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Horizons of pure economic loss: product liability and the Post Office Horizon Scandal

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HORIZONS OF PURE ECONOMIC LOSS: PRODUCT LIABILITY AND THE POST OFFICE HORIZON SCANDAL

Dr Mark Wilde*

Abstract

This paper examines the Post Office Horizon scandal from the perspective of product liability and whether Fujitsu owed a duty of care under English common law to the postmasters who used the system and suffered loss as a result of the faults. It confronts the problem of pure economic loss, which is generally irrecoverable under English law unless it can be accommodated with the narrow Hedley Byrne exception. The paper argues that the current state of the law is not fit for purpose in the light of the technological challenges created by computer software where the boundaries between economic and physical loss are less clear. Nevertheless, it is argued that the pure economic loss issue is not insurmountable and that an argument can be made to the effect that, in certain circumstances, the providers of a computer system owe a duty not to cause economic loss to users, notwithstanding the fact that there is no contract between the parties. As a subsidiary issue the paper looks at the psychiatric harm caused to certain postmasters and how should claims could relate to the economic losses, an area where there is especially scant authority.

Keywords: Negligence, Product Liability, Pure Economic Loss, Psychiatric Injury, Post Office Horizon Scandal

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1. Introduction

The Post Office Horizon scandal needs little introduction and is set to become one of the most egregious and widespread miscarriages of justice in the recent history of English criminal law.[1] In short, faults in a new computerized accounting system supplied by Fujitsu to the Post Office, led to numerous postmasters being held wrongfully accountable for deficits in the takings of their branches. The Post Office brought the full weight of both the criminal and civil law down upon postmasters resulting in imprisonment for offences such as false accounting and liability for vast sums in damages and costs. This was in addition to monies which postmasters had already expended in trying to balance the books from their own resources. Aside from the economic losses the associated stresses had a devastating effect on the mental health of many postmasters resulting in long term psychiatric disorders in some cases, and even suicide.

The scandal was the subject of sporadic mainstream media[2] and Parliamentary attention for a number of years before it rocketed to the top the political agenda in the wake of the ITV dramatization of the events in *Mr Bates vs the Post Office*.[3] Although, as the producers readily acknowledge, they stood on the shoulders of the investigative journalists[4] who traced the history of the scandal from the outset and the legal fightback orchestrated by the eponymous hero of the ITV drama.

The legal issues arising from the scandal are manifold and have included the role of the Post Office in conducting its own prosecutions,[5] and how best to overturn convictions, so as to enable the wronged parties to access a compensation scheme established by the Government.[6] The focus has also shifted more towards the role of Fujitsu and whether the company or its employees were complicit in securing wrongful convictions in terms of the evidence which they supplied during the course of trials.[7]

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[1] The Horizon scandal features very heavily in the Law Commission's review of criminal appeals procedures: Law Commission, *Criminal Appeals Consultation Paper* (Law Com Consultation Paper 268, 27 February 2025). Main review website: Law Commission, 'Criminal Appeals' <https://lawcom.gov.uk/project/criminal-appeals/> accessed 30 May 2025.
[2] It is important to note that the publications *Computer World* and *Private Eye* investigated and reported on the saga on a regular and consistent basis regardless of mainstream interest in the matter.
[3] ITV, 'Mr Bates vs The Post Office' (2024) <https://www.itv.com/watch/mr-bates-vs-the-post-office> accessed 30 May 2025.
[4] In particular the freelancer Nick Wallis and Rebecca Thomson of *Computer World*. Both have written numerous articles and made various podcasts. Nick Wallis brought much of their work together in a BBC radio series and podcast: BBC Radio 4, 'The Great Post Office Trial' (2020) <https://www.bbc.co.uk/programmes/m000jf7j> accessed 30 May 2025.
[5] See Stephen Colman, 'Private Prosecutions: reform or abolition?' (2023) 11 Crim LR 692.
[6] As will be seen below, this was eventually achieved by means of a controversial item of legislation.
[7] There has been keen media interest in this aspect of the case: see, for example, John Hyde, 'Fujistu boss egged on witness to fight 'nasty' sub-postmaster in court, inquiry hears' (*Law Society Gazette*, 18

However, an issue which has yet to receive much, if any, attention simply concerns whether Fujitsu owed a duty of care under product liability to the postmasters and failed in that duty by providing a defective system. The reason why this angle has received scant attention is possibly due to the fact that it raises two classic problematic areas of liability in negligence, namely, the extent to which, if at all, damages for pure economic loss and psychiatric injury are recoverable in respect of products causing loss to persons other than the purchaser.

Although the Horizon system, which included both software and hardware components, was designed as a bespoke package exclusively for the use of postmasters, and had a direct impact on their businesses and livelihoods, it was supplied to and owned by the Post Office under a major contract. Unless one has a sufficient proprietary interest in a defective product or damaged article, one's interest in the matter is deemed to be purely financial and thus purely economic.[8] The law has historically imposed strict limits on the recoverability of pure economic loss, largely due to classic floodgates arguments. Generally speaking, such losses are only recoverable if they fall within the *Hedley Byrne* exception,[9] originally confined to negligent misstatement but gradually extended to other services under so-called 'extended *Hedley Byrne*' liability. However, bellow it will be argued that the law in this area is beset with dogmatic approaches and rigid distinctions between physical and non-physical harm which do not reflect the current reality, especially where information technology (IT) is concerned, which transcends the boundaries between pure information and tangible products.

Nevertheless, ever since pure economic loss was first sequestrated from physical loss and treated as generally irrecoverable subject to narrow exceptions (the exclusionary rule), there has been a strand of judicial thought which regards such distinctions as arbitrary and unnecessary. Moreover, in other jurisdictions, such as Canada, the one size fits all approach to pure economic loss has given way to a more nuanced approach which recognizes that not all forms of pure economic loss give rise to identical policy arguments. Some of these 'straws in the wind' have been captured by a number of more recent House of Lords and Supreme Court decisions which have not started from the starting point that pure economic loss must be treated as irrecoverable unless it falls into an exception (although the more orthodox approach does reassert itself from time to time).

January 2024) <https://www.lawgazette.co.uk/news/fujistu-boss-egged-on-witness-to-fight-nasty-sub-postmaster-in-court-inquiry-hears/5118474.article> accessed 5 June 2025; Simon Jack, 'Post Office scandal: Key questions for Fujitsu' (*BBC News*, 15 January 2024) <https://www.bbc.co.uk/news/business-67985374> accessed 5 June 2025; John Hyde, 'Trust the Expert' (2024) 121(24) LSG 8.

[8] As regards what constitutes a sufficient legal interest in a physical item see *Colour Quest UK Ltd v Total Downstream UK plc* [2010] EWCA Civ 180, [2011] QB 86; *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6, [2025] AC 406.

[9] *Hedley Byrne & co v Heller & Partners Ltd* [1964] AC 465.

Against the background it is possible to build a convincing argument to the effect that Fujitsu owed a duty of care to the postmasters, notwithstanding the fact that their losses were largely economic, irrespective of whether such losses can be accommodated within the narrow exceptions. Notwithstanding this debate, even if one were to adhere to the narrow approach, there is a strong case for arguing that the matter would fall within the narrow *Hedley Byrne* exception to the exclusionary rule.

The financial devastation wrought by the Horizon system cannot be isolated form the consequent impact which it has on the mental health of many of the postmasters many of whom, as noted above, are still living with the long-term psychiatric effects. A subsidiary argument will be made to the effect that, whilst there is scant authority on the issue, it is possible to formulate a claim based upon the collateral psychiatric damage caused by incurring significant financial losses as a result of a negligent act.

2. A brief history of the Horizon scandal

The Horizon system, a newer and 'debugged' version of which is still in use in post offices, has its antecedents in the Pathway Programme, a £1bn contract awarded to ICL in 1996 to revolutionize the payments of benefits at post office counters. At that time ICL, one of the old school IT companies from the pioneering days of computing in the UK, was 80% owned by Fujitsu. By the end of the following year costs were spiralling out of control as the complexities of the task became apparent. It has been reported that, on getting wind of the fact that the UK government was preparing to cancel the contract, political and economic pressure was applied by Fujitsu and the Japanese government to agree an alternative IT project. The benefits payment aspects of the project were discarded and the scheme morphed into the Horizon branch accounting system.[10] Around the turn of the millennium, ICL became a wholly owned subsidiary of Fujitsu before the brand name was dropped entirely; henceforth the name Fujitsu became synonymous with the scandal.

The new Horizon system was rolled out to post office sub-offices in 1999. Postmasters encountered difficulties with the system from the outset and often worked late into the night in futile attempts to balance the books.[11] When they raised concerns with or sought help from

[10] Bryan Glick, 'How Fujitsu became a central part of the Post Office scandal' (*ComputerWeekly.com*, 10 January 2024) <https://www.computerweekly.com/news/366565720/How-Fujitsu-became-a-central-part-of-the-Post-Office-scandal> accessed 18 January 2024. The article cites evidence submitted to the Post Office public inquiry.

[11] The various bugs have been named after the various post office branches in which they were first identified. Some are readily understandable from the point of view of the layperson. For example, with the 'Dalmellington Bug' the screen would sometimes freeze as one tried to enter a transaction. The screen would remain unresponsive as multiple attempts were made to re-enter the transaction; however, despite the screen appearing to be locked, the system would be recording each entry as a new transaction thus multiplying the actual amount several fold. See Alex Hern, 'How the Post Office's

the Post Office, they encountered an implacable attitude epitomized in popular culture by the phrase 'computer says no;'[12] a computer cannot possibly be wrong, and the error must be the postmaster's own.[13] Of course, anyone who knows the first thing about computers knows the phrase 'garbage in – garbage out,' a computer is only as good as the code put into it. As has now been documented ad nauseum, the code in this case was 'garbage.'

Thereafter, the Post Office embarked on a course of conduct which, at best, constituted blind faith in a defective system and, at worst, amounted to a potentially criminal conspiracy designed to protect the reputation of the Post Office and the integrity of Horizon at the cost of the livelihoods, reputations, mental health and freedom of innocent postmasters and postmistresses.

In a David and Goliath battle which has now almost become a matter of folklore, thanks to the aforementioned publicity, a legal fightback was orchestrated by Alan Bates, one of the wronged postmasters. In a group action Bates secured compensation for some 550 claimants for breach of an implied contractual term of good faith.[14] The victory was extremely hard won, and the Post Office fought the case extremely fiercely employing every legal technique at their disposal.[15] The decision blew the case wide open and constituted the first official public acknowledgement of the extent of the scandal. It paved the way for the quashing of 39 convictions by the Court of Appeal in *Hamilton v the Post Office Ltd*[16] in which the failures on the part of the Post Office to properly investigate credible claims as to the unreliability of the system and to make proper disclosure were described as 'so egregious as to make the prosecution of any of the "Horizon cases" an affront to the conscience of the court.'

These victories were a key factor in triggering a public inquiry[17] which took evidence over nearly three years and published its first report in 2025[18] focusing on the human cost and the

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Horizon system failed: a technical breakdown' *Guardian* (London 9 January 2024) <https://www.theguardian.com/uk-news/2024/jan/09/how-the-post-offices-horizon-system-failed-a-technical-breakdown> accessed 28 February 2024.

[12] The catchphrase of a bored and unthinking bureaucratic character in the comedy sketch show *Little Britain* who would invariably answer all requests for information or assistance in the negative having briefly glanced at her computer screen.

[13] A cultural reference which has not been lost on the media in its coverage of the scandal: see Hugo Rifkind, 'Horizon was "computer says no" on a vast scale; the Post Office scandal is a reminder that all automation must be backed up by accountable humans' *The Times* (London, 9 January 2024) 23.

[14] See *Bates v Post Office Ltd (No. 3: Common Issues)* [2019] EWHC 606 (QB), [2019] 3 WLUK 260.

[15] The case had to survive an attempt to strike out large parts of the evidence: *Bates v Post Office (No. 2)* [2018] EWHC 2698 (QB), [2018] 10 WLUK 291; and even an attempt to recuse the judge for 'apparent bias': *Bates v Post Office (No. 4: Recusal Application)* [2019] EWHC 871 (QB) | [2019] 4 WLUK 150.

[16] [2021] EWCA Crim 577, [137]. For case note see [2021] Crim. L.R. 684.

[17] The Post Office Horizon IT Inquiry <https://www.postofficehorizoninquiry.org.uk/> (accessed 13 June 2024).

[18] The Post Office Horizon IT Inquiry, 'Volume 1 of the Post Office Horizon IT Inquiry's final report, focusing on the human impact of the scandal and redress' (HC 1119, 2025)

manner in which the various compensation schemes (outlined below) have worked, or not as the case appears to be; this has formed the backdrop to recent media interest in the topic. To some extent, it is the vast amount of technical detail exposed by the inquiry to date which has shifted more of the focus from the Post Office to the actions of Fujitsu and their role in the scandal.

However, in the white heat of the public furore generated by the dramatization, the Government chose not to wait for the outcome of the inquiry before taking some significant steps. In May 2024 convictions were overturned *en masse* under an unprecedented item of legislation, the Post Office (Horizon System) Offences Act 2024. This coincided with the instigation of compensation schemes funded by the taxpayer.[19] However, these have proved to be highly controversial and many postmasters have complained that they are slow, complicated and fail to deliver anything approaching full compensation for the losses sustained.[20] Indeed, the first report of the Post Office IT Inquiry has been highly critical of the manner in which the schemes have been operated and has made a number of

<file:///C:/Users/sbrt051/Downloads/Post%20Office%20Horizon%20IT%20Inquiry%20Final%20Report%20Volume%201_0.pdf> accessed 21 July 2025.

[19] There are in fact three schemes in operation. The Group Litigation Order (GLO) Scheme is open to those who were part of the group litigation pursued by Alan Bates against the Post Office (n 14); however, it excludes those who received criminal convictions which amounts to 63 of the 555 sub-postmasters and mistresses in the group: Department for Business and Trade, 'Compensation scheme for Group Litigation Order case postmasters' <https://www.gov.uk/government/publications/compensation-scheme-for-group-litigation-order-case-postmasters> accessed 6 June 2025. Those whose convictions were overturned by the Post Office (Horizon System) Offences 2024 Act are eligible under the Horizon Victims Redress Scheme; this absorbed the Overturned Convictions Scheme which was open to those whose convictions were overturned on appeal in the courts prior to the passing of the 2024 Act: see Department for Business and Trade, 'Horizon Convictions Redress Scheme (HCRS) <https://www.gov.uk/government/collections/horizon-convictions-redress-scheme-hcrs-applicant-information> accessed 6 June 2025. Finally, the Horizon Shortfall Scheme (HSS) aims to catch anyone falling through the gaps of the aforementioned schemes, namely those who were not part of the group litigation and did not receive a criminal conviction: see Post Office, 'Horizon Shortfall Scheme'https://www.onepostoffice.co.uk/scheme <accessed 6 June 2025>. The schemes are monitored by the Horizon Compensation Advisory Board who constantly review how the schemes are running and make recommendations with a view to securing consistency and best practice across each element of the system: .

[20] As might be expected, Sir Alan Bates has been especially vocal in his criticisms of the system and described the administration of the system as analogous to a 'quasi-kangaroo' court suggesting that the Department for Business and Trade is not a suitably impartial adjudicator and 'moves the goalposts' to suit its own ends: Alan Bates, 'The state is still failing postmasters. We need a new, fair system' *Sunday Times* (London, 25 May 2025). Whilst the Horizon Compensation Advisory Board rejected these criticisms (see Horizon Compensation Advisory Board, 'Statement by the Board on fairness of the GLO redress scheme' (27 May 2025) <https://assets.publishing.service.gov.uk/media/6835a62f214f7f554cf692ff/Statement_on_fairness_of_GLO_redress_scheme.pdf> accessed 6 June 2025) it is notable that the Business and Trade Committee has been highly critical of the system, albeit in less colourful terms, and made a number of recommendations: Business and Trade Committee, *Post Office Horizon scandal redress: Unfinished business: Government response* (Fourth Report of Session 2024-25, 25 March 2025) <https://publications.parliament.uk/pa/cm5901/cmselect/cmbeis/778/report.html> accessed 6 June 2025.

recommendations.[21] Whether these recommendations will be swiftly acted upon and expedite proceedings remains to be seen. In any event, claimants are once more beginning to explore what avenues of redress might be available before the courts.

To this end Lee Castleton, one of the most high-profile postmasters in the saga, has become the first to commence individual civil proceedings against both the Post Office and Fujitsu.[22] In 2007 Mr Castleton was successfully sued by the Post Office for alleged shortfalls in his takings which it later transpired were attributable to the failings in the Horizon System and not any malpractice on his part. Fujitsu provided crucial evidence attesting to the reliability of the system and refuting the idea that it was in any way defective. The purpose of Mr Castleton's action is to have the decision set aside on the grounds that the judgment was obtained by fraud and to seek damages in respect of the sums for which he was made liable under the judgment and the consequent damage to his reputation and livelihood.[23]

The fact that Fujitsu has been joined as a co-defendant in the proceedings instigated by Mr Castleton is especially significant in that it is the first time that the company has been sued directly for its part in the scandal. As noted above, the action focuses on the specific role played by Fujitsu in securing the civil judgment against Mr Castleton. However, irrespective of the outcome of this litigation, as previously noted, it will be argued that Fujitsu could be liable under the wider issue of manufacturers or products liability for the losses caused to the users of their system, notwithstanding the lack of a direct proprietary interest in the hardware or software.

3. Product liability: background issues

3.1 General considerations

The classic starting point for any analysis of the duty of care in general and the specific issue of manufacturers' or product liability is *Donoghue v Stevenson*.[24] May Donoghue claimed that she was injured by consuming ginger beer contaminated by the decomposing remains of a snail which had been hidden from view by the opaque nature of the glass bottle. One does not need to labour the point that the manufacturer was held liable on the basis of Lord Atkin's neighbourhood principle, notwithstanding the fact that the claimant's unidentified friend bought the product rather than her. Crucial to the decision appears to be the fact that the claimant

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[21] Post Office Horizon IT Inquiry Report (vol 1) (18), parts 4 and 6.

[22] See John Hyde, 'Ex-postmaster sues Post Office and Fujitsu over Horizon scandal' (*Law Society Gazette*, 19 March 2025) <https://www.lawgazette.co.uk/news/ex-postmaster-sues-post-office-and-fujitsu-over-horizon-scandal/5122716.article#commentsJump> accessed 16 June 2025.

[23] Such actions are unusual but far from unheard of and there is a substantial body of case law underpinned by the maxim 'fraud unravels all.' Key authorities on the substantive and procedural aspects of such claims include *Jonesco v Beard* [1930] AC 298 and *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450.

[24] [1932] AC 562.

was injured by the defective product and was not merely disappointed that it did not meet her expectations. As has been pointed out on more than one occasion, there would have been no cause of action had the bottle been found to contain clean and uninjurious water as opposed to the noxious compounds of a rotting gastropod.[25] The need for this external physical damage is a crucial issue and, as will be seen below, raises major conceptual difficulties in respect of categorizing the types of loss which are typically associated with defective computer systems.

3.2 Computer systems and product liability

At the outset it is important to note that the computer system was supplied in a commercial as opposed to a consumer setting which means that the strict liability regime introduced by the Consumer Protection Act 1987 (CPA 87) does not apply.[26] As such, the issue falls under the common law of negligence and the subset of 'manufacturers' liability', a somewhat misleading term in that it may stretch to persons other than the original manufacturer such as assemblers and distributors. Product liability is perhaps a better description although it tends to be more associated with liability under the CPA 87.

As will be discussed in more detail below, there has been a longstanding debate as to whether computer software is information or a tangible product. Software which is hardwired into a physical product is clearly part of that item and, if the software is defective and causes the item to malfunction in a way which causes external physical loss, liability in tort clearly arises. If, however, the software merely damages the product of which it forms part, the loss would be regarded as purely economic and hence irrecoverable. As regards software which merely processes information, such as an accountancy package, there has been a degree of uncertainty over the years as to whether defective computer code is a product or merely information which is not sufficiently tangible to be categorised as a product.

It is necessary to look to the United States to find case law on this specific issue. In the US the Third Restatement of Torts defines a product as 'tangible personal property;'[27] although different States have interpreted this in very different ways.[28] In *America Online, Inc v St Paul Mercury Insurance Co*[29] it was held that software is not a tangible product because it cannot be touched or perceived with the senses. Whereas, in *Retail Systems, Inc v CNA Insurance*

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[25] See Alistair Clark, 'Product liability and pure economic loss: a radical proposal' [1993] JBL 383; Goudkamp and Nolan (n 38).

[26] Notwithstanding the fact that the matter would fall outside the scope of the 87 Act and the European legislation from which it arose, developments in the consumer protection sphere will be referred to extensively below in that this is where key recent developments on liability for defective software are to be found. In this respect, the consumer legislation provides invaluable insights into the issue and how the common law ought to develop.

[27] *Third Restatement*, § 19(a).

[28] See, generally, Michael D. Scott, 'Tort Liability for Vendors of Insecure Software: Has the Time Finally Come?' (2008) 67(2) Md. L. Rev. 425.

[29] 207 F. Supp. 2d 459, 461 (E.D. Va. 2002).

Co[30] it was held that the intangible elements of a computer system were rendered tangible by the storage medium, in this case tape. The latter approach led to the inventive argument in *Transport Corp of America v IBM Corp*[31] that a defect in the physical storage medium, in this case a disk drive, could be regarded as having caused external damage where it corrupted the data contained therein. The court rejected this argument and held that the data could not be separated from the storage medium with the result that the damage was entirely internal.

In the EU the original Product Liability Directive,[32] pursuant to which the Consumer Protection Act 1987 was passed, made no reference at all to computer systems or software[33] despite the fact that by the 1980s computers had become a mainstream technology upon which commerce, government and the private individual were becoming increasingly reliant. As will be seen in due course, the New Product Liability Directive[34] has largely resolved any ambiguities in this respect, although post Brexit it will have no effect in the UK unless a decision is taken to shadow it in domestic law.[35] To reiterate, such developments would have no direct impact on the Horizon scenario due to the commercial nature of the system which brings it outwith the scope of consumer protection legislation; however, as will be seen in due course, they provide vital insights into how thinking is progressing in terms of how software should be conceptualized.

In any event, defective accountancy packages, such as Horizon, are by definition apt to cause purely financial losses. According to the established orthodoxy, such losses would be irrecoverable as pure economic loss unless they could be accommodated with the rule established by *Hedley Byrne v Heller*[36] on negligent misstatement, or the extended version

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30 469 N.W.2d 735 (Minn. Ct. App. 1991).

31 30 F.3d 953 (8th Cir. 1994).

32 Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of
the Member States concerning liability for defective product OJ L 210/29.

33 Art. 2 on the definition of product merely referred to 'all movables' denoting some form of tangible object.

34 Directive (EU) 2024/2853 of the European Parliament and of the Council on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L 2853.

35 See UK product safety review <https://www.gov.uk/government/consultations/smarter-regulation-uk-product-safety-review> (accessed 25 Feb. 25). This was a consultation conducted in 2023 to which the government responded in November 2024. In its response the government acknowledges that the Consumer Protection Act 1987 has fallen woefully behind the times and blames this on the fact that it is linked to an out-of-date EU Directive. No mention is made of the fact that the New Product Liability Directive 2024/2853 has been in the pipeline for a few years and that the UK had the opportunity to keep up to speed with the debate arising therefrom: See Department for Business and Trade, 'Government Response to the Product Safety Review and next steps' (5 November 2024) <https://www.gov.uk/government/consultations/smarter-regulation-uk-product-safety-review/outcome/government-response-to-the-product-safety-review-and-next-steps> (accessed 25 February 2025), at para [11].

36 [1964] AC 465.

thereof.[37] As such, the position is that the matter is essentially one of contract and must be pursued by the purchaser of the system. Of course, regarding the Horizon scandal, it was the postmasters who had to use and rely upon the system and were most directly impacted by the defects in the system rather than the Post Office which procured it. Nevertheless, due to the financial nature of the losses and the fact that they were not party to the contract under which the system was procured, any claim against Fujitsu would be likely to run straight into the pure economic loss problem.

Below it will be argued that the law in this area has been beset by dogma and simplistic floodgates arguments which need to be reassessed in the light of developments in technology and some of the specific iniquities raised by the scandal. Moreover, it will be argued that there has always been a strand of judicial thought which has fought against the notion that a one size fits all approach should be adopted towards the issue and that the starting point should not be that there is a policy-based presumption against such claims.

4. The doctrinal backdrop to pure economic loss

The textbook position on pure economic loss and product liability is very clear; in short, as with any other form of negligence-based liability, pure economic losses are not recoverable unless they can be brought within the *Hedly Byrne* exception.[38] However, before turning to the specific issue of the extent to which defective computer systems may give rise to a cause of action for pure economic loss sustained by users other than those who are in a contractual relationship with the manufacturer or software developer, it is necessary to set the issue in its broader legal context.

As Lord Oliver of Aylmerton put it in *Murphy v Brentwood District Council*:

> [I]n an uninterrupted line of cases since 1875, it has consistently been held that a third party cannot successfully sue in tort for the interference with his economic expectations or advantage resulting from injury to the person or property of another person with whom he has or is likely to have a contractual relationship.[39]

4.1 The floodgates argument

The 1875 case taken as the starting point was *Cattle v Stockton Waterworks Co*[40] in which a defective water main, owned by the defendant, flooded a tunnel under construction by the

[37] As has long been noted in the incredibly scant literature on the issue of computer systems and product liability in the UK; see, for example, Howard Johnson, 'Systems down' (1995) 13(8) IBFL 86, 87.
[38] See, for example, James Goudkamp and Donal Nolan, *Winfield & Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) 287.
[39] [1990] 1 AC 398 (HL) 485C-D (Lord Oliver).
[40] (1874-75) LR 10 QB 453.

claimant who suffered economic losses through delays and penalty clauses under the construction contract. Thus, the loss arose from the fact that the contract was rendered less profitable than it would otherwise have been. Appropriately enough, given the subject matter of the case, Blackburn J adopted a classic floodgates argument to justify a finding to the effect that this type of loss was not recoverable; although he admitted to finding the argument 'technical and against the merits.'[41] In this case the finding was that the facts did not disclose a cause of action at all as opposed to the loss simply being too remote.[42]

4.2 Exceptions emerge: 'common adventure'

This approach was affirmed in a number of subsequent cases but, in one of the cases which is often flagged up as a landmark in the development of the law in this area, it was made clear that there could be exceptions to the general proposition that there could be no liability for purely economic loss. In *Greystoke Castle*[43] the owners of cargo onboard a ship incurred 'General Average' expenditures following a collision with a vessel owned by the defendants who were found partly to blame for the accident. 'General Average' is a principle of maritime law according to which cargo owners must contribute to the salvage costs associated with recovering the cargo. Notwithstanding the fact that the losses were economic in that the cargo was undamaged, Lord Roche held that the claimants were engaged in a 'common adventure' with all parties charged with transporting the goods. Thus, the interests of the cargo owners could not be disentangled from the owners of the ship. His Lordship gave the example of two lorries loaded with cargo and asserted that if a collision was caused by a negligently driven lorry, even if the goods were undamaged, the costs of unloading the goods and making alternative transport arrangements would be recoverable.[44] In other words, the loss should be regarded as a direct consequence of the collision and not too remote.

The case carved out a very narrow exception to the general rule and attempts to use the specific 'common adventure' test in other contexts have failed.[45] Nevertheless, the case did perhaps serve to demonstrate that the rapidly hardening concept of pure economic loss was not entirely unassailable.

The issue next came to the fore a short time later in the context of financial services which, be definition, are apt to cause pure economic loss as opposed to physical damage. The 1950s saw the beginning of attempts to use negligence as a means of increasing accountability in this sector. Could it be right that a professionally qualified accountant, for example, could

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41 ibid, 457.
42 ibid, 458.
43 *Morrison Steamship Co Ltd v Greystoke Castle* [1947] AC 265
44 ibid, 280.
45 See *Londonwaste Ltd v Amec Civil Engineering Ltd* (1997) 53 Con LR 66.

escape liability purely because any losses they caused were purely economic; notwithstanding the fact that, because of the very nature of the activity, the losses can only have a financial dimension? In order to recover such losses it was necessary to show that the transaction had been tainted by bad faith or a decision to mislead so as to trigger liability under the tort of deceit.

4.3 Negligent misstatement

The issue was crystallized in the case of *Candler v Crane, Christmas & Co*[46] in which the claimant based an investment decision in a new Cornish tin mining venture upon accounts which had been negligently prepared by the mining company's accountants, Crane Christmas. The accounts gave an inaccurate picture of the financial health of the company which subsequently went into liquidation causing the claimant to lose his investment. During the course of the negotiations the managing director of the mining company had impressed upon the accountants the need to expedite matters as the information was needed by the claimant in order to inform his decision. In the Court of Appeal, the majority decided against the claimant on the grounds that Lord Atkin's neighbourhood test established in *Donoghue v Stephenson* only contemplated physical damage and had had no effect on earlier case law pertaining to loss which was only financial in nature.[47]

Of course, the case is far better known for the dissenting judgment of Denning LJ (as he then was) which laid the groundwork for subsequent developments. He was adamant that the time had come to establish such a duty and that the courts should not be faint-hearted. Interestingly, given his subsequent pronouncements on the issue, he did not attach any significance to the fact that the loss was purely financial and had no physical dimension:

> I must say, however, that I cannot accept this as a valid distinction. I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think that liability depends on the nature of the damage.[48]

Thus, according to this approach, there is no hard and fast rule against pure economic loss although, where the loss is purely financial, it may be necessary to look more carefully at the issue of proximity. In this case Denning LJ asserted that abundant evidence of proximity was provided by the fact that the accountants were told why the matter was urgent and who was going to rely on the information.

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[46] [1951] 2 K.B. 164.
[47] ibid. See, for example, Asquith LJ at 189-90.
[48] ibid 179.

A little over a decade later Denning LJ found himself in the unusual position of having his dissenting judgment approved by the House of Lords in *Hedley Byrne & Co v Heller and Partners*[49] which remains the leading authority on negligent misstatement. The facts of the case are too well known to require extensive repetition. Suffice it to say, the claimants, an advertising agency, undertook work 'on account' (on credit) for new clients on the strength of a statement of credit worthiness supplied by the client's bankers (Heller) via the claimant's bankers (National Provincial) in accordance with banking etiquette. The statement proved to be erroneous, and the client went out of business before the claimants could recoup their costs. The simple question was whether, in the absence of a contractual link between the claimants and Heller, a successful claim could be pursued against them in negligence, notwithstanding the absence of physical damage.

Lord Morris could find no logical distinction between financial harm arising from reliance on information and physical harm arising from reliance on a product or piece of equipment which proves to be unsafe:

> It is said, however, that where careless (but not fraudulent) misstatements are in question there can be no liability in the maker of them unless there is either some contractual or fiduciary relationship with a person adversely affected by the making of them or unless through the making of them something is created or circulated or some situation is created which is dangerous to life, limb or property. In logic I can see no essential reason for distinguishing injury which is caused by a reliance upon words from injury which is caused by a reliance upon the safety of the staging to a ship or by a reliance upon the safety for use of the contents of a bottle of hair wash or a bottle of some consumable liquid. It seems to me, therefore, that if A claims that he has suffered injury or loss as a result of acting upon some misstatement made by B who is not in any contractual or fiduciary relationship with him the enquiry that is first raised is whether B owed any duty to A: if he did the further enquiry is raised as to the nature of the duty.[50]

The references to 'staging to a ship' and 'hair wash' relate to the cases of *Heaven v Pender*[51] and *George v Skivington*[52] respectively both of which, prior to *Donoghue v Stephenson*, went against the flow and established liability for defective products which injured someone outside the contract under which they were supplied. Those cases created proximity problems in that there were no kinetic forces, such as the direct infliction of physical harm by the tortfeasor,

[49] [1964] AC 465.
[50] ibid 496 (Lord Morris of Borth-y-Gest).
[51] (1883) 11 QB. 503.
[52] (1869-70) LR 5 Ex 1

locking the parties into a normative embrace.[53] Thus, it was necessary to establish a relationship between two parties who never met or had any course of dealing and were linked solely by a defective object which was passed from one to the other through one or more intermediaries. However, the lack of geographic proximity was overcome by imputing knowledge to the manufacturer or original supplier that the user may be someone other than the purchaser. This knowledge established a relationship between the parties which could be expressed as proximity arising from the injured party being regarded as a foreseeable victim of the defendant's negligence.

Similarly, the case at hand entailed the passing of a defective entity from the defendant to the claimant via an intermediary, only, the entity took the form of information as opposed to a physical product or service. However, the solution adopted by the House of Lords was essentially the same, a relationship could be established between the maker of the statement and the party relying on it to their detriment by imputing knowledge to the defendant that someone other than the direct recipient of the information was reliant upon its accuracy. Of course, information is not constrained by a corporeal form and can be far more diffuse and uncertain in its effects than a physical object, the transactions pertaining to which are more readily traceable.

Thus, reliance on wrong information was equated with placing one's faith in a defective product which causes personal injuries. Although, their Lordships acknowledged the aforementioned point that proximity is less apparent where the harm does not manifest itself in a physical form and, in the absence of kinetic forces linking the parties, some other means would have to be found of locking them into a normative embrace. In order to achieve this, Lord Morris proposed the following formulation:

> My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another

[53] To borrow a term coined by Weinrib in the context of the corrective function of tort law: see Ernest Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press 2012), 142.

> person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.[54]

From this we can see the clear emergence of three essential criteria, namely, an assumption of responsibility arising from agreeing to undertake a task for the benefit of another person; reliance by that person on the skills of the other; and full knowledge on the part of the person offering information or advice that their skills will be relied upon for a specific purpose. Lord Devlin offered additional thoughts on the type of relationship that would be apt to produce an assumption of responsibility and concluded that it would most likely be something 'equivalent to contract.'[55] This might denote a course of dealing between the parties, albeit outside a contractual setting. As regards the circumstances in which it would be reasonable to rely upon such advice or information, Lord Pearce suggested that the context would need to be commercial or business orientated

4.4 Beyond negligent misstatement

The extent to which the *Hedley Byrne* approach could be applied in situations other than the narrow field of negligent misstatement remained to be determined. In *Weller v Foot and Mouth Disease Research Institute*,[56] concerning loss of profit claims brought by a firm of livestock auctioneers whose business had been disrupted by an outbreak of foot and mouth disease caused by the defendant's negligence, Widgery J rejected the argument that *Hedley Byrne* had

> swept away any existing notion that direct injury to the person or property of the plaintiff is necessary to support an action in negligence and that the door is now open for the plaintiffs in the present action to recover the indirect or consequential loss which they have suffered.[57]

Rather, it was important to consider whether the loss fell outwith the scope of the duty of care. In the case at hand the duty was not to cause property damage to owners of livestock by failing to contain a dangerous virus within the research laboratory. This could not be extended to a duty not to cause economic losses to those who had a purely financial interest in the matter; notwithstanding the fact that such losses may have been foreseeable:

> In my judgment, there is nothing in *Hedley Byrne* to affect the common law principle that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take

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[54] *Hedley Byrne* (n 49) 502-503 (Lord Morris of Borth-y-Gest).
[55] ibid 529.
[56] [1966] 1 QB 569.
[57] ibid 585B (Widgery J).

> care. If the plaintiff can show that the duty was owed to him, he can recover both direct and consequential loss which is reasonably foreseeable, and for myself I see no reason for saying that proof of direct loss is an essential part of his claim. He must, however, show that he was within the scope of the defendant's duty to take care.[58]

Contrary to how the case is sometimes presented in the textbooks, at no point did the judge set out a heavily policy laden argument to the effect that pure economic loss is generally irrecoverable due to floodgates type policy arguments. Rather, his main argument was that foreseeability of harm alone is not sufficient to give rise to a duty of care or bring harm within the scope of an existing duty not to cause other types of harm; otherwise: 'The world of commerce would come to a halt and ordinary life would become intolerable.'[59] However, this would be true of any type of loss based on foreseeability alone and is not confined to pure economic loss. Where the consequences of ones actions are likely to manifest themselves as physical damage, a duty not to cause that type of loss can be readily assumed. In order to bring other types of losses within the duty an additional ingredient is required in order to establish the requisite degree of proximity, such as a course of dealing or some form of undertaking. Widgery J regarded *Hedley Byrne* as an example of where a duty of care might arise in respect of purely financial loss even though 'no contract or fiduciary relationship exists between the giver of the advice and the person who may act upon it;'[60] but he certainly did not regard *Hedley Byrne* as setting out any sort of exclusionary rule whereby all subsequent cases would have to be brought within an eponymous exception established by the case. Moreover, as will be seen, his focus on the scope of the duty as opposed to the nature of the loss as the starting point for the analysis has been returned to from time to time in subsequent judicial analyses of the issue and has more recently gained traction as the key test.

4.5 The disrupted utilities cases

There then followed a short sequence of cases where utilities serving factories were negligently cut causing interruptions to production and subsequent loss of profits. In *Electrochrome v Welsh Plastics*[61] the defendant's employee damaged a fire hydrant with his van necessitating cutting the water supply until the damage had been repaired. Geoffrey Lane J closely followed *Weller* and found that a duty not to damage physical infrastructure did not generally encompass a duty not to cause loss to those who did not own the infrastructure but who were dependent upon it for commercial purposes. A similar approach was adopted in *SCM (UK) Ltd v WJ Whittall & Son*[62] in which a workman hammered a steel tube into an

[58] ibid 587D-E (Widgery J).
[59] ibid 585C (Widgery J).
[60] ibid 587B-C (Widgery J).
[61] [1968] 2 All ER 205.
[62] [1971] 1 QB 337.

electricity cable cutting power to a factory that produced typewriters and copiers. However, there was a crucial factual difference in this case which allowed the claim to succeed on the facts in that molten metal solidified in delicate moulding machines requiring painstaking and time-consuming repairs. The loss of profits stemming from the inability to use a damaged item constituted consequential as opposed to pure economic loss and was thus recoverable without the need to enquire more deeply into issues of proximity and so forth. However, on a wider level, the *SCM* case marked the beginnings of a shift towards a more arbitrary and policy orientated justification for limiting recovery for pure economic loss.

4.6 A retreat into policy

Although the claimant in *SCM* succeeded on the basis of a key factual difference to previous utility cutting cases, on a broader level Lord Denning MR, in contrast to his earlier pronouncements on the issue, veered towards a heavily policy-based rationale for limiting liability for this type of loss. In response to Lord Devlin's assertion in *Hedley Byrne* to the effect that he could 'find neither logic nor common sense'[63] in the distinction between physical damage and economic loss, his Lordship asserted in the most Denning-esque of terms that:

> There may be no difference in logic, but I think there is a great deal of difference in common sense. The law is the embodiment of common sense: or, at any rate, it should be. In actions of negligence, when the plaintiff has suffered no damage to his person or property, but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy…
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> …When an electric cable is damaged, many factories may be stopped from working. Can each of them claim for their loss of profit? I think not. It is not sensible to saddle losses on this scale on to one sole contractor. Very often such losses occur without anyone's fault. A mine may be flooded, or a power failure may occur, by mischance as well as by negligence. Where it is only mischance, everyone grumbles but puts up with it. No one dreams of bringing an action for damages. So also when it occurs by negligence. The risk should be borne by the whole community who suffer the losses rather than rest on one pair of shoulders, that is, on one contractor who may, or may not, be insured against the risk. There is not much logic in this, but still it is the law.[64]

Thus, in Lord Denning's universe, the policy of the law resides in common sense rather than logic in that the logical approach may lead to non-sensical conclusions. Without a specific heading into which to locate such policy concerns, Lord Denning framed the issue in terms of

[63] *Hedley Byrne* (n 49) 517 (Lord Devlin).
[64] *SCM* (n 62) 344A-D (Lord Denning MR).

remoteness. Quoting Lord Wright in *Leisbosch Dredger*[65] he stated that remoteness entails selecting 'some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.'[66] 'Practical reasons' in Lord Denning's analysis being synonymous with common sense and hence policy considerations.

A short time later, in the context of another case concerning the cutting of the electricity supply at a critical time, Lord Denning doubled down on this approach and suggested that policy reasons alone would suffice to limit liability without the need to assimilate them with issues of proximity, foreseeability or remoteness. In *Spartan Steel and Alloys v Martin*,[67] a mechanical excavator operated by an employee of the defendants, negligently severed an electric cable serving the claimant's arc furnace which was used to produce stainless steel ingots. The issue was whether they could recover loss of profit on future lost production runs in addition to consequential damages for damage to the work in progress, and loss of profit thereon, which was in the furnace at the time the power was cut. Unlike in *SCM*, the claimants had managed to avoid damage to their equipment with the result that the recoverability of pure economic loss was directly relevant to the outcome of the case. In this respect, a sharp difference of opinion emerged between the majority decisions of Denning MR and Lawton LJ and the dissenting judgment of Edmund-Davies LJ.

In the leading judgment Denning MR expressed dissatisfaction with many of the existing authorities on the grounds that each used varying doctrinal methods to justify limitations on the recovery of pure economic loss; this was conducive to complexity and lack of clarity in the law. In his Lordship's view, the time had come to sweep away such legalistic debates and replace them with a bright-line policy-based rule against the recoverability of pure economic loss save for very specific and narrow exceptions.

> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I says "There was no duty". In others I say: "The damage was too remote". So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as matter of policy, economic loss should be recoverable, or not. Thus in Weller's case (l966) 1 Q.B. 569 it was plain that the loss suffered by the auctioneers was not recoverable, no matter whether it is put on the ground that there was no duty or that the damage was too remote. Again in Electrochrome Ltd. v. Welsh Plastics Ltd. (1968) 2 All. E.R. 205, it is plain that the

[65] *Liesbosch Dredger v SS Edison* [1933] AC 449, 460 (Lord Wright).
[66] *SCM* (n 62) 344D-E (Lord Denning MR).
[67] [1973] 1 QB 27.

> economic loss suffered by the plaintiffs' factory (due to the damage to the fire hydrant) was not recoverable, whether because there was no duty or that it was too remote.[68]

This retreat into policy-based distinctions in *SCM* and *Spartan Steel* was something of a turnabout on the part of Lord Denning in that, as noted above, in *Candler* he opined that the difference drawn between physical and economic loss was not a 'valid distinction.'[69] This point was not lost on Edmund-Davies LJ in his dissenting judgment where he pointedly reminded the Master of the Rolls of the part he had played in that case in 'blazing the trail which was to lead to Hedley Byrne and Co Ltd. v. Heller and Partners Ltd.'[70] The main thrust of Edmund-Davies LJ's dissenting argument was that there was no conceptual basis for drawing a rigid distinction between physical and economic loss. He challenged the by now deeply entrenched interpretation of Blackburn J's judgment in *Cattle* to the effect that there was a generally applicable policy-based limitation on this type of loss based largely on floodgates.[71] Moreover, he asserted that catastrophist theories as to the economic consequences of unshackling claims from physical loss and allowing them to run amok had ultimately proved to be unfounded in the field of nervous shock:

> Many alarming situations were conjured up in the course of counsel's arguments before us. In their way, they were reminiscent of those formerly advanced against awarding damages for nervous shock; for example, the risk of fictitious claims and expensive litigation, the difficulty of disproving the alleged cause and effect, and the impossibility of expressing such a claim in financial terms.[72]

However, floodgates issues had been resolved 'either on the ground that no duty of care was owed to the injured party or that the damages sued for were irrecoverable not because they were simply financial but because they were too remote.'[73] His Lordship did not specifically address the issue of proximity in that the case at hand did not raise proximity difficulties since the initial event, which triggered the losses, entailed a degree of physical interaction between the parties inasmuch as the defendant damaged infrastructure upon which the claimant relied. The issue was whether the lost profits on future production runs could be regarded as sufficiently linked to the initial power cut. Edmund-Davies LJ asserted that the issue could be resolved through a straightforward application of foreseeability of harm and remoteness and on this basis: 'we are here dealing with economic loss which was both reasonably foreseeable

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68 ibid 37C-E.
69 *Candler v Crane Christmas* (n 48).
70 *Spartan Steel* (n 67) 45E-F (Edmund-Davies LJ).
71 ibid 42F-43B (Edmund-Davies LJ).
72 ibid 45B-C (Edmund-Davies LJ).
73 ibid 45C (Edmund-Davies LJ).

and a direct consequence of the defendants' negligent act.'[74] He expressed no view on cases which raised greater proximity problems such as *Weller* where there was no physical event or course of dealing directly linking the parties. However, one can surmise that in approaching the issue of proximity, his Lordship would not have attached any significance to the distinction between economic and physical damage. Indeed, this is borne out by his approval of Denning LJ's assertion in his dissenting judgment in *Candler*[75] that, although financial losses may give rise to additional difficulties in establishing proximity, once a duty is established it matters not if the loss is economic as opposed to physical. Thus, the fact that the loss is purely financial should certainly not be a bar to a finding of proximity.

4.7 Defective buildings and defective goods

Aside from the power-cut cases, the early 1970s also saw the development of a line of case law on defective buildings and defective goods. As regards the former, the issue was whether tort could be used to secure compensation for property owners who had no contractual link with the original builder or where the builder was no longer extant necessitating placing some other party in the frame. In terms of the latter, which to some extent emerged as an offshoot of the defective building cases, the issue was whether, in the absence of external physical damage, a user of a defective chattel could recover economic losses notwithstanding the absence of a contractual relationship with the manufacturer or supplier. This clearly brings us closer to the Horizon issue; however, given the extent to which case law developments on defective goods are intermingled with defective buildings, it is necessary to trace both strands of case law development before teasing out those elements most relevant to the Horizon scandal.

4.7.1 Internal or external loss?

As regards defective structures, the line of case law arguably begins with *Dutton v Bognor Regis Urban District Council*.[76] Soon after the claimant bought a house major structural defects began to emerge as a result of subsidence. It transpired that the house and been built on a former rubbish tip and that the foundations were not adequate to cater for the more unstable ground conditions. An action was instigated against the builder (with whom the claimant had no contractual link as she was not the first owner) and the local authority on the grounds that its building inspector had signed off on the foundations without properly checking them. Having been advised that the claim against the builder stood no chance of success the claimant made a low out of court settlement with him which in no way reflected the true damage costs. The claim against the local authority, as employer of the inspector, progressed and was successful

[74] ibid 46C-D (Edmund-Davies LJ).
[75] *Candler v Crane Christmas* (n 46).
[76] [1972] 1 QB 373.

at first instance.[77] The Court of Appeal upheld the decision although the reasoning was complicated and there were differing shades of opinion and emphasis in the judgments. Although the litigation did not involve the builder, Lord Denning MR found it necessary to consider the position of the builder because, if there was no liability on the part of the builder there could be no liability on the part of the local authority.[78] Attention was drawn to the case of *Bottomley v Bannister*[79] which was decided shortly before *Donoghue v Stevenson*. In *Bottomley* it was held that a builder owed no duty of care to anyone other than the purchaser who was injured as a result of defects in construction. In other words, the position of builders was identical to that of manufacturers who, prior to *Donoghue v Stevenson*, owed no duty to injured parties other than the purchaser who would have had a contractual relationship in any case. *Donoghue v Stevenson* did not expressly overrule *Bottomley* and the view prevailed that the concept of manufacturers' liability did not extend to buildings and real property.[80] Subsequent decisions only served to make the position more complicated and anomalous[81] and Lord Denning decided that the time had come to assimilate builders' liability with manufacturers' liability in respect of dangerous defects.[82] However, given that no one had actually been injured by the structural defects in the house there remained the problem of whether the loss was purely economic and hence irrecoverable. Lord Denning avoided this difficulty by holding that the damage to the fabric of the property arising from the defective foundations was physical damage and not pure economic loss.[83] Arguably, Lord Denning was of the view that structural damage caused by defective foundations was external damage. However, it seems that the hazardous nature of the defect was the decisive factor. According to the Master of the Rolls, where a structure is dangerously defective, it would make no sense to only hold the defendant liable in cases where someone is injured as a result; liability should

[77] [1971] 2 All ER 1003.
[78] *Dutton* (n 76) 392F-G (Denning MR).
[79] [1932] 1 KB 458.
[80] In fact, the distinction between *Bannister* and *Donoghue* was a very fine one. *Bannister* was a fatal accident claim brought by the son of a couple who had been overcome by carbon monoxide poisoning caused by a defective gas boiler installed in a new house during construction. Before the house was fully complete and prior to purchase, the builder allowed the couple to move in under a temporary tenancy arrangement. Scrutton LJ proceeded on the basis that the boiler was part of the realty; however, Greer LJ entered into some obiter discussion about what the position would be if the boiler was regarded as a chattel in its own right. He was of the view that the bulk of the case law ran contrary to the view that any duty was owed to a third party injured by a defective product but confessed that it was difficult to reconcile all the authorities. In briefly considering *Bannister* Lord Atkin largely distinguished it on the grounds that the boiler had been found to be part of the realty and used Greer LJ's discussion to underscore the fact that the law was uncertain and in need of clarification. See *Donoghue* (n 24) 598 (Lord Atkin).
[81] As in *Sharpe v. E. T. Sweeting & Son Ltd*. [1963] 1 W.L.R. 665 where it was held that *Bannister* was authority for the proposition that a builder who still owns a defective property does not owe a duty to persons other than the purchaser; whereas, a builder who is a contractor and does not own the building does owe a duty.
[82] *Dutton* (n 76) 393D-G (Denning MR).
[83] *Dutton* (n 35) 396D-E (Denning MR).

also follow if the defect was discovered and acted upon before any injury occurred. Moreover, he asserted that the same approach should be extended to defective products under manufacturers' liability.

> If he [the manufacturer] makes it [an article] negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.[84]

Thus, according to this approach, if May Donoghue discovered the decomposing snail before she had consumed any of the drink and avoided any injury she might still have had a claim; although working out what this might be requires some imagination. Say, for example, the unidentified friend who bought her the drink had no more money to pay for a replacement and the café owner was not prepared to offer another, according to Lord Denning's approach, Mrs Donoghue could claim for the cost of having to obtain another ginger beer for herself. This certainly comes uncomfortably close to conferring a contractual remedy on a person who was not party to the original contract purely on the basis that the item did not live up to expectations. Mrs Donoghue did not pay for the original drink, and it is unlikely that it was imperative that she was supplied with a replacement had the defect been discovered in time. However, it is easy to formulate other scenarios in which the consumer or user is far more heavily reliant on repair or replacement. An obvious example would be a scenario where someone is provided with equipment for their business in circumstances where they do not have a contract with the supplier. The losses accruing from being unable to use the equipment would give rise to a form of consequential loss which would not be faced by Mrs Donoghue in the modified ginger been scenario. Furthermore, as will be seen below, especially where defective structures are concerned, defects may impose a burden on the property owner because they cannot simply be ignored.

Returning to the *Dutton* case, it is possible to detect this argument in the judgment of Stamp LJ who, in contrast to Lord Denning, tackled the pure economic loss issue head-on. He argued that there was an important distinction to be made between defects of quality and defects which gave rise to losses which went beyond the value of the item. Thus, had Mrs Donoghue been furnished with a bottle of water when she was expecting ginger beer, she would have had no remedy because, 'I do not warrant, except to an immediate purchaser, and then by the contract and not in tort, that the thing I manufacture is reasonably fit for its purpose.'[85] He then turned to the issue of losses not confined to the value of the item:-

[84] *Dutton* (n 35) 396F (Denning MR).
[85] *Dutton* (n 76) 414F (Stamp LJ).

> But the distinction between the case of the manufacturer of a dangerous thing which causes damage and that of a thing which turns out to be defective and valueless lies, I think, not in the nature of the injury but in the character of the duty. I have a duty not carelessly to put out a dangerous thing which may cause damage to one who may purchase it; but the duty does not extend to putting out carelessly a defective or useless or valueless thing. So again one goes back to consider what was the character of the duty, if any, owed to the plaintiff, and one finds on authority that the injury which is one of the essential elements of the tort of negligence is not confined to physical damage to personal property but *may embrace economic damage which the plaintiff suffers through buying a worthless thing*, as is shown by the *Hedley Byrne* case [1964] AC 456.[86] [emphasis added]

Thus, Stamp LJ was of the opinion that the starting point should not be the fact that the loss was purely economic as opposed to physical. Rather, the starting point should be whether there was a duty of care to avoid causing the loss in question, whatever form that loss took. Accordingly, the rest of his analysis was devoted to the policy issues associated with attaching a duty of care to the local authority's statutory powers and duties to enforce building regulations. Moreover, the words which have been emphasised in the above extract are of particular note. They indicate a clear argument to the effect that there is a distinction between economic losses associated with the fact that the item is rendered worthless or less valuable and external economic losses caused by those defects; these can be characterised as 'consequential losses.' Typically, in tort, consequential losses resulting from a defective product must be manifested in a physical form; however, Stamp LJ's analysis questions the logicality of this distinction.

4.7.2 The significance of dangerous defects

Before the decade was out the outcome of *Dutton* was largely endorsed by the House of Lords in the much-derided decision in *Anns v Merton Borough Council.*[87] Once again, the issue was whether a local authority owed a duty to the owners and occupiers of buildings to ensure that foundations were adequately inspected during construction. In a decision which has often been described as the 'high water mark' of an approach to the duty of care based upon an undiluted application of *Donoghue v Stephenson* type proximity and foreseeability arguments, their Lordships found in favour of the claimants. Lord Wilberforce was in no doubt that subsequent property owners were foreseeable victims of the defendant's negligence:

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[86] *Dutton* (76) 415A-B.
[87] [1978] AC 728.

> A reasonable man in the position of the inspector must realise that if the foundations are covered in without adequate depth or strength as required by the byelaws, injury to safety or health may be suffered by owners or occupiers of the house.[88]

However, in common with the approach adopted by Lord Denning in *Dutton*, the judgment appeared to sidestep the awkward pure economic loss issue by adopting an expansive definition of 'physical damage' on the grounds that the danger created by the defect gave rise to a necessity to take corrective measures before further loss or injury was caused:

> To allow recovery for such damage to the house follows, in my opinion, from normal principle. If classification is required, the relevant damage is in my opinion material, physical damage, and what is recoverable is the amount of expenditure necessary to restore the dwelling to a condition in which it is no longer a danger to the health or safety of persons occupying and possibly (depending on the circumstances) expenses arising from necessary displacement.[89]

In this respect his Lordship said that he had 'derived much assistance' from the judgment of Laskin CJ (dissenting in part) in the Canadian case of *Rivtow Marine Ltd v Washington Iron Works*.[90] Given that Lord Wilberforce chose not to expand on his reasons for favouring that judgment, it behoves us to consider the case in a little more detail.

The essential facts of *Rivtow* are that the claimants were the charterers of a log barge fitted with two cranes for loading and unloading. At the height of the logging season the barge was ordered back to Vancouver for emergency repairs after it came to light that a fatal accident had been caused by a manufacturing defect in an identical crane fitted to another vessel. It transpired that the manufacturer and their distributor had known about the defect for some time but had not taken steps to notify users of the equipment. The claimant argued that had they been notified about the defect in a timely fashion, they would have had the opportunity to effect the repairs before the start of the logging season.

The majority of the Supreme Court of Canada held that the repair costs could not be recovered as this constituted pure economic loss. There was, however, a specific duty to warn interested parties about dangerous defects[91] and the loss of profits resulting from having to take the barge out of service during the logging season were recoverable.

Laskin CJ dissented in part on the grounds that both the repair costs and the loss of profits ought to be recoverable. He was of the opinion that economic losses, associated with putting

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88 ibid 758D.
89 ibid 759G-H.
90 [1974] RCS 1189.
91 This aspect of the judgment is dealt with more fully below.

right a dangerously defective product, are a direct and foreseeable consequence of the negligence in manufacture and that the manufacturer should not benefit from the fact that the claimant averted a greater disaster:

> It is foreseeable injury to person or to property which supports recovery for economic loss suffered by a consumer or user who is fortunate enough to avert such injury. If recovery for economic loss is allowed when such injury is suffered, I see no reason to deny it when the threatened injury is forestalled. Washington can be no better off in the latter case than in the former. On the admitted facts, a crane on another person's barge, of similar design to that installed on the appellant's barge, had collapsed killing its operator. It was when this fact came to its notice that the appellant took its crane out of service. Its crane had the same cracks in it that were found in the collapsed crane, and they were due to the same faulty design in both cases. Here then was a piece of equipment whose use was fraught with danger to person and property because of negligence in its design and manufacture; one death had already resulted from the use of a similar piece of equipment that had been marketed by Washington. I see nothing untoward in holding Washington liable in such circumstances for economic loss resulting from the down time necessary to effect repairs to the crane. The case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations) but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such harm gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure.[92]

From this we can see that Lord Wilberforce latched onto the idea that, notwithstanding the absence external physical damage, certain defects have an external dimension and are not purely issues of intrinsic quality or functionality confined to the inward workings of a product or the four walls of a building. Throughout his judgment there are references to the regulatory context of buildings and the health and safety implications of unsound structures. A person lumbered with an unsafe or unsound structure cannot simply ignore the issue and the matter may become exceedingly burdensome. Failing to tackle the issue may result in them having to move out and could even result in personal liabilities if the defect were to cause injury to a third party. As a result, his Lordship clearly had difficulty in placing the case in the same group as those where the losses could be described as purely economic.

[92] *Rivtow* (n 90) 1222.

4.7.3 The zenith of liability for defective structures and products

Lord Wilberforce's approach helped pave the way for another decision which has been much vilified and maligned in subsequent decades, *Junior Books Ltd v Vietchi Ltd*,[93] which steers us closer to the territory of product liability, albeit in the context of a construction project.

The case stemmed from the construction of a new factory for the pursuers in Grangemouth pursuant to which the defenders had been engaged as subcontractors to lay the flooring (a specialist magnesium oxychloride cement composition). Although there was no direct contractual relationship between the litigants, Vietchi had been nominated, crucially as it turns out, as the flooring contractor by Junior Books on the advice of their architects. Before long cracks began to appear in the flooring and it became clear that the task had been performed negligently. Junior Books sought damages in excess of £200,000 as the cost of rectifying the defects and having to work around them.

On this occasion, the House of Lords could not sidestep the pure economic loss issue because there was no suggestion that the defect gave rise to any risk to health and safety.[94] Lord Fraser referred to *Hedley Byrne* as an example of where a course of dealing between the parties may give rise to a quasi-contractual relationship thereby establishing a high degree of proximity:

> The proximity between the parties is extremely close, falling only just short of a direct contractual relationship. The injury to the respondents was a direct and foreseeable result of negligence by the appellants. The respondents, or their architects, nominated the appellants as specialist sub-contractors and they must therefore have relied upon their skill and knowledge.[95]

This is highly redolent of a *Hedley Byrne* type approach, although, his Lordship appeared to be using the case as an example or guide as opposed to a specific rule or exception into which all claims for pure economic loss must be accommodated; at no point was *Hedley Byrne* referred to as a special rule or distinctive principle.

Having surveyed the key landmarks in the establishment of liability for pure economic loss, Lord Roskill also noted the quasi-contractual nature of the setting and the degree of proximity which this created.[96] Moreover, he questioned the logic of drawing a rigid distinction between defects causing some form of external risk or danger and those which do not:

> It seems curious that if the appellants' work had been so bad that to avoid imminent danger expenditure had been incurred the respondents could recover that expenditure,

[93] [1983] AC 520.
[94] ibid 532B-C (Lord Fraser).
[95] ibid 533B-C (Lord Fraser).
[96] ibid 542C-D (Lord Roskill).

> but that if the work was less badly done so that remedial work could be postponed they cannot do so. Yet this is seemingly the result of the appellants' contentions.[97]

However, his most significant assertion, in terms of liability for pure economic loss stemming from a defective product, was to the effect that the key issue is the nature or scope of the duty rather than the type of loss. In this respect he cited, with approval, the aforementioned passage from the judgment of Stamp LJ in *Dutton v Bognor Regis UDC* to the effect that recoverability depends not upon 'the nature of the injury but in the character of the duty.'[98] To reiterate, according to this approach, a manufacturer's liability is normally confined to not placing on the market goods which are liable to do physical harm. A manufacturer is not, as a matter of course, under a duty not to place on the market goods which are simply of inadequate quality or functionality. But this does not mean that the manufacturer is precluded from assuming such a duty if the facts disclose a special relationship with the user of the goods. In the case at hand, the product was not a generic item placed on the open market with no way of telling who would eventually use it; rather, it was a bespoke building component provided for, and at the behest of, a specific person. Thus, the starting point should be the scope of the duty rather than the fact that the loss is purely economic and establishes a presumption of irrecoverability unless it can be accommodated within some form of narrow exception.

On one level, therefore, Lord Roskill argued that defects in quality could give rise to a duty of care notwithstanding the absence of a contractual relationship between the parties and notwithstanding the absence of an external risk to health and safety. However, his Lordships also adopted a far more radical argument which sought to collapse the distinction between pure economic loss and physical harm entirely in the context of liability for defective things:

> My Lords, to my mind in the instant case there is no physical damage to the flooring in the sense in which that phrase was used in *Dutton*, *Batty and Bowen* and some of the other cases. As my noble and learned friend, Lord Russell of Killowen, said during the argument, the question which your Lordships' House now has to decide is whether the relevant Scots and English law today extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself. It was powerfully urged on behalf of the appellants that were your Lordships so to extend the law a pursuer in the position of the pursuer in *Donoghue v. Stevenson* could in addition to recovering for any personal injury suffered have also recovered for the diminished value of the offending bottle of ginger beer. Any remedy of that kind it was argued must lie in contract and not in delict or tort. My Lords, I seem

[97] ibid 542D-E (Lord Roskill).
[98] *Dutton* (n 86) (Stamp LJ).

> to detect in that able argument reflections of the previous judicial approach to comparable problems before *Donoghue v. Stevenson* was decided. That approach usually resulted in the conclusion that in principle the proper remedy lay in contract and not outside it. But that approach and its concomitant philosophy ended in 1932 and for my part I should be reluctant to countenance its re-emergence some fifty years later in the instant case. I think today the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not—it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages—but in the first instance establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.[99]

Such an approach would potentially bring all defects with the manufacturers' liability aspects of *Donoghue v Stevenson* irrespective of whether there had been external damage, or the risk of such damage, and without the need to enquire deeper into the issue of proximity where the defect was simply one of quality or functionality. His Lordship sought to forestall the argument that such an approach risked blurring the boundaries between tort and contract in this context by evoking the 'privity of contract fallacy' which had been used against the establishment of manufacturers' liability in the first place.

This was a step too far for Lord Keith who argued that it would impose quasi-contractual duties on manufacturers to guarantee the quality of products used by those with whom they have no contractual relationship and no opportunity to delineate the scope of their liability:

> The policy considerations which would be involved in introducing such a state of affairs appear to me to be such as a court of law cannot properly assess, and the question whether or not it would be in the interests of commerce and the public generally is, in my view, much better left for the legislature.[100]

Nevertheless, on the facts of the case at hand, his Lordship was prepared to find that the defendants owed the pursuers a duty of care to perform the work competently, so as not to cause pure economic loss, in that the latter 'must have been aware of the nature of the respondent's business, the purpose for which the floor was required and the part it was to play

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[99] *Junior Books* (n 93) 545B-F (Lord Roskill).
[100] ibid 537B-C (Lord Keith).

in their operations.'[101] However, Lord Keith was critical of the pursuer's averments in that: 'On the face of it, their averments might be read as meaning no more than that the respondents have got a bad floor instead of a good one and that their loss is represented by the cost of replacing the floor.'[102] Whilst they referred to costs associated with working around the defects, they did not specifically link these with the profitability of the business. His Lordship was prepared to do the pursuers' work for them and plug the gap in the averments by finding that the costs associated with having to manage the defective floor situation 'may properly be held to include less profitable operation due to the heavy costs of maintenance.'[103]

Thus, whilst his Lordship was prepared to accept that pure economic losses associated with a defective product may be recoverable in instances where there is a high degree of proximity and foreseeability, the losses must be something more than the immediate costs associated with repairing or replacing the item. The loss of profits could be regarded as extrinsic to the item itself thereby constituting consequential losses. Although his Lordship did not directly refer to the case, this reasoning closely mirrors the approach adopted by Edmund-Davies LJ in his dissenting judgment in *Spartan Steel*.[104] Moreover, it is redolent of the majority decision in *Rivtow*[105] where damages could be recovered in respect of loss of profits arising from the barges being taken out of use while the cranes were repaired, but not the repair costs themselves.

Lord Brandon, in dissent, argued that the touchstone of liability under *Donoghue v Stevenson* and 'all the numerous cases in which the principle of that decision has been applied'[106] was 'the existence of danger, or the threat of danger, of physical damage to persons or their property…'[107] The defects in the case at hand were purely related to the quality of the product and its installation and there was no suggestion that they were a threat to persons and property. His Lordship concluded that it would be ill advised to bestow the ultimate user or consumer with a cause of action in tort against the manufacturer or distributor of goods, in respect of defects in quality, as this could have deleterious consequences for the cohesiveness of the law: 'In my view, the imposition of warranties of this kind on one person in favour of another, when there is no contractual relationship between them, is contrary to any sound policy requirement.'[108]

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[101] ibid 536B-C (Lord Keith).
[102] ibid 535H – 536A (Lord Keith).
[103] ibid 536C (Lord Keith).
[104] *Spartan Steel* (n 74) (Edmund-Davies LJ).
[105] *Rivtow* (n 90).
[106] ibid 551C-D (Lord Brandon).
[107] ibid.
[108] ibid 551G-H (Lord Brandon).

These arguments closely mirrored the policy arguments advanced by Lord Keith; however, Lord Brandon parted company with Lord Keith on the need for the defect to be of a dangerous nature. As noted above, whereas Lord Keith considered that economic losses could be recovered in respect of the additional expenses caused by working around the defect, Lord Brandon considered that the danger element was an essential component of manufacturer's liability.

Although Lord Brandon offered the only dissenting judgment and ruled against the recoverability of pure economic loss in such circumstances, it is worth pausing to consider his judgment in some detail in that his more restrictive approach to manufacturers' liability was still far more expansive than that adopted in subsequent decisions. As will be seen below, this far more restrictive line of cases still constitutes the current legal position. Returning to Lord Brandon's dissent, on one level his approach to dangerously defective goods closely follows that of Lord Wilberforce in *Anns* in that he regarded manufacturer's liability as extending to dangerous defects which have yet to cause physical damage in that a person might reasonably incur 'pecuniary loss in order to prevent or mitigate imminent danger of damage to the persons or property exposed to that danger…'[109] In common with Lord Wilberforce, he also cited the dissenting judgment of Laskin J in *Rivtow* as persuasive authority in that regard.[110] However, there is in fact a shade of difference between Lords Wilberforce and Brandon on this issue in that Lord Wilberforce regarded dangerous defects as akin to physical harm not pure economic loss as such. Whereas, Lord Brandon was firmly of the opinion that such defects constituted pure economic loss but, alongside liability for negligent misstatement under *Hedley Byrne*, was a specific exception to the general rule that such losses are irrecoverable.[111]

4.7.4 The retreat from *Anns*

In any event, any hopes that the combination of *Anns* and *Junior Books* would open up a new chapter of liability for defective structures and products and come to the aid of those suffering the huge financial and psychological burdens of being saddled with unsellable properties, proved to be short lived.

Peadbody Fund v Sir Lindsey Parkinson[112] marked the first signs of the tide ebbing from the 'high-water mark' established by *Anns v Merton LBC* in terms of an undiluted application of *Donoghue v Stevenson* to the issue of establishing a duty of care. Delivering the only judgment, Lord Keith held that all factors had to be considered in the round and that policy

[109] ibid 550B-C (Lord Brandon).
[110] ibid.
[111] ibid.
[112] [1985] AC 210.

issues, encapsulated by the idea of whether it was ‘fair and reasonable’ to impose a duty of care had equal status to foreseeability and proximity.[113] Nevertheless, on the narrower issue of the liability of building control authorities arising from failure to identify or act upon defects in construction, the judgment purported to be on all fours with the principle established in *Anns*. Thus, the local authority owed a duty to the claimant property developer to ensure that the latter’s building contractor adhered to the approved plans for drainage works. However, as regards whether the breach of this duty had resulted in actionable harm on the facts of the specific case, *Anns* was distinguished on the grounds that the defect did not cause a risk to health and safety.[114] Thus, although this was not clearly spelled out in the judgment, the loss could be regarded as purely economic in that it lacked the external harm dimension necessary to categorise it as consequential loss. It is notable that, despite the fact that Lord Keith had delivered one of the leading judgments in *Junior Books* just over two years earlier, the case was not mentioned at all. This is, perhaps, surprising given the amount of detailed discussion in *Junior Books* about the nature of actionable harm and what constitutes pure economic loss. Arguably, this marked the beginnings of the sidelining of that case.

Indeed, this is borne out by another case of the same year, *Muirhead v Industrial Tank Specialists*,[115] which focused on product liability. In this case oxygenating pumps fitted to a lobster tank failed causing the loss of the claimant’s stock. The pumps had been supplied by a subcontractor with whom the claimant had no contractual relationship or prior course of dealing. Goff LJ sought to confine *Junior Books* to its facts:

> ‘It is, I think, safest for this court to treat *Junior Books* as a case in which, on its particular facts, there was considered to be such a very close relationship between the parties that the defenders could, if the facts as pleaded were proved, be held liable to the pursuers.’[116]

The facts of the case at hand were distinguished on the basis that, unlike in *Junior Books*, the supplier had not been nominated. Thus, economic losses arising from the costs expended in trying to replace or repair the defective pumps were deemed irrecoverable. However, the physical losses manifested by the death of the lobsters were deemed to be reasonably foreseeable consequential loss and thus recoverable.[117] Thus, Goff LJ sought to draw a sharp distinction between internal defects in the product itself and consequential losses arising from the defect. The judgment is, perhaps, redolent of the view that consequential loss, of the type

[113] ibid, at 240F-H.
[114] ibid, at 245A-B.
[115] [1986] QB 507.
[116] ibid 528C (Goff LJ).
[117] Ibid 532G-H (Goff LJ).

which may attract tortious liability, must generally have a physical dimension. Nevertheless, he acknowledged Lord Keith's 'intermediate position'[118] in *Junior Books* to the effect that consequential losses could have an economic dimension which goes beyond the internal characteristics of the product; however, he did not regard his observations as forming part of the ratio of the case.

The retreat from *Anns v Merton BC* markedly accelerated in *D & F Estates v Church Commissioners*[119] in which damages were sought in respect of defective plasterwork by property owners who did not enjoy a contractual relationship with the developer. Lord Bridge was firmly opposed to the view that damages should be recoverable in such circumstances and was heavily critical of his predecessors' decisions in *Anns* and *Junior Books*. *Anns* was distinguished on the basis that, in the case at hand, the defect was purely internal and one of quality and thus constituted a classic case of pure economic loss. Whereas, in *Anns* the argument was successfully made that the foundations could be regarded as a distinct entity with the result that the structural damage which they caused could be regarded as external or consequential loss. Nevertheless, Lord Bridge seized the opportunity to lambast much of the reasoning in *Anns* and *Junior Books* on the issue of whether pure economic loss should be recoverable at all in this context. As regards *Junior Books* his Lordship praised Lord Brandon's dissenting judgment for its 'cogency and clarity'[120] and deprecated the reasoning of the majority. As noted above, Lord Brandon dissented on the grounds that allowing tortious claims for defects as to quality risked muddying the waters between contract and tort to an unacceptable extent. Lord Bridge cited lengthy extracts from the judgment of Lord Brandon, aspects of which have already been covered by the analysis of *Junior Books*, above. However, in doing so his Lordship appeared to overlook an important nuance in the judgment which only comes to the fore when one examines it in context alongside the other judgments. To recap, at the extreme end of the spectrum, Lords Fraser and Roskill advocated allowing tort free rein to provide a cause of action for defects in quality irrespective of whether the consumer or user enjoyed a contractual relationship with the producer. Lord Keith was concerned that this would entirely undermine the distinction between contract and tort with capricious consequences. His solution was to look for some external or consequential loss arising from the defect that was distinct from the thing itself, and that this could include economic losses. However, in the passage cited by Lord Bridge (which has already been referred to in the foregoing analysis), Lord Brandon was concerned that an:

[118] ibid 526A (Goff LJ).
[119] [1989] AC 177.
[120] ibid 202B (Lord Bridge).

> 'essential ingredient in the cause of action relied on was the existence of danger, or the threat of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat of danger, arises.'[121]

Thus, according to Lord Brandon, the external loss must have a hazardous quality in order to engage liability in tort. What he did not say, however, was that the physical harm must actually have occurred in order to trigger liability. Nevertheless, this is the meaning which Lord Bridge took from the judgment who then proceeded to use the example of a poorly built garden wall to challenge Lord Wilberforce's imminent danger argument:

> '…if I acquire a property with a dangerously defective garden wall which is attributable to the bad workmanship of the original builder, it is difficult to see any basis in principle on which I can sustain an action in tort against the builder for the cost of either repairing or demolishing the wall. No physical damage has been caused.'[122]

However, this somewhat misses the point of the argument made by Lord Wilberforce in *Anns* and Stamp LJ in *Dutton* before him, which is that the danger imposes a burden on the owner or occupier which cannot simply be ignored, especially if the defect is of a hazardous nature. This burden can be construed as a form of consequential loss and is not purely an aspect of the quality or functionality of the item or structure itself. In this regard it is especially noteworthy that Lord Bridge overlooked the aforementioned assertion of Lord Brandon to the effect that damages may be recoverable where a person 'reasonably incurs pecuniary loss in order to prevent or mitigate imminent danger of damage to the persons or property exposed to that danger.'[123] In other words, the costs associated with avoiding the harm are recoverable even where the harm has yet to occur because those costs can be regarded as external or consequential losses.

Whereas in *D & F Estates* the House of Lords confined itself to distinguishing its earlier decision in *Anns* whilst still criticising much of the reasoning under the cover of obiter dicta, in the next case their Lordships took a wrecking ball to *Anns* and the retreat from the authority became a rout. In *Murphy v Brentwood District Council*[124] the issue of defective foundations again came to the fore. In this case the property was built on a concrete raft foundation designed to stabilise the ground conditions at a former landfill site and seal in the pollutants. The raft failed causing cracks in the building and losses to the current owners. On this occasion

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121 *Junior Books* (n 93) 551D (Lord Brandon) cited by Lord Bridge in *D & F Estates* (n 119) at 203C
122 *D & F Estates* (n 119) 206E-F (Lord Bridge).
123 *Junior Books* (n 93) 550B-C (Lord Brandon).
124 [1991] 1 A.C. 398.

their Lordships wheeled out the 1966 Practice Statement on judicial precedent[125] and turned its fire on *Anns* without mercy. Lord Bridge declared that *Anns* was 'judicial legislation'[126] which was 'without precedent'[127] and should no longer be regarded as sound authority for the proposition that a local authority owes a duty of care to owners and occupiers of structures in respect of defects which should have come to light during the building control process.

Lord Bridge returned to the 'complex structure' theory which he had outlined in *D & F Estates* where he had used it to distinguish the facts of the case at hand from *Anns*. This time he used it to directly criticise the factual finding in *Anns* to the effect that damage to a building caused by defective foundations could be regarded as a form of external damage. According to the theory the foundations should be regarded as an integral part of the structure with the result that damage to the foundations is damage to the whole and should be regarded as an internal defect.[128] He then turned his attention to Lord Wilberforce's argument that an imminent danger should be regarded as a form of tangible loss and not dismissed as pure economic loss. This he rejected on the grounds that it could provide a perverse incentive to do nothing until a defect became dangerous.[129] Moreover, it would be a 'very strange result' if the owner of an unoccupied building could recover while it was still standing, albeit in a dangerous state, but not once it had collapsed and no longer posed a risk.[130]

As regards chattels, his Lordship repeated his argument in *D & F Estates* to the effect that a dangerous defect ceases to be so if it is discovered before the thing is used; at which point the matter becomes one solely of quality with remedies residing in contract as opposed to tort.[131] Nevertheless, in the absence of a contractual link, a tortious liability could arise if there was a high degree of proximity between the parties. *Junior Books* could be 'understood on this basis' in that the relationship was so close that it was 'akin to contract.'[132]

Above it was noted that, in *D & F Estates*, Lord Bridge somewhat missed the main point of Lord Wilberforce's argument which was that the main harm results from the need to do something about the danger rather than the defect per se. Especially where a building is concerned, one cannot simply elect not to use it because the defect has been discovered. As the residents of flats clad by materials deemed a fire risk in the wake of Grenfell will attest, they have to live with the defect for years on end and cannot escape or start afresh. Nevertheless, despite his heavy criticism of Lord Wilberforce, Lord Bridge did seem to absorb

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[125] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
[126] *Murphy* (n 124) 473D (Lord Bridge).
[127] ibid.
[128] *Murphy* (n 124) 478G-479B (Lord Bridge).
[129] *Murphy* (n 124) 480B-C (Lord Bridge).
[130] *Murphy* (n 124) 480C-E (Lord Bridge).
[131] *Murphy* (n 124) 475C-D (Lord Bridge).
[132] *Murphy* (n 124) 481D (Lord Bridge).

some elements of the external loss or burden argument. Thus, to the general proposition that losses arising from defective structures should be characterised as purely economic, he added the following qualification:-

> The only qualification I would make to this is that, if a building stands so close to the boundary of the building owner's land that after discovery of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land or on the highway, the building owner ought, in principle, to be entitled to recover in tort from the negligent builder the cost of obviating the danger, whether by repair or by demolition, so far as that cost is necessarily incurred in order to protect himself from potential liability to third parties.[133]

Thus, his Lordship appeared to recognize that in some circumstances the loss has an external dimension in terms of the liabilities or other burdens which it places on the owner or user of the defective property. However, it is difficult to reconcile this qualification with the main thrust of Lord Bridge's argument and more recently the High Court appeared to suggest that it was little more than an ill-thought-out obiter afterthought of no real significance.[134]

Lord Keith's judgment displayed a significant change of position from that which he had taken in *Junior Books*,[135] and he adopted a far more restrictive approach towards the recoverability of pure economic loss. Recall that in *Junior Books* his Lordship was prepared to countenance the possibility that such losses could be recovered provided that they reflected costs other than the lost value and repair or replacement cost of the item itself. However, in the case at hand he rejected Lord Wilberforce's imminent danger test and asserted that loss which is discovered before any external damage has been caused is pure economic loss. As such, it was only recoverable if it could be accommodated within the narrow exception established by *Hedley Byrne* for negligent misstatement.[136] He asserted that *Greystoke Castle* was a separate and even narrower exception 'turning on specialities of maritime law.'[137] He did not acknowledge or engage with the wider point which Lord Wilberforce endeavoured to make to

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[133] *Murphy* (n 124) 475F-G (Lord Bridge).
[134] See *Thomas v Taylor Wimpey Developments Ltd* [2019] EWHC 1134 (TCC), [2019] PNLR 26, [26] (Keyser HHJ): 'What is true, however, is that Lord Bridge's qualification must rest on a basis that was not clearly articulated by Lord Bridge himself and was different from anything contained in the reasoning of the other members of the Appellate Committee. The ratio of *Murphy* does not itself justify Lord Bridge's qualification.'
[135] Which Goff LJ in *Muirhead* (n 115) 526A, described as an 'intermediate position' between the extreme approach of Lord Roskill, who was prepared to do away with the distinction between economic and physical loss in all respects, and Lord Brandon who considered that only dangerous defects should be actionable.
[136] *Murphy* (n 124) 468D-E (Lord Keith).
[137] *Murphy* (n 124) 468E-F (Lord Keith).

the effect that defective structures place burdens on owners and occupiers which have an external (or consequential) dimension.

His Lordship paid scant attention to *Junior Books* and his own judgment therein, and simply asserted that it was an application of the *Hedley Byrne* principle.[138] Moreover, at the time *Anns* was decided, 'the right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent misstatements, as in *Hedley Byrne*.'[139] This appeared to acknowledge that *Junior Books* had at least expanded *Hedley Byrne* beyond negligent misstatement to the provision of other services, provided that there was a sufficient degree of proximity between the parties; as will be seen in due course, this feeds into the concept of extended *Hedley Byrne* liability.[140]

Lord Oliver, for his part, wholeheartedly agreed with the assertion that the decision in *Anns* should be overruled insofar as it was authority for the proposition that the common law should impose a duty of care on builders and local authority inspectors, and such like, in respect of defects of quality suffered by subsequent owners of property. However, a significant aspect of his Lordship's judgment was that he sought to escape from framing the debate as one about pure economic loss and the recoverability thereof. As regards finding some way of limiting liability for losses not confined by the natural limitations of physical damage so as to avoid 'what would otherwise be an endless, cumulative causative chain bounded only by theoretical foreseeability,'[141] his Lordship queried the utility of an approach based upon arbitrary classifications of loss:

> I frankly doubt whether, in searching for such limits, the categorisation of the damage as "material," "physical," "pecuniary" or "economic" provides a particularly useful contribution. Where it does, I think, serve a useful purpose is in identifying those cases in which it is necessary to search for and find something more than the mere reasonable foreseeability of damage which has occurred as providing the degree of "proximity" necessary to support the action.[142]

Thus, according to this approach, the starting point should not be that pure economic loss is generally irrecoverable unless it falls with in the narrow *Hedley Byrne* type exception. Rather, the issue is that proximity may not be self-evident where the loss flows from more abstract

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[138] *Murphy* (n 124) 466G (Lord Keith).
[139] *Murphy* (n 124) 468D-E (Lord Keith).
[140] Although it will also bee seen that others do not even attempt to accommodate *Junior Books* with an expanded concept of *Hedley Byrne* liability and regard it as a very narrow exception confined to its own facts.
[141] *Murphy* (n 124) 486F (Lord Oliver).
[142] *Murphy* (n 124) 486F-G (Lord Oliver).

interactions than the collision of physical entities. Accordingly, the court must enquire far more deeply into the issue or proximity. This is because:

> The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorised as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen. Thus the categorisation of damage as economic serves at least the useful purpose of indicating that something more is required and it is one of the unfortunate features of Anns that it resulted initially in this essential distinction being lost sight of. [143]

Whilst such an approach may invite a *Hedley Byrne* type analysis is does not necessitate conceptualising *Hedley Byrne* as an exception into which all successful economic loss claim must be accommodated. Moreover, according to Lord Oliver's analysis, *Anns* was not wrongly decided on the grounds that it transgressed some boundary between pure and consequential economic loss; rather, there was inadequate consideration of the additional proximity difficulties created by the circumstances of the case. As will be seen in due course, the essence of this approach has arguably been adopted by more recent case law developments which challenge the notion that pure economic loss is governed by an exclusionary rule.

4.7.5 The effect of the retreat from Anns: A known defect is no defect

Against this backdrop it is now possible to turn to a Court of Appeal decision of the late 1990s which is sometimes presented as the most authoritative and directly relevant case on the specific issue of economic loss and defective products; *Hamble Fisheries v L Gardner and Sons Ltd (The 'Rebecca Elaine').*[144] The case stemmed from an incident in which the claimant's fishing boat, the *Rebecca Elaine*, got into difficulties when its engine failed in spectacular fashion whilst it was 4½ miles southwest of the Needles. Fortunately, the vessel was towed to safety without further mishap or injury; however, that was only a matter of chance and any number of vessels have come to grief as a result of engine failure and the subsequent loss of essential systems and navigation.[145] In any event, repair costs for the engine were substantial and loss of profits were sustained for the period the vessel was out of use.

The engine failure had been caused by defective pistons which had been produced by Wellworthy Ltd and supplied to the engine manufacturers, Gardner and Sons Ltd. The claim

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143 *Murphy* (n 124) 487B-C (Lord Oliver).
144 [1999] 2 Lloyd's Rep 1.
145 A random example of many concerns a fishing vessel which ran aground on the Norfolk coast as a result of engine failure: see Emily Thomson, 'Fishermen rescued after engine failure caused boat to run aground' *North Norfolk News* (Norwich, 14 July 2022). <https://www.northnorfolknews.co.uk/news/22786326.fishermen-rescued-engine-failure-caused-boat-run-aground/> accessed 30 April 2024.

clearly had to be treated as one of pure economic loss in that the damage was confined to the engine itself and, as noted above, external damage such as the vessel running aground, or sinking was avoided.[146] An additional difficulty was created by the fact that, although the vessel had been built especially for the claimant to their specifications, the engine manufacturer had been taken over by a new company (the defendant) in the intervening years which put further distance between the parties.

Nevertheless, it transpired that the new company, which had taken Gardner over lock stock and barrel as a going concern under the same brand name,[147] had been aware of the defective cylinder issue for some time but had not contacted known users of the engines in order to warn them. The Court of Appeal did not contest the trial judge's assertion that they could have done so 'by contacting known customers, authorized distributors and service agents or by advertising in trade journals.'[148] The claimants advanced two arguments, firstly, that a duty arose under *Hedley Byrne* and, secondly, that the Canadian case of *Rivtow*[149] (which had received some judicial endorsement in the UK) was authority for the proposition that there was a freestanding duty to warner users about dangerously defective goods before the harm actually occurred.

Tuckey LJ commenced by outlining the scope of a manufacturer's liability under *Donoghue v Stevenson* and noted that whilst it applied to 'a latent defect which renders it dangerous to persons or property'[150] and which goes on to cause 'injury to persons'[151] or 'damage to property,'[152] it did not cover a product which was 'merely defective in quality even to the extent that it is valueless for the purpose for which it is intended.'[153] Moreover, even if a defect is dangerous, if it is discovered before external property damage or injury is caused, 'because the danger is now known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality.'[154] The Judge did not appear to recognize an obvious factual difference with the facts of the case at hand in that the defect did not manifest itself until the crew were at sea and reliant upon the engine for their safety. Thus, the defect did not become apparent at a time when they had the opportunity not to use the engine, for example, if the engine had failed the moment the crew tried to start it before leaving harbour.

[146] ibid. Thus, had the vessel suffered damage and/or had there been personal injuries the requisite degree of external physical harm would be deemed to have occurred.
[147] *The 'Rebecca Elaine'* (n 112); as regards the terms under which the business was acquired see 3 [3] (Tuckey LJ).
[148] ibid, 3 [4].
[149] *Rivtow* (n 90).
[150] 4 [17] quoting *Murphy v Brentwood District Council* (n …) 475A-E (Lord Bridge).
[151] ibid.
[152] ibid.
[153] ibid.
[154] ibid.

However, the case was in the immediate shadow of *Murphy* and Lord Bridge's emphatic rejection of Lord Wilberforce's argument that imminent risks to health and safety should be regarded in the same way as physical losses. No matter how perilous the situation of the crew (and recall that many maritime disasters have started with engine failure) and no matter how great their fear or apprehension, there would be no physical loss until the vessel had come to grief on rocks or capsized through being unable to navigate in heavy seas or avoid a collision.

Thus, turning to the first argument, given that the loss was purely economic, could it be accommodated within the *Hedley Byrne* exception? As a preliminary point, it was acknowledged that *Hedley Byrne* could cover an omission in the sense of a failure to convey information as well as the conveyance of defective information.[155] Although, given the general reluctance of the common law to impose liability for pure omissions, it would be necessary to double down on the already stringent *Hedley Byrne* criteria for foreseeability and proximity.[156] In this respect Tuckey LJ emphasized the phrase in *Hedley Byrne* to the effect that, in order for an assumption of responsibility to arise, there would need to be some conduct or course of dealing between the parties sufficient to create a relationship which was 'akin to contract.'[157] This, he asserted, was the explanation for the decision in *Junior Books v Vietchi* in that, as noted above, the flooring contractor had been nominated by the claimant.[158]

At this point it is worth turning to the judgment of Nourse LJ who more fully catalogued the failures on the part of the defendant and their attempts to minimize, ignore or obfuscate on the piston issue in a manner which is chillingly redolent of some of the allegations which have been levelled against the Post Office and Fujitsu in the Horizon scandal. In this respect the general service manager, a Mr MH Sharp, was singled out for particular criticism. He dismissed a marine engineer's report into a previous incident, which identified a problem with the Wellworthy Pistons, and 'blithely sought to ascribe the occurrences to other factors or to say that the problems were confined to rebuilds…'[159] Moreover, '[H]e declined to take any steps to warn owners/operators even after June 1988, deciding instead to "hold the fort" by telling people that there must be some operational problem.'[160]

Notwithstanding these failures and full knowledge of the potential danger in which this placed identifiable users of the engines, who were customers of the company into whose shoes the

[155] *The 'Rebecca Elaine'* (n 144) at 5-6[21] (Tuckey LJ) citing *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665.
[156] ibid. See *Skandia* (n 155) at 798 (Slade LJ): 'The reluctance of the Courts to give a remedy in tort for pure omission applies – perhaps even more so – when the omission is a failure to prevent economic harm.'
[157] *The 'Rebecca Elaine'* (n 144) at 5[19] (Tuckey LJ).
[158] ibid.
[159] *The 'Rebecca Elaine'* (n 44) at 9.
[160] ibid.

defendant had stepped, the Court was unitedly of the opinion that there was no assumption of responsibility in that there was no course of dealing between the parties. A great deal of reliance was placed on the following passage from the judgment of Lord Steyn in *Williams v Natural Health Foods Ltd*.[161] In this case it was held that, even where a company had a sole director, a course of dealing with the company could not be regarded as synonymous with a course of dealing with the director:

> The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously the impact of what the defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff.[162]

Thus, in *Williams*, the line was effectively the corporate veil dividing the director from the company he controlled. Only statements crossing this line could be attributed to the company with whom the claimants had had direct dealings and conceivably provide evidence of an assumption of responsibility. In the case at hand the line was the separate legal identifies of the original manufacturer and the company that had taken over the business. The only statement which Tuckey LJ conceded could possibly have crossed the line was the assertion in the engine manual to the effect that the pistons had an operational life of 20,000 hours, on the grounds that 'the respondents should be taken to have adopted it when they bought the business and continued to trade as if there had been no change of owner.'[163] Nevertheless, notwithstanding the fact that the 20,000 hour claim was deemed to have 'crossed the line,' the Court was still not prepared to find that this was sufficient evidence of an assumption of responsibility. A duty of care arising from an error in a manual between the manufacturer and anyone relying on that manual, irrespective of whether there had been any course of dealing between the parties would be too wide.[164]

The reasoning adopted by the Court is highly problematic. Firstly, the piston service life assertion was only one piece of evidence and, as noted above, Nourse LJ outlined in some detail the correspondence, reports and general course of conduct which sought to at best downplay, and at worst actively misrepresent, the piston defect issue. Yet the court offered no clear rationale for only allowing the manual to cross the line. In this respect the Court of Appeal

[161] [1998] 1 WLR 830.
[162] ibid, at 835.
[163] *The 'Rebecca Elaine'* (n 144) at 7[27] (Tuckey LJ).
[164] ibid, at 7[28] (Tuckey LJ).

seems to have acted in a highly selective and arbitrary manner in only allowing the 20,000 hour piston life assertion in the manual to cross the line between the claimant and the defendant. One might venture that this was to allow the Court to construct a straw man argument to the effect that it would be unreasonable to regard an assertion in a manufacturer's manual as constituting an assumption of responsibility to the world at large. In fact, the case was not remotely concerned with establishing such a broad principle and the issue was specifically about a course of conduct designed to fob-off a readily identifiable class of persons who were reliant upon a defective product.

Secondly, the Court appeared to adopt a wider argument to the effect that no assumption of responsibility could arise on the basis that the defendants could not have known who would be at risk as a result of using the defective engines: 'The appellants were unknown to them as one of an unspecified number of customers who had purchased Gardner engines.'[165] However, this contradicts the aforementioned assertion made by the trial judge, and seemingly accepted by the Court of Appeal, that customers could have been contacted and that this would not have been an unduly burdensome task. Clearly, this would not have been thought possible had customers formed part of some indeterminate and 'amorphous'[166] class.

Added to which is the fact that the 'line crossing' argument is somewhat of a red herring. The *Williams*[167] case was preoccupied with preserving the corporate veil between the directors of a company and the company itself. If statements made by directors could be readily attributed to the company, and vice versa, the entire concept of separate legal personality could begin to unravel. The *Rebecca Elaine* case did not raise this particular policy issue in that the claimant did not at any point question the fact that the defendant was a different legal person to the original manufacturer. The issue was whether, by virtue of its conduct and the nature of the agreement under which it acquired the business, the defendant could be said to have voluntarily assumed a responsibility to the existing customers. To all intents and purposes, the defendants held themselves out as being the same company. Nevertheless, having emphasized the fact that the business was bought as a 'going concern, together with the respondent's right to represent that they were carrying on the business in continuation of and in succession to the manufacturers;'[168] and despite acknowledging that 'they [the defendants] bought the business and continued to trade as if there had been no change of owner,'[169] the Court held that there could be no assumption of responsibility as there had been no direct course of dealing between the parties. In some cases, a direct course of dealing might be

[165] ibid, at 7[27].
[166] ibid, see Mummery LJ at 8[4].
[167] *Williams* (n 161).
[168] *The 'Rebecca Elaine'* (n 144) at 3[3] (Tuckey LJ).
[169] ibid, at 7[27] (Tuckey LJ).

necessary to establish that the parties were known to one another. However, in other cases it is clear that there can be an assumption of responsibility simply on the basis that the defendant agrees to undertake a task in full knowledge of the fact that certain identifiable third parties are reliant upon it being performed competently.

The Court of Appeal also rejected the alternative argument that the Canadian case of *Rivtow*[170] constituted persuasive authority for the proposition that there was a freestanding duty to warn users about dangerously defective goods. It will be recalled that in *Rivtow* the claimant sought to equate dangerously defective goods with inherently dangerous goods, such as firearms. *Langridge v Levy*[171] was interpreted as establishing a duty to warn where goods were inherently dangerous and it was a small step to apply this reasoning to dangerously defective goods. Tuckey LJ gave short shrift to this argument firstly on the basis that *Langridge v Levy* was about the tort of deceit and 'has no relevance.'[172] In any event, in English common law the courts had long since abandoned drawing any distinction between inherently dangerous goods and dangerously defective goods; although it might be relevant to 'the degree of care.'[173] Moreover, the Canadian Court 'attached no significance to the fact that the claim was a claim for pure economic loss.'[174] Tuckey LJ fundamentally disagreed with the assertion in *Rivtow* that the cases of *Donoghue v Stevenson* and *Grant v Australian Knitting Mills* did not of themselves preclude claims for pure economic loss.[175]

Thus, *The 'Rebecca Elaine'* leaves us in no doubt that product liability is confined to external physical damage and, even if a defect is dangerous or compels one to take onerous measures to avoid physical harm, there is no liability in tort unless or until that damage actually occurs; unless the relationship between the parties is such that such losses can be brought within the *Hedley Byrne* principle.

Indeed, a recent postscript to the above doctrinal developments illustrates that the costs of averting a disaster may fall within the *Hedley Byrne* 'exception' in some circumstances. The case of *URS Corporation v BDW Trading*[176] stems from the fallout of the Grenfell Tower disaster and the need to replace defective cladding on residential buildings which poses a fire risk. The claimants, a firm of property developers, undertook remediation works to replace cladding on buildings which had been constructed for them by the defendants. This was some time after the properties had been sold, and the developers no longer had any legal interest

[170] *Rivtow* (n 90).
[171] (1837) 2 M & W 519; (1837) 3 M & W 337.
[172] *The 'Rebecca Elaine'* (n 144) at 6[24] (Tuckey LJ).
[173] ibid.
[174] ibid, at 6-7[25].
[175] ibid.
[176] [2025] UKSC, 21 [2025] 2 WLR 1095.

in them or responsibility for upkeep and repairs. The defendants contested the claim on the grounds that the costs had been 'voluntarily' incurred in that they had not been fixed with a legal duty to undertake them. The Supreme Court took it as read that the claim concerned pure economic loss and only offered a brief whistlestop tour through the main case law developments.[177] However, the court did not accept that, in terms of recoverable loss, there was a brightline distinction between losses sustained without any agency on the part of the claimant and those which have been voluntarily incurred.[178] It was noted that the claimants had acted out of a sense of obligation due to the gravity of the risk created by the cladding.[179]

Of course, this finding is of no help to apartment owners who find themselves unable to sell properties in buildings with dangerously defective cladding and with no recourse in tort against those involved in the installation of the cladding due to a lack of proximity under the *Hedley Byrne* criteria. It has already been established that defective cladding falls squarely within the line of cases culminating in *Murphy* and the categorization of building defects as pure economic loss notwithstanding the hazardous nature of the defect.[180] The Supreme Court in *URS Corporation* was not required to consider wider issues pertaining to the nature of pure economic loss and the boundaries with consequential damage in that all parties were agreed that the matter turned upon bringing the *Hedley Byrne* 'exception' into play. However, the fact that the defendant was said to have acted out of a sense of duty or obligation[181] is highly redolent of Lord Wilberforce's argument that defective structures impose burdens on the person saddled with them. The developer in this case no longer owned the properties, but given the notoriety of the Grenfell Tower disaster and the reputational risk associated with being seen to do nothing about properties in a similarly hazardous state resulted in them feeling compelled to act. According to Lord Wilberforce's approach, this could be framed as a form of consequential or external loss without needing to frame it as falling within the extended *Hedley Byrne* principle. This is a theme which shall be returned to below.

5. Product liability and pure economic loss

From the above analysis it will be seen that the issue of pure economic loss as it pertains to products is deeply intermingled with case law developments in the field as a whole. At this point it is worth teasing out and clarifying those issues which are especially relevant to product liability and, as will be seen, the specific issue of product liability in the IT sphere. The main point is that, in the absence of external physical damage, loss arising from the inconvenience

[177] ibid, Lords Hamblen and Burrows JJSC (joint opinion) at [27].
[178] ibid, at [67].
[179] ibid, at [62] – [66].
[180] See *Sportcity 4 Management v Countryside Properties (UK) Ltd* [2020] EWHC 1591 (TCC), [2020] 2 P. & C.R. DG21.
[181] ibid, at [8].

and expense of putting right a defective product is regarded as pure economic loss on the grounds that it is confined to the thing itself and is thus irrecoverable. The decision in *Junior Books* appeared to allow for the costs of putting right defects as to quality where there is a high degree of proximity, although subsequent courts have consistently endeavoured to sideline the case; this is a theme which shall be returned to below.

The fact that defects in the quality or functionality of products are always classified as pure economic loss in the absence of a narrow conception of external physical harm is deeply limiting and restrictive and belies the reality of the situation in many cases. The development of 'pure economic loss' as a term of art, has obscured the fact that economic loss can be as diverse as physical injuries. Not all purely economic losses entail the floodgates type problems which provide the usual policy arguments for limiting recovery. Yet the expression has served to lump all losses together which lack the requisite physical dimension. In many respects, the courts have deprived themselves of the language or tools necessary to address these differences. Where product liability issues are concerned, the courts can conceive of external physical damage as constituting the trigger for tortious liability, however, all other losses must be purely economic as they are confined to the internal characteristics of the thing itself. Hence, the use of the aforementioned example that May Donoghue would have had no claim if she found that the opaque bottle of ginger been only contained harmless water as opposed to decomposing snail infused ginger beer. However, the disappointment of receiving a soft drink comprising water, instead of a sugary coloured concoction, is some distance away from a having a computer system foisted upon one that entirely messes up the business accounts and results in criminal and civil liability for losses which one did not in fact incur. This harm has an external dimension which goes beyond the quality or functionality of the product and can be equated with flood damage caused by a defective washing machine. Nevertheless, the case law only offers the vaguest awareness of the limitations of the established approach and offers no solutions.

Indeed, as the following analysis seeks to demonstrate, one can venture to suggest that the current state of the law is not fit for purpose in the context of the technological challenges posed by increasingly sophisticated IT systems and the blurring of boundaries between information and tangible products.

5.1 Product liability, economic loss and computer systems

As noted above, computer systems create many challenges for laws on product liability in that they transcend the boundaries between physical objects and pure information. At one end of the spectrum there is no doubt that information in its purest sense, which is static and not interactive, is a separate entity from the media used to convey it and does not constitute a product or part of a product.[182] At the opposite end of the spectrum, a microchip which controls a domestic appliance or a car engine management system clearly forms an integral part of the functionality of the product and has the requisite physical dimension. However, within those two extremes there are an infinite variety of computer systems which have real world consequences to varying degrees. Many phone apps, for example, are interactive and provide information and advice on issues ranging from health to finance. Moreover, the sophistication of software and its interactivity is increasing exponentially with the advent of machine learning or AI. The new EU Product Liability Directive 2024/2853 has sought to put the matter beyond doubt and expressly defines computer software as a product.[183] The status of computer software sold as a consumer item is critical in terms of determining whether it falls within the scope of the strict liability regime established by the Directive.[184] The matter is less significant where software is supplied in a commercial context in that, irrespective of whether the Consumer Protection Act 1987 is amended so as to shadow the new Directive, the common law of negligence will continue to apply. Moreover, as will be seen below, the pure economic loss issue comes to the fore regardless of whether computer code is regarded as a product or pure information with no physical dimension as such.

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182 As regards the original Product Liability Directive, *in VI v KRONE - Verlag Gesellschaft mbH & Co KG* (C-65/20) EU:C:2021:471; [2021] 6 WLUK 123 (ECJ), the ECJ held that a newspaper could not be rendered a defective product as a result of a column containing misleading health information; thus the intellectual content of the newspaper was deemed to be a separate entity from the paper and ink (or electronic medium such as the newspaper's website) used to convey it. Whether pure information (not constituting advice for the benefit of a specific party) can give rise to a duty of care, where there is a risk of serious property damage or personal injury, remains a moot point. In obiter comments in *Candler v Crane Christmas* (n 46) it was postulated that a marine hydrographer would owe no duty of care to the owners of a ship which comes to grief on a reef which he negligently omitted from a navigation chart. Asquith LJ, at 194, indicated that there were sound policy reasons for not imposing liability in such circumstances: ' Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages? If so, people will, in future, think twice before making maps. Cartography would become an ultra-hazardous occupation.' However, in a series of US cases it has been held that liability can arise in respect of aircraft crashes caused by reliance on inaccurate aeronautical charts. In *Winter v GP Putnam*, 938 F.2d 1033, 1036 (9th Cir. 1991) the Court of Appeals for the Ninth Circuit explained this on the basis that, notwithstanding the fact that they may comprise paper and ink, aeronautical charts are technical instruments going beyond the mere provision of information: 'aeronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data.' See Scott (n 28) 465-66.

183 (n 34), see Article 4(1). Recital (13) affirms that software can be regarded as a product whether it is 'placed on the market as a standalone product' or 'integrated into other products as a component.' However, information stored as digital files, such as an e-book, is not regarded as a product; with the exception of digital manufacturing files which are the templates used by computer operated machines, 3D printers and so forth (see Article 4(2) and Recital (16)).

184 In the US the product liability provisions of the Third Restatement do not differentiate between consumer items and those supplied in a commercial context. However, strict liability only relates to manufacturing defects; design defects remain subject to negligence although a formulation based on the Learned Hand Formula (B<PL) is expressly adopted whereby the burden (cost) placed on the supplier has to be balanced against the probability multiplied by the magnitude of the injury: See Scott (n) 467.

The Horizon system comprised accounting software and specialist hardware designed for clarity and ease of use by postmasters. Given that the system as a whole was designed to undertake a very specific, mechanistic task, there can be no doubt that it can be regarded as a product. It makes no odds if faulty figures are generated by a computer as opposed to an old-fashioned mechanical adding machine or cash register.[185] Yet financial losses caused by a defective computerized accounting system are regarded as being of a fundamentally different nature to personal injuries and property damage caused by a defective computer system in an autonomous or semi-autonomous vehicle which causes it to crash. It is only the latter which are regarded as external loss for the purposes of manufacturers' or product liability.[186]

In fact, losses associated with defective computer systems render rigid distinctions between physical loss and pure economic loss increasingly difficult to draw with any degree of precision. As previously noted, in some of the earlier US case law, judges struggled with the notion of whether something as intangible as a computer program could be regarded as a product. The direction of travel, as exemplified by the new Product Liability Directive, is now very much towards the conceptualization of computer software as a tangible product. There is still much uncertainty, however, in terms of what types of loss arising from defective software are of a tangible nature. The new Product Liability Directive has made some tentative inroads into rigid distinctions between tangible and intangible losses by classifying 'destruction or corruption of data' (in a non-professional context) as compensable loss.[187] Moreover, as will be seen below, it covers 'damage to psychological health'[188] which appears to be something lesser than psychiatric injury although there is ambiguity on this point. The effect of this is to bring these specific types of harm within the definition of 'material losses;' however, the recoverability of 'non-material' losses, of which pure economic loss is an example, remains

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185 As the *Guardian* succinctly put it: 'In layperson's terms, Horizon was a till. More specifically, it was an electronic point-of-sale (Epos) system. It replaced the old paper-based tills that had been used in post offices across Britain with a new networked system. It was also the massive backend of those tills, that networked together the entire Post Office system.' See Alex Hern, 'How the Post Office's Horizon system failed: a technical breakdown' *The Guardian* (9 January 2024) <https://www.theguardian.com/uk-news/2024/jan/09/how-the-post-offices-horizon-system-failed-a-technical-breakdown> accessed 3 May 2024.

186 One has to turn to the US in order to find case law on the specific issue of whether defective software has caused external damage of the type which attracts liability in tort. In *Transport Corp of America v IBM Corp* 30 F.3d 953 (8th Cir 1994), for example, it was held that a loss of data caused by a defect on a disk drive could not be regarded as external loss as the data could not be separated from the storage medium and other parts of the computer system in this way. However, in the EU it should be noted that the new

187 New Product Liability Directive (n 34) Art. 6(1)(c).

188 New Product Liability Directive (n 34) Art. 6(1)(a).

subject to the domestic laws of the member states.[189] Notwithstanding these debates as to the boundaries between tangible and intangible (or material and non-material) loss, for the purposes of the following argument, it will be assumed that there remains a basic distinction between physical and purely economic losses; although the need to treat the latter as something special deserving of an overly restrictive approach will be challenged.

In essence, there are two approaches which one can adopt to the issue of Fujitsu's liability to the sub-postmasters and mistresses. On the one hand the case could be regarded as focusing on product liability, whereupon it would instantly run into the pure economic loss obstacle, the nature of which has been fully set out above. This might lead one to adopt the alternative approach and focus on the *information* aspect of the term *information technology* so as to bring it within the *Hedley Byrne* exception to the general proposition that there is no duty to avoid causing pure economic loss.

Below, it will be argued that liability would clearly arise according to a *Hedley Byrne* analysis in that there was a very high degree of proximity between the parties. However, it will also be argued that the case raises fundamental issues regarding manufacturers' liability more widely and the nature of pure economic loss in this context. It will be concluded that, especially in the field of IT and in the light of the rapid development of AI, the concept of pure economic loss needs to be re-evaluated and disaggregated from the 'once size fits all' approach which has dominated thinking in this field for far too many years. In short, there are circumstances in which liability for defective products should extend to financial losses which lack any physical dimension without the need to have recourse to a *Hedley Byrne* analysis. It will be concluded that manufacturers' liability in this context is ripe for review so as to render it fit for purpose in the 21st Century and the increasingly complex issues raised by defective computer systems. Paradoxically, judicial insights from some of the older cases offer a clearer grasp of the nuances of pure economic loss and the complex boundaries between physical and pure economic loss than much of the current orthodoxy which borders on the dogmatic.

5.1.1 Defective computer systems and the Hedley Byrne 'exception.'

As noted above, if one focuses on the 'information' aspect of the term 'information technology' it is possible to consider whether financial losses caused by defective computer systems, such as Horizon, might be brought within the *Hedley Byrne* exception to an exclusionary rule on pure economic loss.

189 New Product Liability Directive (n 34) Art. 6(2). See, generally, Shu Li and Béatrice Schütte, 'The proposal for a revised Product Liability Directive: The emperor's new clothes?' (2023) 30(5) Masst J Eur & Comp L 573, 582.

Recall that the *Rebecca Elaine*[190] case is the only major product liability case which has examined the extent to which financial losses stemming from defective goods can be brought with the *Hedley Byrne* exception. To recap, the damage caused by the defective pistons was contained within the engine of which they formed an integral part with the result that it was categorized as pure economic loss; as were the lost profits stemming from being unable to use the fishing boat. However, the claimant argued that knowledge of the defects on the part of the defendant, who had taken over the manufacturers, gave rise to a duty to convey this information to customers so as to enable them to take avoiding action. The Court of Appeal regarded assumption of responsibility as an essential criterion of liability under *Hedley Byrne*. In this case the criterion was not met because of an absence of any course of dealing between the parties or knowledge of the identity of the customers on the part of the defendant.

It was argued above that the manner in which the assumption of responsibility criterion was applied in this case is open to criticism. Nevertheless, even if one accepts the case at face value and the narrow approach which was adopted, it is clearly distinguishable from the known facts of the Horizon scandal. Fujitsu entered into a contract with the Post Office in full knowledge of the fact that the system would form an integral part of the businesses of the postmasters and mistresses and that they would be entirely reliant upon it. It was a bespoke system designed for a specific customer and the users formed part of a clearly defined closed group. This is as far removed as it is possible to get from the assertion made in *Rebecca Elaine* to the effect that: 'The appellants were unknown to them [the defendants] as one of an unspecified number of customers who had purchased Gardner engines.'[191] To use the language of *Greystoke Castle*,[192] and leaving aside the issue as to whether that case is purely confined to a technical point of maritime law, Fujitsu, the Post Office and the postmasters were clearly engaged in a 'common adventure.'

It will also be recalled that the Court of Appeal in *Rebecca Elaine* set great store by the 'line crossing' argument stemming from *Williams v Natural Health Foods Ltd*.[193] Thus, only information which crosses the line separating the claimant from the defendant can be regarded as giving rise to a course of dealing. Above, it was argued that the line-crossing argument is not especially helpful and mainly related to the corporate veil issues arising from the *Williams* case. However, as will be explained below, even if one accepts this approach, it is clear that the line was crossed so many times it was effectively erased altogether.

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190 *The 'Rebecca Elaine'* (n.144).
191 *The 'Rebecca Elaine'* (Tuckey LJ) (n.165).
192 *Greystoke Castle* (n 43).
193 *Williams* (n 161).

In this case the notional line was effectively created by the Post Office which stood between the postmasters and mistresses and Fujitsu. There was a contract between the postmasters and the Post Office and between the Post Office and Fujitsu, but no contract between the postmasters and Fujitsu. Thus, on the face of it, any interactions with Fujitsu would be via the Post Office and not direct. However, the inquiry has produced abundant evidence to the effect that the line was crossed from the outset of the project and there were numerous interactions between Fujitsu and the postmasters and mistresses. When the Pathway programme (as Horizon was initially known) was rolled out Fujitsu (still trading under the ICL brand at that time) was required to orchestrate a huge installation and training programme in order to get the computer system up and running in branches.[194] Thereafter, ICL and subsequently Fujitsu ran a helpdesk in order to field requests for technical support from postmasters and mistresses. However, the issue which has caught the attention of the media is the fact that Fujitsu technicians were able to remotely access branch terminals and did so on a routine basis. In other words, Fujitsu took a direct hand in managing the accounts of the businesses which relied upon the system. The High Court made a finding of fact to this effect in the litigation pursued by Alan Bates and others against the Post Office;[195] however, the issue had come to light some years before but the existence of such a 'backdoor' had been consistently denied.[196]

Thus, there is abundant evidence to the effect that there was a course of dealing between the parties sufficient to establish an assumption of responsibility. As a matter of law, there has been some debate as to whether the assumption of responsibility needs to be voluntary in the

194 The Post Office enquiry has looked at the installation and training programme in some depth. The scale of the project was vast involving 'rolling out 40,000 sets of counter equipment to 18,500 Post Office branches at a rate of hundreds a week, having first connected each branch to the network via ISDN (or otherwise satellite); modifying the branches to accept the installation of PCs and printers….Given the state of technology at the time, and then, finally: training 67,000 subpostmasters and counter staff.' The training was described as 'ineffective' by many of those who received it and that there were 'significant problems' with the installation. See Post Office Horizon IT Inquiry, evidence and questioning of Anthony Oppenheim (former Commercial and Finance Director, ICL Pathway), Transcript POH 26 October 2022 at 143-144. <https://www.postofficehorizoninquiry.org.uk/hearings/phase-2-26-october-2022> (accessed 7 June 2024).

195 *Bates v Post Office Ltd (No. 6: Horizon Issues)* [2019] EWHC 3408 (QB), [2019] 12 WLUK 208.

196 See, for example, Post Office Horizon IT Inquiry, evidence and questioning of Stephen Parker (former Fujitsu Deputy Manager, Problem Manager and Manager of SSC), Transcript POH 10 May 2023 <https://www.postofficehorizoninquiry.org.uk/hearings/phase-3-10-may-2023> (accessed 11 June 2024). In 2015 the Post Office denied that it was possible to 'manipulate or remove transaction data once it has been recorded in a branch's accounts.' However, documentary adduced in evidence before the inquiry, namely, a Fujitsu operations manual from 2001, made it clear that Fujitsu's Software Support Centre (SSC) enjoyed precisely this type of access: 'SSC has access to the live system, which can be used to correct data on the system when this has been corrupted in some way.' The Inquiry heard that protocols and safeguards for accessing systems were routinely disregarded and postmasters would have no knowledge that their system had been accessed and financial data changed. It has been suggested that this 'backdoor' into branch systems was routinely used to manipulate financial data providing clear evidence that Fujitsu knew the system was defective and was in some sense endeavouring to mitigate some of the losses.

sense that the defendant accepted responsibility for the accuracy of the information. Although Lord Devlin used the term in *Hedley Byrne*, later decisions asserted that the requirement arose from the facts of the case and was not intended to be 'universally applicable.' Thus, an assumption of responsibility could arise as a result of the imposition of a legal obligation which the defendant might not have willingly incurred. However, as Hartshorne has pointed out, in a more recent series of cases, which usually involved an element of compulsion in providing information due to the existence of investigatory powers or regulatory requirements, the *voluntary* component has come to the fore again.[197] The degree of coercion associated with complying with such requirements or obligations is difficult to reconcile with an approach based upon the voluntariness of the defendant's actions. Thus, in *Customs and Excise Commissioners v Barclays Bank*[198] a *Hedley Byrne* analysis was rejected on the grounds that the duty arose from the need to comply with an order to freeze bank accounts pursuant to an investigation concerned with tax offences. Thus, as Lord Walker put it: 'In this case the appellant has not, in any meaningful sense, made a voluntary assumption of responsibility towards the commissioners.'[199] As will be seen below, however, the case was decided upon other grounds which are highly pertinent to the Horizon case.

In terms of how best to explain the reemergence of the voluntary requirement, Hartshorne has suggested that it might stem from a desire by the courts to limit the assumption of responsibility test to the core or classic *Hedley Byrne* situation where it serves 'as a mechanism for determining whether a duty of care existed in situations where the defendant had chosen to act for the claimant's benefit where the relationship between them was one which was equivalent to contract.'[200]

Turning to the Horizon issue, it seems clear that one could accommodate the facts within a narrow or core application of *Hedley Byrne* centering upon a voluntary assumption of responsibility giving rise to a relationship which was equivalent to contract. The entire backdrop to the case is one of contractual relations voluntarily assumed between Fijitsu (and its previous incarnation as ICL) and the Post Office. There was no element of coercion or public regulation of the type that was at issue in *Customs and Excise Commissioners*.[201] When ICL, as forerunner of Fujitsu, first entered into a contract with the Post Office it did so in full knowledge of the fact that the postmasters and mistresses had a major stake in the success of the system and that their commercial interests were deeply intertwined with those of the

[197] John Hartshorne, 'Contemporary approaches towards pure economic loss in the law of negligence' (2014) 5 JBL 425, 436-40.
[198] [2006] UKHL 28, [2007] 1 AC 181.
[199] ibid., at [74].
[200] Hartshorne (n. 197) at 439.
[201] *Customs and Excise Commissioners v Barclays Bank* (n. 198).

Post Office. To use the *Greystoke Castle*[202] illustration once again, this was clearly a 'common adventure' between all the parties concerned.

Moreover, detrimental reliance is self-evident in that the postmasters and mistresses were entirely dependent on the figures produced by the system to provide the Post Office with an accurate picture of the business which they had transacted on the Post Office's behalf.

So far, the analysis has focused upon what has variously been termed a classic or core application of *Hedley Byrne* focusing on misleading information. However, it is also possible to adopt a broader analysis based upon so-called 'extended *Hedley Byrne*' liability[203] and its application to the 'performance of other services.'[204] This entails conceptualizing Horizon as an entire financial services package rather than looking at it purely in terms of information. Where computer systems are concerned the boundaries between the two are not easy to draw in that, as has already been noted, there is a complex interplay between many components including software, hardware, installation, training, user support, and management of systems. Given the extent to which computer systems go beyond information in its purest sense, one might argue that Horizon fits better within the extended *Hedley Byrne* principle.

The distinction between core and extended *Hedley Byrne* is of practical significance, however, in that it might be questioned whether an assumption of responsibility is necessary at all where one is endeavouring to bring the claim within the extended rule. Given the unpredictable and uncontainable nature of information, it is reasonable to afford the information provider or advice giver some agency in terms of setting the scope of the duty and determining who can justifiably rely upon it. Thus, it is reasonable to ask whether, in freely entering into a transaction in full knowledge of who would be reliant upon their skills and expertise, the defendant willingly assumed a responsibility towards the claimant. In this respect the assumption of responsibility plays a vital role in terms of establishing proximity between the parties. However, so-called extended *Hedley Byrne* liability covers specific tasks and services, the negligent performance of which may have more localized and predictable effects than dissemination of erroneous information and advice alone. Indeed, it may be the direct and immediate cause of the loss and give rise to far fewer uncertainties than trying to predict who might use erroneous information or advice and for what purpose. Thus, merely undertaking a task falling under the extended rule may give rise to a duty of care, irrespective of whether the defendant could be said to have consciously agreed to assuming such a duty, in much the same way that the act

202 *Greystoke Castle* (n 43).
203 The idea of an extended version of Hedley Byrne which brings more cases within the single exception to the exclusionary rule of pure economic loss is widely credited to Lord Goff who declared in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 180: 'the principle extends beyond the provision of information and advice to include the performance of other services.'
204 ibid.

of driving a car unquestionably gives rise to a duty of care. Thus, as we move away from core *Hedley Byrne* liability into extended *Hedley Byrne* territory the assumption of responsibility test diminishes in relevance in that it ceases to have any useful role to play in establishing proximity. Instead, the focus shifts to foreseeability and remoteness as a control mechanism for determining the extent of the tortfeasor's liability. [205] Indeed, in such cases, affording the defendant some choice in the matter risks resurrecting the 'privity of contract' fallacy which, prior to *Donoghue v Stevenson*,[206] allowed manufacturers to set the scope of their liability.[207]

As regards the Horizon case, the postmasters and mistresses suffered loss as a direct result of using defective systems and equipment and, given that they were the intended users of the systems and equipment, foreseeability and proximity is self-evident; this alone should suffice to establish liability irrespective of whether Fujitsu could be said to have assumed a responsibility towards them. Suppose that the hardware provided as part of the Horizon package was so badly designed that it caused physical injuries such as repetitive strain injury from using unergonomic keyboards and migraines resulting from defective display screens. There is no doubt at all that Fujitsu would be liable in these circumstances in that the harm would fall squarely within manufacturers' or product liability. The only difference is that the harm in this example would be physical as opposed to purely financial; notwithstanding the fact that the financial losses suffered by the postmasters and mistresses were an equally direct consequence of a defective system and equally predictable. This brings us to the wider issue of whether, at least in this field of liability, the distinction between pure economic loss and physical harm remains logically sustainable.

5.1.2 Beyond Hedley Byrne: direct infliction of financial harm by a computer system

One of the most striking aspects of the Horizon scandal is the manner which a defective computer system caused direct harm to the postmasters and mistresses. It was not simply the case that they were provided with erroneous information upon which they made bad decisions; the computer system had a relatively straightforward mechanistic task to fulfil and were simply required to balance the books and this it failed to do so in spectacular fashion. The shortfall in the takings of branches was the direct, immediate and highly foreseeable consequence of such defects and did not require any further action on the part of the sub postmasters and mistresses to occur. Moreover, there is no great mystery associated with the fact that computer software was involved in the process. As noted above, a similar outcome could have been produced by a defective old school electrical or even mechanical adding machine or cash

[205] See Hartshorne (n 197) 435-36, citing *Customs and Excise Commissioners* (n 198) at [93] (Lord Mance).
[206] *Donoghue* (n 24).
[207] As noted above, this point was forcefully made by Lord Roskil in *Junior Books* (n 93) at 545C-E.

register. Nevertheless, despite the fact that such losses can be construed as the immediate and direct result of a defective product, they would be dismissed as irrecoverable pure economic loss according to the orthodox approach.

As the doctrinal overview demonstrates, several judges over the years have struggled with the idea that all losses which might be described as purely economic should be lumped together and rendered irrecoverable on the basis of a single floodgates type policy argument. As regards liability for defective structures and products, the conceptualization of defects as to quality or functionality as internal and only capable of giving rise to pure economic loss, is seemingly immutable. On occasion, judges have sought to ameliorate this approach by reaching for the idea that such losses may have an external dimension in certain cases providing the 'spike protein' onto which tortious liability may latch. In this regard Lord Wilberforce in *Anns*[208] and Lord Brandon in *Junior Books*[209] proposed an approach based upon whether the defect was of a dangerous nature; notwithstanding the fact that physical harm had yet to occur. Also in *Junior Books*, Lord Keith was prepared to find in favour of the claimants on the basis that, even though the defect was not dangerous, the defect had an external dimension in that it placed a burden on the claimant and adversely affected the profitability of the business.[210] Such losses could be distinguished from those which purely reflected the loss of functionality or quality of the product, such as the costs of repair or replacement. However, the majority in *Junior Books* went far further and made no attempt to treat economic loss as a special type of harm for which liability should be restricted. In other words, they did not regard pure economic loss as being governed by an exclusionary rule subject to very limited exceptions.[211] Although it was acknowledged that, where defective structures and products are concerned, a very high degree of proximity would be required between the parties. *Hedley Byrne* was a used as a useful guide for determining whether there was a sufficient degree of proximity, but it was not treated as the exception to an exclusionary rule into which the facts of the case at hand had to be accommodated.[212]

Subsequent decisions sought to distinguish *Junior Books* on the grounds that there was a very high degree of proximity between the parties and have sought to neutralize its precedential potency by shackling it to the facts.[213] The upshot of this is that the case has become an awkward outlier which textbooks try to sidestep much to the vexation of law students. Nevertheless, the case cannot simply be ignored because it has never been expressly

[208] *Anns v Merton BC* (n 89) (Lord Wilberforce).
[209] *Junior Books v Vietchi* (n 106) (Lord Brandon).
[210] *Junior Books v Vietchi* (n 103) (Lord Keith).
[211] *Junior Books v Vietchi* (n 99) (Lord Roskill).
[212] *Junior Books v Vietchi* (n 95) (Lord Fraser).
[213] Not least of which is *Murphy v Brentwood DC*; see (n 132) (Lord Bridge).

overruled by the House of Lords and latterly the Supreme Court. Moreover, on several occasions the high degree of proximity argument has been used to justify the decision. The intention behind such findings is to explain the decision as an exception to an exception which is confined to its particular facts. However, this is not logically sustainable and allowing *Junior Books* to survive on this basis has the potential to bring about the precise opposite effect and resurrect it as an authority. Merely countenancing the possibility that a high degree of proximity may suffice to establish liability for pure economic loss stemming from a defective structure or product, establishes that *Hedley Byrne* is not the be all and end all in this context. In addition, the facts of *Junior Books* are not so unusual that seeking to fetter the reach of the case on this basis will necessarily succeed. There could well be other scenarios where there is a very high degree of proximity between a manufacturer and a user; it is submitted that the Horizon scandal is a case in point. Furthermore, certain more recent case law developments suggest that *Junior Books* may not be as much of an outlier as it is normally presented.

Hartshorne has pointed to a number of decisions where 'an approach has been followed similar to that taken in claims involving personal injury or damage to property, where at the outset of any consideration into whether a duty of care was owed there are no initial preconceptions that no duty was owed based purely upon the nature of the loss itself.'[214]

In the aforementioned case of *Customs and Excise Commissioners v Barclays Bank*,[215] the Commissioners sought compensation when Barclays Bank were slow in implementing a court order requiring them to freeze the bank accounts of two customers who were under investigation for not paying VAT. The delay enabled the customers to transfer sums of money out of the accounts and beyond the reach of the authorities. Thus, the novel feature of the case appeared to be that the financial losses stemmed from failing to comply with regulatory powers as opposed to being the recipient of negligent advice or a poorly performed service. However, whilst the purely economic nature of the loss was acknowledged and although there was some consideration of the *Hedley Byrne* criteria, the House of Lords did not start from the premise that such losses are normally irrecoverable unless they can be accommodated within negligent misstatement or extended *Hedley Byrne* liability. Rather, the main focus was upon whether there were sound policy reasons for not imposing a duty of care according to a *Caparo*[216] type analysis. In other words, rather than the *existence* of a duty of care being

[214] Harthorne (n 197) 427.
[215] (n 198).
[216] *Caparo Industries v Dickman* [1990] 2 AC 605 whereby policy arguments are ascribed to the 'fair just and reasonable criterion.' Latterly there has been much judicial debate as to whether the so-called 'Caparo test' has been over-used so as to create liability out of thin air at one extreme, or deny liability despite there being nothing truly novel about the situation at the other. A detailed exploration of this debate is outside the scope of this paper although a useful starting point is the discussion in *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736.

treated as an exception to an exclusionary rule, the *absence* of such a duty was regarded as an exception to a general proposition that such losses ought to be recoverable.

In *Jain v Trent Strategic Health Authority*,[217] the defendant regulator negligently conducted an investigation into alleged failings at a care home, run by the claimant, which culminated in the instigation of proceedings to cancel the care home's registration. This compelled the defendant to close the care home and sustain huge financial losses as a result. Although the decision was later the subject of a successful appeal, by this point the financial damage had already been done and could not be remediated. However, as Hartshorne points out, the House of Lords did not start from the premise that pure economic loss is not generally recoverable (indeed the term was not used at all); instead, their Lordships' main focus was directed to the nature of the statutory power which brought about the loss. In this respect they concluded, as a matter of statutory interpretation, that the power was intended to protect the residents of care homes and did not give rise to a duty of care vis a vis the care home providers.

Thus, if one was to apply this line of reasoning to the Horizon scandal and the potential liability of Fujitsu, the fact that the losses were purely economic would not frame the analysis in any material way. The starting point would be that there was a very high degree of proximity between the parties, although this would not depend upon bringing the case within the ambit of *Hedley Byrne*. One might argue that imposing a duty of care for pure economic loss arising from a defective product raises novel issues and extends the liability of manufacturers. However, policy reasons of the type which might be raised under the third limb of *Caparo*, the fair just and reasonable criterion, would be the determining factor as opposed to a blanket exclusionary rule against pure economic loss. This shifts the whole focus of the analysis and requires one to consider whether there are good reasons for *not* imposing a duty of care as opposed to whether there are good reasons *for* imposing a duty of care. At this point it is worth considering what type of policy argument might be used to counter any attempt to bring pure economic loss within the scope of product liability. In *Customs and Excise Commissioners*[218] and *Jain*[219] the regulatory context was an important factor and the risk that the imposition of tortious liabilities might conflict with the relevant regulatory regimes. These factors are not present in the Horizon scandal which stems from voluntary interactions. The floodgates argument is always a useful fallback position for those seeking to limit the scope of liability and, as we have seen in the doctrinal analysis, above, has characterised the entire debate regarding pure economic loss from the outset. However, such concerns would be countered

[217] [2009] UKHL 4, [2009] 1 AC 853.
[218] *Customs and Excise Commissioners v Barclays Bank* (n 198).
[219] *Jain v Trent Strategic HA* (217).

by the higher degree of proximity required for losses which take the form of pure economic loss. This would confine liability to bespoke products and services intended for a specific customer or user as opposed to 'off the shelf' consumer items.[220]

Thus, proximity alone could conceivably provide one means of controlling the scope of liability and countering floodgates arguments. Nevertheless, there may still be concerns to the effect that such an approach risks eroding the boundaries between contract and tort and the intellectual coherence of the law. Such concerns could conceivably be packaged as policy arguments and slotted into the third limb of *Caparo*. This returns us to the problem of recognizing that there are different types of pure economic loss concealed by the blanket exclusionary rule. As has now been argued at some length, some losses have an external dimension which transcend the quality and functionality of the product and impose a new burden or liability on the user. The external loss *trigger* for tortious liability serves to maintain some distinction between contract and tort in this context but has hitherto been limited to physical losses. As noted above, in previous decisions there has been some attempt to characterize dangerous defects as tangible harm. As regards non-dangerous defects, there has been some debate as to whether additional financial burdens arising from managing the defective product and devising workarounds could be construed as external losses as opposed to a manifestation of the internal deficiencies of the product. To return once more to the 'glass of water' analogy which is often used to justify limiting the scope of manufacturers' liability to dangerous defects; a consumer may be disappointed to receive a glass of water when they were looking forward to glass of ginger beer (minus the decomposing snail) but this does not impose new financial burdens and liabilities upon them. This raises the issue of whether it is conceptually possible to impose some form of categorization on the various forms of pure economic loss as an aid to determining which forms of loss ought to be recoverable.

As Gilliker has argued,[221] it might be possible to draw some lessons from the manner in which Canadian law has developed in this field. The Canadian Supreme Court parted company with the House of Lords when the latter emphatically rejected the two stage *Anns* test[222] in *Murphy v Brentwood District Council*.[223] The Canadian Supreme Court continued to subscribe to the view that issues of proximity and foreseeability should still be used to establish a prima facie duty of care before deciding whether there were any countervailing policy arguments

[220] See *Junior Books* (n) 533D (Lord Fraser): 'I rely particularly on the very close proximity between the parties which in my view distinguishes this case from the case of producers of goods to be offered for sale to the public.'
[221] Paula Giliker, 'Revisiting Pure Economic Loss: Lessons to be Learnt from the Supreme Court of Canada' (2005) 25 Legal Stud 49.
[222] *Anns v Merton Borough Council* (n 87).
[223] *Murphy* (n 124).

suggesting that liability should be limited or denied altogether.[224] The types of claim apt to involve pure economic loss were divided into five broad non-exhaustive categories including defective products.[225] Moreover, rather than adopting a one size fits all approach, the policy arguments were tailored to each of the five types of claim.[226] Thus, where product liability was concerned, issues such as floodgates, conflict with contract law and insurance implications would come to the fore. Hence, pure economic loss was not characterized as being irrecoverable per se (unless it could be accommodated within a narrow exception); although it was recognized that it is an area where policy issues are prevalent and demand careful consideration.

Thus, in summary, the starting point for this analysis should not be that the provider of a computer system owes no duty in respect of defects causing pure economic loss to persons other than the purchaser unless the matter can be brought within *Hedley Byrne* construed as a narrow exception to an exclusionary rule. Rather, as per the Canadian model, economic loss and product liability should be regarded as a specific area of liability where bespoke policy considerations should determine the scope of liability. Such an approach has helped the Canadian courts to progress beyond the view that a duty of care only arises from dangerous defects; unless the defective is discovered in time in which case the defect ceases to be dangerous.[227]

The exponential growth of information technology and the somewhat belated recognition of the fact that a computer programme is a product in its own right, irrespective of whether it controls a physical object, provides an example *par excellence* of an instance where there needs to be a free and open examination of the type of liability to which this should give rise. The Canadian approach offers the courts a space to consider the policy arguments without being fettered by an exclusionary rule which tells them that they ought not to be engaging in this exercise at all.

In this respect there are compelling arguments for regarding a defective computer system as creating distinctive risks and causing distinctive types of loss. It provides hard data which dictates subsequent events and goes far beyond mere information or advice. Of fundamental

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224 *The Norsk* (1992) 91 DLR (4th) 289. See Giliker (n 221) 56.

225 The other four are liability of public bodies in respect of losses arising from the negligent use of regulatory powers (such as the defective building control cases); negligent performance of services; negligent misrepresentation; and some relational loss cases. See Giliker (n 221) 56-57.

226 See Giliker (n 221) 69-70.

227 Giliker (n 221) 68 cites the example of *Hughes v Sunbeam Corp (Canada)* (2002) 219 DLR (4th) 467 in which the Ontario Court of Appeal held that a defective smoke alarm could give rise to tortious liability on the basis of the risk it caused to those who were reliant upon it, notwithstanding the fact that the defect was discovered before any fire occurred which it failed to detect. Although, one could argue that the *Rivtow* decision (n 90), which has been discussed above, opened the way for such an approach some years previously.

significance is the fact that they can expose persons to financial liabilities and detriments which, as extensively argued above, have an external dimension which is entirely separate from the repair or replacement costs that one would normally associate with a defective product. Moreover, as demonstrated by the Horizon scandal, the data may be regarded as compelling proof of dishonesty thereby destroying the reputation and livelihood of the user and even depriving them of their liberty. In terms of policy arguments associated with product liability in the Canadian model as outlined by Giliker, floodgates issues have already been dealt with; as regards 'conflict with contract law' this would clearly not apply in that the aforementioned losses cannot be equated with simply failing to get the benefit of the bargain.

It has been extensively argued that the economic losses associated with the Horizon scandal have an external dimension and should be regarded as consequential as opposed to pure economic loss thereby triggering liability in tort without the need to accommodate them within the *Hedley Byrne* 'exception.' However, there is in fact a type of personal injury associated with the Horizon scandal which is unequivocally external or consequential and is closely associated with the financial implications; namely, psychiatric injury.

5.2 Product liability, economic loss and the psychiatric harm dimension

The impact of the Horizon scandal on the mental health of the postmasters and mistresses cannot be ignored or overstated. Many have been left with long term psychiatric illnesses and such issues may have been a contributing factor to the early demise of others.[228] On the face of it this may appear to be an entirely separate claim involving a very different type of harm. However, there are clear links between the financial and mental health costs of the scandal and, at the risk of opening another 'can of worms,' no analysis would be complete without some consideration of this aspect of the case.

A useful place to start is the New Product Liability Directive[229] which, as noted above, has made some tentative inroads into eroding some of the distinctions between 'material' and 'non-material' harms (or tangible and intangible). Recall that Article 6 specifically singles out 'destruction or corruption of data' and 'damage to psychological health' as actional harms with the former linked to property damage and the latter linked to personal injuries. As regards data loss, the Directive could be accused of offering clarity with one hand and instantly removing it with the other in that Article 6 goes on to state that the recoverability of non-material losses is

[228] Indeed, the human impact of the scandal constitutes a major part of the first volume of the report of the Post Office IT Inquiry. The report concludes there is a strong possibility that at least 13 suicides are attributable to the scandal although others may have been unreported: see Independent Inquiry into the Post Office Horizon IT System, First Interim Report: Compensation (HC 1749, 17 July 2023) https://www.gov.uk/government/publications/post-office-horizon-it-inquiry-sir-wyn-williamss-first-interim-report-compensation-july-2023 accessed 17 July 2025, at paras [3.7] – [3.12].
[229] Directive 2024/2853(n 34).

a matter for domestic law. Given that recital (24) specifically singles out pure economic loss as a type of non-material loss and given that data loss typically manifests itself as financial damage, one might be forgiven for questioning the utility of Article 6. However, the fact that data loss is singled out and added to the definition of actionable property damage suggests that it has been classified as a form of material harm.[230] As regards 'damage to psychological' health it should be noted that it appears to relate more closely to what would be understood as psychiatric injury in English law in that Article 6 specifies that it must relate to a 'medically recognised' condition. As a matter of English language and scientific taxonomy only the term 'psychiatric' relates to mental disorders which are sufficiently serious to be medicalised. Psychological disorders are thought to belong at the behavioural end of the spectrum and are not treated as medical issues.[231]

Data loss and psychological harm could be linked together; thus, if the data loss was of a type which could be regarded as material, it could also give rise to a cause of action for psychological harm (or psychiatric injury). Thus, it seems clear that software failures could give rise to claims for financial damage arising from data loss and the psychiatric or psychological harm arising therefrom. This provides conceptual support for the idea that other types of financial harm arising from defective software could be classified as material harm. Thus, one could argue that the Horizon system mangled the sales data input by the postmasters in a manner which caused direct and consequential financial losses.

The New Product Liability Directive[232] might provide conceptual support for the argument that financial loss of this nature could be linked with psychiatric harm; however, given that it would not extend to commercial products (even if English law were to be amended so as to reflect the New Directive), it is necessary to consider whether there is any authority in English common law, however slim, which might justify such an approach.

There is scant authority on the extent to which damage to physical property can be linked to psychiatric injury. The only major case (another to be treated as an outlier or oddity by much of the literature) is *Attia v British Gas*[233] in which the claimant, who was traumatised by

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[230] Li and Schütte (n 189), at 584, postulate that the Directive will only regard such claims as material where it is possible to attach a specific monetary value to the lost data, such as 'digital learning materials' for which expenditure has been incurred in accumulating them. It is unlikely, they argue, that 'digital photos of significant emotional value' would constitute material harm for the purposes of the Directive and the matter would have to be determined according to domestic law.
[231] Resolving this conundrum is clearly beyond the scope of this paper. Suffice it to say, the boundaries between psychiatry and psychology are not as clear cut as English law might have us believe and different translations of the terms result in boundaries, intersections and nuances which may differ in different European languages. See Brigitta Busch and Tim McNamara, 'Language and Trauma: an Introduction' (2020) 41(3) *Applied Linguistics* 323.
[232] Directive 2024/2853 (n 34).
[233] [1988] QB 304.

witnessing the severe fire damage caused to her home by the defendant's negligent fitter, was found to have a cause of action for nervous shock or psychiatric injury. Much of the academic criticism of the case focuses on the fact that witnessing damage to property cannot be equated with witnessing harm to another person. A typical example is provided by Horsey and Rackley where it is commented:

> 'Why is it, for example, that a house owner was able to recover in respect of psychiatric harm caused by witnessing a fire which extensively damaged her home (Attia v British Gas [1988]) while a brother who saw his sibling being crushed to death was unable to claim (Alock v Chief Constable of South Yorkshire Police [1992]?'[234]

However, this rather misses the crucial point that *Alcock*[235] concerned relational claims brought by secondary victims where the admittedly arbitrary *Alcock* criteria were used to overcome issues of proximity. *Attia* was not a case of relational loss, and the primary and secondary classification issue was not relevant. The claimant was the owner of the damaged and destroyed property and the direct and immediate victim of the defendant's negligence; thus, there was only one victim, and the issue of proximity did not arise. The point was in fact recognised and dealt with by Dillon LJ who noted that this differentiated the claim from *McLoughlin v O'Brien*[236] which was the most recent leading case on psychiatric injury at the time:

> '… a great deal of the difficulty which has been felt over the development of the law as to damages for "nervous shock" has arisen in relation to what, in the terminology of the tort of negligence, is described as the question of proximity. How far is it right that the law should allow a claim for damages against a wrongdoer, where the wrong done by the wrongdoer was primarily a wrong done to someone other than the claimant, and the claimant is a person of whom, at the relevant time, the wrongdoer had no knowledge and who may then have been far away from the scene of the wrongdoer's act? This difficulty is particularly concerned with whether the wrongdoer owed any duty of care to the claimant. But that difficulty does not arise in the present case because in the present case there is no problem of proximity. The defendants knew about the plaintiff and unquestionably owed a duty of care to her not to start a fire in her house. If her claims for damage to the house and contents had not been settled, she would have brought the one action against the defendants in which she would have pleaded the negligence of the defendants in starting the fire and would have gone on to assert that, by reason thereof, she had suffered and was suffering damage and loss, which

234 Kirstey Horsey and Erika Rackley, *Tort Law* (8th edn, OUP 2023) 109.
235 *Alcock v Chief Constable of West Yorkshire Police* [1992] 1 AC 310.
236 [1982] 1 AC 410.

> would be put under two headings, viz: (1) damage to the house and contents; and (2) damage for nervous shock.'[237]

A claim arising from witnessing the destruction of one's home and the security and investment which that embodies, is only a short step away from a claim arising from the destruction of one's livelihood and the financial consequences which flow from that. This issue was touched on by litigation arising from the grounding of the *Braer* on the coast of Shetland in 1993, one of the worst oil pollution disasters to have occurred in British waters. In *Black v Braer Corp*[238] a component of the damages sought by a farmer included psychological harm arising from witnessing damage to livestock and crops caused by strong winds whipping the oil up into an oily spray. Lord Gill accepted that damage, for the purposes of the maritime oil pollution regime under which the claim was brought, could include mental distress or psychological harm.[239] However, he stated that the case 'would have been stronger' if the harm was linked to personal injuries suffered by the farmer through his own inhalation of the contaminated air.[240]

The case law on the extent to which psychiatric harm can be linked with purely economic losses arising from injurious affection of one's livelihood or commercial interests is sparser still. In *Wokingham Borough Council v Arshad*,[241] an appeal from a decision of the Oxford County Court, the claimant taxi driver was given incorrect information by the local authority as to whether a vehicle he was planning to purchase for his business met licencing requirements. Having been told that the vehicle was suitable and having acquired it he was then told that it was not in fact suitable because of disabled access issues. He claimed for economic losses and psychiatric injury arising from the stress induced by the potential threat to his livelihood. The County Court found that a duty not to cause pure economic loss would arise under classic *Hedley Byrne* liability for negligent misstatement. However, on the facts it was found that such losses had not actually been incurred in that the claimant had been able to switch to a private hire licence. Nevertheless, the County Court went on to apply a *Hedley Byrne* type of analysis to the issue of whether other losses might be recoverable, 'finding in particular that the Council voluntarily assumed responsibility for the reasonably foreseeable consequences of the statements of Mr Joplin [the council official who had advised on the suitability of the vehicle];'[242]

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237 *Attia* (n 233) 311G – 312C.
238 [1999] SLT 1401.
239 ibid., at 1404. The claim was brought under the Merchant Shipping (Oil Pollution) Act 1971 which implemented the 1969 Convention on Civil Liability for Oil Pollution Damage. In the absence of any clear guidance in these instruments as to the definition of damage the courts have had to fall back on common law principles. See Mark Wilde, 'Magnohard Ltd v The United Kingdom Atomic Energy Authority: claiming for the economic and psychological "legacy" of nuclear and maritime pollution' (2004) 12(6) Env Liability 243.
240 *Black* (n 238) 1404 (.(Lord Gill).
241 [2022] EWHC 2419 (KB), [2023] RTR 9.
242 ibid, [21] (Bourne J).

such losses include psychiatric injury arising from the aforementioned reasons. Whilst such an analysis might suffice to establish proximity, Bourne J agreed with the appellant's argument that there had been inadequate consideration of whether such losses were foreseeable. In this regard it was concluded that, in the absence of knowledge of the precise state of mind of the claimant, the test was whether it was reasonably foreseeable that a person of 'reasonable fortitude' would succumb to a psychiatric disorder as a result of the negligent conduct.[243] The case of *Yapp v Foreign and Commonwealth Office*[244] set the threshold relatively high in terms of what a person of reasonable fortitude is expected to endure in that 'even a serious threat to a person's career, by itself, is not enough.'[245] Given that the claimant was able to continue working, albeit as a private hire driver, the threat to his livelihood was not so significant that psychiatric harm could be deemed foreseeable.

Notwithstanding the fact Mr Arshad lost his case on the facts, it is important to note that Bourne J considered the evidence to be borderline to the extent that he expressed 'great regret' for 'the consequences of this appeal for Mr Arshad.'[246] Moreover, a number of cases were cited in which psychiatric harm was deemed to be the foreseeable consequence of negligent conduct not entailing any risk of physical harm. A prime example concerns employers' duties and the need to adopt working practices and procedures which do not subject the employee to undue stress as part of the obligation to operate a safe system of work.[247] However, there had been an incremental extension to other situations involving the provision of defective advice in a non-employment context and the negligent provision of services. For example, in *McLoughlin v Grovers (a firm)*[248] the claimant was wrongfully convicted of an offence due to negligence in terms of the preparation of his defence by his solicitors. Brooke LJ adopted a *Hedley Byrne* type approach to the issue of whether a duty of care to prevent such harm arose. In this regard he noted that the House of Lords had formulated a 'battery of tests' including the purpose of the transaction and whether there had been an assumption of responsibility.[249] It was held that avoiding wrongful conviction was the main purpose of the engagement and from this it would follow that there had been an assumption of responsibility to avoid causing foreseeable consequences of the negligent performance of the legal services such as 'anxiety, distress or psychiatric disorder.'[250]

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243 ibid, [56] (Bourne J).
244 [2014] EWCA Civ 1512, [2014] IRLR 112.
245 *Arshad* (n 241), [60] (Bourne J).
246 Ibid, [62] (Bourne J).
247 See, for example, *Walker v Northumberland CC* [1995] ICR 702 (QB); *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] ICR 613.
248 [2001] EWCA Civ 1743, [2002] QB 1312.
249 ibid, [28] (Brooke LJ).
250 ibid, [29] (Brooke LJ).

In terms of the Post Office Horizon system, the need to avoid the risk of wrongful convictions for fraud and theft may not have been the main purpose of the engagement of ICL/Fujitsu; however, as the central accounting system for business conducted by postmasters on behalf of the Post Office, Horizon clearly played a crucial role in evidencing the competence, efficiency, integrity and honesty of those charged with using it; especially given that both the Post Office and Fujitsu repeatedly asserted that the system was infallible and provided definitive evidence of dishonesty. Psychiatric injury is clearly a foreseeable consequence of a defective system which calls into question these attributes. In this respect it would be reasonable to assert that there had been an assumption of responsibility to avoid causing this type of harm through the provision of a defective accounting system.

Thus, there is sufficient authority to conclude that, aside from the economic losses themselves, it may be possible to seek compensation in respect of the collateral impact on the mental well-being of the postmasters and mistresses.

6. Conclusions

In terms of the number of wronged parties, the scale and complexity of the issues, the egregiousness of the conduct of hitherto reputable organizations and the sheer span of time over which the affair has endured, the Horizon scandal is without equal in the history of English, Welsh and Scottish Law. In the autumn of 2023, it appeared that matters may at last be coming to a head and that justice might be at hand for the numerous postmasters and postmistresses whose reputations and finances had been destroyed by defects in the computer system. The television dramatization shone an intense spotlight on the tireless efforts of the postmasters to clear their names and the work of investigative journalists and a small number of politicians who had pursued the case for years. Moreover, it turned the full gaze of the media upon the public inquiry which might otherwise have proceeded largely unnoticed by those without a direct interest in the matter. However, any hopes that these events would serve to concentrate minds and expedite the payment of full and proper compensation to those affected has begun to dwindle. Thus, it is little surprise that attention is now focusing on pursuing litigation as opposed to relying upon the compensation system.

The Horizon system was, and is, a product and, as a commercial as opposed to a consumer product, is subject to well-established common-law principles of manufacturers' liability stemming from *Donoghue v Stevenson*.[251] The fact that the losses suffered by the postmasters were largely economic (leaving aside the psychiatric dimension for the moment) might once have stood as an intractable barrier to pursuing any successful claim. This may in part explain

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[251] *Donoghue* (n 24).

why Fujitsu has referred to a *moral* obligation to make amends for the losses as opposed to a *legal* one.[252] The purpose of this article has been to show that this is far from an intractable problem and that facilitating such claims would not entail any dramatic departure from existing common law principles. The judiciary have never been entirely unified as to the desirability of an exclusionary rule for pure economic loss and there are signs that the rigid distinctions between physical loss and pure economic loss is being eroded in some areas.

In particular, there is a need to break away from the 'glass of water' analogy which has often been used to limit the scope of manufacturers' or product liability under the common law. To recap, May Donoghue would have had no cause of action had she been served a bottle of uncontaminated water as opposed to ginger beer in that it would not have caused her harm. Allowing her to claim for the fact that she had not received the benefit of the bargain (made between her friend and the café) would have established quasi contractual relations between May Donoghue and the suppliers without the latter's knowledge and consent. From this we seem to get to the position that defects as to functionality and quality are purely internal and thus only raise matters of pure economic loss which are essentially the province of contract. However, this was certainly not how Stamp LJ intended the analogy to be used when he first formulated it in *Dutton*.[253] As the aforementioned quote from the salient part of his judgment makes clear, he was using the analogy to differentiate between those defects which render the item 'useless or valueless' and those defects which cause other losses which go beyond the cost of repairing or replacing the item.

As the doctrinal analysis demonstrates, the external dimension of pure economic loss is an issue which certain judges have grappled with over the years. Most notably, in *Anns*,[254] Lord Wilberforce cited the Canadian case of *Rivtow*[255] in support of an argument to the effect that dangerous defects do not cease to be so simply because they have been discovered before they cause physical loss. They impose a burden on the person saddled with the defective item or structure which cannot be ignored, especially if there are health and safety implications. The loss is the financial liability arising from the need to obviate the hazard rather than the dangerous defect per se. Lord Keith, in *Junior Books*,[256] was prepared to find that, where there is a high degree of proximity between the parties, the additional costs associated with working

[252] In January 2024, in a widely reported statement made to the House of Commons Business and Trade Select Committee, Paul Patterson, the Chief Executive of Fujitsu Europe, said that the company had a 'moral obligation' to contribute to the compensation of the postmasters: see Rafe Uddin, 'Fujitsu agrees to contribute to Post Office scandal compensation' *Financial Times* (London 16 January 2024) <https://www.ft.com/content/82d8ebc7-5fbc-4bc0-8f8b-9f4d18f49d5e> accessed 21 July 2025.
[253] *Dutton* (n 86).
[254] *Anns* (n 87).
[255] *Rivtow* (n 90).
[256] *Junior Books* (n 93).

around defective workmanship may be recoverable notwithstanding the lack of imminent danger. The external nature of the losses caused by the Horizon computer system are self-evident and go far beyond the quality and functionality of the system. Postmasters incurred both criminal and civil liabilities based upon the defective processing of their branch takings by defects in both the software and hardware of the system. This is far removed from the glass of water analogy and demonstrates the artificiality of adopting a one size fits all approach to the issue of pure economic loss.

Lord Denning's overtly policy-based limitations on pure economic loss claims have become deeply ingrained and have fettered the ability of the courts to fully engage with the issues and the demands of new technologies such as IT. Nevertheless, as we have seen, certain judges have sought to challenge the fetishisation of pure economic loss and allow such claims to be subject to the normal considerations of proximity, foreseeability and policy. A number of notable decisions in recent years, such as *Barclays Bank*,[257] have not rejected claims out of hand simply because the claim involves pure economic loss. Granted, the claims may have been rejected for other reasons including policy arguments, but the point is that the court did not start from the position that pure economic loss is irrecoverable unless the claim can be accommodated within *Hedley Byrne* principles. In Canada, varying forms of pure economic loss are recognised as recoverable and different factors come in to play according to the nature of the claim. As regards Horizon, there was a very high degree of proximity between the parties in that it was a highly specialised, bespoke system the users of which constituted a well defined and closed class. The system did not merely produce misleading information leading to ill-informed decisions, it caused direct financial harm by communicating false data to the Post Office and triggering legal repercussions. Information and data in this context are not purely passive or static, they have immediate real-world consequences. One might ask the question, what is the logic of distinguishing between a computer system which causes a driverless car to crash and a computer system which mangles sales data and destroys the livelihood of the user? Merely saying that one loss is physical and one is purely economic is not an answer.

Thus, a key conclusion is that the one size fits all approach to pure economic loss must be abandoned. The Canadian approach, for example, affords the courts the space to consider all the issues in the round including the challenges created by evolving technologies. The New Product Liability Directive[258] has its limitations and is certainly not a perfect solution to these challenges in the consumer sphere, but it does at least now recognise that computer programs are a world apart from static or passive information on the printed page; in this respect there

[257] *Barclays Bank* (n 198).
[258] (n 34).

may be lessons for the common law which is left to govern commercial transactions. As mentioned above, irrespective of whether computer systems are concerned with the control of a physical item or manage data, they can bring about immediate and devastating real world consequences if defective. In future, AI can only serve to exacerbate these issues as it facilitates increasingly complex and interactive interfaces between the user and the software.

Even if such a 'radical approach' were to be rejected requiring one to bring such claims within *Hedley Byrne* as an exception to an exclusionary rule on pure economic loss, there can be no doubt that such a case could be made. There was an exceedingly high degree of proximity between the parties in that ICL/Fujitsu entered into the contract with the Post Office with full knowledge of the fact that a clear and distinct class of persons would be entirely reliant upon the system for managing their business transactions. In this sense it was a case of core or classic *Hedley Byrne* liability establishing a relationship that was 'akin to contract' from which an assumption of responsibility can be clearly discerned. Moreover, if one were to frame the relationship as falling within extended *Hedley Byrne* liability, on account of the fact that the system as a whole involved more than the provision of information or data, the need to show some form of voluntary assumption of responsibility diminishes in any case. The negligent performance of the service and a close causal nexus between the negligence and the loss suffices to establish liability. In any event, the Post Office Horizon IT Inquiry has produced much evidence to the effect that the line separating the postmasters and Fujitsu was crossed on numerous occasions dispelling any notion that there was no course of dealing between the parties.

Finally, the psychiatric impact of the scandal cannot be entirely disentangled from the economic damage. Although they constitute very different types of loss, floodgates arguments have resulted in certain similarities in terms of how the courts have approached such claims over the years. Indeed, as noted above, on occasion the courts have applied the assumption of responsibility approach to the issue of whether a person owes a duty not to cause psychiatric harm to another in contexts where there is no risk of physical injury. Although a psychiatric injury claim may not piggyback directly on a claim for pure economic loss, there is authority for the proposition that a collateral claim may arise from the foreseeable stress caused by the damage to ones livelihood, reputation and even loss of liberty.

In conclusion, as regards Fujitsu's aforementioned statement that it has a moral responsibility to contribute to the compensation of postmasters, the use of the word 'moral' was clearly deliberate and intended to show that the company does not accept any form of legal obligation. This view is already being challenged in the action pursued by Mr Castleton regarding the part allegedly played by Fujitsu in securing wrongful judgments against postmasters. The aim of this article has been to show that far wider legal obligations may stem from liabilities under manufacturers' or producers' liability for defective products. The pure economic loss argument should no longer be regarded as an unassailable defence against such claims.