test for liability in negligence has failed. Outside the established categories where it is settled that the duty of care does, or does not, exist, we are left with little more than "pragmatism" and the concept of what is "just and reasonable" in the circumstances; and the circumstances include, today, not only the conduct of the defendant which actually caused the plaintiff's loss or damage but much else besides. It is no longer only the relationship between plaintiff and defendant which matters, but considerations of the impact that a decision for or against liability will have in society at large. Instead of the concept of the duty of care as formerly understood, we have, perhaps, the concept of a duty to compensate, though still called a duty of care.⁶²

Even if this is so, there is no reason to conclude that "legal fault" has had its day. Let it be supposed that external factors such as the undesirability of encouraging "defensive medicine," and using public funds to compensate people who have bought defective houses or the desirability of spreading the cost of insurance against damage done by defective products over the body of consumers play their part in judicial decisions; let it be supposed further that, in a given case, it is held to be "just and reasonable" for the defendant to be subject to a duty of care to the plaintiff. This is to say that the defendant is subjected to a duty to compensate the plaintiff, and that duty is set by the judges who have powers of social control. By hypothesis, the defendant has not complied with that duty; if he had done so, there would have been no litigation. If anything is necessary, therefore, to bring the idea of legal fault up to date, it is no more than a gloss to indicate that the standard of conduct to which it refers may include the compensation of an injured plaintiff, whether or not the injury itself was caused by behavior which is in some sense itself substandard.

I said earlier that to reread "Touchstones of Tort Liability" was rewarding. For me it was made even more rewarding because, at much the same time as I extracted my copy of the article from my files, the issue of the *Law Quarterly Review* for January 1991 reached my desk. That issue contains an article by Sir Robin Cooke,⁶³ which

61. *Sutherland Shire Council v. Heyman* (1985) A.L.R. 1. A similar approach, using somewhat different language, may be found in the speech of Lord Diplock as long ago as 1970 in *Dorset Yacht Co. v. Home Office* [1970] 1004, 1059.

62. If this is right, it provides another instance of the persistence of "fault."

63. *An Impossible Distinction* (1991) 107 L.Q.R. 46.

demonstrates, even if unwittingly, the strength of Ferd's ideas, and this after forty years of movement in the law. Writing, it is true, with particular reference to the problem dealt with in *Anns* and *Murphy's* cases⁶⁴ and not altogether in sympathy with the later decision, Sir Robin echoes Ferd's words. "From the point of view of evolving common law principle, the dominant policy factors should be straightforward canons of conduct generally accepted in the community, however imperfectly observed by most of us." After due allowance is made for the fact that Ferd would have included the judges amongst the forces in society having powers of social control while Sir Robin, as a judge,⁶⁵ could not openly admit to possession of such powers, the two statements are strikingly similar in content.

Ferd was himself aware of a danger in the touchstone of legal fault.

In a sense it represents a substitution of law-discipline for self-discipline to a greater degree than before. To decry this situation is not to cure it. To describe the situation frankly is perhaps to focus attention upon it so that we may understand the angle of the drift from individual liberty to social control and the winds that carried us along.

Ferd's description remains valid today for the English law of tort and his warning is still apposite. "Touchstones of Tort Liability" should be read or reread by all who are concerned about the uncertainties of our law as it stands at present.

64. *Supra* note 42.

65. He is President of the New Zealand Court of Appeal.

