"WHO THEN IS MY NEIGHBOUR NOW!"
by Roger Doulton, Solicitor, Winward Fearon & Co.

One does not lightly mention the tort of negligence in the presence of an insurer. It tends to provoke a rather apoplectic glare. And, indeed, quite how far we have travelled in that last 50 years may perhaps best be seen in the following passage from Lord Buckmaster's disserting judgment in *M'Alister (or Donoghue) (Pauper) v. Stevenson (1932).*

> "There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step then why not 50? If a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling fails and injures the occupier or anyone else, no action against the builder exists according to English Law, although I believe such a right did exist according to the laws of Babylon."

Notwithstanding that Lord Buckmaster was merely enunciating the law as widely understood before *Donoghue* (that an action in negligence would only lie (i) where the article was dangerous per se and (ii) where the article was dangerous to the knowledge of the manufacturer) as all readers of this magazine will surely know the majority decision in *Donoghue* established a general duty of care with respect of physical damage based on foreseeability of harm but also, and equally important, proximity of neighbourhood. In Lord Atkin's famous and justly celebrated words:-

> "The liability for negligence whether you style such or treat it as in other systems a species of "culpa" is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restrictive reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected

when I am directing my mind to the acts or omissions which are called in question."

This decision created wide areas of risk for persons or bodies whose mistakes would normally lead to physical damage. Builders, Architects, Engineers etc were particularly affected. Lawyers, Bankers, Accountants, Valuers and others whose mistakes would normally cause only economic loss were not (other than under contract) put at serious risk until 1963 when in the equally celebrated case of *Hedley Byrne & Company Limited v. Heller & Partners* (1963) 3 W L.R. it was held that the maker of a negligent statement could be liable to a third party for economic loss provided that there was a special relationship between the parties.

Somewhat unhelpfully, however, the Law Lords then suggested three different criteria for determining whether or not there existed a special relationship (a) knowledge that there would be third party reliance, (b) assumption of responsibility towards a third party by the maker and (c) relationships akin to contract. And this, together with the rather unspecific nature of Lord Atkins' ratio created a situation in which Trial Judges found it very difficult to determine any clear criteria by which they could decide whether or not in any given set of circumstances one person owed a duty of care to another. Trial Judges proceeded by means of a kind of classic English empiricism which with hindsight might perhaps be seen as really rather satisfactory (in so far as it tended to produce practical and sensible decisions) were it not for the uncertainty it induced in the minds of both commercial organisations and their legal advisers.

All this changed with *Anns v. Merton London Borough* (1977) 2 All E.R. In a passage of crystal clarity, which later became the excuse for a far reaching and dramatic expansion of those circumstances in which a duty of care might be held to exist, Lord Wilberforce said the following:-

"Through the trilogy of cases in this House, *Donoghue v. Stevenson (1932) A.C. Hedley Byrne & Co Limited v. Heller & Partners (1969) 2 All ER* and *Home Office v. Dorset Yacht Co Limited (1970) 2 All E.R.* the position has now been reached that in order to establish that a duty of care arises in a particular situation it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to

cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or class of person to whom it is owned or the damages to which a breach of it may give rise..."

The importance of this decision was three fold. First, it was widely perceived as placing the main emphasis for establishing a duty of care on foreseeability of harm rather than giving equal emphasis to proximity and/or neighbourhood. Second, and not surprisingly given the language in which the Judgment was couched, Judges tended to perceive the policy restrictions as being restrictions which should only be applied in fairly exceptional circumstances. Third, and perhaps just as important, Trial Judges had at last a clear and unequivocal test which they could apply with great ease to almost any factual background in order to establish whether or not a duty of care existed.

The impact was immediate and, indeed, rather devastating. In New Zealand, for example, a case even went to the Court of Appeal on the issue as to whether or not a Plaintiff's Solicitor in litigation owed a duty of care to the Defendant! Closer to home, the decision of the Court in *Yianni v. Edwin Evans & Sons (1981) 3 All E.R.* was the direct result of the application by Mr Justice Park of Lord Wilberforce's test. In his words:-

"For these reasons I have come the the conclusion that the Defendants owed a duty of care to the Plaintiffs because, to use the words of Lord Wilberforce in *Anns v. London Borough of Merton* there was a sufficient relationship of proximity such that in the reasonable contemplation of the Defendants carelessness on their part might be likely to cause damage to the Plaintiffs.

I turn now to consider whether they are any considerations which ought to negative or to reduce or limit the scope of the duty or the class of persons to whom it is owed."

One year later, and in *Junior Books v. Veitchi (1982) 3 All E.R.* (another case in which the two-stage test was applied) we find Lord Roskill mounting a strong and vigourous attack on the distinction which the Courts have historically drawn between liability for physical damage and/or economic loss flowing from that physical damage as opposed to liability for economic loss per se.

"The familiar "flood gates" argument was once again brought fully into play. My Lords, although it cannot be denied that policy considerations have from time to time been allowed to play their part in the last century and the present either in limiting or in extending the scope of the tort of negligence since it first developed as it were in its own right in the course of the last century yet today I think its scope is best determined by considerations of principle rather than of policy. The "flood gates" argument is very familiar. It still may on occasion have its proper place but if principle suggests that the law should develop along a particular route and if the adoption of that particular route will accord a remedy where that remedy has hitherto been denied I see no reason why, if it be just that the law should hence forth accord that remedy, that remedy should be denied simply because it will, in consequence of this particular development, become available to many rather than to a few."

"Where will this all end?" bemused insurers were heard to ask as premiums and losses climbed ever higher. To which the irresistible reply was "when we are all bankrupt". But *Yianni* and *Junior Books* proved to be the end of the road. Notwithstanding Lord Roskill's speech, and over the last four years, policy considerations have played a major part in the decisions of the English Courts which have always been particularly adept at making practical and sensible decisions consistent with economic reality.

The first glimmering was *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson (1985) A.C.* In that case Lord Keith said the following concerning Lord Wilberforce's judgment in Anns:-

> "There has been a tendency in some recent cases to treat these passages as being themselves of definitive character. This is a temptation which should be resisted."

In *Leigh and Sillivan Limited v. Aliakmon Shipping Co Limited (1986) 2 W L.R.* Lord Brandon is found saying the following concerning Lord Wilberforce's speech:-

> "The first observation which I would make is that the passage does not provide, and cannot in my view have been intended by Lord Wilberforce to provide, a universally applicable test of the existence and scope of a duty of care in the law of negligence."

In this connection he drew the Court's attention to the passage on Lord Keith's speech in *Peabody* quoted above and then went on to say:-

"The second observation which I would make is that Lord Wilberforce was dealing, as is clear from what he said, with the approach to the questions of the existence and scope of a duty of care in a novel type of factual situation which was not analagous to any factual situation in which the existence of such a duty had already been held to exist. He was not, as I understand the passage, suggesting that the same approach should be adopted to the existence of a duty of care in a factual situation in which the existence of such a duty had repeatedly been held not to exist."

In *Curran v. Northern Ireland Housing Association Limited (1987) 2 W L.R.* Lord Bridge referred with approval to a case in which the High Court of Australia specifically refused to adopt the two stage Ann's approach.

This trilogy of cases, often referred to as "The Retreat from Anns" has now reached its climax in the very important case of *Yuen Kun-yeu v. Attorney General of Hong Kong (July 1987) 2 All E.R.* In this case, Lord Keith, so it seems to me, finally buries the two-stage test formulated by Lord Wilberforce in Anns. At the very least he imposes stringent rules for its interpretation as follows:-

"Their Lordships venture to think that the two-stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps that its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs C.J. pointed out in *Sutherland Shire Council v. Heyman* there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs C.J. is that he meant to test the sufficency of proximity simply by the reasonable contemplation of likely harm. The second view favoured by Gibbs C.J. himself, is that Lord Wilberforce meant the expression "proximity of neighbourhood" to be a composite one, importing the whole concept of necessary relationship between Plaintiff and Defendant described by Lord Atkins in *Donoghue v. Stevenson (1932).* In their Lordship's opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v. O'Brian (1982) 2 All E.R.*, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of

care. Foreseeability of harm is a necessary ingredient of such a relationshiip but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air and forebears to shout a warning."

Insurers, therefore, can, so it seems to me, take very great heart from the developments I describe above. At least a partial answer to the question:-

"Who then is my neighbour now?"

is:-

"Very many fewer people than two years ago".

Postscript. As luck would have it, and just two days after delivering the above to the Editor, The Times carried its report in the case of *Harris and Anor v. Wyre Forest District Council.*

In this case the Plaintiffs claimed damages for loss and expense caused by the negligence of Mr Lee as servant or agent of the Local Authority in carrying out his survey of premises subsequently purchased by the Plaintiffs together with the assistance of a mortgage granted by that same Local Authority. The Plaintiffs filled in one of the Local Authority's standard mortgage application forms which carried a disclaimer of liability in terms that:-

"We understand... that the valuation is confidential and is intended solely for the information of Wyre Forest District Council in determining what advance if any may be made on the security and that no responsibility whatsoever is implied or accepted by the Council for the value or condition of the property by reason of such inspection and report. You are advised for your own protection to instruct your own surveyor/architect to inspect the property."

The trial Judge held that the Plaintiff should recover but this decision has now been overturned by the Court of Appeal on the basis

(i) That the Defendants did not owe a duty of care to the Plaintiffs and

(ii) That the disclaimer of liability was not rendered ineffective by section 2 (2) of the Unfair Contract Terms Act 1977 insofar as the disclaimer did satisfy the requirement of reasonableness.

The case of *Yianni v. Edwin Evans & Sons* was distinguishable because in that case, although the building society had disclaimed liability, no such disclaimer had been made by or on behalf of the Defendent. Lord Justice Kerr concurring in the judgment of Lord Justice Norse, and after observing that in fairness to the trial Judge his approach to the case was clearly conditioned by the state of the authorities as they then stood, said the following:-

> "The well known passage in the speech of Lord Wilberforce in *Anns v. Merton London Borough Council* to which the Judge referred had not yet been subjected to the further restricting analysis which was to be found in the decision of the Privy Council in *Yuen Kun Yeu v. Attorney General of Hong Kong*".
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> Above all, however, the Judge was understandably influenced to a great extent by the second part of the Court of Appeal of Northern Ireland in *Curran v. Northern Ireland Co-Ownership Housing Association Limited.* That part of the decision went to Appeal and had since been reversed by the House of Lords.
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> It was highly doubtful whether the Judge would have reached the same conclusion if he had had the benefit of that decision."

It seems very doubtful indeed that the Court of Appeal would have reached the same conclusion four years ago. As to whether or not Yianni would have been decided in the same way in the present climate I would hazard no guess.